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Testing limitations, legal and sociological aspects of abortion laws in India

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Abstract---In September, addressing the limitations of abortion laws in India, the Medical Termination of Pregnancy (Amendment) Act 2021 came to force. The case, Meera Santosh Pal vs Union of India, further exposes the issues with the Medical Termination of Pregnancy Act 1971 and explains why there was a desperate need for an amendment. While the Medical Termination of Pregnancy (Amendment) Act 2021 garnered praise, abortion in India is still a question of morality concerning many religions. Even though India promulgated the Medical Termination Act in 1971, it was fraught with issues that were left unaddressed. Is the amendment successful in undoing the fallacies of the principal Act? What has been the role of the Indian Judiciary in this respect? The researchers writes a case analysis for Meera Santosh Pal vs Union of India. They also highlights other such cases that visibilised the issues with the 1971 Act.

Keywords---abortion, MTPA, morality, pregnancy.

Introduction

In 2017, a married woman (22) approached the Supreme Court to abort her fetus of 24 weeks, as the latter suffered from ‘anencephaly’. ‘Anencephaly’ is a defect where a baby is born with an underdeveloped brain and an incomplete skull.¹ A baby born with this defect is mostly stillborn or dies shortly after birth, and to date, there is no standard treatment for this defect. Hence, if a pregnancy is not terminated, it could gravely affect the mother’s mental and physical health.² Thus, the petitioner wanted to terminate her pregnancy.

¹ James Roland, ‘What is Anencephaly?’ (*Healthline*, December 6 2018) < <https://www.healthline.com/health/anencephaly> > Accessed on September 18 2021

² Ibid

However, under the Medical Termination of Pregnancy Act 1971, physical incapacity was admitted as grounds for termination only till the twentieth week of gestation, which she had crossed. In that case, according to the MTP Act 1971, the only justification for procuring permission to abort is when there is a threat to the pregnant women's life. This article will analyse the judgment and the petitioner's right to her bodily autonomy through abortion laws in India. Women and their right to sexuality, fertility and reproductive health are seldom considered important enough to be discussed in the mainstream. Such conversations are often silenced due to the looming influence of the patriarchal setup of society in general. The same reflects in the kind of legislations formulated concerning issues related to women.

Abortion, in particular, has always been vexed for its ethical aspect because it implies taking away a human life. People favouring liberal abortion present an argument based on legal rationale, stating that it is a matter of pure choice for women. While those against it often come up with a religious and moral argument to counter the former. From outright criminalising abortion to allowing it on specific grounds and now finally approaching abortion laws more liberally, we have come a long way. Despite this liberal outlook, there's a lot that needs altering.

History of Abortion Laws In India

British India dubbed abortion as a 'criminal act' in the Indian Penal code 1860 and the Code of Criminal Procedure 1898. The colonial regime made it a punishable offence for both the woman and any other person who intended to do so with or without the women's consent. Sections 313 to 316 are specified under the title: 'Of the causing of miscarriage, of injuries to unborn children, of the exposure of infants, and of the concealment of births' in the IPC 1860.

The same elaborately explain the term 'causing miscarriages' of an unborn child both in gestation and after. These sections allowed only medically indicated abortions done in 'good faith' to save women's lives.³ In fact, at the start of the twentieth century, abortion was illegal in almost every country of the world. But *Roe v. Wade*,⁴ a landmark judgement by the Supreme Court of the United States concerning the legality of abortion, changed the way other countries perceived abortion laws. The judgement brought down restrictive abortion laws, upholding the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

The Fourteenth Amendment to the U.S. Constitution provides 'Right to Privacy', which also protects a woman's rights to choose whether or not she should have an abortion.⁵ Soon after this judgement, European countries began to legalise

³ Hirve S, 'Abortion Law, Policy And Services In India: A Critical Review' (*Taylor & Francis*, 2005) <https://www.tandfonline.com/doi/full/10.1016/S0968-8080%2804%2924017-4>

⁴ 410 U.S. 113 (1973).

