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Changing Face of Abortion Laws in India: A Critical Investigation with Special Reference to the Medical Termination of Pregnancy (Amendment) Act, 2021

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ABSTRACT

An authenticated attempt to study the rationale behind the contemporary abortion laws, the study primarily focuses its attention on decoding the existing interdictions associated with the act of abortion in India. Pregnant women still are not given enough liberty to exercise their reproductive choices freely especially in matter of deciding the gender and no. of the children. Efforts are also made to demarcate the sphere of the Medical Termination of Pregnancy (Amendment) Act, 2021 along with the endeavor to understand as to how the recently made amendments can contribute to protecting the reproductive health of the women. Research Methodology and Reference Materials: The author has employed doctrinal research methodology thereby making use of the existing qualitative data to recognise the aggravating and mitigating factors which control the present problem in the light of the deductions and observations extracted from existing set of facts. For reference the preliminary findings of the WHO reports along with the study of comprehensive laws on abortion in India is made. Conclusion: The present study aims to uncover the legal technicalities involved in the present abortion laws along with the objective of laying down such means and methods which practically may help those women who want to exercise their right to abortion willingly and freely.

Keywords: *abortion, MTP Act, female, pregnancy.*

I. INTRODUCTION

Reproductive rights are of paramount importance because these rights help the woman to give birth to the child without any fear, constraint, or coercion. The progenerative right of the woman gets violated when she is forced to abort the child without her consent. The term abortion in general terms, refers to an intentional termination of pregnancy. Throughout the history, we find that women have tried different forms of birth control and used abortion as a tool to get rid of the unwanted child. Existence of end no. of interdictions associated with the act of abortion especially in the Indian society have always triggered never ending debate

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upon this issue.²

The heated argument regarding the question as to who will decide the fate of the child in the womb i.e., the pregnant woman, the in-law's family, the state, or the society at large, emerges to the screen whenever the woman bearing the child expresses her wish to abort the child. The Oxford Dictionary defines an abortion as, "an operation or other procedure to terminate pregnancy before the fetus is viable or the premature termination of pregnancy by spontaneous or induced expulsion of a nonviable fetus from the uterus."³ The act of getting rid of the child which is in the womb can occur spontaneously as miscarriage or be artificially induced through chemical or surgical methods. An abortion refers to an "induced procedure" at any point in the pregnancy⁴.

Although we all have entered the era of progressive societies, the fact which becomes hard to digest is whether till today the woman needs to seek permission for exercising her right to abortion or not. Whenever the concept of abortion is discussed, we come across the prochoice vs prolife debate. Before understanding the nature of the debate, we need to throw some light upon the meanings of these two terms. The pro-life rule does not allow abortion or killing of human beings by any other means and methods such as by way of active or passive euthanasia.

However, the pro-choice movement defenders believe that every human being has absolute right over his/her body hence the decision whether the person wants to give birth to a new life or not totally lies in the hands of that concerned person. In other words, the advocates of the prochoice movement vehemently oppose any kind of restriction upon the act of abortion, active or passive euthanasia.⁵

Pro-choice rule diligently contends for those rights of the women through which they can continue with their pregnancy or access medically designed facilities to end it. Such facilities and processes need to be medically vigilant enough to protect pregnant woman's life. There is very thin line of difference in forcibly exercising the right of abortion and carrying the abortion with one's own choice or after having consensus-ad-idem with the husband and his family members. The woman who undergoes abortion against the will of her husband encounters mental and physical stress which sometimes destroys her married life also.

² Alaka Malwade Basu, *The Socio- cultural and Political Aspects of Abortion: Global Perspectives* 102(2003).

³ Definition of abortion, Oxford Lexico (March 18, 2020, 3.31pm) <https://en.oxforddictionaries.com/definition/abortion>.

⁴ Loretta J. Ross & Rickie Sollinger, *Reproductive Justice: An Introduction* 20(2017).

⁵ Robert M. Baird & Stuart E. Rosenbaum, *The Ethics of Abortion: Pro-Life vs Pro Choice* 200(3rd ed. 2001).

