

## THE MEDICAL TERMINATION OF PREGNANCY ACT THEN AND NOW – AN ANALYSIS

\*NIKITA JAIN

*“There is no freedom, no equality, no full human dignity and personhood possible for women until they assert and demand control over their own bodies and reproductive process...The right to have an abortion is a matter of individual conscience and conscious choice for the women concerned.”*

*---Betty Friedan*

### INTRODUCTION:

The Indian Legislature has prevailed numerous statues for safeguarding every citizen against any injustice happen to them and peaceful functioning of the nation. Various rights are enshrined under constitution of India and also under different statues which prevail rule and order in the society. Since time immemorial women is fighting different battles for their rights and establishing their position in the society. Right to abortion and Reproductive Rights is one of those. The decriminalization of abortion is a historic development in evolution of not only women’s rights but also Human Rights as well. The Medical Termination of Pregnancy Act is one of well-defined law in enhancing Human Values in the society and improving the position of women in the society. This act increased the scope of women’s power in sexual and reproduction decision-making. The World Health Organization defines, “reproductive rights as rights including the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children, and the right to have the information and means to implement those decisions free from discrimination, coercion, and violence<sup>1</sup>”. Human rights are inherited in all human beings irrespective of their sex, race, nationality, language, religion, etc. It is particularly founded on the principle of equality and dignity<sup>2</sup>. Human Rights include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education, and many more. Therefore, Human Rights are auxiliaries in maintaining the Rule of Law in the society.

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<sup>1</sup>UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, REPRODUCTIVE RIGHTS ARE HUMAN RIGHTS (June 3, 2020, 7:24 PM), <https://www.ohchr.org/Documents/Publications/NHRIHandbook.pdf>.

<sup>2</sup> Aditi Sharma, ABORTION LAW AND SEXUAL FREEDOM IN INDIA VIS-À-VIS RIGHT TO THE UNBORN TO LIVE, VOL-4/27 SRJIS 4514, (2016).

## RIGHT OF ABORTION AND HUMAN RIGHTS:

In simple terms the Abortion means “*the termination of pregnancy*”. Abortion is the artificial or spontaneous termination of a pregnancy before the embryo or foetus can survive on its own outside a women’s uterus<sup>3</sup>. Abortion is defined by the Canadian Intermediate Dictionary as, “*the deliberate ending of a pregnancy by causing the foetus to be expelled from a woman’s womb*”. Medically, abortion means the expulsion of the ovum within the first three months of pregnancy; miscarriage, the expulsion of the foetus from 4th to 7th month; and premature delivery, the delivery of a baby after 7 months of pregnancy and before full term. For administration of gender justice in the society liberalization policies for adoption is paramount. Only women have this reproductive feature so it should be the will of a women that, is she willing to continue the pregnancy or terminate it. Any force put on women for continuing unwanted pregnancy would result in personal attack on one’s autonomy and also infringes her right to privacy. Also, this force makes replica of women as a slave and also rob her bodily integrity. The formulation of abortion policies would advocate as a measure of family planning.

One of the supreme Human Right is Right to Life and question of conflict is, whether this right is equally available to embryos and foetuses. In Historic times Abortion had been considered as a sin and crime. Mahatma Gandhi once said that “*It seems me clear as clear as daylight that abortion would be a crime*”. Also, it is considered as a destruction to mankind because its concerns the taking of human life and destroys human values. This issue resultant into strenuous debates regarding its ethical, political and legal status. The whole struggle of legalizing abortion is based on ideology that it directly challenges the meaning of the family, motherhood, Human Rights and a State. But with the passage of time the status of abortion has been changed. Law-makers with time to time refine the statutes for fulfillment of social needs. It is now considered as Right of women. However, unwanted pregnancy may cause mental torture on a woman. In India the journey for evolution of Medical termination of pregnancy act was every challenging because major governing aspect of Indian society is Secularism. Generally, different religion has different aspects and arguments in, for and against of decriminalization of abortion.

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<sup>3</sup> Black Law Dictionary, 2<sup>nd</sup> Ed.

## **ABORTION AND CONSTITUTION OF INDIA:**

India is a democratic country where rule of law prevails. Constitution of India enshrined different rights to every individual which inculcate the spirit that people should be protected against any injustice. Part III of Constitution of India outlined the Fundamental rights. The Indian constitution provide “*right to life*” which includes within its ambit the “*right to privacy*”<sup>4</sup>. Right to life and personal liberty is the most sacrosanct, precious, inalienable and fundamental of all the fundamental rights of citizens. This guarantee imposes a restraint on the government and it is part of the cultural and social consciousness of the community in India. In this context, every woman owes an individual right, right to her life, to her liberty, and to the pursuit of her happiness, that sanctions her right to have an abortion<sup>5</sup>.

