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Pre-Natal Diagnosis and Judicial Forums: The Application of Transformative Constitutional Values in the Medical Termination of Pregnancy Act, 1971

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Abstract

Termination of pregnancies by itself is an extremely sensitive issue and is even characterized as an offence within Sections 312-316 of the Indian Penal Code. However, legally sanctioned exceptions have been created in the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as the "MTP Act"). Whenever congenital malformations are detected in a foetus, the relaxation of the upper statutory limit set by the MTP Act becomes the subject of intense debate. When the permissible statutory period elapses, writ petitions to judicial forums may become the last refuge of couples who wish to terminate pregnancy.

Many experts question the legal legitimacy of such a relaxation since the time limit set by the statute is unambiguously precise with no scope for exceptions save for a few statutory conditions. However, the authors argue that there are certain eventualities in cases like these, which can form a class by itself and which the MTP Act doesn't take into account. The authors shall proffer new medico-legal arguments using broader constitutional values and suggest changes in the MTP Act to keep it in consonance with newer conceptions of 'mental health' and 'reproductive autonomy'.

It is stated at the outset that the purpose of this article is to further enrich the medical jurisprudence on pre-natal technologies by using principles of laws discussed in Courtroom decisions. The paper shall provide a critique of the legal insights and Court precedents which have shaped discussions on the legal challenges faced in pregnancy cases where the presence of foetal anomalies forces the parents to make difficult choices regarding the continuation of their pregnancies. It is maintained that the domain of this paper shall be limited to

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legal principles and decisions pertaining to the Indian jurisdiction. The technical and biological variables behind the causation of genetic disorders shall be beyond the scope of this paper.

Key words: Prenatal diagnosis, Foetal anomalies, Medical Termination of Pregnancy (MTP) Act, Genetics, Medico-legal

I. Introduction

Petitions[3] filed across High Courts and the Supreme Court of India by prospective parents often demand a relaxation on the permissible statutory period for abortion under the Medical Termination of Pregnancy Act 1971[4] to prevent the birthing of a child who may be born with severe congenital and/or physical anomalies. A perusal of the relevant sections in the MTP Act lays down that permission to carry out the termination of a pregnancy could be allowed in a limited number of situations. However, with the notification of the new amendment, the statutory time limit doesn't have to be strictly adhered to if there is detection of 'substantial foetal abnormalities.' However, which case comes within the bracket of 'substantial foetal abnormalities' is left to the discretion of the Courts.

Indeed, there have been precedents laid by the Apex Court of India where the statutory period had elapsed, yet the abortion petitions were allowed owing to the detection of foetal anomalies- albeit under limited and specific circumstances. In *Tapasya Umesh Pisal* v. *Union of India*[5], the Hon'ble Apex Court had considered the question of granting permission for termination of pregnancy of 24 weeks for saving the life of a woman and held that when there is a grave danger to the pregnant woman's own physical and mental health, an abortion petition is to be accepted. It was taken into account that the baby would not grow into an adult and therefore the Court deemed it fit to allow the petition.

[3] Akshi Chawla, 'Why 243 Indian Women Had To Ask a Court For Permission To Abort' (*Business Standard*, September 5, 2020) <https://www.business-standard.com/article/health/why-243-women-had-to-ask-a-court-for-permission-to-abort-says-report-120090500257_1.html> accessed 01 February 2021.

[4] Medical Termination of Pregnancy Act, 1971, Sections 3-5.

[5] *Tapasya Umesh Pisal* v. *Union of India* [2018] 12 SCC 57.

In *A* v. *Union of India*[6], the Hon'ble Apex Court had an occasion to consider granting permission for medical termination of a pregnancy, that had surpassed 25/26 weeks. The Court found that the foetus was causing grave danger to the mother's life and was suffering from incurable medical conditions as a result of which the petition was admitted. It was further observed that the foetus would not survive outside the womb and there was no point in continuing with the pregnancy. In *Mamta Verma* v. *Union of India*[7], the Hon'ble Apex Court had occasion to consider the question of termination of pregnancy during the 25th week of a pregnant woman, apprehending danger to her life after discovering that her foetus was diagnosed with a defect that leaves foetal skull bones unformed and such a condition was untreatable. It was certain to cause the infant's death during or shortly after birth, and the condition was also known to endanger the mother's life. Likewise, the matter was admitted.

