

INDIAN JOURNAL OF CONSTITUTIONAL STUDIES

ARTICLE

OCTOBER 2021

Copyright © 2016-17. All rights reserved with the Editors of Indian Journal of Constitutional Studies.

ISSN 2456 - 5008
Published bimonthly

- - Disclaimer - -

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of the Indian Journal of Constitutional Studies. The Indian Journal of Constitutional Studies (hereinafter IJCS) and its affiliates holds the copyright to all articles contributed to this publication. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Board or Board of Advisors for the Indian Journal of Constitutional Studies. Though all efforts are made to ensure the accuracy and correctness of the information published, the Editorial Board or the Board of Advisors for IJCS are not responsible for any errors caused due to oversight or otherwise.

- - Note - -

This compilation has continuous footnoting. Kindly read the references to previous footnotes in all the Articles in isolation upon the particular Article only.

Publisher Details -

Bishikh Mohanty

E33, AWHO Colony Chandrasekharapur, Sailashree Vihar,

Khorda, Odisha, Pin - 751021

Telephone: +91 8106743973

Email: ijconsstudies@gmail.com

- Acknowledgement-

We would like to express a deep sense of gratitude towards our editor, **Ms. Akshara Adibhatla**, who thoroughly validated all articles sent to her for reviews. We would also like to thank our contributor, **Ms. Kanchumarthi Vineetha** for their contribution towards journal's blog.

MEDICAL TERMINATION OF PREGNANCY (AMENDMENT) ACT, 2021

- Ms. Kanchumarthi Vineetha, student, Damodaram Sanjivayya National Law University

The recent Medical Termination of Pregnancy Act, 2021 has turned a new leaf to further empower women by providing comprehensive abortion care to all the pregnant woman by expanding the access to safe and legal abortion services on therapeutic, eugenic, humanitarian and social grounds to ensure universal access to comprehensive care. The recent order passed by Delhi High Court in *Priyanka Shukla v. Union of India & Ors* is an embracing move as it allowed the medical termination of pregnancy of a woman who had completed 22 weeks of gestation as the foetus was suffering from multiple abnormalities.¹

The questioning voices, about the constitutionality of MTP Act, were rightly answered in cases like *Sudha Sandeep Devgikr v. Union of India*² where the constitutionality of the MTP Act was upheld. Though Section 312 of IPC punishes persons causing miscarriage in a pregnant woman, it exempts and decriminalizes miscarriage, if undertaken in good faith for the purpose of saving the life of the mother. This is based on the logic that *the foetus cannot have an independent existence outside the womb of the mother, and the life of the mother who independently exists, is entitled to greater protection*. Hence, the provisions of IPC become subservient to the special law codified in MTP Act.

Perceptions on Abortion in Ancient India:

Abortion in Hinduism is governed by Garbha Upanishad. The Mahanarayana Upanishad lists the abortionist with actions such as breaking one's vow of chastity. The British Broadcasting Corporation writes, "When considering abortion, the Hindu way is to choose the action that will do least harm to all involved: the mother and father, the fetus and society... Classical Hindu texts are strongly opposed to abortion." It's evident from the ancient vedic texts that the ancient

¹ Priyanka Shukla v. Union of India & Ors W.P (C) 7080/2019

² Sudha Sandeep Devgikr v. UOI, (2018) 13 SCC 339.

Indian society was not averse to abortions. If the mother's life is at risk, Hinduism permits abortion.³

Reproductive Choice of Woman v. State's Obligation to Protect Life of Foetus:

It's an undeniable fact that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The personal liberty of women and obligation of state were weighed in the case of *Suchita Srivastava and Ors. vs. Chandigarh Administration* (28.08.2009 - SC): MANU/SC/1580/2009 where it was observed that

"The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth-control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children."

However, in the case of pregnant women there is also a 'compelling state interest' in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the amended MTP Act, 2021 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.

Loadable Changes in the MTP Amendment Act, 2021:

Increased Gestation Period:

S. 3 (2) (a), MTP Act, 2021 increases the maximum gestational limit for pregnancies that may be aborted on the advice of one 'registered medical practitioner' from 12 weeks to 20

³ ["Hinduism and abortion"](#). BBC. 25 August 2009. Retrieved 14 September 2010.

weeks.⁴ For pregnancies that may be aborted on the advice of two medical practitioners, the limit has been raised from 20 to 24 weeks.⁵ This amended section is in line with advanced medical technology where a number of “birth anomalies” can be detected only in the later stages of pregnancies after the first trimester. By increasing the limit, things are made easier than earlier as the pregnant women no longer need to file a writ of “Mandamus” before HC/SC unless it’s beyond 24 weeks.