## **INDIAN LAWS ON ABORTION:**

Before the enactment of Medical termination of pregnancy act, 1971, abortion was criminalized under section 312 of Indian Penal Code, 1860 which describe it as intentionally “causing miscarriage”.

Section 312 to 316 of Indian Penal Code, 1860 deals with Abortion as:

Section 312- Causing miscarriage

Section 313- Causing miscarriage without woman's consent

Section 314- Death caused by act done with intent to cause miscarriage

Section 315- Act done with intent to prevent child being born alive or to cause it to die after birth.

Section 316- Causing death of quick unborn child by act amounting to culpable homicide

The framers of this statute have not used the word “Abortion”. Rather of it they have enunciate about “miscarriage” only, which is even also not defined in the code. However, miscarriage in common sense is a synonym of Abortion. “Miscarriage” technically refers to spontaneous abortion whereas voluntarily causing miscarriage, which is an offence under the Indian Penal Code, 1860 stands for criminal

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<sup>4</sup> INDIA CONST. art. 21.

<sup>5</sup>Bhavish Gupta, Meenu Gupta, THE SOCIO-CULTURAL ASPECT OF ABORTION IN INDIA: LAW ETHICS AND PRACTISE, ILI Law Review 140 (2016).

abortion i.e., induced abortion<sup>6</sup>. Section 312<sup>7</sup> of Indian Penal Code, divides the crime of causing miscarriage into two categories:

- (i) When a woman is with child, and
- (ii) When she is quick with child.

The requirements under IPC, 1860 is that the woman should be "with child" or "quick with child." A literal meaning of woman is "with child" is "as soon as gestation begins i.e. as soon as she is pregnant<sup>8</sup>". "Quickening" is called as presumptive sign of pregnancy in general sense it is the first fetal movement felt by the mother or the embryo has a foetal form<sup>9</sup>. Good faith is an essential element of section 312. If the abortion is caused in good faith to save the life of the pregnant woman it is a complete defence against the criminal charge. If women are not the consenting party than the case come under the purview of section 313<sup>10</sup>. In case termination of pregnancy is caused without the consent of the women, punishment may extend to imprisonment of either description for a term, which may extend to 10 years and fine.

When an accused intending to cause only miscarriage to a woman with child causes her death, he is convicted under section 314<sup>11</sup> of the Penal Code. If act has been committed without Consent of women then the offence becomes intensify. In order to render the accused liable, it is sufficient to prove that the act was done to cause miscarriage. Whether the act was intentional or not to cause death, is immaterial. Accused must be held liable for all the consequences of his act which was illegal. If the death of a women is caused by an act done with the intend to cause miscarriage with her consent punishment may extend to 10 years of imprisonment and fine and if it is done without her consent than punishment would be imprisonment for life or 10 years and fine. In case death of the women occurred with an intend, the provisions of section 315 and 316 though deal with the acts akin to miscarriage. Section 315<sup>12</sup> punished an act done with intention of "preventing the child from being born alive or

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<sup>6</sup>LEGAL ISSUES AND LEGISLATION IN INDIA, Shodhganga (May 16, 2020, 7:18 P.M.), [https://shodhganga.inflibnet.ac.in/bitstream/10603/55993/12/12\\_chapter%204.pdf](https://shodhganga.inflibnet.ac.in/bitstream/10603/55993/12/12_chapter%204.pdf).

<sup>7</sup>Indian Penal Code, 1860, NO. 45, Acts of Parliament, 1860, Section 312.

<sup>8</sup>Queen Empress v. Ademma, (1886) I.L.R.9, MAD 369 (India).

<sup>9</sup>Joy Bryant, Radia T. Jamil, Jennifer Thistle, Fetal Movement, NCBI (May 16, 2020, 8:10 P.M.), <https://www.ncbi.nlm.nih.gov/books/NBK470566/>.

<sup>10</sup>Indian Penal Code, 1860, NO. 45, Acts of Parliament, 1860.

<sup>11</sup>Indian Penal Code, 1860, NO. 45, Acts of Parliament, 1860.

