



## ABORTION LIMIT OF 20 WEEKS UNDER THE MEDICAL TERMINATION OF PREGNANCY ACT: A FALLACY OF RULE OF LAW?

By Vaishali Nair & Rohit Alex Abraham  
From VIT School of Law, VIT University  
Chennai Campus, Chennai

### INTRODUCTION

The rights of a pregnant woman to abort and that of the foetus to life is a debate that has shook the existing global legal framework on post and neo natal care. The act of terminating a pregnancy revolves around genetics, medicine, sexuality, jurisprudence, reproductive rights, as well as the foetus's right to life which would mean that coming to one logical conclusion must be in consonance with all these aspects. The battle is between pro-life supporters who condemn abortions considering the death of an unborn child a social death and pro-choice supporters, who believe that women should be in total control of her reproductive life and nobody, not even the state, has the right to tell her what to do. The pro-choice versus pro-life debate found light in India only in the recent times owing to the state involvement in curbing the burgeoning population rates. This paper will be focussing on the pro-choice aspect of this debate.

The present limitation of 20 weeks prescribed for abortion under Medical Termination of Pregnancy Act in essence means returning to the 'dark ages' of state control over women, with women's rights and liberties finding no sanctuary within the

framework of the state.<sup>1</sup>By enacting MTP Act, India has chosen a middle path instead of choosing outright a pro-life or pro-choice approach and this is perhaps rightly so, given the sensitivity of the issue. Thus India played it safe by adopting a balanced approach between the respective interests of the woman, the unborn and the state.

### CURRENT LEGAL POSITION

S.3 of the Medical Termination of Pregnancy Act 1971 prohibits abortion of the foetus beyond 20 weeks of gestation. The Act does authorise abortion beyond 20 weeks where 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 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. Hence, a substantial risk to the life of the pregnant woman or baby is a must to get a legal abortion beyond 20 weeks of gestation. The major reason for choosing such a particular time limit for abortion is grounded on the fact that the baby becomes viable only at around the 20<sup>th</sup> week of gestation which would mean the baby is no longer indispensably dependant on its mother's body and stands a chance of survival upon delivery, albeit with suitable aids at this pre-mature stage. Thus, in addition to state interest, the interests of the

<sup>1</sup>D. Banerjee & U. Uppaluri, *From R V. Wade to foetal Pain Legislation: A Reflection of American Jurisprudence on the Indian Milieu of Liberalised Abortion policies*, 2 NUJS Law Review 632, 637 (2009).



fully formed unborn child at this stage become noteworthy.<sup>2</sup>

The Indian Penal Code 1860, keeping in view the religious, moral, social and ethical background of the Indian community provides that causing a miscarriage with or without consent for a purpose other than saving the life of the woman is punishable.<sup>3</sup>

The MTP has an overriding application over IPC, yet outside the ring of the former's protection the latter still operates. According to the IPC the offence falls under 'Offences Affecting the Human Body', and provides that causing a miscarriage with or without consent for a purpose other than saving the life of the woman is punishable. The MTP Act makes for a quantum difference in approach, as if by a legislative sleight through a non-obstante clause, by decriminalising abortion without bringing an amendment to the IPC or abrogating the penal provisions. The MTP Act sets some limitations regarding the circumstances when abortion is permissible, the persons who are competent to perform the procedure, and the place where it could be performed. Outside the ring of protection that the Act draws, the IPC still operates.

The Government of India ratified the International Covenant on Economic Social and Cultural Rights (ICESCR), which guarantees the right to the highest attainable standard of health (Article 12) and the Convention on Elimination of All Forms of Discrimination against Women (CEDAW) guaranteeing women the highest standard of reproductive health. Additionally, CEDAW explicitly affords women the right to freely decide the number and spacing of their children and to have access to the

