

MTP Amendments: Sufferers of delay are knocking at court's door

Deepika Sangwan¹

Abstract

“It is no exaggeration to call this a legal torture. Women can be tagged as victims of law, fighting to remove the curtains of illegitimacy from their legitimate rights”

Medical Termination of Pregnancy Act, 1971 which legalised certain abortions received wide applause from every sector. Age old provisions of Indian Penal Code, 1860 that criminalised the abortions were overruled and women celebrated their limited reproductive autonomy. At present, after 46 years of enactment, equipped with better technology and more aware citizens, India stands at different footing. With 20 weeks abortion limit and making the permission of registered medical practitioner mandatory after he diagnoses mental or physical danger to women, narrows down the scope of MTP Act. Under present provisions, abortion is not treated as a matter of female reproductive right but only entertained as an exception coming under sec 3 and sec 5. In the light of limitations imposed on woman's right over her body, The Ministry of Health and Family Welfare proposed few amendments in 2014 to update this outdated act. From raising the abortion limit to 24weeks to making the women's consent sole basis for trimester abortion, these proposed amendments promise a more liberal approach towards abortion rights. Meanwhile, judiciary has acquired driving seat to balance the loopholes. In2017, this research paper highlights the sufferings that are being caused by delay in amendments. It further contemplates various abortion contingencies in the cases of women's prisoners, divorcees and widows.

¹Student, Army Institute of Law, Mohali.

Introduction

Medical Termination of Pregnancy Act, 1971² provides for the termination of certain pregnancies by registered medical practitioners.³ The word ‘certain’ in itself makes it clear that abortion is allowed only in limited cases which conform the requirements mentioned under sec 3 and sec 5. As per present scenario, pregnancy can be terminated in following cases:

- Danger to life of the pregnant women.
- Grave injury to the physical health of the pregnant women.
- Grave injury to the mental health of the pregnant women.
- Pregnancy caused by rape.
- Substantial risk that if the child was born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.
- Failure of any contraceptive device or method.⁴

These above mentioned cases are only operational within 20 weeks abortion limit and that too with the permission of registered medical practitioner⁵. Thus, the decade long debate overborn versus unbornis still occupying centre stage. Lack of political will has further delayed the amendment procedure and has added more sufferers in the queue.

Brief background

- **Prior-1971 scenario:** Based on British laws, century old Indian Penal Code, 1860 criminalised termination of pregnancy. Abortion was a crime for which the mother as well as the abortionist could be punished except where it had to be induced in order to save the life of the mother. Coupled with various socioeconomic, religious and psychological causes, these anti-abortion laws were breached at mass-level throughout India. In order to escape the legal web, pregnant women took refuge to illegal medical clinics which further risked their health status.

²Medical Termination of Pregnancy Act, 1971, No. 34, Acts of Parliament, 1971.

³ Preamble, Medical Termination of Pregnancy Act, 1971, No. 34, Acts of Parliament, 1971.

⁴ Reasons for termination, FORM II, Regulation 4(5); The Medical Termination of Pregnancy Regulations, 2003

⁵ Section 2(d), Medical Termination of Pregnancy Act, 1971, No. 34, Acts of Parliament, 1971.

- In 1964, Shantilal Shah Committee recommended liberalisation of abortion law to reduce maternal morbidity and mortality associated with illegal abortion.⁶
 - In 1969, to save the pregnant women's health, strength and sometimes, life, the MTP Bill was introduced and passed by the Parliament on 10th August 1971.
- **Post-1971 Scenario:** MTP Act was implemented in 1972. In 1975, implemented rules and regulations were again revised to make the process simpler. In 2002, MTP Act got decorated with new amendments. Meanwhile, debate over reproductive right grew more strong. Petitions challenging the abortion limit were entertained by the courts. Thereby, the Ministry of Health and Family Welfare released a draft of the MTP(Amendment) Bill 2014 which is still in journey. Thus, sufferers of delay are being remedied by the Supreme Court but that too in a limited extent and in limited cases.

Abortion provisions in India

India provides qualified abortion rights where women can't have autonomy over her own body.

Sec 312 of IPC provides that "whoever voluntarily causes a woman with child to miscarry shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to 3 years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to 7 years, and shall also be liable to fine.'

Provisions under current MTP act

This act has overriding effect on IPC as long as termination of pregnancy is carried in accordance of this act⁷.