⁵ 'Roe V Wade: What Is US Supreme Court Ruling On Abortion?' (*BBC News*, 2020) <https://www.bbc.com/news/world-us-canada-54513499>

abortion. However, the relaxation in abortion laws in India began in 1964. Owing to high maternal mortality and morbidity caused due to unsafe abortion, in the 1960s, the Indian Government had appointed the Shah Committee, headed by Shantilal Shah. The Committee was set up to review the situation on maternal deaths due to septic abortions. The Committee carried out a detailed analysis of the socio-legal and medical aspects of abortion and recommended legalising abortion on both compassionate and medical grounds. Their recommendations led to the Medical Termination of Pregnancy Act, 1971(MTP Act).

Petitioner's Argument

1. Medical reports stated that her fetus had a defect called 'Anencephaly' which leaves the child with a long time disability, and many die right after birth
2. Continuing her pregnancy in such circumstances would leave her mentally traumatised, which could prove to be fatal to her life
3. Section 5 (i) of the Medical Termination Of Pregnancy Act 1971 allows termination of pregnancy in such circumstances

What Is The Medical Termination Of Pregnancy Act 1971?

Section 3 of the Medical Termination of Pregnancy Act 1971 states when a registered medical practitioner could terminate a pregnancy.⁶

Clause 2 of Section 3 states the conditions and limit till an abortion can take place by a registered medical practitioner:⁷

- Where the length of the pregnancy does not exceed twelve weeks if such medical practitioner is, or
- Where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks if not less than two registered medical practitioners are of opinion formed in good faith that⁸:
 1. The continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury, physical or mental; or
 2. There is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.
- In determining whether the continuance of the pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), the account may be taken of the pregnant woman's actual or reasonable foreseeable environment.⁹
- (a) No pregnancy of a woman, who has not attained the age of eighteen years or, having reached the age of eighteen years, is a lunatic, shall be terminated except with the consent in writing of her guardian.
- Save as otherwise provided in Clause (a), no pregnancy shall be terminated except with the pregnant woman's consent.

⁶ Medical Termination of Pregnancy Act, 1971, s3

⁷ Medical Termination of Pregnancy Act, 1971, s3(2)

⁸ Medical Termination of Pregnancy Act, 1971, s3(2)(i)

⁹ Medical Termination of Pregnancy Act, 1971, s3(2)

Section 4[7]¹⁰ of this Act talks about where the termination should take place. It says that the termination should not take at any other site except:

- A hospital established or maintained by the government, or
- A place for the time being approved for this Act by the government.

Section 5 of this Act played a significant role in the Meera Santosh Pal case. This section says that nothing said in sections 3 and 4 shall be applied to a situation where a registered medical practitioner in good faith prescribes that termination is immediate; otherwise, it could be life-threatening for the woman.¹¹

Overview of The Judgement

A set of trusted medical practitioners examined the petitioner. They confirmed that she was 24 weeks pregnant, and her unborn child had a defect called 'anencephaly'. On the advice of the medical practitioners, the Court decided that if the petitioner goes through the entire term of pregnancy, it would adversely affect the petitioner's mental health, putting her life in danger.¹²

So they recognised a woman's right to terminate her pregnancy concerning the safety of her life, and even though these rights are not absolute, it's still of great significance. The Court also referred **to** Suchita Srivastava and Anr vs Chandigarh administration.¹³ In Suchita Srivastava, a three judges' bench had reiterated the need for consent of the pregnant woman for termination or abstaining from it. The Court held:

"There's no doubt 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 Court further observed:

"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 [2009 (9) SCC 1] 11 20.6430.18 wp.doc 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."

¹⁰ Medical Termination of Pregnancy Act, 1971, s4

¹¹ Medical Termination of Pregnancy Act, 1971, s5

¹² Meera Santosh Pal v. Union of India (January 16 2017)

¹³ Suchita Srivastava and Anr. v. Chandigarh Administration [2009] 9 SCC 1

Coming back to the Meera Santosh Pal case, the Court held that it was crucial first to recognise the petitioner's rights as a woman. Thus, it was essential to save her from a long-lasting mental trauma that could have aggravated if she continued this pregnancy to her full term. Thus, the Court allowed the termination under the provisions of the Medical Termination of Pregnancy Act 1971. It was further stated that termination of her pregnancy should be carried out by the doctors of the hospital where she had all her medical checkups. In addition, her pregnancy termination will be monitored by the medical board listed above, which would record the procedure to be performed on the patient.

