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ARTICLE 21 & ABORTION

AUTHORED BY - MAKAM GANESH KUMAR¹

Abstract

Reproductive rights are critical towards the realization of a broad range of human rights. The Indian constitution recognises an individual's right to life, health, and personal liberty (including sexual, reproductive, and decisional autonomy) as well as privacy and equality. The Supreme Court has recognized reproductive rights as both a component of the right to health and a component of personal liberty under Article 21², defining them as the right to "access a range of reproductive health information, goods, facilities, and services that enable individuals to make informed, free, and responsible reproductive behaviour decisions". It is under this context that I must aim to analyse how abortion rights in India have been the topic of numerous debates and controversies for several decades.

Introduction

In India, abortion refers to the purposeful medical termination of pregnancy, which can be performed in two ways: medically or surgically. The term abortion is not defined by any law.

A woman who is pregnant for less than ten weeks is eligible for a medical abortion. This technique involves using tablets and drugs to terminate a pregnancy. It is a non-surgical procedure that must be performed under the guidance of a doctor. **In-Surgical Abortion** If a woman desires an abortion after ten weeks of gestation, a surgical abortion can be performed.

India is among the many nations whose abortion laws have been liberalised to permit abortions for a variety of therapeutic, humanitarian, and social reasons. The Supreme Court has ruled firmly that Article 21 covers a person's reproductive rights. Various abortion laws in India govern the legality or

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² Article 21 in The Constitution of India 1949 - Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law

illegality of abortion, in the Indian Penal Code abortions are addressed in Sections 312 through 316 and the Medical Termination of Pregnancy Act where addresses the provisions of India's abortion laws. The act allows for the termination of pregnancies within the first 12 weeks with the consent of a physician. For pregnancy termination between 12 and 20 weeks, the consent of two medical professionals is required.

Article 21 of the Indian Constitution

Article 21 of the Indian Constitution provides that no one's right to life or personal liberty shall be violated except in accordance with the procedure established by law. The Supreme Court has firmly declared that Article 21 protects a person's "reproductive rights" and has elevated the expression "Right to Life" to a new level of significance. This right encompasses the right to sleep, the right to a dignified life, the right to privacy, the right to movement, and the right to health, among other things. It is in this scenario that the question of whether the right to life encompasses the right to abortion arises. Another significant point of contention in the abortion debate is the mother's right to terminate pregnancy vs the unborn child's right to life. Here, the right of an 'unborn child' is a salient moot point as only a 'person' is guaranteed the Right to Life under Article 21 of the Indian Constitution. Since a child is regarded as a foetus in the mother's womb until it is born, a major issue also revolves around if an unborn child is a person.

Medical Termination of Pregnancy Act 1971

Medical Termination of Pregnancy Act 1971 was passed under the Indian Penal Code to provide for the termination of pregnancies under a registered medical practitioner³ (RMP) on certain grounds. The Act prescribes the mandatory approval of one medical practitioner for the termination of pregnancy until the first 12 weeks along with the consent of two medical practitioners for termination of pregnancy for a period between 12-20 weeks. Under the MTP Act, Abortion is permitted only up to 20 weeks of pregnancy. This provision was incorporated with the aim to eliminate gender prediction tests and sex-selective abortions. Under this Act, a pregnancy may be terminated only under certain

³ Registered medical practitioner means a registered medical practitioner within the meaning of the Medical Practice Act 1994

circumstances wherein it poses a grave risk to the life or towards the physical or mental health of the mother, in cases of foetal abnormalities, failure of birth control measures or for cases wherein pregnancy occurs as a consequence of rape.

Beyond 20 weeks

Under certain circumstances, the High Courts have the authority under Article 226⁴ of the Indian Constitution to authorize termination for pregnancies beyond 20 weeks. Certain circumstances exist in which fatal defects or threats to the mother's life become apparent after 20 weeks of pregnancy. In such instances, the MTP Act requires the mother seeking an abortion to obtain prior approval from the court. However, there have also been numerous instances in which Courts have rendered a negative decision notwithstanding the family's desire for abortion. Further, courts have confirmed that abortion requires just the agreement of an adult woman. Husbands, partners, male siblings, fathers, and in-laws

⁴ Article 226 in The Constitution of India 1949 - Power of High Courts to issue certain writs

1. Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose
2. The power conferred by clause [1] to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories
3. Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause [1], without
 - a. furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and
 - b. giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the aid next day, stand vacated
4. The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause [2] of Article 32

do not have the right to consent to or refuse abortion.

