



# ANALYZING MTP AMENDMENT ACT 2021- A LEGISLATIVE HOLD ON BODILY AUTONOMY

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## INTRODUCTION TO THE MTP ACT

Before the enactment of the MTP Act, around 5 million abortions were performed annually in India, of which 3 million were illegal. In the 1960s, several nations began to pass legislation legalizing medical abortion. The MTP Act was largely modelled after the *Abortion Act of 1967* that had been passed in the United Kingdom, and the legislative intent, was to provide a qualified "right to abortion" and the termination of pregnancy, which has never been recognized as a normal recourse for pregnant women.<sup>1</sup>

The *Medical Termination of Pregnancy Act 1971* was enacted following the recommendations given by *Shantilal Shah Commission*. Only certain pregnancies are eligible to be terminated by medical experts in accordance with the MTP act. The Act's principal goals are to improve maternal health in India and lower the number of deaths caused by unsafe and illegal abortions. After this law was enacted, women finally had the legal right to have safe abortions, but only in limited circumstances.

The MTP Act is an exception to *Section 312 of the Penal Code of 1860*, which makes it illegal to "willfully cause a pregnant woman to miscarry" unless it is done in good faith to save the woman's life.

## RIGHT TO ABORTION VIS-A-VIS RIGHT TO PRIVACY

The right to life and the personal liberty is the most basic and comprehensive principle of human rights. *Article 21*<sup>2</sup> of the Indian Constitution has come a long way in recognizing the right to privacy as an inherent fundamental right and a component of the right to personal liberty.

<sup>1</sup> Alice Jacob, *ABORTION LAW REFORM : A STUDY OF THE MEDICAL TERMINATION OF PREGNANCY ACT, 1971*, 16 Journal of the Indian Law Institute, <https://www.jstor.org/stable/43950393> .

<sup>2</sup> INDIA Const. 21.

In *k s Puttasamay et al. v. UOI*<sup>3</sup>, it was stated that the right to life is protected under article 21 of part III of the Constitution which states, "*No person shall be deprived of his life and personal liberty except in accordance with procedure established by law.*" The right to abortion is one of a woman's recognized and attainable rights and one of the most fundamental and vital rights under the right to privacy.

In a significant case, *R. Rajgopal v. State of Tamil Nadu*<sup>4</sup>, it was determined that the right to procreate is a multifaceted part of the right to privacy, sometimes known as the right to reproductive autonomy.

In *Suchita Srivastava v. Chandigarh Administration*<sup>5</sup>, the Supreme Court also established the "*best interests test*" and "*substituted judgement test.*" The "*best interests test*" provides the court to determine the course of action in the best interests of the individual in question. This decision should be based solely on the victim's interests, not society's. The application of the "*substituted judgement*" test requires the court to assume the position of a person who is deemed mentally incompetent and attempt to make the choice she would have made if she were competent. In addition, the court distinguished between those with "*mental illness*" and those with "*moderate mental retardation.*"

## ANALYZING THE PROVISIONS OF THE MTP AMENDMENT ACT 2021

In a historic move to enable universal access to reproductive health services, India revised the Medical Termination of Pregnancy Act of 1971 to empower women further by providing abortion care to all.

The Medical Termination of Pregnancy Amendment Act of 2021 expands access to safe and legal abortion services on therapeutic, eugenic, humanitarian, and social grounds to enable universal access to comprehensive care. In the past, women who sought to terminate a pregnancy after 20 weeks were required to undergo a lengthy legal process. This undermines women's reproductive rights, as abortion is vital to their reproductive health.

Within the Act's purview, it proposed to establish a "*medical board.*" If the pregnancy is of 24 weeks or more, the medical abortion would be allowed only if the medical board has determined that a "*substantial foetal abnormality exists*" and medical termination is essential. Therefore, if a woman discovers a foetal anomaly after 24 weeks of pregnancy, she does not have to go to the Supreme Court or High Court to get approval for an abortion. Nonetheless, suppose a woman's pregnancy lasts longer than 24 weeks, and she wants an abortion for a reason other than the presence of a foetal abnormality. In that case, she must submit a writ petition before the court concerned.

In addition, the amendment recommends *revising the Explanation to Section 3 (2)*<sup>6</sup> to read "*any woman*" rather than "*married woman*" and "*partner*" rather than "*husband.*" This amendment eliminates statutory discrimination against single women and expands the right to health and presumptive exception of the provision to cover all women and their partners regardless of their marital status.

<sup>3</sup> (2010) 10 SCC 1

<sup>4</sup> AIR (1995) SC 264

<sup>5</sup> (2009) 9 SCC 1

<sup>6</sup> The Medical Termination Act, 1971, § 3(2).

In the landmark case *Mahima Yadav v. Government of NCT of Delhi and Others*<sup>7</sup>, the petitioner sought permission to have her pregnancy medically terminated. The petitioner invoked the provisions of the Medical Termination of Pregnancy Act of 1971. Section 3 of the Act makes it plain that the recent modifications to the Medical Termination of Pregnancy Act, 1971, permit the termination of a pregnancy with serious defects even beyond 24 weeks, as declared by the court. In this instance, the foetal age was 25 weeks. This modification does not permit all abortions after 24 weeks, but only those in which the foetus develops severe defects, which are widespread in this instance. The Supreme Court considered all relevant factors of the case and authorized the abortion. In this case, as in earlier cases reviewed by the court, abortion was permissible after 24 weeks of gestation.