Analysing The Limitations Of Abortion Laws In India Through Other Similar Cases

Similar to the Meera Santosh case, in Vaishali Pramod Sonawane v. Union of India, the petitioner approached the Court to terminate her pregnancy at the 24th-week mark. The petitioner presented that after being examined by a sonologist, certain congenital anomalies were reported. A congenital anomaly is a type of defect which develops in a baby before or at birth. Due to this defect, a lot of babies die within weeks after birth.¹⁴ As per the World Health Organisation (WHO) data, till 2016, around 295,000 newborns have died within four weeks of birth worldwide.¹⁵

Accordingly, the petition was allowed by a Division bench comprising Dharam Chand Choudhary, j. and Vivek Singh Thakur and directions were given to proceed with the termination of the pregnancy at the Kamla Nehru Hospital for Mother and Child, Shimla.¹⁶ In another case, a rape survivor from Bihar approached the Court to terminate her pregnancy. The petitioner lived on the streets as she was thrown out of the house by her husband and inlaws.¹⁷ She was then taken in by a shelter home. After living there for some time, they found out that she was pregnant and then took her to the Patna Medical College hospital to terminate her pregnancy with her consent. Her brother and father were called to sign up a consent form, and in this process, it was also found out that she was HIV+. The hospital didn't terminate her pregnancy, and she had entered the 20th-week of her pregnancy, which was the upper gestational limit to abort.

When she approached the Patna High Court, a single judge bench impleaded the husband, but it didn't reach him since his information was incorrect, which caused further delay. Later, she was again examined by the multi-disciplinary committee of the Indira Gandhi Institute of Medical Sciences for her mental and physical state. However, by the time she was 24 weeks pregnant and the Court rejected her plea. Against this decision, the woman again approached the Court, challenging the earlier order. Hearing her plea, the three-judge bench comprising Dipak Mishra, Amitava Roy and AM Khanwilkar noted that it was due to Patna High Court's negligence that the woman couldn't terminate her pregnancy on

¹⁴ 'Congenital Anomalies' (WHO, 1 December 2020) < <https://www.who.int/news-room/fact-sheets/detail/congenital-anomalies>>

¹⁵ Ibid

¹⁶ Great Devi v. State of Himachal Pradesh < <https://indiankanoon.org/doc/3865328/>>

¹⁷ Ms Z v. State of Bihar, [2018] 11 SCC, 572; [2018] 2 SCC (Cri) 675

time. The Court noted that she decided on abortion when she was 13-weeks pregnant. So, there was still legal for her to get the pregnancy terminated under Section 3 (2) (ii) of the Medical Termination of Pregnancy Act 1971. However, the bureaucratic and juridical delays reduced her legal window to abort.

Further, the bench observed that the single bench judge didn't need to implead the husband since the petitioner was a rape survivor and a victim of domestic violence. And the same could have affected her mental health even more.¹⁸ The bench ordered the State of Bihar to pay Rs.10 lacs as compensation to the petitioner for her irreversible condition. The Court further asked the state to offer the amount as a fixed deposit in the appellant's name so that she could enjoy maximum interest. Besides, the Court iterated that the State of Bihar will take full responsibility for the child's wellbeing, providing proper treatment and nutrition.

What's Wrong with the Medical Termination Of Pregnancy Act 1971?

The Act states that when the length of pregnancy is within twelve weeks, the opinion of one medical practitioner is required to abort the foetus lawfully. And if the length of pregnancy is between twelve to twenty weeks, the woman needs the opinion of two medical practitioners to proceed with the abortion.¹⁹ However, women in rural areas struggle to find registered medical practitioners who have all the facilities and training to provide abortion services. The All-India Rural Health Statistics (2018-19) indicates there are only 1,351 gynaecologists and obstetricians in community health clinics in rural areas across India. And we fall short of 4,002, which means there is a 75% shortage of qualified doctors.²⁰ India lacks a sufficient number of trained medical personnel as compared to our population. The scarcity of medical practitioners and services often force women to resort to unsafe ways to abort and encourages quackery.

