

ISSN: 2582-6433



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed 6th Edition

VOLUME 2 ISSUE 7

www.ijlra.com

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume 2 Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsoever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis

IJLRA

EDITORIAL TEAM

EDITORS

Megha Middha



Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshargarh, Sikar

Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshargarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

Dr. Samrat Datta

Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board



Dr. Namita Jain



Head & Associate Professor

School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC -NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.

Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India. India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020). Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019

Mrs.S.Kalpana

Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr. Ambedkar Law College, Pudupakkam. Published one book. Published 8 Articles in various reputed Law Journals. Conducted 1 Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

ABOUT US

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

THE MEDICAL TERMINATION OF PREGNANCY (AMENDMENT) ACT, 2021 AND ITS CONFLICT WITH ARTICLE 14 OF THE INDIAN CONSTITUTION

AUTHORED BY - NAKUL SINGH^{1*},

RAJIV KUMAR SINGH IRS² & SONICA SHARMA³

^{1*} B.A. LL.B. (Hons.), West Bengal National University of Juridical Sciences (NUJS), Kolkata

² Commissioner Income Tax, Visakhapatnam, Andhra Pradesh, India.

³ Professor, Department of Radio-diagnosis, Maharajah's Institute of Medical Sciences,
Nellimarla, Vizianagaram District, Andhra Pradesh, India.

^{1*}Corresponding Author

Nakul Singh,

B.A. LL.B. (Hons.),

West Bengal National University of Juridical Sciences (NUJS),

Kolkata

Phone number: +91-8074834824

Ethics approval and consent to participate: Not applicable

Consent for publication: Informed consent was obtained from all authors participated in the study for publication.

Availability of data and material: The authors confirm that the data supporting the findings of this study are available within the article and are available openly in reference number.

Competing interests: The authors declared "No competing interest"

Funding: Nil

Abstract

This paper is an endeavor to put forth section 3 of The Medical Termination of Pregnancy (Amendment) Act, 2021, and cast light on the repugnancy between the said section and Article 14 of The Constitution of India. The conflict will be highlighted by assailing section 3 on the basis of the doctrine of manifest arbitrariness to judge whether the legislation is violative of Article 14 or not.

Key words: MPT, Amendment, Article 14

Introduction

As per the *Cambridge Dictionary*,ⁱ 'abortion' has been defined as a procedure whereby a pregnancy is intentionally put to an end. It is also a procedure that has been the subject matter of fierce debates on ethics and religion. In the domain of ethics, the discourse is between the proponents of the pro-choice and pro-life sides. The protagonists in the former favor the existence and development of abortion rights and women being granted autonomy over their bodies by creating a framework where it is the sole discretion of the woman in deciding whether to terminate her pregnancy or not.ⁱⁱ On the other hand, the latter, considering the fetus as a living being or considering abortion as a practice that hinders the growth of life, absolutely condemns the practice of abortion and looks forward to it being impermissible.ⁱⁱⁱ When the frame of reference is religion, in Hinduism, Christianity, Islam, and Judaism, the practice of abortion is generally 'not' permitted and is considered a grave sin.^{iv}

Abortion, because of centering around such complex questions and debates, has found its practice as absolutely illegitimate and impermissible under any circumstance in 26 countries where it is prohibited altogether^v, 39 countries permit abortion only when doing so is essential to save the woman's life^{vi}, 56 countries permit it on therapeutic or health grounds^{vii}, 14 countries only allow for it keeping in mind the social and economic circumstances of the woman^{viii} and only do the remaining 67 countries of the world allow abortion simply on request.^{ix}

As far as the position in India is concerned, prior to the year 1971, abortion was a criminal offense^x and had been provided for in the Indian Penal code, with the only exception being that such a practice will not be regarded as an offense if it has been carried out in good faith to save a woman's life.^{xi} If heed is paid to the black letter of section 312^{xii}, it is undoubtedly axiomatic to realize that

the scope of the said section was quite limited or restricted.

Due to this undue rigidity, the law before 1971 was honored much more in the breach than its observance.^{xiii} Due to this rigidity, almost 1/7th of all the pregnant women, in a particular year used to opt for back door abortion channels or services, which are highly unsafe, unhygienic, and posed a grave danger to the lives of women.^{xiv}

In 1964, a committee under the chairmanship of Shanti Lal Shah was appointed to address the rigidity of the prevailing laws dealing with abortion.^{xv} The recommendations put forth by the Shantilal committee were incorporated in the medical termination of pregnancy bill and were brought before the parliament in the year 1970. The recommendations were accepted by both the houses and the Medical Termination of Pregnancy Act was made operational in the year 1971.^{xvi} As per section 3 of the act^{xvii}, which prescribes specific grounds, the termination of pregnancy can only be done by the registered medical practitioner if,^{xviii} (I)The life of 'pregnant woman' is at risk; or (II)There is a risk of grave injury to her physical or mental health; or (III)The pregnancy has been caused due to rape; or (IV) If the child on birth would suffer from severe physical or mental deformities to be seriously handicapped; or (V)Failure of the contraceptive or any other method used by the 'married couple' to limit childbirth; or (VI)Risk to the health of the pregnant woman by her actual or reasonably foreseeable environment.