In *S. Jayanthi v. Union of India*[8], the petitioner's pregnancy had crossed 26 weeks, yet it was observed that even if the child is born, the chances of its survival are remote, and it is not possible to predict the longevity of its life span even after numerous surgeries. Going by the current stream of interpretations, statutory relaxations by way of Courtroom petitions are primarily allowed in cases where life outside the womb is incompatible or the condition of foetal impairment is causing danger to the mother's life since the mental anguish would be too severe for the birth-giver. It still begs the question- What constitutes 'mental anguish' in the event of detection of foetal anomalies? Why does mortality alone define the causation of mental anguish from the viewpoint of the Courts? What exactly is included within the ambit of 'substantial foetal abnormalities'? Would these petitions still hold water if there is no harm to the physical health of the mother and yet the foetus has a significant chance of being born with physical and mental challenges with no threat to the longevity of its life? There is a certain class of abortion seekers which is caught in the middle of these questions, and which do not exactly fall into the bracket of 'substantial foetal anomalies'.

The conundrum goes into the technicalities of law and bioethics and reaches the core of issues like reproductive agency. In such cases where there is no mortality risk, even the statutory period of 24 weeks is not considered amenable to

[6] *A* v. *Union of India* [2018] 14 SCC 75.
[7] *Mamta Verma* v. *Union of India* [2018] 14 SCC 289.
[8] *S. Jayanthi* v. *Union of India* [2019] SCC OnLine Mad 2078.

relaxation as the sense of urgency gets stripped if there is absolutely no danger to the health of the mother or the foetus. Placing a limit on the number of eventualities under which abortion petitions are acceptable negates the experiences of those who without any fault on their part end up reaching the judicial forum(s) after the statutory limit for abortion has been crossed and yet do not find themselves in the bracket of 'substantial foetal abnormalities'. For example, a Supreme Court bench headed by the former Chief Justice, Sharad Arvind Bobde rejected a petition in which the mother, a resident of Alibaug, Maharashtra, belonged to a lower-middle-class family. The foetus was diagnosed via an antenatal confirmatory test at 22 weeks with Trisomy 21, a chromosomal aberration more commonly known as Down Syndrome. The couple already had a differently abled child in the family, knew the hardships of bringing up such a child, and thus, wanted an abortion after receiving the confirmatory reports.[9]

Further costs and risks are attached to the confirmatory tests which are conducted if the first results are indicative. The process of getting conclusive confirmatory tests along with the initial screening tests mostly crosses the 20-week limit put forth by the unamended MTP Act. Combined with this is the socio-economic background of the couple involved who not only had limited access to medical resources but also suffered from considerable lack of awareness. They originally hailed from rural habitats with little exposure to the trappings and technicalities involved in approaching the judicial and medical forums. This added two weeks to their delay. Cases take time to get filed and then reach the bench for adjudication. Since the Supreme Court judges are not medical experts, they often order another set of medical reports to invite the comments and opinions of medical experts in the field, furthering the delay. During the 26th week of the pregnancy, the bench rejected the abortion petition as the statutory period had elapsed and the foetus, though afflicted with 'Down Syndrome' didn't cause any threat to the mother's health or to its own lifespan.[10]

Similarly, in another shocking example, Patna High Court denied an abortion of a 26-week-old foetus of an HIV-positive rape victim as the Court felt that it was the responsibility of the Court to keep the child alive. The victim appealed to the

[9] Somashekhar Marutirao Nimbalkar and Dharti Sanjay Patel, 'The Medical Termination of Pregnancy Act: Need To Keep Pace With Technology' (2018) Indian Journal of Medical Ethics 4(1) <https://ijme.in/articles/the-medical-termination-of-pregnancy-act-need-to-keep-pace-with-technology/?galley=html> accessed 02 February 2021

[10] ibid

Supreme Court which heard her plea but denied her an abortion citing similar reasons. It is quite probable for the above-mentioned factual matrix to repeat itself, especially in a country like India where there is an acknowledged disparity[11] in the access to socio-economic resources and health forums. Parental autonomy in countries like India is not an unqualified right. However, by recognizing that there are couples which encounter legitimate bottlenecks in access to resources and information, medico-legal bioethics can constitutionally justify the relaxation of the statutory period in certain contexts using the humanitarian aspect of Article 21. This is where the 'criminal' connotation of the 'Victorian era'[12] Indian Penal Code becomes an antiquated conceptualization of abortion and hurts in cases where the humanitarian intervention of Article 21 is desperately needed.

The explanations drafted for Section 3(2) of the MTP Act with all its expansive interpretation, do not take note of all eventualities under which the relaxation may be permitted. While the provision talks about the importance of recognizing mental health as an important facet in the termination of pregnancy, Explanation I[13] describes the mental anguish caused to a woman in case the pregnancy has arisen out of rape while Explanation II refers to the anguish caused by unwanted pregnancies due to the failure of any device or method used for the purpose of limiting children. Both Explanations are laudable additions, however, the legal description of extremely important terms like 'good faith'[14] and 'mental health'[15] does not make it entirely clear whether the anguish caused by the mere detection of congenital anomalies is a ground grave enough to relax the upper limit for abortion set by the MTP Act 1971.