Where pregnancy exceeds 20 weeks, then termination can be carried out if registered medical practitioner is of opinion, formed in good faith, that termination is immediately necessary to save

⁶Kriti Dwivedi, "Medical Termination of Pregnancy Act, 1971: An Overview", <http://www.legalservicesindia.com/articles/pregact.htm>.

⁷ Sec 3(1), Medical Termination of Pregnancy Act, 1971, No. 34, Acts of Parliament, 1971.

| | |
|---|---|
| the life of pregnant woman. ⁸ | |
| Where pregnancy is between 12 and 20 weeks then approval of two registered medical practitioner is required. | Approval is given in good faith that ⁹ <ul style="list-style-type: none">• continuance of pregnancy would risk the life of pregnant woman; or• grave injury to her physical or mental health; or• if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. |
| Where pregnancy does not exceed 12 weeks then approval of one registered medical practitioner is required. | |
| To determine risk of injury to the health of pregnant women, account may be taken to her actual or reasonable foreseeable environment. ¹⁰ Pregnancy shall be terminated with the consent of pregnant women and in case of minor or mentally-ill women, written consent by her guardian is required. ¹¹ | |

Reasons to declare current MTP Act anachronous

This law walks on the narrow road of liberty and makes mockery of much cherished idea of women empowerment. The final say is given to registered medical practitioner in the termination of pregnancy and approval by two practitioners becomes necessary when pregnancy exceeds 12 weeks. Present law sets 20 weeks' abortion limit that can be waived only when termination is immediately necessary to save the life of pregnant women. Medical advancements which promise safe abortion up to 26th week, has made present Act outdated. Moreover, physical and mental trauma faced in delivering a foetus with severe abnormalities is not a concerned ground enough for post 20 weeks pregnancy termination under sec 5 of MTP Act, 1971¹². Hence, these limited abortion rights which become enforceable only under

⁸ Section 5, Medical Termination of Pregnancy Act, 1971, No. 34, Acts of Parliament, 1971.

⁹ Sec 3(2), Medical Termination of Pregnancy Act, 1971, No. 34, Acts of Parliament, 1971.

¹⁰ Section 3(3), Medical Termination of Pregnancy Act, 1971, No. 34, Acts of Parliament, 1971.

¹¹ Section 3(4a), (4b), Medical Termination of Pregnancy Act, 1971, No. 34, Acts of Parliament, 1971.

¹² HRLN: *Supreme court to examine Fundamental Rights Violations Resulting from India's Outdated Medical Termination of Pregnancy Act (1971)*: Available at : <http://www.hrln.org/hrln/reproductive-rights/pils-a->

certain conditions like grave injury to women, rape, failure of contraceptive measures etc. cannot be used by legislatures as chocolate candy that can appease an immature child but not a woman claiming her right to choice and reproductive autonomy.

Legal tale of Sufferings

As MTP (Amendment) Bill, 2014 is still in its journey and will take considerable time to reach at its appointed destination. Meanwhile, we found many victims of outdated law knocking at court's door in the hope of relief.

- *Dr. Nikhil D. Datar v. Union of India & Ors.*¹³: Plea was made by Niketa Mehta and her husband Haresh Mehta just after the 25-week-old foetus was diagnosed with a congenital heart block that would require the child to use pacemaker for the rest of its life.¹⁴ Their plea was turned down by the Bombay High Court as current law does not allow termination beyond 20 weeks when the health of child is at risk.
- *Chandrakant Jayantilal Suthar v. State of Gujarat*¹⁵ : In an appeal against Gujarat High court decision which denied to consider 24week pregnant minor to consider under sec 5¹⁶ of MTP Act, 197, Supreme court bench comprising of justices Anil R. Dave and Kurian Joseph ruled in favour of minor. Thus, on the basis of recommendations given by Medical board, minor girl was allowed to go for termination in order to avoid mental trauma.
- *Meera Santosh Pal & ORS v. Union of India*¹⁷: On the recommendations of medical board which indicated grave danger to mother's life, 26-year-old rape victim was allowed by Supreme Court to abort 24-week-old foetus with severe deformities.¹⁸

Although, balancing the wheel of law, honourable Supreme Court and High Courts provided relief, sometimes with wide interpretations while other times, with tight hands considering their limitations pertaining to legislative powers.

cases/1516-supreme-court-to-examine-fundamental-rights-violations-resulting-from-indias-outdated-medical-termination-of-pregnancy-act-1971-.html.