The Medical Termination of Amendment Bill 2020

The Medical Termination of Pregnancy (Amendment) Bill aims to increase women's access to safe and legal abortion services for therapeutic, eugenic, humanitarian, and societal reasons. It was introduced in the Lok Sabha in 2020 with amendments proposed to include the following provisions:

- Proposed the requirement of the approval of only one qualified medical practitioner for terminating pregnancies up to 20 weeks along with the approval of two registered medical practitioners for termination of pregnancies between 20-24 weeks of gestation.
- Seeks to extend the maximum gestation period from 20 weeks to 24 weeks, especially for special groups of women, which include vulnerable women such as rape survivors, incest victims, differently abled women, children etc.
- Seeks to waive off the maximum gestation period in cases of significant prenatal abnormalities diagnosed by the Medical Board⁵.
- Confidentiality is to be maintained with respect to the details of the woman seeking termination of pregnancy. Such a person's name or other relevant information shall not be disclosed to anyone except as authorised by law.

Landmark Cases & Judgements

The revisions proposed in the MTP Amendment Bill were made in response to various Court petitions seeking authority to terminate pregnancies at a gestational period greater than the currently permissible maximum period owing to several factors like foetal abnormalities, sexual assault against women etc. In the landmark cases of **Suchita Srivastava v. Chandigarh Administration**⁶ as well as **Devika Biswas v. Union of India**⁷, the Supreme Court has unequivocally and emphatically declared that a woman's reproductive autonomy is a basic right to privacy and that the decision about whether or not to have a child should be made solely by her, with no interference from the government.

⁵ A body of medical experts responsible for the examination of military personnel, the maintenance of public health, or the regulation of medical practitioners.

⁶ UNICEF India, <https://www.unicef.org/india/what-we-do/maternal-health> (last visited Apr. 7, 2021).

⁷ The Lancet, [https://www.thelancet.com/pdfs/journals/langlo/PIIS2214-109X\(17\)30453-9.pdf](https://www.thelancet.com/pdfs/journals/langlo/PIIS2214-109X(17)30453-9.pdf)

Further, in the case of **XYZ v. Union of India**⁸, it was held that the term 'life' in Section 5 of the MTP Act⁹ ought to be interpreted broadly following the scheme of Article 21 of the Indian Constitution, considering both the physical discomfort and mental trauma associated with an unwanted or forced pregnancy.

The Supreme Court's views on pregnancies exceeding 20 weeks involving fetuses with medical deformities can be perceived from its judgement in **Mrs X vs. Union of India**¹⁰. In the aforementioned case, the petitioner had approached the court under Article 32 for medical termination of her pregnancy owing to the elevated risk of intrauterine foetal death. The Supreme Court, in this case, ruled in favour of the petitioner enabling her to terminate her 22-week-old pregnancy post-due consultation with a medical board constituted by the court which had affirmed that continuation of such a pregnancy may jeopardise the physical and mental conditions of the woman. The Court determined that "a woman's right to make reproductive choices is likewise a component of her personal liberty under Article 21 of the Constitution," and that her right to bodily integrity entitles her to

⁸ XYZ v. Union of India [W.P. 10835 of 2018]

⁹ Section 5 in The Medical Termination of Pregnancy Act, 1971 - Sections 3 and 4 when not to apply. -

1. The provisions of section 4, and so much of the provisions of sub-section [2] of section 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.
2. Notwithstanding anything contained in the Indian Penal Code [45 of 1860], the termination of pregnancy by a person who is not a registered medical practitioner shall be an offence punishable with rigorous imprisonment for a term which shall not be less than two years, but which may extend to seven years under that Code, and that Code shall, to this extent, stand modified.
3. Whoever terminates any pregnancy in a place other than that mentioned in section 4, shall be punishable with rigorous imprisonment for a term which shall not be less than two years, but which may extend to seven years.
4. Any person being owner of a place which is not approved under clause [b] of section 4 shall be punishable with rigorous imprisonment for a term which shall not be less than two years, but which may extend to seven years.

Explanation 1.-For the purposes of this section, the expression "owner" in relation to a place means any person who is the administrative head or otherwise responsible for the working or maintenance of a hospital or place, by whatever name called, where the pregnancy may be terminated under this Act.

Explanation 2.-For the purposes of this section, so much of the provisions of clause [d] of section 2 as relate to the possession, by registered medical practitioner, of experience or training in gynaecology and obstetrics shall not apply.]