At this juncture, it is pertinent to note that the law, as stood before the Medical Termination of Pregnancy (Amendment) Act, 2021, was that, if the woman in question is pregnant but not married, for her to be eligible for an abortion under the act,^{xix} had to make her case squarely fit in categories (I) or (II) or (III) or (IV) or (VI).

As far as category (V) is concerned, a point that should be paid heed to is that the failure of a contraceptive used in 'premarital' sex or not gaining access to one due to educational or socioeconomic factors plays a significant role in paving way for premarital pregnancies.^{xx} However, category (V), which is the spitting image of such concerns or provides explicitly for a case where a contraceptive fails, explicitly mentions the terms 'married woman'. This alludes to the fact that 'only' a 'married woman' can only utilize the benefit of category (V) or the ground provided in category (V).

The Medical Termination of Pregnancy (Amendment) Act, 2021

The changes which the amendment has brought about are^{xxi}, (I) Women can now legitimately seek an abortion till the 24th week as compared to the 20th week, which was the upper gestation limit before the amendment. (II) Until the 20th week, the nod of only one registered medical practitioner would be needed and between the period of 20th and the 24th week, the nod of two registered medical practitioners would be needed. (III) If abortion is sought for post the 24th week, then the permission of a medical board would be needed.

Post the amendment, a welcome change is that in section 3 of the act^{xxiii} the words contained in the section now are 'woman' and 'her partner' as opposed to 'married woman' and her 'husband,' which was the position before the amendment. Due to this amendment, even an unmarried woman, in the case of a contraceptive failure, can get her pregnancy aborted within the specified gestational limits under the act.^{xxiii}

The MTP(Amendment) Act, 2021, section 3 the conflict with Article 14.

Before delving into the nitty-gritty of the conflict involved, a brief explanation of the conflicting factors is deemed relevant.

Although section 3 after the amendment takes a significant stride in the direction of a more progressive law, the author submits that on reading section 3(2)(a), section 3(2)(b)(I), and section 3 explanation-1 in conjunction, it is to be seen that a pregnant woman, married or unmarried, in the case of a contraceptive failure, can only get access to abortion between a period of 12-20 weeks. If a woman, married or unmarried, is seeking abortion post the 20th week, she will have to satisfy any of the grounds in section 3(2)(b)(I) or section 3(2)(b)(II). In sum and substance of it, if a contraceptive failure has caused a pregnancy, post the 20th week, abortion as per the MTP(Amendment) Act, 2021 will not be permitted.

This axiomatically leads us to understand that post the amendment, it is unambiguously a straightforward and simple task to get a fetus aborted within 12-20 weeks as simply quoting a contraceptive failure will get the procedure done. However, getting a fetus aborted in 20-24 weeks

is indeed an arduous task as not only will the nod of two medical practitioners be required, the very process itself has been circumscribed by certain specific grounds in section 3(2)(b)(I) and section 3(2)(b)(II) any of which have to be satisfied for an abortion to be done.

Apropos the disparity involved, scholars from many disciplines have commented and offered rationales or justifications behind such measures. They are, (I) It has been argued that to curb gender prediction testing and 'sex-selective abortions,' which are only possible post the 20th week, restrictions or specific grounds for abortion must be put in place for abortions required post 20 weeks.^{xxiv} (II) Scholars from the pro-life school argue that since post the 20th week, organs and body parts of the fetus have been formed, it is viewed as a sacred life form. The fetus is 'viable' and can sustain herself independent of the mother and without medical support and is well placed and equipped to be brought into the world and that is one reason why the sacred life of hers should be allowed to prevail unless exceptional circumstances justify an abortion.^{xxv} (III) Lastly, it has been submitted by medical experts that the 'invasive procedures' involved in abortion make it a highly risky procedure during the later stages of pregnancy. Therefore, an abortion in the later stages should only be permitted in exceptional circumstances.^{xxvi}

At this juncture, it is pertinent to cast light on Article 14 of our constitution.^{xxvii} Article 14 guarantees every person the right to be treated equally before the law and extends the equal protection of laws to all persons. Arbitrary state action, be it from the executive or the legislative wing of the government, is antithetical to equality^{xxviii} as contemplated in Article 14 and thus violative of Article 14. To check whether an executive promulgation or notification or a legislation by a legislature falls foul of Article 14 or not, determining tests have been developed over time by judicial pronouncements. The test for determining whether an executive action is arbitrary or not is the 'test of arbitrariness.' If the courts of the land, by employing this test, find an executive action arbitrary, it will fall foul of Article 14 and will be declared null and void by the aid of Article 13.^{xxix} The arbitrariness test finds its genesis in the case of *E.P. Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3.