¹³Dr. Nikhil D. Datar v. Union of India & Ors, C.W.P (L) 1816/2008.

¹⁴ Nikhil Datar: Gynaecologist represented Mehta's in Bombay High Court and Supreme Court; Available at:<http://www.timescontent.com/tss/showcase/preview-buy/92241/News/Nikhil-Datar.html>.

¹⁵Chandrakant Jayantilal Suthar v. State of Gujarat, 2015 S.C.C. OnLine S.C. 668.

¹⁶Section 5, Medical Termination of Pregnancy Act, 1971, No. 34, Acts of Parliament, 1971.

¹⁷Meera Santosh Pal & ORS v. Union of India, WRIT PETITION (CIVIL) NO. 17 OF 2017.

¹⁸ Live law: *SC allows rape victim to abort 24-week-old foetus as mother's life in danger*; <http://www.livelaw.in/sc-allows-rape-victim-abort-24-week-old-foetus-mothers-life-danger/>.

Provisions under MTP (amendment) Bill, 2014

- Substitution of registered medical practitioner with registered health care provider: Considering the massive shortage of medical practitioners, this draft bill replaces registered medical practitioner with registered health care provider. Thus, it allows Ayurveda, Unani and Siddha practitioners carry out abortions, albeit only through medical means, and not surgical ones.¹⁹ It will also cover nurse or midwife possessing essential qualifications as may be specified.²⁰
- Women sole consent as basis of termination of first trimester pregnancy: As per proposed amendment provision, where the length of the pregnancy does not exceed 12 weeks, there pregnancy can be terminated by a registered health care provider on the request of women concerned.²¹
- Requirement of the opinion of only one service provider in case of second trimester pregnancy: This will remove the unnecessary hindrance for the women seeking safe and legal abortion where two service providers are not available. Thus, termination services can be provided by a registered health care provider if he is of opinion that continuance of pregnancy will cause grave mental or physical injury to women; or pregnancy caused by rape: or by failure of contraceptive measures etc.²²
- Provision for increasing the upper gestation period for legal MTP Services: Taking medical advancements and latest technological modifications into account which provide for safer late abortions, upper gestation limit is proposed to be increased at 24 weeks.²³
- Relaxed termination provisions in case of substantial foetal abnormalities: Provisions related to length of pregnancy shall not apply to the termination of a pregnancy where such termination is necessitated by the diagnosis of any of the substantial foetal abnormalities.²⁴
- Covering unmarried women under the umbrella of legal abortion in case of unwanted pregnancy: The amendment bill, proposes to make changes in sec (3), explanation 2

¹⁹ Abantika Ghosh, MTP Act: “*what 45-year-old abortion law says, why it must change*”, Indian Express, JULY 26, 2016; <http://indianexpress.com/article/explained/abortion-law-rape-victim-terminate-pregnancy-supreme-court-20-weeks-pregnant-2935481/>.

²⁰ Section 3 of Draft MTP (Amendment) Bill, 2014; notification no. 12015/49/2008-MCH.

²¹ Section 4(ii)(a) of Draft MTP (Amendment) Bill, 2014.

²² Section 4(ii)(b) of Draft MTP (Amendment) Bill, 2014.

²³ Proposed Amendments to the MTP Act; Summary Note, [http://www.populationfirst.org/Common/Uploads/HomeTemplate/WNDoc_Proposed%20amendments%20to%20the%20MTP%20Act%20-%20summary%20note%20\(1\).pdf](http://www.populationfirst.org/Common/Uploads/HomeTemplate/WNDoc_Proposed%20amendments%20to%20the%20MTP%20Act%20-%20summary%20note%20(1).pdf).

²⁴ Section 4(ii)(C) of Draft MTP (Amendment) Bill, 2014.

by replacing the words “any married women or her husband ” with “any women or her partner”²⁵. This progressive change will allow unmarried women to terminate their unwanted pregnancy legally. This step will surely help to counter the alarming cases of unsafe abortions which are being carried under covers.

- Protection of privacy of a woman: By inserting a new clause under section 5, guidelines have been given to medical fraternity in clear words to respect woman’s privacy.²⁶
- Minor shift in the focus of abortion law: Although, the shift is minor but one can clearly see the shifting of focus from healthcare provider to the women undergoing abortions. Such a shift decreases the vulnerability of women within the clinical setting and frees them from subjective interpretations of abortion law.²⁷

Scope of further Amendments in the Amendment bill of MTP.