<sup>12</sup>Indian Penal Code, 1860, NO. 45, Acts of Parliament, 1860.

causing it to die after its birth”, except when it is done in good faith for the purpose of saving the life of the mother. Any act of such kind will be punishable up to 10 years of imprisonment or fine or both. The offence committed under this section is of foeticide of the fully developed foetus in case the child is killed before its birth, or infanticide when death is caused immediately after birth. Section 316<sup>13</sup> on the hand, designated the act which results in causing death to the quick unborn child, as culpable homicide, it would have caused death of the person (mother) against whom it was directed. Any act of such kind will be punishable up to 10 years of imprisonment and fine. The following ingredients of the offence are:

- a. that the woman was quick with the child;
- b. that the accused did an act to cause the /death;
- c. that the circumstances under which such act was done were such as to make the accused guilty of culpable homicide, if death had been caused; and
- d. that such act did cause the death of the quick unborn child.

#### **MEDICAL TERMINATION OF PREGNANCY ACT, 1971:**

Till 1960, abortion was legalized in 15 countries except India and increasing cases of abortion at alarming rate create a stimulation to the lawmakers to draft an act for legalizing abortion in India. In 1964, a policy making body called as Central Family Planning Board appointed an 11-member committee under the guidance of Shantilal Shah (Health Minister of Maharashtra). This committee submitted its report in 1966 which mentioned that penal code was too restrictive and supported the legal abortion. The recommendation was accepted with some modifications. Then by taking Model of the Abortion Act, 1967 of England taking as an essence, The Medical Termination of Pregnancy Act, 1969 was passed by the parliament. President grant his assent in 1971 and was enforced from 1<sup>st</sup> April, 1972. It is a small act with Eight sections only.

The MTP, 1971 preamble states that “An Act to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto<sup>14</sup>”. This act guaranteed the Right of women to terminate her pregnancy in certain situation.

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<sup>13</sup>Indian Penal Code, 1860, NO. 45, Acts of Parliament, 1860.

<sup>14</sup>Medical Termination Pregnancy Act, Act No. 34, Acts of the Parliament, 1971.

-WHO CAN TERMINATE PREGNANCY?

Only Registered medical practitioner<sup>15</sup> (RMP) who possess recognized medical qualification as defined in Section 2(h) of the Indian Medical Council, 1956, whose name has been mentioned under State Medical Register and who has such experience or training in gynecology and obstetrics as may be prescribed by rules made under this Act.<sup>16</sup> Therefore, this said enactment provides women restricted rights to abortion.

-WHOSE CONSENT IS REQUIRED FOR TERMINATION OF PREGNANCY?

Only the consent of a pregnant women is required for termination of pregnancy. In case of minor i.e. below the age of 18 years or in case of mentally ill women consent of guardian is required (not necessarily parents).

-WHAT ARE THE GROUNDS FOR TERMINATION OF PREGNANCY?

The termination of pregnancy is to be carried out in a government hospital or at a place approved by the government and two medical practitioners are necessary if the pregnancy is more than 12 weeks but less than 20 weeks duration; for less than 12 weeks one medical practitioner can terminate it.

When an immediate abortion is necessary to save a woman's life, the approval of a single registered practitioner is sufficient. The MTP Act, 1971 makes the following legal:

1. When the pregnancy is of 12weeks and if it exceeds but less than 20weeks, with the advice of two medical practitioners can terminate if
  - a. women' life is in danger physically or mentally including pregnancy by rapes.
  - b. if there is a risk that the child will be born with abnormalities or if pregnancy is unwanted due to failure of any contraceptive.
2. Pregnancy of a girl less than 18 years, or 18 who is mentally ill with the consent of the guardian.
3. Informed consent is a must.
4. Abortion should be performed by an authorized medical practitioner and place.
5. To save the life, spontaneous abortion is necessary<sup>17</sup>.

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<sup>15</sup>Medical Termination Pregnancy Act, Act No. 34, Acts of the Parliament, 1971, section 2(d).

<sup>16</sup>Medical Termination Pregnancy Act, Act No. 34, Acts of the Parliament, 1971.

<sup>17</sup>Medical Termination Pregnancy Act, Act No. 34, Acts of the Parliament, 1971, Section 3.