information, education and means to enable them to exercise these rights.<sup>4</sup> Thus in being forced to carry an unwanted foetus especially in cases where the foetus suffers from a substantial anomaly and no probability of independent survival, several pregnant all over the world and India are being denied the right to decide freely on the number and spacing of her children guaranteed under CEDAW. General Recommendation 24<sup>5</sup> states that, "State parties that have laws that criminalize medical procedures only needed by women punish women who undergo those procedures." Abortion is a medical procedure only needed by women and it is women whose lives and health are disproportionately put at risk by the MTP Act's restrictions. The right to non-discrimination under CEDAW requires that abortion be lawful when necessary to protect woman's health as a measure to eliminate discrimination against women in the field of health care. Unlike the position in India, countries like Albania, Australia, Belgium, Canada, China, Croatia, Denmark, Iceland, Israel, Luxembourg, Nepal, Netherlands, Slovakia, South Africa, United Kingdom, and United States do not include absolute time limits in their abortion laws conforming to women's rights to life, equality and health. Instead, these countries consider the woman's physical and mental health and doctors' expert opinions in determining

<sup>4</sup>See Articles 12 and 16 of CEDAW and General Recommendation 24.

<sup>5</sup>*CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, UN Committee on the Elimination of Discrimination Against Women 1999, A/54/38/Rev.1, chap. I, available at: <http://www.refworld.org/docid/453882a73.html> [accessed 16 August 2018].

<sup>2</sup>Id.

<sup>3</sup>See 312 to 316 of IPC 1860.



whether a medical termination of pregnancy can be performed post 20 weeks.

### A.21 AND RIGHT TO ABORTION

A foetus is not a legal person, which means that it cannot be owed a duty of care.<sup>6</sup> Right to Abortion has been recognized under Right to Privacy which is a part of Right to Personal Liberty and which emanates from right to life. Thus, provisions of MTP Act and IPC violate the pregnant woman's fundamental right to life by criminalising abortions beyond 20 weeks.

Reproductive autonomy is part of a woman's personal liberty guaranteed under A.21. The Supreme Court has clearly laid down in the landmark judgement of *Rajagopal v. State of Tamil Nadu* that right to privacy protects matters involving "procreation, motherhood and child-bearing."<sup>7</sup> The rights of an unborn child are tangent to that of the woman carrying the unborn child in her body. The Supreme Court in *Nar Singh Pal v. Union of India*<sup>8</sup>, asserted that "Fundamental Rights under the Constitution cannot be bartered away. They cannot be compromised nor there does any estoppel exist against the exercise of Fundamental right available under the Constitution."

The validity of the MTP Act was first challenged in *Nand Kishore Sharma v. Union of India*<sup>9</sup>; it was argued that the Act, particularly Section 3(2)(a) and (b) and Explanations I and II to Section 3 of the Act

were unethical and violative of Article 21 of the Constitution of India. The court here was equivocal on issues pertaining to status of a foetus and whether it is entitled to legal protection and hence avoided a closure on the matter. It went on to declare the MTP Act to be valid as it was in consonance with the aims and objectives of Article 21 of the Constitution.

The judiciary's decisions in the recent times have been welcomed as progressive and supportive of reproductive rights. Nevertheless, for every liberal judgment, there are several ones which still succumb to the archaic limitations prescribed by the 1971 law. In one such case<sup>10</sup>, the Bombay High Court, on its own motion, decided to take up the case of a pregnant prisoner seeking permission to terminate her pregnancy.<sup>11</sup> In her requisition, the prisoner had written that she already had a five-month-old baby who was suffering from convulsions/epilepsy, diarrhoea and fever, and she herself was missing a clean bill of health. It was stated by her that it was already difficult taking care of herself and her first child and therefore it was much better for the child to be aborted now than have it be born into the world and have a bad life. The court finally held that a woman had the absolute right of choice over abortion regardless of her position or job in society. This is applicable to all women irrespective of their marital status or whether she was a working woman, a homemaker or a prisoner. Besides other concerns

<sup>6</sup> E. Jackson, *Medical Law: Text, Cases and Materials*, 642 (Oxford, 2nd edition, 2010).

<sup>7</sup> *R. Rajagopal v. State of T.N.*, 1994 Indlaw SC 832, 276.