De-Stigmatization of Pregnancies outside Traditional Marriages:

S. 3 (2) (b), Medical Termination of Pregnancy Act, 2021 replaces the word “by any married woman or her husband” with the words “any woman or her partner”. These seemingly small changes have indeed broken the chains of stigma attached to pregnancies outside the institution of marriage and it has put a full-stop to statutory discrimination between married and unmarried women and extend the benefits of presumptive exception created under the law.

The ambit is further broadened by inserting an explanation 1,2 to S.3 (2) where unwanted pregnancies due to contraception failure and pregnancies as a result of rape are also covered. Mental trauma rape survivors experience is construed to be an injury to the mental health of the woman and hence no intervention of courts is mandated. Under the original MTP Act, abortions could take place only by proving that there was grave risk to the pregnant woman or grave risk of serious physical or mental abnormality.

Establishment of Medical Boards:

The MTP Act being Docto-Centric legislation has emphasised on the establishment of Medical Boards for cases beyond 24 weeks and they shall comprise of

1. a gynaecologist,
2. a paediatrician,
3. a radiologist or sonologist, and;
4. other members, as may be specified by the state government.⁶

⁴ S. 3 (2) (a), Medical Termination of Pregnancy Act, 2021.

⁵ S. 3 (2) (b), Medical Termination of Pregnancy Act, 2021.

⁶ 3 (2C), Medical Termination of Pregnancy Act, 2021.

Earlier, there was no statutory requirement to set up boards. It only happened after SC/HC entertained writ for termination of pregnancy. Now, this amendment has statutorily mandated the same.

Guaranteed Confidentiality:

Women's constitutional right to make reproductive choices and the right to "abstain from procreating" was read into the right to privacy, dignity and bodily autonomy in the landmark judgement of *KS Puttaswamy v Union of India*.⁷ the 2021 MTP Act mandates that 'the name and other particulars of the woman whose pregnancy is terminated shall not be revealed, except to a person authorized in any law which is in force and any person acting in contravention of this provision will be punished with imprisonment which may extend to one year, or with fine, or with both.

Conclusion:

With the changing times, legislations have to change confirming to the needs of society. The MTP amendment Act, 2021 is a progressive legislation with a wider ambit and in conformity with the changed social norms and medical advancements. It will contribute towards ending preventable maternal mortality to help meet the Sustainable Development Goals (SDGs) 3.1, 3.7 and 5.6 pertaining to reducing maternal mortality ratio and universal access to sexual and reproductive health and rights respectively.

However, the legislation is a doctor-centric legislation with over emphasis on the third-party authorisation. When it's held in a catena of decisions that reproductive choices form part of personal liberty, why is the decision to procreate or abstain from doing so is not left to the partners especially the woman to decide? Interestingly, the MTP Amendment Bill introduced in 2014 was a relatively more progressive piece of legislation as it proposed that pregnancy up to 12 weeks could be terminated "on the request of a woman."⁸

⁷ Justice K.S.Puttaswamy (Retired). vs Union of India and Ors, (2017) 10 SCC 1.

⁸ Medical Termination of Pregnancy (Amendment) Act, 2014. Available at <https://main.mohfw.gov.in/sites/default/files/74582186651414643779.pdf>.

The Act “makes motherhood the norm and abortion the exception.”⁹ There might be situations where termination of pregnancy is resorted to as a result of changed socio-economic situations, death of partner. By excluding the likewise valid reasons, the Act can’t be said to be an inclusive one. It’s commendable that pregnancies outside marriages are brought under the umbrella of this legislation but it still limits its scope to a ‘partnership’ framework, thus excluding groups like sex workers.

⁹ Sankya Kumar & Rakshanda Deka, *Why the MTP Bill is not Progressive Enough*, The Indian Express, March 24, 2021, available at <https://indianexpress.com/article/opinion/columns/medical-termination-of-pregnancy-bill-passed-7241943/>.