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[11] Rural Health Statistics (2019-20), Ministry of Health and Family Welfare, Government of India, 2021.

[12] David Skuy 'MACAULAY AND THE INDIAN PENAL CODE OF 1862: THE MYTH OF THE INHERENT SUPERIORITY AND MODERNITY OF THE ENGLISH LEGAL SYSTEM COMPARED TO INDIA'S LEGAL SYSTEM IN THE NINETEENTH CENTURY (1998) 32(3) MODERN ASIAN STUDIES CAMBRIDGE CORE <www.cambridge.org/core/journals/modern-asian-studies/article/abs/macaulay and-the-indian-penal-code-of-1862-the-myth-of-the-inherent-superiority-and-modernity-of-the-english-legal system-compared-to-indias-legal-system-in-the-nineteenth-century/6A9889BD636F246801F478CF04079DFF> accessed 03 February 2021.

[13] Medical Termination of Pregnancy Act 1971, Section 3(2)(b)(ii), Explanation I and II, what constitutes as a mental injury.

[14] *Ibid*, an opinion formed in good faith over what constitutes 'mental injury'.

[15] *In the High Court on its own Motion* v. *The State of Maharashtra*, Suo Moto Public Interest Litigation No. 1 of 2016; Bombay High Court 20 September 2016, in which the Courts acknowledged how the explanatory notes on 'mental health' in the statutes are insufficient to tackle other possibilities.

Ordinarily, any criterion unrelated to a woman's aspirations and wishes dictating the continuation of a pregnancy is considered a regressive interference with her bodily autonomy.[16] Public law/constitutional litigation in medicine[17] has often enlarged the scope of legislative instruments by framing the issue of access to medicine or any procedure on a rights-based model. This allows the Courts to pave the way for a kind of medical access which couldn't be occasioned by statutory laws alone. For medicine in particular, public interest petitions filed over the years have been instrumental in securing a host of positive orders including providing 'special treatment to children in jails, addressing pollution hazards, casting away inhuman conditions in aftercare homes, securing health rights for mentally ill patients, providing immediate medical attention to injured people, ensuring corruption less operation of blood banks and medical programmes'[18] etc. It is for this reason that bioethics and constitutional litigation must be read and analyzed in consonance owing to the huge bearing that the latter has on the former. None of these orders would be legally enforceable under the provisions of directive principles of the State. Therefore, the humanitarian aspect of Article 21 has the ability to triumph when the appropriate factual matrix desires it to do so.

In such a scenario, the authors argue that legal principles can influence medical bioethics in order to come up with a comprehensive interpretive solution for solving the legal conundrum and that far from being instances of judicial activism, the relaxation of statutory upper limit in the MTP Act can, in fact, be legally justified with the help of medical bioethics. It shall also be argued that the newly amended Medical Termination of Pregnancy Bill 2021[19] with its liberal additions still falls short of addressing the bottlenecks in the un-amended legislation.

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[16] ibid.

[17] Poorvi Chitalkar and Varun Gauri, 'A Qualified Hope: The Indian Supreme Court and Progressive Social Change', (2019) THE RECENT EVOLUTION OF PUBLIC INTEREST LITIGATION IN THE INDIAN SUPREME COURT (2019) 77-91 Cambridge University Press <https://www.cambridge.org/core/books/abs/qualified-hope/recent-evolution-of-public-interest-litigation-in-the-indian-supreme-court/1C267D85579009978BA46F536235761E> accessed 04 February 2021.

[18] K. Mathiharan, 'The Fundamental Right to Health Care', (2016) 13 (123) INDIAN JOURNAL OF MEDICAL ETHICS, <https://ijme.in/articles/the-fundamental-right-to-health-care/?galley=html> accessed 04 February 2021.

[19] The Medical Termination of Pregnancy Act 2021, Amendment Sections 3-5.