Although, the MTP Amendment Bill, 2014 showers tiny liberal droplets in the drought prone field of conservative abortion laws. By expanding the base of legal abortion providers, making abortion services easily accessible, extending the indication of contraceptive failure to unmarried women, increasing the upper gestation limit and making women sole consent as the basis for first trimester termination; this bill, indeed, deserves a wide applause. But after a detailed analysis of proposed bill, various loopholes become visible and lot of voices seems to be unheard.

- Abortion by women prisoners: Story behind the bars was entirely different until a session judge report seeking guidelines on the right of women prisoner’s to abort was converted into a PIL in the Bombay High Court²⁸. Lack of proper rules lead to delay in handling the requests for medical termination by pregnant women prisoners. The matter caught attention when a woman inmate of Byculla women’s jail requested to terminate her second pregnancy as her 5-month-old first born suffered an ailment and child as well as mother was considerably weak²⁹. Following a judge’s visit to jail, she

²⁵ Section 4, explanation (ii) of MTP, Amendment Bill, 2014.

²⁶ Section 5A, MTP Amendment Bill, 2014.

²⁷ Shweta Krishnan, MTP Amendment Bill, 2014: *towards re-imagining abortion care*; Indian Journal of medical Ethics, vol. XII No. 1 January- March 2015.

²⁸ Indian Constitutional Law and Philosophy; *The Bombay High Court’s Abortion Judgment: Some Unanswered Questions*; September 22, 2016; <https://indconlawphil.wordpress.com/2016/09/22/the-bombay-high-courts-abortion-judgment-some-unanswered-questions/>.

²⁹ THE TIMES OF INDIA, *Women inmates can undergo abortion, says HC*; Sept 20, 2016, <http://timesofindia.indiatimes.com/city/mumbai/Women-inmates-can-undergo-abortion-says-HC/articleshow/54433747.cms>.

was allowed to undergo a medical termination. Thus various guidelines were issued by the High Court to ensure that women inmates do not become prisoners of red-tapism and miss the legal deadline under MTP Act.³⁰

- Every woman of child bearing age shall undergo a urine pregnancy test within five days of being admitted to jail.
- A second test is to be conducted within 30 days, if first is not positive.
- If positive, a medical officer will inform the prisoner of eligibility under law to abort.
- Jail authority to record statement of woman if she wants to terminate pregnancy.
- No court order is required for jail staff to act.
- Every prison shall maintain a 'prison OPD register'.

Present scenario clearly hints towards neglected conditions of women prisoners. Apart from above mentioned guidelines, there are no provisions in prisoners' rule book or any other statute that deal with inmate abortion right. In the present case, inmate was allowed to terminate under Sec{3(2)}ii of MTP Act i.e. 'grave injury to woman physical and mental health'. As per proposed amendment, if pregnancy exceeds 12-week term, then opinion of one medical service provider given in good faith becomes essential in order to operate termination. Hence, on exceeding 12-week- pregnancy, right to choice³¹ automatically gets converted into limited choice on the basis of limited grounds. Phrases pertaining to 'grave physical and mental injury' are shadowed under grey area and are open to interpretations. Thus, the scope can be widened as well as narrowed down.

- Abortion rights to widows and divorcees: Similarly, if a woman in her second trimester pregnancy faces these contingencies, and contemplates about future of her prospective child, then her right of choice to undergo termination has already gone. Now, she can operate her limited right only if she establishes any ground mentioned in the said provision. Thus, if she is not able to prove physical or mental injury or grave threat to her as well as to her foetus life then she has to continue with her pregnancy. No doubt, initially her pregnancy was her own choice but after divorce or her husband death, there will be a major transition in her psychological, social, economical and

³⁰ High court on its own motion., The state of Maharashtra; 2016 S.C.C. OnLine Bom. 8426.

³¹ Women sole consent is enough to operate termination during first trimester under MTP(Amendment) Bill, 2014.

emotional status. Hence, in order to get remarry or hundreds of other reasons, a woman might choose to terminate after exceeding 12-weeks of pregnancy.

Hence, to remove above mentioned conflicts of interests, abortion rights shall be made liberal. Any major and sound-mind woman shall be allowed to undergo termination during 24-weeks of her pregnancy solely on the basis of her consent.