One of the ways to resolve this issue would be to train more service providers. The same could be done by increased staffing, simplifying procedures for abortion, making people aware and designing legislations that can keep up with technology. Technology in medical science is far ahead of when the MTP Act was promulgated in 1971. This Act was also ignorant towards the change in technology, and the same was not recognised until the Medical Termination of Pregnancy (Amendment) Act 2020 was staged ahead of the parliament. Advancements in technologies in medical science have enabled streamlining procedures for abortion in late pregnancy. Now, doctors can detect defects in the foetus even after the twentieth week. However, this law allowed abortion up to the twentieth week, leading to scratchy implementation and a stuck-up approach.

¹⁸ Ms Z v. State of Bihar, < <https://www.advocatekhaj.com/library/judgments/announcement.php?WID=9123>>

¹⁹ 'MTP ACT, 1971 | Ministry Of Health And Family Welfare | GOI' (Main.mohfw.gov.in) <https://main.mohfw.gov.in/acts-rules-and-standards-health-sector/acts/mtp-act-1971>

²⁰ 'The Medical Termination Of Pregnancy (Amendment) Bill, 2020' (PRS Legislative Research) <https://prsindia.org/billtrack/the-medical-termination-of-pregnancy-amendment-bill-2020>

Several petitions were filed before introducing the MTP (Amendment) Act 2021, highlighting the irregularities in the principal Act 1971. However, even the courts have responded erratically. Therefore, we have a confusing set of judgements and orders, all of which have been different in their approach to implementing the MTP Act 1971. In *Nikhil D. Dattar v. Union of India*, Section 3 and 5 of the MTP Act was challenged on the ground of non-inclusion of eventualities *vires* of the Act. In this case, the foetus was diagnosed with a complete heart block in the twenty-sixth week of pregnancy. And thus, the woman had sought termination of pregnancy. The petitioner argued that Section 5(1) of the MTP Act should be read down to include the eventualities in Section 3. And consequently, a direction should be issued to the respondents to allow them to terminate the pregnancy. But, the court said that it was not empowered to decide upon a statute and relief under Section 5 can only be granted if it can be proved that non-termination of pregnancy would threaten the life of the mother. Thus, this petition was dismissed.

Conclusion

The Medical Termination of Pregnancy Act 1971 was vague and filled with inconsistencies. Moreover, the Act was socially and scientifically outdated. It also excluded unmarried women, thus, forcing them to seek judicial intervention, or in some cases, succumbing to unsafe abortion. In addition, the delay by the judiciary in hearing such cases further projected mental trauma on women, increasing hassle and reducing the window to abort. Finally, on September 24, the Medical Termination of Pregnancy (Amendment) Act 2021 came to force. The 2021 Amendment got passed in March. The new amendment modifies Section 3 of the Medical Termination of Pregnancy Act, extending the upper limit of medical termination from 20 to 24 weeks.²¹ The new Act also considers the Sustainable Development Goals 3.1, 3.7 and 5.6 adopted by the United Nations in 2015. Among these goals, 3.1 envisages reducing the maternal mortality rate, while 3.7 and 5.6 are set to offer worldwide access to sexual and reproductive health and rights.

Further, the 2021 Amendment is conscious of protecting the woman's identity. Furthermore, the amends have also prescribed more stringent punishment in case of any violation.²² The amended Act further includes unmarried women in the clause regarding the failure of contraceptive methods to prevent pregnancy²³. However, the Act is still far from perfect as many issues still need to be relooked. Some oppose abortion as a means of taking human life, advocating that no human should be allowed to take the life of another even if the latter is an unborn child. Although this is righteous, it is also argued that abortion should be a women's own prerogative as it is her body.

Those advocating for women's right often argue that the foetus is not an independent entity of life during the first trimester of pregnancy, as he cannot survive independent of the mother. Therefore, abortion does not amount to

²¹ Medical Termination of Pregnancy(Amendment) Act, 2021, s3(2)(b)

²² Medical Termination of Pregnancy(Amendment) Act, 2021, s5A

²³ Medical Termination of Pregnancy(Amendment) Act, 2021, s3(2)(b)(ii)

murder or taking away human life. Another argument often advanced is that early motherhood could have adverse effects, including financial, mental and social for the mother and child. But there's no reason why abortion shouldn't be considered a woman's fundamental right to practice her choice. Therefore, the state should empower women by granting them the choice to look after their reproductive health by not snatching their agency. Even the Amendment Act 2021 gives more value to a medical board after twenty-four weeks over a women's will, body and economic and mentally capacity to bear the child.

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