II. NEED FOR ABORTIONS LAWS IN INDIA

Indian society has been witnessing to reproductive rights violations since times immemorial. The social fabric of our community is such that abolishing outdated and baneful practices and eradicating end no. of dotages of superstition attached with the act of abortion is hard task. Tracing the historical perspective of existence of penal laws in India, it is found that The Indian Penal Code, 1860 declares abortion to be a crime which is punishable in a stringent manner. However, for the purpose of drafting a full-fledged special law regarding the practice of abortion in India, The Government of India, in the year of 1964, tried of constituting a special committee for facilitating such an object. It was led by Shantilal Shah hence it came to be known as Shantilal committee. Taking into consideration the various suggestions of citizens of India with regard to right of abortion, the committee succeeded in reaching to a final submission of drafting a separate and special law for abortion. Various recommendations which were made by the committee from time to time were given ears to in 1970 in a comprehensive manner. Thereafter, the accepted recommendations were passed to the parliament and were introduced there in the form of a bill known as the Medical Termination of Pregnancy Bill. After making scrutiny over the provisions of the Bill, it was passed in the year 1971 in the form of an Act named the Medical Termination of Pregnancy Act, 1971.

(A) Research Objectives:

1. To understand the implications of existing abortion laws in India.
2. To delineate the boundaries of the Medical Termination of Pregnancy(Amendment) Act, 2021 along with the analysis of the same.

(B) Research Questions:

1. Whether existing taboos connected with the right to abortion makes it difficult for the pregnant woman to exercise such right freely?
2. Whether the recent amendments introduced by way of MTP(Amendment)Act, 2021 will contribute to escalating the reproductive autonomy of pregnant women or not?

III. ABORTION- ANATHEMA IN SECULAR INDIA

The society of India primarily is male dominated hence a wish for the male child governs the psyche of majority of the population of India. From ancient communities to the modern ones' girls were and are still considered as burden in most of the families. The right to abortion is happily exercised when the foetus inside the mother's womb is found to be of girl-child.

Aborting the girl child does not bring any bad omen to the concerned family or to the society at large. The women who have already undergone abortion earlier is again forced to conceive the child without even taking into consideration this fact that reproductive health of such women is put to stake. Increase in no. of dowry deaths, domestic violence, rape, acid –attacks etc. force the parents to think twice before giving birth to the girl –child on this planet. The hardest question which remains unanswered is –who will decide the fate of the child in the womb? The child resides inside the body of the mother, yet the mother does not have reproductive autonomy to freely decide the future of such child. These interdictions portray the act of abortion as dreadful one and forces the layman to think can womb in these days be declared as the safest place for the fetus to grow or not?

IV. THE MEDICAL TERMINATION OF PREGNANCY ACT, 1971

The Medical Termination of Pregnancy (MTP) Act, 1971 provides for the introduction of legally structured regulations for declaring abortions valid in India. The MTP Act deals with different aspects of abortion such as who can legally terminate pregnancy at what place and following what kind of procedure.

Section 2(d) of the MTP Act elaborates the essential requirements which shall be possessed by the Registered Medical Practitioner, who is legally entitled to carry out the process of medical termination of pregnancy viz. abortion.⁶

Section 3 of the Act, specifies that pregnancy can be terminated only under certain conditions which exist upon the parameter of having grave risk or injury to the body of mother that may resultantly cause abnormality to the child, or in case there is any serious risk diagnosed in the existence of child, or under certain circumstances if it is found that the child would be born with sustained physical or mental disability or if it is medico-legally found that pregnancy had resulted from rape and it needs urgency to be terminated or under another condition, if it legally allowed to terminate the child on account of having been caused due to the failure of contraceptives, etc.

Moreover, section 4 of the Act provides for the place where pregnancy shall be terminated. It infers that all government hospitals which are fully equipped with necessary quint-essential are permitted to provide abortion services.

Section 5 of the MTP Act lays down two important conditions relating to abortion which state that if in case, the concerned doctor acts in good faith and finds that it is necessary to

⁶ Reference here is made to the Medical Termination of Pregnancy Act, 1971 in the light of the book of Deepa Sarkar on abortion laws. Deepa Sarkar, *Abortion in India: Facts and Realities* 52(2013).

carry out the termination of pregnancy, then it would not be mandatory to accept the medical opinion of two registered medical practitioners and secondly if it is found that the termination has been carried out by a non-registered medical practitioner, then it would amount to be a penal offence punishable under the purview of existing penal laws.