<sup>8</sup> *Nar Singh Pal v. Union of India*, AIR 2000 SC 1401.

<sup>9</sup> *Nand Kishore Sharma v. Union of India*, AIR 2006 Raj. 166.

<sup>10</sup> High Court on its own Motion v. The State of Maharashtra, Suo Motu Public Interest Litigation No. 1 of 2016 (India).

<sup>11</sup> V. Johari & U. Jadhav, *Abortion rights judgment: a ray of hope!*, 1 Indian Journal on Medical Ethics 115, 120 (2017).



mentioned herein, the age of the child who becomes pregnant resulting from rape need to be considered. A minor child's body will be in no position to withstand a normal vaginal delivery let alone a C-section in case of complexities arising in the pregnancy. In itself the abortion would pose lesser risk to the girl than a delivery by surgical intervention in terms of anaesthesia, major abdominal surgery, complications, blood loss and wound healing. According to the Indian Academy of Paediatrics, at the age of 10, an average Indian female child will weigh 30 kg and be 140 cms tall at the 50th percentile. Given that maternal height of less than 145 cm is a predictor for obstructed labour and increases the risk of a bladder wall fistula during vaginal delivery. It is not likely that this child can have a vaginal delivery without causing serious trauma to the perineum and pelvic floor muscles. Of course the foetus may also be growth retarded and of a low birth weight but it seems that the delivery will have to be surgical via a caesarean section.<sup>12</sup> The Federation of Obstetric and the Gynaecological Societies of India (FOGSI), a body comprising of 24,000 plus members stated: "*the risk to the mother in case of termination of pregnancy at 25 weeks is not significantly higher than the risk at 20 weeks.*" FOGSI advised that "*in case of foetal abnormality which has been detected late and which leads to an extremely serious handicap at birth, such foetus should be allowed to be terminated, even after 20 weeks.*" In the case of *Suchita Srivastava*

*and Anr. v. Chandigarh Administration*<sup>13</sup>, the Supreme Court expressed the view that the right of a woman to have reproductive choice is an inseparable part of her personal liberty, as envisaged under Article 21 of the Constitution. She has a sacrosanct right to have her bodily integrity. The Court further noted that it is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive

#### MENTAL HEALTH OF THE PREGNANT WOMAN

In case of pregnancies caused by rape, or a failure of birth control (for married women), the risk to the pregnant woman's mental health is an acceptable admissible ground for abortion. Contrary to what legislator's believe, the 20 weeks limitation only aggravates the mental trauma faced by pregnant woman resulting in the rise of illegal abortions which is a graver risk to the pregnant woman's health. In several pronouncements by the Supreme Court in the recent times he term 'mental injury' has been given wider interpretation by the courts.<sup>14</sup> The Supreme Court in 2017 rape victim to abort a 24-week old foetus with severe abnormalities, as the medical board thought that the pregnancy could put her life in danger. According to the court, "The

<sup>12</sup>S. Dalvie, *Right to Safe Abortion*, 52 Economic and Political Weekly 23, 35(2017), Available at: <http://www.epw.in/journal/2017/32/web-exclusives/right-safe-abortion.html>. (last accessed on 22.07.2018)

<sup>13</sup> *Suchita Srivastava and Anr. v. Chandigarh Administration*, AIR2010SC 235.

<sup>14</sup> *Sarmishtha Chakraborty and Ors. Vs. Union of India (UOI) Secretary and Ors; 2017(3)RC R(Civil)757*



foetus is not compatible to life outside uterus. In other words foetus would not be able to survive. Equally, rather more important, continuance of the pregnancy would endanger the physical and mental health of the petitioner”<sup>15</sup> Thus decisions made by courts in this regard have not always been on an even footing, thereby necessitating changes to the existing law.<sup>16</sup>