As quoted by Justices V.K. Tahilramani and Mridula Bhatkar in suo moto PIL³²:

“According to international human rights law, a person is vested with human rights only at birth; an unborn foetus is not an entity with human rights. The pregnancy takes place within the body of a woman and has profound effects on her health, mental well-being and life. Thus, how she wants to deal with this pregnancy must be a decision she and she alone can make. The right to control their own body and fertility and motherhood choices should be left to the women alone. Let us not lose sight of the basic right of women: the right to autonomy and to decide what to do with their own bodies, including whether or not to get pregnant and stay pregnant.”

- Accountability of medical service providers: Unsafe abortions have become a rapid phenomenon in this country. It is not just untrained doctors who jeopardise women's lives, deprive them of their rights and charge exorbitant fees. But also highly qualified and well established doctors who stain their noble profession by exploiting their status and ignore patients' rights. In various countries, pregnancy related deaths are reported and inquired into but not in this country. Firstly, abortion is stigmatised in this country so nobody wants any embarrassment reporting unsafe abortion. Secondly, the patients are not organised: but doctors are. If, following an abortion, a woman doesn't get her periods or gets a severe infection; three doctors will join hands to convince a woman that it is due to her fate and fortune and not due to the complications of the surgery.³³Section 8³⁴ coupled with people's fear of being stigmatised by the society, let the doctor go unpunished. Hence, accountability shall be a major concern as the reality check provides certain number of upright doctors as exception and the majority comprises of ordinary, fallible human beings. Ethical principles are put on altar for the cravings of huge benefits; that override all other concerns, including the integrity of women's body.

³²2016 S.C.C. OnLine Bom. 8426.

³³ Manushi, “*Legal but Not Available; The Paradox of Abortion in India*”: January, 2002, <http://www.indiatogether.org/manushi/issue126/abortion.htm>.

³⁴Section 8, Medical Termination of Pregnancy Act, 1971, No. 34, Acts of Parliament, 1971.

Conclusion

In the western world, abortion rights are debatable because of polarisation of opinions among pro-life and pro-choice groups. Indian abortion policy indicates towards a middle way policy that was never opposed by any religious as well as political group. Hence, MTP was silently passed by the legislatures without facing any resistance. However, a close observation indicates that legislature's intentions were never to give women their reproductive autonomy. MTP Act was passed to overcome the pressure from population lobby. In this way, two years before the revolutionary judgement in *Roe v Wade*³⁵, India became first country to opt liberal though limited abortion rights. Although 46 years of enactment has passed but MTP, still proved to be at utter failure when it comes to safe abortions. In India, abortions bring stigma and are never considered a normal business. Thus, these issues are discussed under the culture of silence. Many a times, woman is asked for her spouse consent to operate termination. Termination of pregnancy without husband consent has been tagged as cruelty by various courts. Lack of awareness further adds to misery. Large numbers of women do not move to government hospitals thinking abortions to be illegal or believing that their identity will be revealed. Unauthorised medical centres are preferred which ameliorate unsafe abortions.

Suggestions

- Women should be made aware about their rights under MTP Act, 1971, including availability of services, safer procedures and privacy right. This can be done through radio, TV, posters on public places like bus stand, railway station etc.
- Substantial reduction in the excessive paper work that hampers proper reporting by medical providers.
- Initiative to involve AYUSH doctors, Ayurveda, mid-wives and nurses shall be encouraged coupled with provisions for regulated training for them. In this way, services can be provided in remote areas and loss of precious lives can be minimised.
- Liberal abortion rights shall be given to women till 24-week-pregnancy without giving any justification except in the cases of sex-selective abortions. Because the child becomes viable only in later stage of pregnancy and rights of a living identity cannot be sacrificed on the account of an unborn identity.

³⁵Roe v. Wade, 35 L Ed 2d 147. (U.K.)

- Accordingly, changes shall be brought in Indian Penal laws and abortion shall be decriminalised in all cases except when it is without women consent or sex-selective abortion.

Crux of the whole story is simple. In the advanced 21st century which is governed by the lofty principles of women empowerment and human rights, woman is still considered to be a child producing machine. She is denied the basic right to control her own body. No doubt, the proposed amendment bill makes promising provisions which help women to exercise their right to choice but in a limited extent. Hence, time has come to let them lead their lives, their choices and priorities in their own way.