The Medical Termination of Pregnancy Amendment Act, 2002

The Medical Termination of Pregnancy (MTP) Act 1971 as amended in the year 2002, primarily dealt with the women working in the private health sectors. The amendments that were introduced in the Act accounted for the following provisions and objectives:

1. To permit the private places to act as MTP service providers, was to be decided by a committee which was to act at district level basically;
2. To deal with the mental disorder that didn't amount to mental retardation was dealt under the purview of amending the term 'lunatic' with 'mentally ill person';
3. The nature and quality viz. time and place of carrying out the MTP service had to be strictly complied with the provisions of the Act, else there had been introduced stricter penalties for the same.

After the amendments being introduced by way of MTP Amendment Act, 2002 there still arose a need to improve the condition of the private hospitals which offered the abortion services. Hence to regularize the working of the private hospitals The Medical Termination of Pregnancy Rules, 2003 were introduced.

V. THE MEDICAL TERMINATION OF PREGNANCY RULES, 2003

The MTP Rules, 2003 lay down the following provisions so that the act of abortion is performed by the registered medical practitioner with utmost care and caution in such a way that it does not lead to the death of the pregnant woman. Some of the guidelines introduced by way of The Medical Termination of Pregnancy Rules, 2003 are as following:-

- Provisions relating to the composition of District Level Committee

A committee has been constituted under the rules of 2003, wherein a surgeon or gynecologist or anesthetist is to be held as one of the members of such committee and the other members would include those from the NGOs, PRIs, and the local medical practitioners of a particular district wherein one person shall be a woman as a member of the committee.

- Approved place for providing medical termination of pregnancies.

The rules of 2003 also provide for the infrastructure and the incidental medically well-managed equipment and the related facilities that are prima facie required to carry out the objective and operation of termination of pregnancy viz. abortion.

- **Inspection of private place**

The rules also lay down a specific duty of the Chief Medical Officer (CMO) to visit and inspect the place wherein the practice of abortions is carried out and ensure that the location and the adjoining places nearby are in a hygienic and medically safe condition.

- **Cancellation or suspension of the certificate of approval for a private place**

The rules of 2003 concurrently provide that if, in certain circumstances, it is found by the Chief Medical Officer that the place where the practice of termination of pregnancies is carried out is not up to the mark i.e., not in a safe and hygienic condition, then he may generate a report for the same and convey it to the committee which is dealing with the composition and approval for the licensing of the same. As a consequence of this, the committee, in lieu of its satisfaction, may suspend or even cancel the approval that was given to the owner to carry out the operation of abortions. But to support the legal parameters, the owner of the place is also given an opportunity of being heard and to represent before the committee before the certificate issued to him is cancelled then and there. In spite of the fact that such stringent provisions are laid down by the Govt. of India, still the problem of killing the girl child in the womb persists in the society. The incidents of recovery of dead fetus or newborn female child from the dustbins of the public places authenticates the dreadful plight of the female children in India.

VI. THE MEDICAL TERMINATION OF PREGNANCY (AMENDMENT)ACT, 2021

The wave of change was seen in the reproductive health-care system when the Medical Termination of Pregnancy (Amendment) Bill, 2020 got its introduction in the Lok Sabha on March 2, 2020, got the approval from the Parliament on March 17, 2020, and finally got the assent of the president of India on March 25, 2021, thereby turning into a comprehensive law regulating the provisions of abortion in India. Some of the key features of the MTP (Amendment) Act, 2021 are discussed as following:-

- **Increase in upper limit for termination of pregnancy-** The MTP(Amendment)Act 2021 aims to increase the gestation limit for the woman bearing the child i.e., if the pregnant woman wants to terminate her pregnancy up to the gestation limit of twenty weeks, she needs to have the opinion of one registered medical practitioner and for the gestation limit of twenty

to twenty-four weeks, she needs to consult the two registered medical practitioners. The upper gestation limit is also increased from twenty to twenty-four weeks for special categories of women such as for the victims of rape or incest, minors, and differently-abled women. However, this rule is not applicable in cases where substantial abnormalities are found in the fetus.

