

A Comparative Study of Medical Termination of Pregnancy Act, 1971 with Recent Medical Termination of Pregnancy (Amendment) Bill, 2020 Through Judicial Pronouncement

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Abstract

Recently Cabinet has passed the proposed Medical Termination of Pregnancy (Amendment) Bill, 2020. In current bill certain changes has been made regarding the upper limit of gestational age for termination of pregnancy under MTP Act, 1971. Through this paper researcher will discuss about the drawback of the MTP (Amendment) Bill, 2020 in terms of gestational age with the help of the various judicial pro-announcement.

Keywords- *Abortion, Miscarriage, Right to life, Gestation, Reproductive right*

Introduction

The current MTP Bill of 2020 has proposed certain amendments under Section 3 of the MTP Act, 1971. The Bill¹ generally speaks about two important points relating to amendments-

I. Abortion right- This bill speaks about the abortion right for single or unmarried lady which is not allowed in MTP Act of 1971. Prior to this Bill, even in MTP (Amendment) Bill, 2014 it was suggested to include single and unmarried lady for abortion right.

II. Gestational age- Upper age limit for termination of pregnancy for rape victim is suggested to be increased up to 24 weeks and for fetal abnormalities there will be no limit.

The current Bill of 2020 has considered the single and unmarried women right for abortion because in last few years various courts in India including Supreme Court, considered Live-in relationship as legal. In **Khushboo versus Kanniammal, 2010 5 SCC 600** the Honorable Supreme Court held that “that a living

relationship comes within the ambit of right to life under Article 21 of the Constitution of India. The Court further held that live-in relationships are permissible and the act of two major living together cannot be considered illegal or unlawful²”.

To know about the drawback of current and previous Bill of MTP, first we have to know about Section 3 of The MTP Act, 1971. Section 3 of The MTP Act, 1971 deals with When Pregnancies may be terminated by registered medical practitioners. If we go through the Section 3 then we will find that basically it allows abortion only in three grounds-

i. *When the continuation of the pregnancy will risk mother life or grave injury to physical or mental health³.*

Explanations 1 and 2 of Section 3 are the only two situations where it is considered that continuation of the pregnancy will risk mother life or it will cause grave injury to her physical or mental health i.e.

a. For the Victim of rape and

b. For married women when she get pregnant on the ground of failure of any contraceptive device used by her or by her husband.

ii. *When there is a substantial risk that if the child born, it will suffer from such physical or mental*

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abnormalities which may lead to being seriously handicapped³.

iii. Any actual or reasonable foreseeable environment³.

Now here what is “actual or reasonable foreseeable environment” under Section 3(3) needs an elaboration? This is the gap of law which needs to be filled through medical research, because only the medical expert can give the best explanation here.

Regarding the gestational age for termination of pregnancy for all cases the maximum limit is 20 weeks where the opinion of two registered medical practitioners is needed and opinion of one registered medical practitioner is needed to terminate the pregnancy below 12 weeks.

Section 5 and 8 of MTP Act, protect doctor for any act which is done in good faith for the protection of mother life. But then also in numerous cases doctors refused to terminate the pregnancy and referred patients to apply before court. It might be because of the lack of knowledge of the Act and judgment passed by the Supreme Court relating to this Act.

Material and Method

This research is purely doctrinal in nature. Researcher has used both Primary and secondary sources available for this research like Gazettes of India, Acts, Books, Journals, and Newspaper etc.

Critical Study of the Upper Age Limit For Mtp Through Judgements

Issues relating to gestational age will get cleared from the following judicial cases-

□ *Chandrakant Jayantilal Suthar v. State of Gujarat, 2016(4)RCR(Criminal)876*

This is a landmark judgment where Supreme Court has allowed termination of pregnancy of a minor rape victim even after 20 weeks of pregnancy.