## ANALYZING THE SHORTCOMINGS OF THE MTP AMENDMENT 2021

- Even though the changes to the MTP Act of 1971 are a good step toward protecting the reproductive rights of women in the country, they do not go far enough. The *MTP (Amendment) Act, 2021* was passed as a legal solution to the backlog of cases that had been filed as Writ petitions before the Hon'ble Supreme Court and various High Courts, asking for permission to end pregnancies after 20 weeks in cases of foetal abnormalities or pregnancies caused by rape. In this direction, the only way to end a pregnancy caused by rape after 24 weeks is to get approval through a Writ Petition. This means that the process for ending a pregnancy caused by rape before 24 weeks *hasn't been significantly changed*.
- The Act lets "*pregnant women*" end their pregnancies under certain circumstances. However, as medical science has developed, it has become clear that there may be cases where people who have been labelled as having more than one gender, *i.e. transgenders, can get pregnant even after getting hormone therapy to change from female to male*, and they may need abortion services. Since the new law only lets women end their pregnancies, it is not clear if transgender women are included under the ambit of this act.
- Further analysis reveals that pregnancy termination is a time-sensitive concern. The new Act does not specify the timeframe within which the medical board must reach a conclusion. The board's delay in reaching a resolution may result in further issues for pregnant women.
- When it comes to making legal determinations, *inconsistency is generally viewed*. It is common to have lower courts render decisions based on flawed reasoning, only to have those decisions overturned by higher courts on appeal. However, in situations involving abortion, where the mother's mental and physical health is of the utmost importance, an irrational decision may be harmful to her human rights. In addition, a mother who is going through physical challenges may not have the financial means to appeal an unjustified ruling, making her a victim of the lengthy judicial system. As in the case of *State of Rajasthan & Ors. v. S & Anr*

<sup>7</sup> 2021 SCC OnLine.

the Rajasthan HC denied a rape victim's request to terminate her pregnancy on the grounds that, under Article 21, the unborn child in the mother's womb had the right to life.

- Lastly, after carefully analyzing the MTP (Amendment) Act, 2021 provisions, it became clear that there is no mechanism for enforcing responsibility in cases where a mother dies because she refused to have an abortion. Women who are unable to navigate the legal system are mainly the extremely young and socially impoverished or fearful of the abortion process are disproportionately represented among those who are denied access to abortion.

## DEBATE ON RULE 3B OF MTP ACT

Recently, while deciding in favour of an unmarried woman seeking an abortion in *X v. The Principal Secretary of Health and Family Welfare Department of the Government of Delhi NCT and Others*<sup>8</sup>, the Supreme Court made notable observations about marital rape.

In the earlier High Court ruling on this case, the court denied her permission to terminate her pregnancy on the grounds that the pregnancy was the result of consenting sexual conduct. The Supreme Court ruled that all women, regardless of marital status, had the right to an abortion.

In present case, the court considered whether the exclusion of unmarried women from Rule 3B of the MTP Act was valid. This section outlines the types of women who may seek an abortion.

Rule 3B describes the categories of women whose pregnancies between 20 and 24 weeks may be terminated. The Supreme Court was defining the term '*rape*' in this context of rule 3B of the abortion act. Under Rule 3B(a) of the Medical Termination of Pregnancy Rules, married women who become pregnant as a consequence of forced intercourse by their husbands will also be deemed "survivors of sexual assault, rape, or incest."

This means that while forced intercourse by a husband is not deemed a felony under IPC *section 375*, it is considered a felony under the abortion law. In addition, the bench noted that the inclusion of marital rape in the definition of rape under Medical Termination of Pregnancy Rules does not extend to rape-related statutes.

The court emphasised that a woman need not prove she was raped to seek an abortion under the law. A woman who gets pregnant from the act of rape may seek an abortion without commencing legal action. Under the Indian Penal Code, the accused need not be convicted of rape charges for a woman to be granted the right to an abortion.<sup>9</sup>

<sup>8</sup> Civil Appeal No 5802 of 2022

<sup>9</sup> Thh Hindu, <https://www.thehindu.com/sci-tech/health/explained-how-has-the-supreme-court-expanded-abortion-rights/article65960016.ece>, (last visited. Oct 2, 2022).

## COMPARATIVE ANALYSIS- USA PERSPECTIVE

While abortion has been a contentious issue in the United States for decades, numerous states, particularly those governed by conservatives, have recently expressed interest in or initiated legislation to severely restrict abortion.

In 2022, the U.S. Supreme Court overturns *Roe v. Wade*<sup>10</sup>, a landmark 1973 decision that gave American women the right to abortion before the foetus is viable outside the womb, or before the 24-28 week mark. Additionally, the supreme court reversed *Planned Parenthood v. Casey*, a 1992 judgement that supported *Roe*.

In India, the right to an abortion can only be terminated with the consent of a registered medical practitioner, unlike in the United States, states can prohibit abortions done for non-medical reasons. Over the decades, states in the United States have imposed varied amounts of limitations on abortion. Some have passed laws that would take effect now that *Roe v. Wade* has been reversed.

States have imposed extreme legal limitations on abortion, such as the notorious Texas Heartbeat Act, which prohibits abortions after six weeks of pregnancy. Contrast this , The MTP Act 1971 was radical for its time, and the 2021 Act loosened abortion regulations even further.

## CONCLUSION

Although the Indian government and courts have always taken a progressive stance on abortion rights, this does not mean they are without flaw. However progressive the MTP Act, 1971 may have been when it was passed, the 2021 Act is even more so. The latter included single women and accounted for medical progress when setting the abortion limit. Furthermore, in 1891 the United States acknowledged the right to privacy, and in *Roe v. Wade* , the right to abortion was incorporated into the right to private of American women. The right to privacy under Article 21 and the right to abortion as a component of the right to privacy were only recognised in India in 2017. Despite these setbacks, it is notable that India is headed towards the right direction.

<sup>10</sup> 410 US 113 (1973).