

AN OVERVIEW OF ABORTION LAWS IN INDIA

By *Adv. Yashasvita Apte*

Practising Counsel before the Bombay High Court

“Abortion is part of being a mother and of caring for children because part of caring for children is knowing when it’s not a good idea to bring them into the world.” - Katha Pollitt.

The term abortion is not defined under any Act, but it refers to the deliberate medical termination of pregnancy in India, which can be done in two ways – medical or surgical.

- **Medical Abortion:** A woman who is less than ten weeks pregnant can undergo a medical abortion. This process involves terminating a pregnancy with help of pills and medications. It is a non-surgical method which one must do under the supervision of a physician.
- **Surgical Abortion:** If a woman wishes to undergo an abortion beyond ten weeks of gestation, then one can perform a surgical abortion.

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India is amongst one of the many countries, which has liberalized abortion laws that allows legal abortions on a broad range of therapeutic, humanitarian and social grounds.

The Hon’ble Supreme Court has unequivocally held that Article 21 includes the “reproductive rights of a person.” The Supreme Court recognized reproductive rights as both part of the right to health as well as an aspect of personal liberty under Article 21, and defined such rights to include the right to “access a range of reproductive health information, goods, facilities and services to enable individuals to make informed, free, and responsible decisions about their reproductive behavior.”

Abortion rights in India have been subject to many debates and discussions. There are various abortion laws that govern the legality or illegality of abortion in India, such as-

- **Indian Penal Code** – Section 312 to 316 deals with Penal Abortions.

- **Medical Termination of Pregnancy Act** - It deals with the provisions of abortion laws in India. The Act provides for termination of pregnancy until the first 12 weeks with the approval of a medical practitioner.

For termination of pregnancy between 12-20 weeks of pregnancy, approval of two medical practitioners is mandatory.

ABORTIONS CAN BE PERFORMED UNDER FOLLOWING CONDITIONS

The thought of termination of pregnancy cannot originate by choice and is purely circumstantial. Following are the situations and circumstances, in which medical termination of pregnancy can be performed legally in India-

- Where continuation of pregnancy involves risks to the life of the mother or her physical or mental health.
- On eugenic ground, where there is substantial risk that if the child is born, it would suffer from deformities and diseases.
- On humanitarian ground; such as- when a pregnancy arises from a sex crime.
- On Social and Economic considerations
- Where the pregnancy has occurred as a result of failure of contraception methods. (Only applicable for married women).

WHY THE 20 WEEKS BAR?

As per the provisions of the MTP Act, termination of pregnancy (abortion) can only be carried out till 20 weeks of conception. Such provision was inserted with an intention to prevent gender prediction testing and sex selection abortions.

MEDICAL TERMINATION OF PREGNANCY BEYOND 20 WEEKS

Under Article 226 of the Indian Constitution, the High Court have powers to allow termination of pregnancies beyond 20 weeks under certain conditions.

There are certain situations, where any foetal abnormalities or risks to mother's life come to light after 20 weeks of pregnancy or there are situations, in which the pregnancy has occurred as a result of Rape or on the basis of social and foreseeable environment of the woman is also considered by Courts.

In such cases, the MTP Act requires the mother seeking abortion to get an approval from the Court.

However, there have been many cases where the courts give judgment in the negative, despite the family wanting the abortion.

WHETHER SPOUSAL CONSENT IS REQUIRED FOR TERMINATION OF PREGNANCY OR NOT?

Courts in India have confirmed that only consent from an adult woman is required for an abortion. Husbands, boyfriends, brothers, parents, and in-laws, have no right to give consent to termination or to refuse to give consent for an abortion.

THE MEDICAL TERMINATION OF AMENDMENT BILL, 2020

The proposed **amendments** introduce the following provisions-

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- For termination of pregnancy up to 20 weeks of gestation, the opinion of one registered medical practitioner will be required; and for termination of pregnancy of 20-24 weeks of gestation, opinion of two registered medical practitioners will be required.
- Extending the upper gestation limit from 20 to 24 weeks for special categories of women, which includes vulnerable women including survivors of rape, victims of incest and other vulnerable women (like differently abled women, minors) etc.
- Upper gestation limit not to apply in cases of substantial foetal abnormalities diagnosed by Medical Board. The composition, functions and other details of Medical Board to be prescribed subsequently in Rules under the Act.
- Name and other particulars of a woman whose pregnancy has been terminated shall not be revealed except to a person authorized in any law for the time being in force.

The Medical Termination of Pregnancy (Amendment) Bill, 2020 is for expanding access of women to safe and legal abortion services on therapeutic, eugenic, humanitarian or social grounds.

The amendment is in response to several petitions received by the Courts seeking permission for aborting pregnancies at a gestational age beyond the present permissible limit on grounds of foetal abnormalities or pregnancies due to sexual violence faced by women. Further, the Ministry of Health and Family Welfare proposed amendments after extensive consultation with various stake holders and several ministries.

CASE LAWS

In landmark cases such as-

Suchita Srivastava v. Chandigarh Admin and Devika Biswas v. Union of India

The Supreme Court has held a woman's reproductive autonomy to be her fundamental right to privacy, and has said that the decision to have or not have a child should be hers alone, devoid of any state intervention.

