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Supreme Court of India judgement on abortion as a fundamental right: breaking new ground

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The Supreme Court of India's judgement on 29th September, 2022, held that unmarried women have the same right to abortion as married women. The Medical Termination of Pregnancy Act, 1971 (MTP Act),¹ most recently amended in 2021 (Amendment Act),² governs the circumstances under which abortions are legally permitted in India. The law is an exception to criminalisation of abortion under the Indian Penal Code (IPC). The Amendment Act of 2021 is a substantially yet inadequately reformed version of the original MTP Act, including an extension of the gestational limit from 20 to 24 weeks for "certain categories of women". These are listed under Rule 3B of the MTP Rules, 2021³ notified under the MTP Amendment Act, and include survivors of rape, incest, minors, women experiencing a change of marital status (widowhood or divorce), women with disabilities, women with fetal anomaly and those living in emergency, disaster, or humanitarian crises. Notably, the Amendment Act expanded the contours of access by replacing the term "married women" under the 1971 law, with "any woman", allowing pregnant persons to seek abortions, irrespective of their marital status. However, by restricting termination between 20 to 24 weeks of gestation to "certain categories of women" delineated under Rule 3B, the benefits of the Act do not extend to unmarried women, unless they fall under any of the other categories listed under Rule 3B. Further, the Amendment Act allows termination of pregnancies beyond 24 weeks only in cases of fetal anomalies. The revised law thus exceptionalises persons with disabilities

and retains the eugenic rationale of the original MTP Act.⁴ The provisions of the Act are not framed in a gender justice context, taking note of the rights of pregnant persons. The Amendment Act still requires the permission of doctors for abortions to take place, making it a doctor-centric legislation, and does not take into account doctors' hesitation to grant abortions for fear of prosecution under the IPC or conflation with the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) and other laws.⁵

In *X v. the Principal Secretary Health and Family Welfare Department & Another*⁶ decided by a three-judge bench of the Supreme Court, the anonymous Petitioner learned that she was pregnant in June 2022. On 5 July 2022, an ultrasound revealed an intrauterine pregnancy of 22 weeks. She moved a petition before the High Court of Delhi with a request to terminate her pregnancy through registered medical practitioners (RMPs) at a private or government centre or hospital before 15 July 2022, during the statutory limit of 24 weeks. One of her prayers to the Court was to include unmarried women within the scope of Section 3(2)(b) which governs the termination of pregnancies between 20 to 24 weeks of gestation. The High Court held that since the Petitioner is an unmarried woman whose pregnancy arose out of a consensual relationship, her case is "clearly not covered" by clauses of Rule 3B of the MTP Rules. As a consequence, her termination request was denied. A Special Leave Petition was then filed before the Supreme Court, which found that the principle of statutory interpretation is that the

words of a statute must be read in their entire context.

The Supreme Court while delivering a landmark judgement emphasised that in a gender-equal society, it is imperative that interpretation of the MTP Act and Rules consider current social realities. Speaking for the bench, Justice Chandrachud noted, “*A changed social context demands a readjustment of our laws. Law must not remain static and its interpretation should keep in mind the changing social context and advance the cause of social justice*”. This judgement and the recent Amendment Act together significantly expanded the scope of abortion rights in India. The most important changes to the law are explained below:

First, the Court held that every pregnant person in India has a right to reproductive decisional autonomy, including transgender and gender-variant persons. Everyone is entitled to reproductive health, including access to safe, effective, and affordable methods of family planning, access to contraception, and sex education. Further, the Court acknowledged that the MTP Act is a provider-centric law that does not focus on the rights of pregnant persons. Since the right to access abortion depends on approval from a RMP, denial of services compels women to approach courts or seek abortion in unsafe conditions. RMPs are reluctant to provide abortion services due to fear of prosecution under the IPC, which has a chilling effect on the behaviour of healthcare service providers. Therefore, the Court held that the decision to terminate a pregnancy vests solely with the pregnant person.