On the other hand, the test for determining whether a particular 'legislation' is arbitrary or not, the test employed is the test of 'Manifest arbitrariness.' Firstly, let us understand what is meant by 'arbitrariness'. The author would propound the explanation by offering an example. Let us assume that a child 'A' has to select one chocolate between chocolate 'X' and 'Y.' If 'A' selects chocolate 'X' and the reason behind doing so is her belief that post the consumption of chocolate 'X,' she

will be immunized against COVID-19, such a decision is indeed 'illogical.' It is based on a 'mistaken and erroneous belief. Nonetheless, the decision cannot be arbitrary as 'A' has not 'randomly' picked up chocolate 'X.' Her decision cannot be termed random. It has been guided by a belief, even if such a belief is illogical and erroneous. Therefore, although the reasons or rationale or measures based on which a decision has been made are devoid of rationality, the decision, however, will not be termed arbitrary or random as it has been exercised based on such grounds and not just without any consideration or reason or rationale which unambiguously could be called as a random or arbitrary pick.

It is to be noted here that the test of Manifest arbitrariness does not only stop at a superficial inquiry as to if at all a legislation is being guided or is based on a particular measure or not. While employing the test of 'manifest arbitrariness,' the court also scrutinizes the measure or rationale based on which a legislation has been passed. To elaborate further, the test of Manifest arbitrariness finds its inception in the case *Shayara Bano v. Union of India*, (2017) 9 SCC 1. The test *in toto* as laid out, in this case, is that, if a piece of legislation lacks a rational measure or is capricious^{xxx}, such a piece of legislation is liable to be declared arbitrary and consequentially violative of Article 14.

At this stage, it is apposite to delve into the conflict involved between Article 14 and section 3 of the MTP(Amendment) Act, 2021. Light has already been cast on the reasons or explanations behind making abortion in the 20-24th week much complicated and difficult as compared to getting one done within the 20th week. 'Apropos' a superficial inquiry, the 'disparity' contained in section 3 cannot be termed random or arbitrary as behind such a disparity, relevant explanations or arguments or measures contained in (I), (II), and (III) have been offered. Therefore, the next stage of inquiry welcomes us, which deals with or seeks to scrutinize the very rationality of these measures based on which the disparity contained in section 3 is maintained.

The author submits that the measures or explanations offered in (I), (II), and (III) are devoid of rationality due to the following reasons:

Argument (I) favors restricting abortion beyond the 20th week in order to prevent sex prediction and sex-selective abortions. According to the argument, it is only post the 20th week that sex identification is possible. The author submits that such an argument or measure is without any rationale or utility and is redundant because owing to the advancements in medical science, sex prediction in the status quo can be made much before the 20th week. Between the 10th and 12th

week, it can be done by a technique called Chorionic Villus Sampling^{xxxix} and between the 15th and 20th week, it can be done by another method called Amniocentesis.^{xxxix} Therefore, significantly curtailing abortion post the 20th week on such grounds or measures is redundant and irrational.

Argument (II), which limits abortion post the 20th week on the ground that the fetus has most of her parts developed by now and can sustain herself independent of her mother, also makes section 3 arbitrary as, the stage of the viability of the fetus, a stand on which argument (II) has been premised on, is different for different woman. This essentially means that the stage of viability fluctuates or oscillates anywhere between the 20th and 28th week, and as a matter of fact, up till the 20th week, most of the parts of the body of the fetus have already been formed.^{xxxix} Which is to imply that in many cases even before the 20th week, the fetus becomes viable. And to qualify or restrict abortion on such grounds only between the 20-24th week and not between the 12-20th, a category in which such a concern is equally applicable, the author submits that even though there is a determinative principle embodied in the section, its allocation has only been limited to parts of it and vis. this inconsistency, absolutely no supporting justification has been offered which consequentially attracts arbitrariness.