-LOOPHOLES IN THE ACT:

- As per the existing laws the decision to terminate the pregnancy is a right of a women but, this Act Barged the power of decision making on the medical practitioners
- For second trimester abortion the consent of two medical practitioners are required.
- The abortion under Medical Termination of Pregnancy act, 1971 is legalized till 20 weeks and not beyond that. But the termination of pregnancy is required to save the life of a women, then in that case it is permitted.
- The physical and mental health of an unborn child is not ground for termination of pregnancy in case it is post 20 weeks.
- According to section 3(2) of the act, if pregnancy occurs due to contraceptive failure which is used by any “married women or her husband”, the agony caused due to this created a grave injury to the mental health of pregnant women and whereby can terminate pregnancy. However, the said provision is ambiguous in respect of an ‘unmarried women’.
- As per the act, if minor wants to terminate her pregnancy, written contest from the guardian is required.
- If the term of pregnancy crossed the legal limit of gestation period than women seeking for abortion has to move the court for advancing the permission for termination of pregnancy.

**MEDICAL TERMINATION OF PREGNANCY AMANDMENT ACT, 2002:**

To facilitating better implementation and for increasing the scope of abortion services to private health center, the Medical Termination of Pregnancy Act, 1971 amended in year 2002 as:

1. The amendments to the MTP Act in 2002 decentralized the process of approval of a private place to offer abortion services to the district level. The District level committee is empowered to approve a private place to offer MTP services in order to increase the number of providers offering Comprehensive Abortion Care (CAC) services in the legal ambit.
2. The word ‘lunatic’ was substituted with the words ‘mentally ill person’. This change in language was instituted to lay emphasis that "mentally ill person" means a person who is in need for treatment by reason of any mental disorder other than mental retardation.

3. For ensuring compliance and safety of women, stricter penalties were introduced. MTPs being conducted in unapproved sites or by untrained medical providers by the Act.<sup>18</sup>

### **MTP RULES, 2003:**

The MTP Rules facilitate better implementation and increase access for women, especially in the private health sector.

- **Composition and tenure of District Level Committee:** The MTP rules 2003<sup>19</sup>, define composition of the committee stating that one member of the committee should be a Gynecologist /Surgeon/ Anesthetist and other members should be from the local medical profession, non-government organizations, and Panchayati Raj Institution of the district and one member of the Committee should be a woman.
- **Approved place for providing medical termination of pregnancies:** The MTP Rules 2003<sup>20</sup>, no place shall be approved under section 4(b), unless the Government is satisfied that termination of pregnancies may be done therein under safe and hygienic conditions and it also provide specific guidelines pertaining to equipment, facilities, drugs, and referral linkages to higher facilities required by an approved place for providing quality CAC and post abortion services.
- **Inspection of private place:** The MTP Rules 2003<sup>21</sup>, states that an approved place can be inspected by the Chief Medical Officer (CMO) and it shall be in FORM A, as often as may be necessary with a view to verify whether termination of pregnancies is being done therein under safe and hygienic conditions. The Chief Medical Officer (CMO) of the District may, if he is satisfied after such verification, enquiry or inspection, may recommend the approval of such place to the Committee and the Committee may after considering the application and the recommendations of the Chief Medical Officer of the District approve such place and issue a certificate of approval in FORM B.

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<sup>18</sup> Medical Termination of Pregnancy (Amendment) Act. Act No. 64, Acts of the Parliament, 2002, <https://main.mohfw.gov.in/acts-rules-and-standards-health-sector/acts/mtp-act-amendment-2002>.

<sup>19</sup>The Medical Termination of Pregnancy Rules, 2003, Rule 3.

<sup>20</sup>The Medical Termination of Pregnancy Rules, 2003, Rule 5(1).

<sup>21</sup>The Medical Termination of Pregnancy Rules, 2003, Rule 5(2).

- **Cancellation or suspension of a certificate of approval for a private place:** As per the MTP Rules 2003, if the CMO of the District is satisfied that the facilities specified in Rule 5 are not being properly maintained therein and the termination of pregnancy at such place cannot be made under safe and hygienic conditions, she/he shall make a report of the fact to the Committee giving the detail of the deficiency or defects found at the place. The committee may, if satisfied, can suspend or, cancel the approval of the place provided that the committee gives the owner of the place a chance of representation before the certificate issued under Rule 5 is cancelled<sup>22</sup>.