Second, the Court expanded the scope of access to abortion services from 20 to 24 weeks, taking note of the factors and circumstances changing the material realities of women and how individuals’ unique circumstances cannot be exhaustively accounted for by the law. The Court held,

“the decision to give birth to and raise a child is formed by one’s material circumstances, which includes the situational, social and financial circumstances of a woman and her family and each of these is relevant to her decision to carry the pregnancy to term”.

The Court noted that individual circumstances should be considered on a case-to-case basis because it is not possible for the “*legislature or the Court to enlist each of the potential events which would qualify as a change of material*

circumstances”. The Court held that it is ultimately the prerogative of pregnant persons to make decisions, keeping in mind their material circumstances.

Third, the Court clarified that rape as grounds for abortion includes marital rape. The Court noted, “*It is not inconceivable that married women become pregnant as a result of their husbands having ‘raped’ them.*” It is important to clarify that the Court noted that rape should include marital rape for the purpose of the MTP Act, and that reading the provisions of the MTP Act in a manner that excludes married women who may be pregnant as a result of forced or abusive sexual conduct of their husbands would compel them to have children with abusive partners.

Fourth, the Court empathetically noted that the MTP is a beneficial legislation meant to enable access to abortion services for all pregnant persons. Therefore, the RMPs should offer abortion services without any extra-legal conditions like spousal or family consent, documentation requirement or judicial authorisation.

Further, a significant part of the judgement is the observations on adolescent access to abortion. The Protection of Child from Sexual Offences (POCSO) Act, 2012 was enacted to address issues of child sexual abuse, sexual harassment and child pornography. It criminalises all sexual conduct involving a “child”, who is defined as a person not having attained 18 years of age. The Act also has provisions on mandatory reporting of any sexual activity involving a “child” under Section 19, meaning that when an adolescent seeks abortion services, the RMP is obligated to report an offence of statutory rape under the Act. Taking note of how mandatory reporting requirements impede access to abortions for adolescents, the Court harmoniously read the MTP with POCSO and held that medical practitioners do not need to disclose the identity and personal details of an adolescent seeking an abortion, when filing their report under Section 19 of the POCSO Act. It emphasised that “it could not possibly be the legislature’s intent to deprive minors of safe abortions”.

The decision of the Supreme Court is a landmark ruling on issues of access to abortion and the right to reproductive and decisional autonomy. The Court relied on earlier decisions to articulate a right to reproductive autonomy as a manifestation of the right to decisional autonomy extending to one’s sexual and reproductive health,

which are integral parts of right to privacy, self-determination and right to dignity under articles 14 and 21 of the Constitution of India.

Most significantly, the court recognised several structural barriers that adversely impact access to abortion services including lack of access to health services, caste discrimination, bureaucracy, and poverty, among others. Therefore, the Court issued directions to the Government to ensure that all pregnant persons are able to access abortion and contraception services, information regarding reproduction and safe sexual practices, and that medical facilities and RMPs must be available in every district to provide services to all pregnant persons including marginalised persons with sensitivity and care. The Court noted that unless these recommendations are implemented the right to reproductive and bodily autonomy cannot be achieved.

Many of the concerns articulated by SRHR activists regarding the Amendment Act have been addressed by this judgement. Justice Chandrachud observed that reproduction is both biological and political, and (the) *“decision is intimately linked to wider political, social, and economic structures. A woman’s role and status in family, and society generally, is often tied to childbearing and ensuring the continuation of successive*

generations”. The abortion law, while being touted as a legal framework that protects pregnant persons’ rights, was not a rights-based legislation. The right to access safe abortions *at will* remained aspirational for the majority of pregnant persons in India. This landmark, historic decision paves way for abortion on demand creating a pregnant person’s right in India.

Further, criminalisation of abortion is acknowledged by Justice Chandrachud to impede access. As we move forward, decriminalising abortion will reverse the “chilling effect” on RMPs, making it more likely that they will grant abortions, rather than involving courts. And most importantly, the decision to terminate an unwanted pregnancy now vests only with the pregnant person in India, making it a rights-based legal framework. The MTP Act must therefore be read and implemented accordingly. However, in order for the impact of this verdict to translate on the ground, the legislative framework must be amended to remove the ambiguities and other barriers taken note of by the Court.

Disclosure statement

No potential conflict of interest was reported by the author(s).

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