Argument (III), which advocates restricting or permitting abortion post the 20th week only in exceptional circumstances, does so on the footing that the invasive techniques involved in abortion risk the woman's life when done in the later stages of pregnancy. The author submits that if such is the measure that section 3 embodies, it is also devoid of any utility or rationality. Due to the advancements in medical science, even in the later stages of pregnancy, abortion has become a much safer procedure in the current day.^{xxxix} Therefore, the safety argument ultimately falls flat.

Conclusion

To sum up, the author has subjected section 3 of the MTP(Amendment) Act, 2021, to a manifest arbitrariness test, a test which the section has unequivocally failed to pass. Any law that does not embody a clear determinative principle 'or' a rational measure will be declared arbitrary as per the manifest arbitrariness principle^{xxxix} and will thus be violative of Article 14. Lastly, if none of the arguments advanced in (I), (II), and (III) are the measures which have been the grounds or reasons for the disparity seen in section 3 and the restrictions in the 20-24th week period have just been merely put in without any justification or rationale or measure, in such a case, this particular piece of legislation propounding such disparity, as already explained, due to the absence of any ground

on which such a disparity may have been based *isprima facie* arbitrary and axiomatically, violative of Article 14.

References

1. <https://dictionary.cambridge.org/dictionary/english/abortion>
2. http://www.bbc.co.uk/ethics/abortion/legal/introduction_1.shtml
3. http://www.bbc.co.uk/ethics/abortion/legal/introduction_1.shtml
4. <http://www.bbc.co.uk/ethics/abortion/religion/religion.shtml>
5. <https://www.thehindu.com/data/data-how-many-countries-allow-abortion-on-request-where-is-abortion-completely-prohibited-and-more/article30981255.ece>
6. *Ibid.*
7. *Ibid.*
8. *Ibid.*
9. *Ibid.*
- x. <https://www.firstpost.com/india/abortion-law-in-24-week-pregnancy-case-supreme-court-failed-to-address-womans-right-to-her-body-2916174.html>
- xi. The Indian Penal code, 1860, section312.
- xii. The Indian Penal Code, 1860.
- xiii. <https://www.jstor.org/stable/43951024>
- xiv. <https://www.jstor.org/stable/43950391?seq=1>
- xv. <https://theprint.in/opinion/india-law-abortion-medical-termination-pregnancy-act/423380/>
- xvi. <https://www.jstor.org/stable/43950392?seq=1>
- xvii. The Medical Termination of Pregnancy Act, 1971.
- xviii. <https://www.jstor.org/stable/43951024>
- xix. The Medical Termination of Pregnancy Act, 1971.
- xx. <https://fit.thequint.com/her-health/teenage-pregnancies-in-india#read-more>
- xxi. <https://www.thequint.com/neon/gender/medical-termination-of-pregnancy-abortion-rights-explainer>
- xxii. The Medical Termination of Pregnancy Act, 1971.
- xxiii. <https://thewire.in/health/medical-termination-of-pregnancy-amendment-bill-women-abortions>
- xxiv. <https://timesofindia.indiatimes.com/life-style/health-fitness/health-news/women-know-these-5-facts-about-abortion-in-india-and-whats-wrong-with-the-act/articleshow/64121702.cms>

-
- ^{xxv}. <https://timesofindia.indiatimes.com/readersblog/will-why-i-love-law/india-needs-to-allow-termination-of-pregnancy-beyond-20-weeks-9282/>
- ^{xxvi}. <https://theprint.in/india/indias-abortion-law-ahead-of-its-time-in-1971-but-now-behind-science-societal-demands/244884/>
- ^{xxvii}. The Constitution of India, 1950.
- ^{xxviii}. E.P. Royappa v. State of Tamil Nadu, (1974) 4 SCC 3, ¶88, 89 (*per*, Chandrachud, Bhagawati and Krishna Iyer JJ.)
- ^{xxix}. The Constitution of India, 1950.
- ^{xxx}. Shayara Bano v. Union of India, (2017) 9 SCC 1, ¶82 (*per* Nariman, Lalit JJ.)
- ^{xxxi}. <https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/chorionic-villus-sampling-cvs>
- ^{xxxii}. <https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/amniocentesis>
- ^{xxxiii}. <https://timesofindia.indiatimes.com/readersblog/will-why-i-love-law/india-needs-to-allow-termination-of-pregnancy-beyond-20-weeks-9282/>
- ^{xxxiv}. <https://theprint.in/india/indias-abortion-law-ahead-of-its-time-in-1971-but-now-behind-science-societal-demands/244884/>
- ^{xxxv}. Shayara Bano v. Union of India, (2017) 9 SCC 1, ¶82 (*per* Nariman, Lalit JJ.)

IJLRA