In *Sarmishtha Chakraborty and Ors. Vs. Union of India (UOI) Secretary and Ors*<sup>17</sup>, too the Medical Board was of the opinion that the mother would have suffered a lot mental injury if the pregnancy is continued. This was taken as a ground by the Supreme Court to allow the abortion after 26 weeks. Furthermore, *Ashaben v. State of Gujarat*<sup>18</sup> is one of several cases where the rape victim was denied termination as she was over 20 weeks pregnant<sup>19</sup> Here the girl was held captive before she could seek termination, the provisions of the Act did not grant her any relief and the judge expressed his inability to grant her remedy even when the circumstances were too dire. Hence it is quite apparent that there is an immediate requirement for change in the limitation provided for in the MTP Act as echoes by the views of eminent judges who have dealt with such cases as also the medical professionals who are experts in this area.

### ABORTION BEYOND 20 WEEKS IN CASE OF FOETAL ABNORMALITY

The 20 weeks limitation brought about by the legislation keeping in mind the health of the pregnant woman. But this basis has become outdated, as unlike the circumstances existing in 1971 when the statute was brought about, technology has developed to the extent of making abortions safe even beyond the prescribed time limit. Furthermore, certain rare congenital diseases can be detected only after 20 weeks bearing in mind the stage of development of the foetus at this point. Of the 26 million births that occur in India every year, approximately 2-3 per cent of the foetuses have severe congenital or chromosomal abnormality. In certain cases these abnormalities can be detected before 20 weeks, but there does exist situations where malformations can be detected only after that period. Dr. Rishma Dhillon-Pai, consultant gynaecologist at Jaslok Hospital, says that the period between 20 weeks and 22 weeks offers good opportunities to check for anomalies in foetuses through a sonography. The doctors generally advise the patient to undergo these tests around the 18th week to find abnormalities and most of these reports take three weeks by which time the pregnant woman loses out on the prescribed cut off time under MTP.<sup>20</sup> A doctor while dealing with such a case would resort to three tests in order to determine the existence of abnormalities in the foetus. According to Dr. Nehha V Motghare there are precisely three tests conducted during

<sup>15</sup>S.Rai & S. Sheikh, *India's Abortion Laws Need to Change and in the Pro-Choice Direction*, *The Wire* (11.05.2017), available at: <https://thewire.in/134182/abortion-pregnancy-law-india/>, (last seen on 22.07.2018).

<sup>16</sup>Ibid.

<sup>17</sup>Supra 14.

<sup>18</sup> *Ashaben v. State of Gujarat*, (2015)(4) Crimes 1(Guj.).

<sup>19</sup>24 weeks in this case.

<sup>20</sup> S. Andhale, *NCW wants abortions to be allowed till 24th week*, *DNA*, (02.02.2013), Available at: <http://www.dnaindia.com/mumbai/report-ncw-wants-abortions-to-be-allowed-till-24th-week-1795308>, last seen on 22.07.2018.



the preliminary check-up: the Double Marker Test<sup>21</sup>, the Triple Marker Test<sup>22</sup> and the Anomaly Scan<sup>23</sup>. It is pertinent that the aforementioned tests are carried out either during or beyond the stipulated time limit and after the diagnosis a window of opportunity is available to be utilised for curing the abnormality.<sup>24</sup> But not in all cases is the result positive which prompts pregnant woman to resort to abortions before they can make an informed decision regarding whether or not to go ahead with the abortion. *Dr. Nikhil Dattar & Ors. v. Union of India*<sup>25</sup>, dealt with the issue as to whether the statutory time limit for abortion must be increased from the currently permitted twenty weeks of gestation to twenty-four weeks or above. Here the petitioners reasoned that the congenital heart blockage in the heart of the foetus was detected at a late stage which was why the request to terminate the pregnancy was made in the 25<sup>th</sup> weeks of gestation, they further expressed their inability to bear the emotional stress and monetary burden of giving birth to a child that may suffer from such severe health problems in the context of socio-economic conditions existing in India. The Mumbai High Court held that no categorical opinion of experts had emerged to state that the child would be born with serious handicaps and it thus denied recourse to medical termination of the pregnancy. It might be interesting to note

here that an opinion emerged that terminating the life of a viable unborn on grounds of possible handicap is akin to mercy killing.<sup>26</sup> In *Sarmishtha Chakraborty and Ors. Vs. Union of India (UOI) Secretary and Ors*<sup>27</sup>, the Supreme Court granted permission for the abortion of a 26 week old foetus who was diagnosed with a cardiac malformation. According to a court appointed medical panel's conclusions, the baby, after birth would have required intensive cardiac monitoring and staged management through the surgical procedures which has associated with it high risks of morbidity and mortality.