II. Expanding Constitutional Litigation in Medicine

A. Article 21: A Critical Underutilised Tool

The importance of constitutional litigation in medicine is extremely indispensable. It is important to understand the history of Article 21 and its importance in medico-legal argumentation to realize how its expansive interpretation has often enlarged the access to socio-economic rights guaranteed within the Constitution. The original intent of Article 21 was to act as a procedural safeguard against improper exercise of power by State instrumentalities.[20] It was, therefore, characterized as a negative right which prevented the State from taking steps which transgress fundamental rights. Public law litigation and its relentlessness opened a floodgate for an immense expansion of Article 21. Prior to its judicial expansion, socio-economic obligations were not considered as 'justiciable'[21] as the negative rights protected under Article 21. Socio-economic rights were therefore dependent on the overall development of a State and the strength of its resources and could only be 'progressively realized'[22] but Article 21 and its continued re-interpretation paved the way for socio-economic obligations to be characterized as rights which could be demanded from the State through enforcement of public interest petitions. It is for this reason that constitutional litigation must be paid attention to in medical bioethics owing to its huge bearing in medico-legal cases.

The Medical Termination of Pregnancy Act 1971 has also been ceaselessly qualified by the right to health paradigm which emanates from Article 21.[23] However, aspersions are cast with respect to the threshold with which it must be qualified in any given case. Accepting reproductive autonomy into the domain of 'right to health'[24] also means accepting the pitfalls and limitations which are put on fundamental rights. Furthermore, adding 'substantial foetal anomalies'[25] to the statute without clearly contextualizing the threshold of its application leads to

[20] Dr. Gyanendra Kumar Sahu, 'AN OVERVIEW OF ARTICLE 21 OF THE INDIAN CONSTITUTION', (2017) 3(3) INTERNATIONAL JOURNAL OF LAW, < https://www.lawjournals.org/archives/2017/vol3/issue3/3-3-31> accessed 05 February 2021.

[21] Justiciable- subject to trial in a Court of law.

[22] Sahu (n 18).

[23] *Suchita Srivastava* v. *Chandigarh Administration* (2009) 9 SCC 1.

[24] Mathiharan (n 16).

[25] Medical Termination of Pregnancy Act 1971, Section 3 (2B)

further conflict wherein the subjective values of High Court judges as well as the people constituting the medical board become the deciding factors in adjudication.

The prerogative exercised by High Court judges as well as the due weightage given to the opinions of medical practitioners makes it anything but a rights-based law. Anxious parents find themselves dangling in a stage of pregnancy nearer to the statutory limit placed for termination of such a pregnancy. Furthermore, since the Court ruling may move either way, approaching legal mechanisms can prove to be an unbearably daunting task. The newer waves of constitutional/public law litigation as well as a nuanced medico-legal argumentation can help entangle such eventualities which ought to be cleared by a constitutional bench and yet haven't been addressed by the Apex Court in a holistic manner. The fundamental importance of making 'reproductive choices' becomes incumbent on the building of steady structures of information symmetry and access to medical services. In such a scenario, socio-economic factors, access to information and other 'positive rights'[26] shall be considered equally to ensure 'reproductive justice'.[27] It is for this reason that the authors would go on to argue that by merely looking at 'whether the statutory limit has been breached or not' a very myopic and hyper-technical interpretation emerges which doesn't have all the answers. Therefore, the Courts need to appreciate the factual background of every case and exercise their discretion in a careful and calibrated way. The factual illustration laid down at the beginning of the paper is one such example where a rigid interpretation of the statute follows the letter of the law but not its spirit. Although the termination of pregnancy was disallowed, it wasn't 'reproductive justice'.

III. Precedents

In criminal law jurisprudence, self-preservation[28] is one of the exceptions to the acts of criminal aggression. In other words, any action done with the purpose of causing 'criminal harm' can be condoned by the State if done for the prevention of more grievous harm. Acts committed in pursuance of self-preservation or

[26] Sandra Fredman FBA, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES (Oxford University Press, 2008)

[27] Adam Conti, 'Drawing the Line: Disability, Genetic Intervention and Bioethics' (2017) 6 (1) Laws, MDPI <https://www.mdpi.com/2075-471X/6/3/9> accessed 05 February 2021.

[28] Indian Penal Code 1860, Sections 96-106.

defending oneself become notified exceptions to such offences. The conception that abortion is an inherent 'crime' which is merely allowed to exist in the form of exceptions is a problematic way to characterize its position in the field of law. It takes away from it the rights-based model in which it has been encouraged to be seen.

The reason why such an observation requires contemplation is that it places a very decisive and certain limit on the number of eventualities under which the abortion petitions must be accepted. Such an interpretation narrows down the complexity of situations in which termination of pregnancy is invoked whenever congenital afflictions are detected. For invoking a successful abortion petition, the nature of congenital afflictions should be such that the self-preservation of either the mother or the foetus is threatened. However, abortion is also a rights-based issue guaranteed by Article 21 of the Constitution and any factors external to the agency and aspirations of a woman shouldn't be the only factors influencing the right to invoke it.