□ *Kavita v. State of Haryana, 2015(2)RCR(Criminal)606*

Question of Law: Whether a 12-year-old rape victim will be allowed for medical termination of

pregnancy in 34 weeks of pregnancy?

Judgment- The Court constituted two panels of specialists to look into the matter that whether terminating of pregnancy at 34 weeks constituted a crisis life-sparing measure under Section 5 of the MTP Act? The medical panels noticed that continuing pregnancy will not amount to any danger to a girl’s life but it will be risky to do abortion at 34 weeks because the result will be the delivery of live baby. The Court did not take into account the termination of pregnancy but rather did express its sympathy for the rape survivor. In the light of this constrained pregnancy, the Court requested the clinic to furnish her with a private room, free medicinal services, and psychological well-being care administrations, and Rs. 2 lakhs to help her kid.

Critical study- *This case raises the question in our mind that giving 2 lakhs compensation will be sufficient to compensate the victim for taking care of her baby. A girl who is just 12 years old and a victim of rape for her family whether it will not amount to mental torture to take care of the child of the rapist. Whether the family will take care of the girl child who is a victim of rape or the baby born to her? What will be the relation of the child with the family? How society will treat the child in such cases? How the family will overcome such ordeal? Who will be responsible for the ordeal of the family and for the upbringing of the unwanted child born forcibly from the rape? These entire questions need to be answered..*

□ *R and Another v. State of Haryana 2016(3)RCR(Criminal)*

A girl was kidnapped from her friend’s place and was then raped. The doctors, in this case, didn’t perform MTP even after knowing that this is a case of rape and also there was a long procedural delay in the investigation. The victim was then left with no choice but to seek termination of pregnancy after 20 weeks. By the time she was 22 weeks pregnant. The High court directed to set a committee of doctors if the pregnancy could be terminated. The doctors reported that pregnancy would cause no harm to the victim and the MTP act does not allow terminating pregnancy beyond 20 weeks.

The Court, in this case, ordered the government to provide Rs. 5000 to her each month and also urged the

doctors to provide her proper medical care and asked the state to deposit five lakh rupees in her account.

Critical Study- *Whether the court has done justice with the girl by denying her the abortion right even after knowing that she is a victim of rape? Giving monthly expenses and compensation of 5 lakhs is sufficient? If this so then there is no need for the provision of Section 3 of MTP Act, 1971 which says that rape victims will be allowed to MTP under this act. These cases are examples to show that even after having the law; women were denied from their basic rights. This is the failure of the law to provide justice to the victim of a most heinous crime by denying them the abortion right.*

□ ***Sonali Kiran Gaikwad vs. Union Of India, MANU/SCOR/43704/2017***

In this case medical termination of pregnancy was allowed in 28 weeks of pregnancy because the fetus was suffering from serious anomalies.

Thus, the recent judgment clearly indicates that pregnancy can be terminated even after the 20 weeks whether it's a case of rape or any other case (e.g. Ms. X v. Union of India & Others AIR 2016 SC 3525). From the cases discussed above, it has been proved that termination of pregnancy can be safe even after 20 weeks. Also regarding the abnormality of the fetus, it is necessary to mention here that any abnormality of the fetus is known during 20 weeks of pregnancy as there are many tests which is conducted during 20 weeks of pregnancy like *TRIPLE MARKER TEST*⁴. So, in such a situation there is a need of amendment of the MTP Act where termination of pregnancy should be allowed even after 20 weeks.

COMPARATIVE STUDY OF THE MTP (AMENDMENT) BILL, 2020 WITH PAST MTP BILLS

The MTP Bill, 2020 as already discussed above, has suggested to increase the upper limit of MTP for rape victim upto 24 weeks and for fetal abnormalities cases there will be no upper limit. Even the previous MTP (Amendment) Bill, 2014 has given the same suggestion relating to upper limit for abortion in fetal abnormalities cases means no upper limit for fetal abnormalities cases⁵.