¹⁰ Mrs. X vs. Union of India [W.P. 81 of 2017]

terminate her pregnancy.

Further, The Punjab and Haryana High court in the case of **Dr Mangla Dogra & Others v. Anil Kumar Malhotra & Others**¹¹ upheld the inalienable right and agency of a woman to seek an abortion on her own irrespective of the consent of her husband. The Court considers the consent form contained in the MTP Act and finds that the Act "neither expressly nor implicitly allows for the express or implied permission of the spouse." It is pertinent to note that several judgements of the Supreme Court permitted the termination of pregnancies based on humanitarian grounds. In the case of **Murugan Nayakkar vs. Union of India & Ors**¹², the Supreme Court allowed the termination of a 13-year-old rape victim's 32-week pregnancy, ruling that she be allowed to terminate her pregnancy owing to her age, trauma, and the agony that she is undergoing. A similar application of law can be observed in **Indu Devi vs The State of Bihar & Ors** wherein the Patna High Court permitted the petitioner, a 24-week pregnant rape survivor, to obtain medical termination of pregnancy. The court delivered its judgement duly taking note of the fact that the petitioner had chosen to proceed with the abortion at the 13-week mark of her pregnancy which however was hampered by bureaucratic and legal delays.

The Judiciary has also on several instances allowed medical termination of pregnancies owing to the risk that it poses towards the mother's life. In **Tapasya Umesh Pisal vs. Union of India**¹³, the Court allowed the petitioner, a woman in her 24th week of pregnancy, to undertake abortion under section 3[2][b]¹⁴ of the MTP Act as the anomalies of her foetus posed an imminent risk to her life. Similarly,

¹¹ Dr. Mangla Dogra & Others v. Anil Kumar Malhotra & Others [CR No. 6337/2011]

¹² Murugan Nayakkar vs. Union of India & Ors. W.P. [C] No. 749/2017

¹³ Tapasya Umesh Pisal v Union of India, (2018) 12 SCC 57

¹⁴ Section 3(2) (a) in The Medical Termination of Pregnancy Act, 1971

b) 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, that-

- I. the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or
- II. 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.

Explanation 1.-Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation 2.-Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may

the Supreme Court in **Meera Santosh Pal vs. Union of India**¹⁵ held that women's right to make a reproductive choice is also a dimension of personal liberty as understood under Article 21 of the Constitution and thereby permitted the petitioner to terminate her pregnancy of 23 weeks on the apprehension of danger to her life.

In **Minor R Thr Mother H v State of NCT of Delhi & Anr**,¹⁶ The Delhi High Court has issued instructions to be followed by investigating officials in cases when the pregnancy of a sexual assault victim exceeds 24 weeks. Justice Swarana Kanta Sharma remarked that a board's delay in issuing orders for medical examinations of victims endangers the victim's life. In a comprehensive order, the court stated that a Urine Pregnancy Test will be required during the medical evaluation of a victim of sexual assault. Justice Sharma ordered that if the victim is determined to be pregnant as a result of sexual assault, and if she is a minor who consents and expresses a wish for MTP, the investigating officer would ensure that she is brought before the medical board on the same day.

The Principles Envisioned in KS Puttaswamy's Judgment

In India, there is a lot of disagreement between pro-choice and pro-life views on abortion laws. Pro-choice views include a woman's right to choose whether to have an abortion, as well as the state's duty to protect every life. In this case, the Constitution-Bench decision of the Supreme Court in **KS Puttaswamy v UOI**¹⁷ should be looked at very carefully. A lot of people have been talking about this decision in the legal world, and it has opened a whole new field of thinking about reproductive rights and women's autonomy in India, which the Act does not cover.

In this case, the Supreme Court said that women have a constitutional right to make their own reproductive choices. They also said that the right to "abstain from procreating" was in line with the right to privacy, liberty, bodily autonomy, and dignity. It was J. Chandrachud who explained how access to contraceptive options and abortion important part of due process is. He also said that volitional autonomy for ending a pregnancy is a part of privacy. Privacy is a place where people can

be presumed to constitute a grave injury to the mental health of the pregnant woman.

¹⁵ Meera Santosh Pal v. Union of India, (2017) 3 SCC 462

¹⁶ Minor R Thr Mother H v State of NCT of Delhi & Anr W.P.(CRL) 221/2023

¹⁷ Pollitt, Katha. "Pro." Reclaiming Abortion Rights, Picador, 2015.

be alone, but they also have a lot of freedom. He said that an "unreasonable" restriction cannot be put on that freedom, and so it can only be allowed if it meets the constitutional standard of reasonableness.