### **MEDICAL TERMINATION OF PREGNANCY (AMENDMENT)ACT, 2020:**

The Medical Termination of Pregnancy (Amendment) Bill, 2020 was introduced in Lok Sabha by the Minister of Health and Family Welfare, Dr. Harsh Vardhan on March 2, 2020. The bill amends the Medical termination of Pregnancy act, 1971, and primarily the objective of the Bill is to **amend Section 3 of the Act.**

The Statement of Objects and Reasons of the amended act, which states, *“With the passage of time and advancement of medical technology for safe abortion, there is a scope for increasing upper gestational limit for terminating pregnancies especially for vulnerable women and for pregnancies with substantial foetal anomalies detected late in pregnancy. Further, there is also a need for increasing access of women to legal and safe abortion service in order to reduce maternal mortality and morbidity caused by unsafe abortion and its complications. Considering the need and demand for increased gestational limit under certain specified conditions and to ensure safety and well-being of women, it is proposed to amend the said Act. Besides this, several Writ Petitions have been filed before the Supreme Court and various High Courts seeking permission for aborting pregnancies at gestational age beyond the present permissible limit on the grounds of foetal abnormalities or pregnancies due to sexual violence faced by women.”*<sup>23</sup>

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<sup>22</sup>The Medical Termination of Pregnancy Rules, 2003, Rule 6.

<sup>23</sup>The Medical Termination of Pregnancy (Amendment) Bill, 2020 passed by Lok Sabha ; enhancing upper gestation limit from 20 to 24 weeks, SCC Online (May 16, 2020, 9:30 P.M.), <https://www.scconline.com/blog/post/2020/03/18/the-medical-termination-of-pregnancy-amendment-bill-2020-passed-by-lok-sabha-enhancing-upper-gestation-limit-from-20-to-24-weeks/>.

-KEY FEATURES OF THE SAID AMENMENT ARE:

**Termination of Pregnancy:**

- As per the, The Medical Termination of Pregnancy (Amendment) Bill, 2020, the opinion from one registered medical practitioner is required for termination of pregnancy up to 20 weeks of gestation and also introduce the requirement of opinion from two such providers for termination of pregnancy up to 20-24 weeks of gestation.
- A pregnancy may be terminated within 12 weeks, if a registered medical practitioner is of the opinion that: (i) continuation of the pregnancy may risk the life of the mother, or cause grave injury to her health, or (ii) there is a substantial risk that the child, if born, would suffer physical or mental abnormalities.
- The amended bill proposes increasing the upper gestation limit from 20 to 24 weeks for special categories of women such as vulnerable women including survivors of rape, victims of incest and others such as differently-abled women and minors.
- Under the Act, if any pregnancy occurs as a result of failure of any device or method used by a married woman or her husband to limit the number of children, such an unwanted pregnancy may constitute a grave injury to the mental health of the pregnant woman. The Bill amends this provision to replace “married woman or her husband” with “woman or her partner”.

**Constitution of the Medical Board:**

- Under the amendment bill, the upper gestation limit will not apply in cases of substantial foetal abnormalities diagnosed by the Medical Board. The composition, functions and other details of the Medical Board will be prescribed subsequently in Rules under the Act.
- These Medical Boards will consist of the following members: (i) a gynaecologist (ii) a paediatrician (iii) a radiologist or sonologist, and (iv) any other number of members, as may be notified by the state government. Considering that, the central government will notify the powers and functions of these Medical Boards.

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### **Protection of privacy of women:**

- No medical practitioner shall not allow to reveal the name and other details of the woman whose pregnancy has been terminated except to a person authorized by the law. And any person who contravene with said provision will be punishable with imprisonment up to one year or with a fine or both.

In past years, several petitions have been filled for seeking permission for abortion beyond gestation period on the grounds of foetal abnormalities or any sexual violence faced by the women. The proposed amendment aims to expand women's access to safe and legal abortion services on therapeutic, eugenic, social and humanitarian grounds.

According to a government statement: "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... It is a step towards safety and well-being of the women and many women will be benefited by this. Recently several petitions were 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. The proposed increase in gestational age will ensure dignity, autonomy, confidentiality and justice for women who need to terminate pregnancy."

### **CONCLUSION:**

Termination of pregnancy encourages the promotion of family planning services which seeks to prevent unwanted pregnancies and at the same time recognizes the importance of providing safe, affordable, accessible and acceptable abortion services to women. Earlier, this practice is considered as destruction to mankind but the passage of time the outlook in respect of abortion changed and in present times it is considered as a Reproductive Right of a women. The Medical Termination of pregnancy Act, 1971, though provides a wide range of circumstances for allowing abortion but the said act is a conservative law. The Medical Termination of Pregnancy (Amendment) Bill, 2020 liberalized the earlier aspect for termination of pregnancy and expanded access of women to safe and legal abortion. In furtherance of, it provides **dignity, autonomy, confidentiality and justice to women.**