There are notable conditions mentioned in the Explanations to Section 3 of the MTP Act 1971 that act as exceptions to the 'crime of abortions' but there are two very important conditions which are without any threshold and have to be determined by the context and circumstances surrounding the pregnancies i.e., the severity of the mental anguish occasioned by the pregnancy as well the 'substantial' risk of foetal impairment and congenital malformations. One needs to ask what happens to the scope of these provisions when the 20–24-week statutory period has been crossed. The recent amendments to the Medical Termination of Pregnancy Act in 2021 are certainly progressive and raise the upper limit set for allowing termination of pregnancy which partly alleviates the problem.[29] However, as long as the aforementioned highlighted issue remains unanswered, the Courts are missing out on developing a more well-defined and thoughtful medico-legal jurisprudence. By refusing to shed light on the constitutional principles applicable to the issue, Courts are implicitly accepting that such a termination of pregnancy shall be allowed only if, either the life of the mother is in danger (self-preservation), or if the child so born would have to undergo medical procedures which have 'high morbidity' or 'high mortality', or if it is certain that the child shall not grow into an adult and is afflicted with such

[29] World Health Organization, 'India's Amended Law Makes Abortion Safer and More Accessible' (April 2021)

glaring biological defects that life outside the womb would be completely incompatible. It is contended by the authors that the relaxation of the upper statutory limit could also be constitutionally justified under certain facts and conditions which have nothing to do with the above-stated eventualities.

A Pratigya Campaign study[30]of MTP cases between 2016 and 2019 showed that Courts primarily rely on medical board opinions, which take into account various factors including the severity of afflictions detected in the foetus. With a diverse composition of the boards as well as a lack of uniform jurisprudence on abortions, it will be impossible to reach a decision quickly, and this could result in pregnancies reaching advanced gestational age before termination is permitted. It makes it even more pertinent for our Courts and jurists to start changing their approaches to ensure complete reproductive justice. Therefore, it is befitting that the medico-legal principles push towards the acknowledgement that even with the installation of required infrastructure there could be instances where abortion seekers are plagued by institutional limitations with respect to access and awareness (as described in the illustration in the beginning). Being mindful of these socio-economic realities would greatly benefit couples who reach the judicial forum later than what is allowed simply owing to the difficulty of their circumstances. Such a realization would help the Court to be cognizant of such delays while deciding abortion petitions. Courts are a vehicle for change and have the prerogative to act as protectors of bodily autonomy and bestow beneficence on individuals who need it.

IV. **Justifications**

With the enactment of the Medical Termination of Pregnancy Act 1971, India had become one of the first few countries to legalise abortion on moderately liberal grounds. In fact, the legislature has gone a step further by raising the gestational limit from 20 weeks to 24 weeks based on the recommendations of various stakeholders. However, it is the contention of the authors that more exceptions need to be carved out in order to accommodate as many eventualities as possible by giving due regard to the factual background of every petition and ascertaining

[30] Anubha Rastogi and Raunaq Chandrashekar, 'Assessing the Judiciary's Role in Access to Safe Abortion', A Pratigya Campaign Study for Gender Equality and Safe Abortion Report, (May 2019-August 2020).

the socio-economic condition of every couple. The most important hallmarks of ethics lie in protecting the values of 'autonomy, beneficence and justice'[31]. Couples who untimely reach the judicial forum through no fault of their own- either owing to a late diagnosis or lack of access- deserve the utmost beneficence from the authorities. By only focusing on the fact that the gestational period has been crossed, a very narrow interpretation emerges on a very complex subject.

While it is still difficult to bring a uniformed and streamlined method of interpretation, it will bring a much-needed interpretive relief to focus on factors other than the ending of gestational period and instead shifting focus on other medico-legal issues which the courts have ignored before: -

A. Qualifying Article 21- Judicial Activism

As explained above, Article 21 is more than the sum of its words. It is a certified protection from State interference which includes not only ensuring 'animal existence'[32] but rights which go beyond that and include other facets. The expression 'life' has a more nuanced conceptualization under this provision. The facet of reproductive autonomy not only includes the right to procreate but also the right to abstain from procreating under any condition. This includes a refusal to procreate as well as the refusal to go through with any pregnancy after a procreative act.[33] The term 'life' under the provisions includes its literal definition as well as the factors incidental to its adequate sustenance. In other words, an 'inhibition against its deprivation extends to all those limbs and faculties through which life is enjoyed'.[34] It is in this context that late-term abortions in the face of congenital anomalies must be appreciated.