Despite this, a major problem with this constitutional right is the poor state of the health infrastructure and a low literacy rate. People in India have abortions outside the hospital and other healthcare places, according to a report. These can be both illegal and dangerous, and the high rate of maternal deaths is proof of that. This is not. People who are pro-choice cannot say that because of infrastructural problems and a low literacy rate, the Constitution does not say that they cannot have their rights taken away. That is why, it is said, most women in India are forced to compromise their reproductive health because there are not enough health infrastructure and people are not told about the law. It is nothing more than a tethered deal with a limited amount of free will. It's nothing more than a tethered deal with a limited amount of free will.

Conclusion

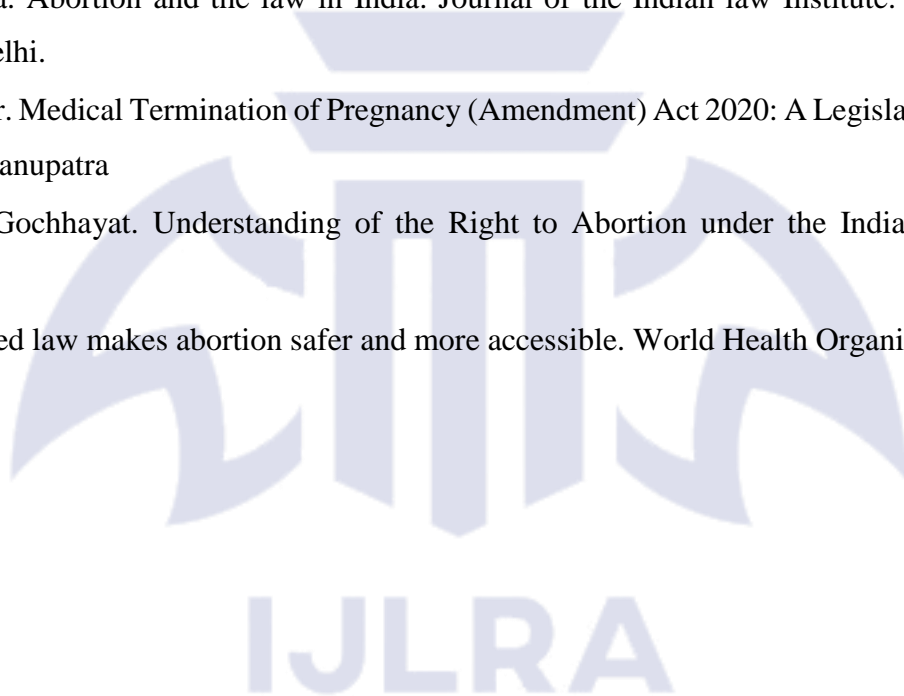
Reproductive rights are a constantly evolving subject in India, and we believe that women should be able to make decisions about their bodies, especially when it comes to having and carrying a pregnancy all the way to full term. This is especially true for women. To be free and equal, a woman must be in control of her body and what happens to it and inside of it.

It is only allowed in India if there is a very good chance that the child will be physically or mentally deformed when it is born, or it affects the life of the woman. This is called "conditional right." Despite 50 years of the MTP Act, the right of a woman to make reproductive choices remains a taboo and the most contentious issue in India and throughout the world. Although the half-decade-old law is the most liberal in the world half a decade ago. Despite numerous court decisions stating that a woman's right to make reproductive choices is a dimension of her 'personal liberty' under Article 21 of the Constitution, reproductive rights are used selectively and are subject to the court's discretion, which is frequently based solely on the medical board's opinion. One of the most concerning facts is that these women must also endure a lengthy and exhausting process in which they are examined by medical boards despite having consulted their own providers. The entire procedure exacerbates women's trauma and is a violation of their rights. There are numerous examples and cases where requests for

abortion termination have been denied, leaving women with no other option but to resort to unsafe abortion methods. The woman's decision to continue the pregnancy to term or not should be given complete and unconditional priority, and the same should be her prerogative and sole decision and not of other external decisions for “Abortion is part of being a mother and of caring for children because part of caring for children is knowing when it’s not a good idea to bring them into the world.”¹⁸

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¹⁸ Pollitt, Katha. “Pro.” *Reclaiming Abortion Rights*, Picador, 2015.