The author is not trying to stray away from the modern inclusive approach adopted by majority of the governing institutions in the present day, yet allowing a foetus with severe abnormalities to be born will only induce further hardships to the child as well as the biological mother taking her mental health and the foetus' physical health into consideration. Such cases can be brought under the purview of s.3, Medical Termination of Pregnancy Act 1971. The basis for the contention in favour of abortion in cases of foetal disability/abnormality reframes the nature of the parenting relationship, making parenting conditional upon the child meeting certain criteria. This framework is essentially a shift from the progressive outlook of advancement of the physically or mentally challenged to avoiding the disability altogether. This idea although in consonance with individual liberty and freedom is highly antagonistic to the modern day inclusive approach. Within this understanding of disability, genetic

<sup>21</sup>10-13 weeks.

<sup>22</sup>18-20 weeks.

<sup>23</sup>20 weeks.

<sup>24</sup>P. Chatterjee, *Medical Termination of Pregnancy Act: A Boon or a Bane for a Woman in India - A Critical Analysis*, 5 Indian Journal for Science and Research, 236, 237 (2016).

<sup>25</sup>*Dr. Nikhil Dattar & Ors. v. Union of India*, (2008) 110 BOM. L. R. 3293

<sup>26</sup>Supra 1.

<sup>27</sup>Supra 14.



technology then becomes a tool not for promoting community health but a mechanism of social control for avoiding the appearance of difference.<sup>28</sup>

Pro-choice supporters argue that late-term abortion is justified as a form of self-defence to get rid of involuntary servitude and a form of slavery caused by pregnancy. The Supreme Court in *Suchita Srivastava v. Chandigarh Administration*<sup>29</sup> while addressing the issue of eugenics, declined to accede to the state's request for abortion for a 20-year-old inmate of a state-run protection home who was a rape victim and was mentally retarded, having a mental maturity of a nine-year-old. The court reminded: "*Empirical studies have conclusively disproved the eugenics theory that mental defects are likely to be passed on to the next generation.*" Though foetus should have a right to life, it must be life with dignity, and a meaningful, wholesome life which would not be possible if the mother herself has not been able to form any emotional bonding with the foetus/would be child.

### THE DEGREE OF ARBITRARINESS

The 2007 WHO report indicates that 98% of the unsafe abortions took place in developing countries with restrictive abortion laws, resulting in an estimated 66,500 deaths<sup>30</sup>. Today, in a growing number

of settings where abortion is legally restricted, women are using the drug misoprostol (Cytotec) to cause a miscarriage, whether under a doctor's care or self-administered. This includes most of Latin America and the Caribbean, parts of Asia, several countries in Africa and a few European countries.<sup>31</sup> Dr Anuradha Kapoor, senior gynaecological consultant at Max Healthcare, states that "the Level-II ultrasound, which is also known as the anomaly test, can be conducted only after the pregnancy is in the advanced stages - between 22 and 24 weeks". It is this scan that detects abnormalities in vital organs, such as a heart or kidneys but doctors continue to face "legal issues whenever it comes to getting rid of such foetuses and couples have to bear babies even if there isn't much chance of their survival later".

Common health problems faced by the foetus inside the mother's womb are Hydrocephalus, where the foetus' brain is not fully developed, and Congenital Anomalies such as Down syndrome, Cardiac trouble etc.<sup>32</sup> In both these situations, the probability of the child succumbing to its impairment immediately after birth is high. If the same occurs while the child is inside the womb it may have adverse and even a fatal effect on the mother which is one more danger she will have to foresee. In any case that the child survives it is usual for the child born to remain alive for some months or year albeit with severe health problem.