In *XYZ v. Union of India [W.P. 10835 of 2018]*, it was held that Section 5 of the MTP Act which states a pregnancy can be terminated beyond the 20-week period by a medical practitioner in cases of likelihood of danger to the life of the mother, the word 'life' should be interpreted purposively in terms of the scheme of Article 21 of the Constitution of India, providing due consideration to both the physical discomfort and mental trauma that may be caused by an unwanted/forced pregnancy.

In *Mrs. X vs. Union of India*, the Supreme Court allowed for the termination of a 22-week old pregnancy. This was done after a 7 members Medical Board opined that allowing the pregnancy to continue could gravely endanger the woman's physical and mental health. The Court held that "a woman's right to make reproductive choices is also a dimension of her 'personal liberty' under Article 21 of the Constitution" and that the right to bodily integrity allows her to terminate her pregnancy. Similar judgments were passed by the Supreme Court in other cases where pregnancies were beyond 20 weeks and the fetuses had various medical conditions and anomalies, resulting in a high risk to the fetus and the mother.

High Court of Punjab and Haryana, Dr. Mangla Dogra & Others v. Anil Kumar Malhotra & Others, 29 November 2011 (CR No. 6337/2011).

The Court uses several sections of the MTP Act to reach the conclusion that only one person, the woman undergoing termination, needs to provide consent. First, Section 3(4)(b) of the MTP Act clearly states that pregnant woman has the sole right to consent to an abortion. Furthermore, the judgment cites Explanation II to Section 3 (2) of the MTP Act, which states that a married woman can obtain a termination in the case of contraceptive failure because of the “grave injury to the mental health of the pregnant woman” (para. 5).

Finally, the Court examines sections of the Act pertaining to MTP clinics and found that the doctors conducted the procedure in a safe and legal setting. The Court examines the consent form in the MTP Act and states that the Act “nowhere provides for the express or implied consent of the husband.

A woman’s freedom of choice whether to bear a child or abort her pregnancy are areas which fall in the realm of privacy”.



**ALLOWED TERMINATION ON THE BASIS OF MULTIPLE ANOMALIES & RISK
TO MOTHER’S LIFE**

Tapasya Umesha Pisal vs. Union of India [24 weeks];

Meera Santosh Pal vs. Union of India [23 weeks];

Mamta Verma vs. Union of India [25 weeks]

Savita Sachin Patil vs. Union of India

Sharmishta Chakraborty Vs UOI (2018)13 SCC 339

Meera Sathosh Pal Vs UOI (2017) 3 SCC 462

X Vs UOI (2017) 3 SCC 458

Sonali Kiran Gaikwad VS UOI

(2018) 14 SCC 75 A Vs UOI

ALLOWED TERMINATION ON THE BASIS OF HUMANITARIAN GROUND

In *Murugan Nayakkar vs. Union of India & Ors. W.P. (C) No. 749/2017*, the Apex Court allowed the termination of 32-week old pregnancy of a 13-year-old rape victim holding, “Considering the age of the petitioner, the trauma she has suffered because of the sexual abuse and the agony she is going through at present and above all the report of the Medical Board constituted by this Court, we think it appropriate that termination of pregnancy should be allowed.”

In *Alakh Alok Srivastava vs. Union of India W.P. (C) No. 565/2017*, where the petitioner was a 10-year-old pregnant rape victim with a 32-week pregnancy as well the Court did not allow termination. The Medical Board opined that the continuation of the pregnancy was less hazardous for the petitioner than termination at that stage. During the course of the proceedings, the Court asked the Centre to direct setting up of permanent medical boards in states to expeditiously examine requests for termination post 20 weeks of pregnancy and the Centre issued instructions for the same.

WOMEN’S RIGHTS

Every woman must have the right to make decisions that pertain to her body, especially when it comes to having and carrying a pregnancy to full term. To be truly free and equal, the control of a woman’s body and what happens to it (and inside of it) must be left up to her.

Abortions in India are a “conditional right”, offered only if there is a substantial risk of the child being born with a physical or mental deformity.

CONCLUSION

Despite almost 50 years of the existence of MTP Act, a women’s right to make a reproductive choice, still remains a taboo and the most debated issue in India and around the world. The half-a-decade old law is probably the most liberal in the world, but is still not free from fallacies.

In spite of various judgments stating that a woman's right to make reproductive choice is a dimension of her 'personal liberty' under Article 21 of the Constitution, there is a selective use of reproductive rights and it depends on the Court's discretion which is solely in most cases based on the medical boards' opinion.

One of the most worrying facts is that these women have to further face a long and tiring process, where they are subject to examination before the medical boards, despite having consulted their own providers. The entire process adds to the trauma for women and is a violation of their rights. There are numerous examples and cases, in which requests for termination of pregnancy has been declined and women in those situations are left with no other choice but to resort to unsafe methods of abortions.

A complete and unconditional priority to the woman's decision should be given, whether to continue the pregnancy to its full term or not and the same should be her prerogative and sole decision.



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