However, the conditions mentioned in the MTP Act 1971 allow for such a termination subject to the gestational periods of the pregnancy. It is here, that Article 21 becomes limited in application. It operates within reasonable restrictions. Its application should not be inconsistent with the law of the land. If a statute places a definitive and unambiguous limit on the set of conditions

[31] Somashekhar Marutirao, PATEL, (n.38).
[32] *Kharak Singh* v. *State of UP*, 1964 SCR (1) 332.
[33] Bhavish Gupta and Meenu Gupta, 'THE SOCIO-CULTURAL ASPECT OF ABORTION IN INDIA: LAW, ETHICS AND PRACTICE' (2016) 140-150 INDIAN LAW JOURNAL REVIEW < https://ili.ac.in/pdf/p10_bhavish.pdf> accessed 02 March 2021.
[34] *Munn* v. *Illinois*, (1877) 94 US 113.

required for admission of a petition, then the law of the land has to be followed. This was the principle used in the '*Nikita Mehta*'[35] case where the Court refused to relax the statutory limit imposed by the statute and explained that such an interpretation would be 'usurpation of authority' by the judiciary. It is contended that the enhanced interpretation of Article 21 now has several precedents to support it and the statutes have the ability to be qualified and relaxed using public law litigation. This is not judicial activism but context-specific application of a law where there is unintended ambiguity. Furthermore, constitutional principles have always had the mandate to discriminately apply the law of the land in pursuance of a legitimate objective[36] (reservation of minorities for instance). In support of the above, the authors contend that the usage of Article 14 is something the Courts have ignored in such situations.

Article 14 of the Constitution is written as the 'equality before law doctrine'[37]. However, it is also much more than that. Although it ensures that no special privilege is to be meted out in favour of anyone, it also demands an equal application of law for similarly placed individuals.[38] A more detailed explanation of 'equal protection of law'[39] entails that there is an obligation on the State to bring forth equality using the instruments of constitutional prerogatives and making room even for unequal application of law for varying needs of different classes or sections of people who by virtue of their situation require differential treatment. Article 14 is fundamentally important from the perspective of medical ethics since it paves the way for differential application so long as there is a legitimate classification in pursuit of a legitimate objective.

The All-India Rural Health Statistics (2018-19)[40] indicate that there are 1351 Gynaecologists and Obstetricians in community health clinics in rural areas

[35] *Nikhil Datar* v. *Union of India*, SLP (C) 5334 of 2009.

[36] Equality before law and equal application of law-Article 14, Constitution of India.

[37] Ibid.

[38]Marc Galanter, 'Equality and "Protective Discrimination" in India' (1961) 16 (42) RUTGERS LAW REVIEW <https://heinonline.org/HOL/LandingPage?handle=hein.journals/rutlr16&div=8&id=&page=> accessed 05 March 2021.

[39] Ibid

[40] Statistics Division, Ministry of Health and Family Welfare, Government of India, 'All India Rural Health Statistics' (2018-2109)

across India, and the shortfall is 4002, i.e., there is a 75% shortage of qualified doctors. It is, therefore, inconceivable that our State machinery should operate under the presumption that every individual's diagnostic circumstances shall be similar and timely. The MTP Act 1971, by prescribing a limit of 24 weeks assumes certain conditions to be met. The prescription of a limited gestational period assumes that there is a timely diagnosis at all times and that every parent goes through the required medical procedures without any problems whatsoever.

The host of situations including late diagnosis, socio-economic roadblocks in access to healthcare or other such delays which don't flow from the willful negligence or laxity on the part of the parents could easily form a classification which is distinct from the natural assumptions of the statute. The said classification of patients should be constitutionally allowed to have statutory relaxation from the strict 24-week period provided under the statute. The purpose of such a classification is legitimate and in pursuance of the statute's intention of protecting the right to refuse the continuation of unwanted pregnancy and at the same time it retains the legitimacy of parameters set by the law. Therefore, using the social and situational realities of different factual backgrounds, the Courts can be more cognizant of medical ethics while adjudicating such petitions.

B. Enlarged Perspective on Mental Health

A reproductive justice framework which doesn't properly integrate the contours of mental health would never be complete or comprehensive enough. The connotation of 'mental health' in the MTP Act 1971 is currently operating in an extremely limited and narrow way. The Act mentions that the grounds for seeking an abortion get strengthened if the continuation of a pregnancy causes grave injuries to a woman's mental and physical health. However, disallowing abortions in cases of no 'immediate threat'[41] to the life of the mother follows the logic that injury to mental health is grave enough only in cases where either the mother's life is in danger, or the life span of the foetus is likely to be short.