Now if we compare or study the MTP Bill of 2014

and MTP Bill of 2018 with MTP Bill of 2020 then we will find-

- *That 2014, 2018 and 2020 Bills gives a wide power to doctors to terminate the pregnancy even after the upper limit for cases of fetal abnormalities.*

- *The MTP Bill, 2018 suggested to increases the upper limit for rape victim upto 27 weeks. But current Bill of 2020 has reduced the upper age limit for rape victim upto 24 weeks like that of MTP Bill of 2014.*

- *The MTP Bill, 2014 and the MTP Bill, 2020 are the only two bills which give the proposal to include the single unmarried women for MTP in parent Act.*

Another important point to mention here that in MTP Act, 1971 there is no such discrimination made between rape victims with fetal abnormalities cases related to upper age limit for MTP. ***But one can find the discrimination in terms of upper limit for termination of pregnancy for rape victims and for the cases of abnormalities of fetus in current MTP Bill, 2020. Now the question which arises here is that what is the need of such discrimination?***

ISSUES WHICH NEED TO BE HIGHLIGHTED

1. Whether monetary compensation is enough for a rape victim whose right to abortion has been

denied?As already seen in the case of *Kavita v. State of Haryana, and R and Another v. State of Haryana* which raises the question in our mind that whether giving compensation will be sufficient to compensate the rape victim after denying her the abortion right for taking care of the baby born from the rapist. Taking care of the child is not a duty of one day or one year. It's a responsibility for a lifetime. The government failed to consider here about the financial and social situation of the family. Even about the future of the girl whose life has been vandalized due to rape at such a tender age or even if she is major the intensity of the pain will be same for the both. The situation here will be like that whom the family will care first, the girl child who is a victim of lady or the baby born to her? It will be like a mental torture for them to take care of the child of the rapist. Even it is also true that the child born from rape has no fault in it but it is also the bitter truth of the society that a child born from rape will never get the respect from the

society when the truth of the birth of the child will be known to all. Another issue here is about the relationship of the child with the family-like relationship with the victim's family and with the accused family? There is no clarity in it. Again who will be responsible for the ordeal of the victim family and for the upbringing of the unwanted child born forcibly from the rape? These entire questions need to be answered. Denying women for abortion right even after knowing that she is a victim of rape is injustice and violation of her Reproductive rights. Giving monthly expenses and compensation of a certain amount is not sufficient to solve the issues where abortion right is denied. If this so then there is no need of the provision of Section 3 of MTP Act, 1971 which says that rape victim will be allowed to MTP under this act. These cases are examples to show that even after having the law; women were denied to exercise her basic right. This is the failure of the law to provide justice to the victim of most heinous crime by denying them the abortion right.

Even it's the lacunae on the part of the legislative and judiciary system for not providing justice to the rape victim and even to the child born from this heinous crime. Their Right to privacy which is part of the Right to life with dignity under Article 21 of the Indian Constitution is grossly violated in such situations. Mother and child rights should be protected separately in such a way that their life and future get secured.

There must be some rehabilitation or adoption center where the child born from the rape victim should be taken care but only for those cases where the court denied the rape victim for abortion and the child is unwanted.

2. Whether Fetus Right to Life is a Fundamental Right?

After the above discussion now it is also important to know about the Right to Life of an unborn fetus, because one of the common reasons for denial of abortion right is to protect the life of the unborn child. Right to life is a fundamental right of all people in every part of the world. But conflict arises when question comes regarding Abortion right of a woman. Almost in all International Human Rights Law, Right to Life is protected after the birth and this is only because to protect the women's rights, it may amount to serious threat to women's rights

to abortion, if the right to life before birth gets protected. Though States has a duty and right to protect the life of the unborn child too but not at the cost of mother life.