- **Constitution of Medical Board**– The new Act provides for the constitution of the Medical Board whose duty is to specifically deal with those cases where substantial abnormalities are found to exist in the fetus. On the opinion of the Medical Board, such pregnancies may be terminated after twenty-four weeks in which the risk of child being born as mentally or physically handicap remains on the higher side.
- **Contraceptive failure cases**- The new Act also gives the liberation to those women who became pregnant because of failure of contraceptive device. Such women have the right to abort the child up to the twenty weeks of gestation limit.
- **Replacement of the words “married woman and her husband”**- The amended Act has opened gates for termination of pregnancies for those women who are not married or are part of live-into relationships. The words “married woman and her husband” now stands replaced by the words “women and her partner”. Such changes can reduce the plethora of complications which were earlier faced by the unmarried pregnant women as the burden of shame, guilt and feeling of inferiority complex was attached to them due to which majority of the times such women were provoked to commit suicide.
- **Protection of right to privacy of the pregnant woman**- The legislature in amended Act has made sincere efforts to protect the privacy of the female who undergoes abortion as according to the new provisions only the person who is authorized by law is given permission to know about the status of pregnant woman who wants to exercise her right of abortion. If the registered medical practitioners try to break this rule, he may be punished with an imprisonment up to one year, fine or both.⁷

VII. ANALYSIS

On critically analyzing the amended Act, it is found that there are certain core-areas upon which still iota of doubt persists. The female victim of rape whose pregnancy has crossed the time –period of twenty-four weeks is forced to take the help of the court in order to abort the

⁷Reference here is made to the preliminary findings of the report of WHO, India’s amended law makes abortion safer and more accessible, <https://www.who.int/india/news/detail/13-04-2021-india-s-amended-law-makes-abortion-safer-and-more-accessible>.

child as the amended law stands silent in such case. The complications in abortion-cases multiply when the decision regarding aborting the child or not is delayed due to various reasons by judiciary. Now this same problem lingers on in relation to the Medical Board. The amended Act has not laid down any time –limit within which the Medical Board should give decision regarding removal of the fetus. Termination of pregnancy is time-bound act, causing an unnecessary delay can always put the pregnant woman in a state of dilemma. The amended Act does not provide platform for the transgenders who are now recognized as the third gender of the society. Last but not the least, the stringent provisions to prevent quackery are still not introduced in the amended Act as aborting the child requires kind of skill and such operations can only be performed by well-experienced medical practitioners. Taking the assistance of quacks or untrained professionals may seriously put the life of the pregnant woman to risk of death.

VIII. CONCLUSION & SUGGESTIONS

Since the issue of abortion involves medical, social, and ethical complications in it, it becomes essential in today's world to lay down such welfare provisions which do not increase the problem of the mother who is carrying the child, but which assists her in exercising her reproductive rights freely without any undue pressure. It is the duty of mother to provide the best possible assistance to her offspring inside the womb as well as outside in the real world.

However, situations may arise where she may cause injury to the fetus due to ignorance, carelessness or due to her own will, in such circumstances abortion is the issue which cannot be left to the sole discretion of the mother. It is very much essential to protect the life of the unborn. The law is meant for considering in account the liberty of mother and that of unborn. A demarcation has to be drawn between the rights of three important institutions i.e., the mother who is carrying the child, the state and the society as it is only then that the social, medical and ethical taboos which are associated with the abortion can be shunned away.

There are some suggestions to tackle the problem of abortion, these are:

- Since India is lacking in sex- education so efforts must be made by the educational institutions to give information to the students about the complications involved in procedures like abortion, surrogacy etc. so that they can handle such situation in the near future with utmost care and caution.
- Efforts should be made by the Central Govt. of India and the respective State Governments to improve the quality of the legal abortion services.

- Non-Voluntary Organizations should come forward to conduct and organize counseling sessions regarding the contraceptive precautions.

- The literacy and the awareness camps must be organized from time to time or in such COVID crises efforts must be made to aid through digital platforms to those women who want to abort the child.

An emergency helpline number can be established where the cases which require immediate attention in relation to abortion services can be dealt with without wastage of time.