<https://main.mohfw.gov.in/sites/default/files/Final%20RHS%202018-19_0.pdf> accessed 05 March 2021.

[41] Tapasya Umesh Pisal v. Union of India (2018) 12 SCC 57.

However, mental health is a much more complex subject[42] and injury to mental health could be uniquely specific to an individual's circumstances and experiences. A short foetal life is not the sole ground where the Court can decide that there is a 'grave injury' to mental health. Not being in a mental space where one can provide the requisite lifestyle and nourishment needed for bringing up a congenitally afflicted child is as much an injury to mental health as is any other factor.[43] There may not be a threat to anyone's life but raising a child with congenital afflictions could subject a mother to poor mental health throughout her life.[44]

In the Supreme Court case pertaining to the Maharashtra family discussed above, the foetus was afflicted with Down Syndrome where the Court opined that 'everybody knows' that children with Down Syndrome are undoubtedly less intelligent but 'they are fine people'. The Court's reasoning is devoid of any scientific and social appreciation of the facts at hand. Parents of children with chronic diseases have also been reported to have poor mental and physical health[45]. Furthermore, this was a family with limited financial resources and didn't have the required emotional resolve to bring up another child afflicted with Down Syndrome. The economic and social costs of bringing up a child diagnosed with Down Syndrome are significantly higher than the costs of bringing up regular children.[46] Such children are also at a higher likelihood to develop other conditions[47] which albeit can be corrected but require immense resources and can take an emotional toll. A lot of literature available on this subject is from the developed countries where State-sponsored insurance schemes run more

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[42] Ankush K Khanna, Anusha Prabhakaran, Priyanka Patel and others, 'Social, Psychological and Financial Burden on Caregivers of Children With Chronic Illness: A Cross-Sectional Study (2015) 82(11) INDIAN JOURNAL OF PEDIATRICS < https://pubmed.ncbi.nlm.nih.gov/25976615/> accessed 06 March 2021.

[43] Veena Johari and Uma Jadhav, 'Abortion Rights Judgement: A Ray of Hope' (2017) 2(3) INDIAN JOURNAL OF MEDICAL ETHICS https://pubmed.ncbi.nlm.nih.gov/28279947/ accessed 10 March 2021.

[44] Khanna, Prabhakaran and Patel (n 40).

[45] ibid.

[46] Sheree L Boulet, Noelle-Angelique Molinari, Scott D Grosse, and others, 'HEALTH CARE EXPENDITURES FOR INFANTS AND YOUNG CHILDREN WITH DOWN SYNDROME IN A PRIVATELY INSURED POPULATION' (2008) 153(2) THE JOURNAL OF PEDIATRICS < https://pubmed.ncbi.nlm.nih.gov/18534234/> accessed 10 March 2021.

[47] Johari and Jadhav (n 41).

efficiently.[48] The added burden of approaching a judicial forum itself could be a significant cause of mental stress and anguish for the mother.

Socio-economic standing of a couple should have a much larger bearing on the Court's interpretive values regarding 'mental health' and 'good faith'. The interpretation of mental health should move away from a one-dimensional interpretation to a more diverse and comprehensive vantage point which acknowledges that grave injuries to mental health need not arise only from a specific set of straight-jacketed circumstances. A threat to the petitioner's life shouldn't be the only circumstance where mental injury should be considered grave enough. Instead, focus must be put on a much more comprehensive frame of analysis. Therefore, by adding explanatory notes to provisions like 'mental health' and 'good faith', the legislature should begin constructing the meaning of these words in its complete sense and reduce uncertainty as much as possible by accommodating even more eventualities that the statute has missed out on.

V. Reproductive Justice

Bioethics deals with the emerging legal and ethical conundrums which stem from the advances made by medical technologies which are in need of 'critical assessment'.[49] The authors disagree with the proposition that what constitutes the 'best life' shall always be looked through the lens of whether there is a detection of foetal anomaly or not. The key issue here is prioritizing certain decisions based on the intensely personal situations of couples who approach the judicial forums and do not conceive the life of a disabled foetus to be anything less than a full-value human. The purpose of this paper is instead to bring attention to neglected eventualities and socio-economic conditions which reasonably justify abortion using existing constitutional prerogatives and their application to medical bioethics.

The 'human rights model'[50] is the type of intervention which acknowledges that a person shall be seen as something more than a sum of their medical characteristics and with complete human dignity. At the same time, it strives to

[48] ibid.
[49] Conti (n 25).
[50] ibid.

achieve a delicate balance between the competing interests of disability advocates as well as the proponents of reproductive autonomy. The justifications built around these abortions should never stem from the reasoning that the tutelage of inalienable rights under Article 21 must be available only to those who have no foetal impairment. On one hand, we have the idea that eradicating disease can alleviate suffering and thus lead to more happiness while on the other hand limiting the conception of human life to a set of genetic characteristics is anything but a dignified conception of human life.