Actually no one can say exactly when human life begins. The medical and scientific community did not arrive at any conclusion that when human life begins. To understand this better first we have to know about the meaning of fetus and embryo. According to Springer pocket Dictionary, Gynecology embryo⁶ means conceptus developing inside the uterus up to the 85th day of pregnancy and fetus⁶ means intrauterine child from the third month of pregnancy; prior to this embryo. From the definition it is clear that one can call an embryo to fetus from the third month of pregnancy i.e. after 12 weeks.

DEFENCE BY INTERNATIONAL LAW FOR THE PROTECTION OF MOTHER LIFE

Even according to "Article 1 of the Universal Declaration of Human Rights" states that "All human beings are born free and equal in dignity and rights⁷." Here the word born does not include fetus. So, Right to Life here will be for those who are born. Even the International Covenant on Civil and Political Rights (ICCPR) 1966, and The United Nations Convention on the Rights of the Child (UNCRC) 1990, speaks about the rights of children born and no reference is made regarding the rights of a fetus.

The Human Rights Committee in *L.M.R. versus Argentina*, UN Doc. CCPR/C/101/D/1608/2007, held that "the denial of a legal abortion for a rape victim inflicted physical and mental suffering, violating the woman's right to be free from torture or cruel, inhuman, or degrading treatment, and her right to privacy⁸".

In *Vo versus France*, (2005)40 EHRR 12⁸, where the European Court of Human Rights, interprets and monitors compliance with the European Convention affirmed that "the unborn child is not regarded as a 'person' directly protected by Article 2 of the Convention and that if the unborn do have a 'right' to 'life,' it is implicitly limited by the mother's rights and interests," including her rights to life, health, and privacy.

Even it was for the first time in India, during *N. K. Sharma and Ors. versus Union Of India (UOI) and Anr*, question was arises that Whether MTP Act

infringes the Right to Life of a unborn child protected under Article 21 of the Indian Constitution? The Court in this case examined the Act and found that it aims is to save women's lives and to protect their mental and physical health. The Court recognized that there may be a debate about when a fetus "comes to life so as to attract Article 21," but concludes that a woman's life and health trump any concern for the fetus⁹".

Regarding the right to life of the fetus several courts has different opinion. Even neither Section 10 nor Section 11 of the IPC speaks about an unborn child. But Section 312-318 of IPC protects the life of unborn children in cases when miscarriage is done without the intention of protection of mother life.

From the above cases it's clear that Right to life started from birth and not before that so there is no point to deny the abortion right to women as this will amount to be violation of their reproductive right which is already discussed above.

Putting restriction on women for having legal abortion is indirectly forcing her to choose unsafe abortion which again may cause damage to her mental as well as physical health. In such situation whom we should blame, the women who choose the illegal methods for having an abortion or the law makers who failed to considered the pain of the lady?

Conclusion and Suggestions

The following are the suggestions-

1. Abortion right on demand to all women irrespective of marital status.
2. Increase of time limit for abortion as discussed above.
3. For those cases where abortion is not possible due to any reason then in such a situation, the Government should provide alternatives where the parents or rape victims can give the child for adoption immediately after birth.
4. More research is to be done in the field of gynecology and in law to find out the situation when a pregnancy can cause anguish to a women.

Apart from these suggestions, the issues which are

highlighted here need to be answered separately by the judiciary and the legislature. All those points are social and legal issues. Giving compensation to rape victim for taking care of the rapist child is like a mockery of the law and it will be like social rape for her where she will be raped every day by the members of the society for giving birth to a rapist child. Emotionally it will be no less than a criminal rape, the only difference will be here is that here the rape will be done verbally by the judiciary and by the so-called members of the society reminding her about the ordeal that she is a victim of rape and she has given birth to a rapist child.

The purpose and object of the MTP Act will be fulfilled only when this law will be applicable to all women and abortion will be allowed on demand. *Legislative and Judicial interference is necessary but that should be limited when it comes to abortion right for a woman.*

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Ethical Approval: The study does not require the approval of Institutional Ethics Committee. As the study is the combination of socio-medico-legal issue. No field study is done for this research.

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