This paper in no way proposes that every termination of pregnancy where detection of genetic disabilities takes place is a cruel judgement or an affront to the dignity of lives which are impaired by such genetic limitations. The authors hold that it is possible to make space for a more nuanced appreciation of circumstances in assessing situations where reproductive agency is stifled by circumstances beyond a couple's control. By shifting the framework from the opposite extremity and re-orienting it towards the idea of 'reproductive justice'[51], the Courts and the legislature would be able to write their opinions on a broader spectrum and not see these issues in a myopic way which can significantly decrease the contradictory judgments if not eliminate them. The reproductive justice framework includes not only procreative freedom dictated by a woman's aspirations but also the right to have children in a healthy, safe, and dignified environment. Reproductive justice is an acknowledgement of the intersectionality of various political contexts and social realities. It has to acknowledge 'that we make reproductive decisions within a social context, including inequalities of wealth and power.'[52]

Therefore, petitions where relaxation of the upper limit is demanded in a landscape where the level of infrastructure and societal intervention to accommodate the disabled community is admittedly abysmal, every individual will have to face the socio-economic realities of the situation and make decisions on whether they can cope with it or not. Once we acknowledge this disparity, there is an increased expectation from the State to not keep its role limited to

[51] Samuel R Bagenstos, 'Disability and Reproductive Justice' (2020) 14 (2) Harvard Law and Policy Review < https://journals.law.harvard.edu/lpr/wp-content/uploads/sites/89/2020/11/Bagenstos.pdf> accessed 12 March 2021

[52] Stefanija Giric, 'Strange Bedfellows: Anti-Abortion and Disability Rights Advocacy' (2016) 3(3) JOURNAL OF LAW AND THE BIOSCIENCES https://academic.oup.com/jlb/article/3/3/736/2654254 accessed 12 March 2021.

'allowing' or 'constraining' reproductive autonomy on a case-to-case basis but also to acknowledge its affirmative role under 'Article 21' and other constitutional prerogatives towards ensuring steady support to all stakeholders so that they have the necessary economic, social and political power to exercise reproductive autonomy in their best interest.

A steady focus towards ensuring that the most comprehensive information is available to women which presents a realistic description of the life they will be raising along with 'non-directive'[53] and 'non-coercive' counselling can only happen in situations where there is a timely diagnosis, availability of resources and the couples are economically and socially aware in a way to understand the implications and contours of these eventualities. It is also true that these ideals can only be 'progressively realized' and until then the Courts as well as the legislature shall vigilantly follow the precedents being set out in every case and be on the lookout to amend and modify our statutes to keep pace with these advancements.

VI. Conclusion

The constant analysis has enabled legislature to increase the gestational limit from 20 weeks to 24 weeks which is laudable and has been described as a welcome move. However, based on the discourse described in the earlier sections of the paper, a continued overhaul and modification of our statutes shall immensely benefit future couples who would find themselves approaching the judicial forum(s). The Courts need to start with slightly lengthier judgements and detailed explanations of the statute so that the contradictions can be kept at the lowest level possible. Moreover, the Courts shall be presented with a more comprehensive factual matrix surrounding the pregnancy which a couple is going through. If the issue remains limited to merely 'whether the presence of foetal anomalies warrant a relaxation of the upper limit set in the statute' then it shall lead to a mechanical application of law and could lead to unjust outcomes for couples who find themselves in different circumstances and socio-economic conditions.

Such a relaxation if warranted by the facts at hand, should not be seen as a judicial overreach as argued by the authors and that Articles 14 and 21 have been

[53] Conti (n 25).

recognized as constitutional instruments for ensuring a comprehensive right to health even in the absence of a statute for right to health (unlike the Right to Education). In furtherance to this, the interpretive system should move away from a unidimensional outlook on 'mental health'. Based on the prevailing precedents, the Courts' conception of 'mental health' points towards a trend whereby mental injury is considered grave enough in cases where either the mother's life is in danger or in cases where the offspring is likely to have a short and painful lifespan. For making such an opinion, a woman's actual and/or reasonably foreseeable environment shall also be considered. MTP Amendment Act 2021 is a very significant step towards ensuring dignity, autonomy, confidentiality, and justice for women who need to terminate pregnancy. Replacing the archaic conception of abortion to keep up with medical advancements is a great step forward to ensure that women across India get access to safe abortions.