<sup>28</sup> K.Kannan, *A tricky debate on abortion*, The Hindu (08.08.2016), Available at: <http://www.thehindu.com/opinion/lead/A-tricky-debate-on-abortion/article14547721.ece>, last seen on 22.07.2018.

<sup>29</sup> Supra 13.

<sup>30</sup> Unsafe Abortion: Global and Regional Estimates of the Incidence of Unsafe Abortions, WHO, (2008), Accessible at:

[http://apps.who.int/iris/bitstream/10665/44529/1/9789241501118\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/44529/1/9789241501118_eng.pdf), Last viewed on: 03.12.2017.

<sup>31</sup> *Reports at: Medical Abortion: An International Forum on Policies, Programs and Services*, International Consortium for Medical Abortion, Johannesburg (17.10.2004-20-10.2004).

<sup>32</sup> Supra 24.



Much of the Indian law was copied from the UK Abortion Act 1967, which included a similar time limit of 20 weeks at the time of enactment, but, with the changing scenario, the act was amended in 1990 and the time limit was increased to 24 weeks. Now, with advanced technology, there is no harm in women going for abortion at any stage.

Dr Rishma Dhillon-Pai, consultant gynaecologist at Jaslok Hospital, says the period between 20 and 22 weeks is the ideal time to check for anomalies in foetuses through sonography. "We generally ask a patient to undergo tests around the 18th week to find abnormalities. Some reports take three weeks and we lose on the MTP cut-off time. A little extension will come as a boon to a lot of women," said Dr Pai.<sup>33</sup> The American Journal of Obstetrics & Gynaecology published a study reporting that diagnosis for cerebral anomalies often cannot be made until at least the 22nd week of pregnancy. In 2008, The Australian Medical Journal issued *Pregnant Women with Foetal Abnormalities: The Forgotten People in the Abortion Debate*, reporting that the accuracy of prenatal testing is compromised in jurisdictions where access to abortion is limited to 20 weeks or prior. The report also finds that in cases of foetal abnormalities, denying abortion may only delay the inevitable death of the child and extend the suffering of the family.<sup>34</sup>

<sup>33</sup> 28, not 20 weeks: Supreme Court petition seeks more time for abortion,

Available at: <http://www.dnaindia.com/india/report-28-not-20-weeks-supreme-court-petition-seeks-more-time-for-abortion-2008343>, Last seen on 25.07.2018.

<sup>34</sup> DeCrespigny & J. Savulescu, *Pregnant women with foetal abnormalities: the forgotten people in the abortion debate*, 5 *Medical Journal of Australia* 121, (2008).

## FETUS'S RIGHT TO LIFE

The pro-life arguments are centred on religion including the traditional Christian doctrines such as that all humans are made in the image of God or that all humans have an immortal soul.

The foremost object behind the twenty weeks cut-off is the fact that the baby becomes viable at this stage. In other words, the baby is no longer indispensably dependant on its mother's body and stands a chance of survival upon delivery, albeit with suitable aids at this pre-mature stage. As it grows, it becomes more and more capable of independent survival. Thus, in addition to state interest, the interests of the fully formed unborn child at this stage become noteworthy.<sup>35</sup> The Convention on the Rights of the Child recognized the need for special protection of children before and after birth on account of their physical and mental immaturity.<sup>36</sup> Further The Convention on Elimination of Discrimination against Women (CEDAW) views maternity as a social function which would mean that corresponding to several rights enjoyed by the pregnant woman including the right to privacy, there exists duties that must be performed to sustain and nurture society.<sup>37</sup> A foetus cannot feel pain until late in pregnancy, because its brain is not

<sup>35</sup> *Supra* 1.

<sup>36</sup> See generally Abby F. Janoff, *Rights Of The Pregnant Child vs. Rights Of The Unborn Under The Convention on the Rights of the Child*, 22 B.U. INT'L L.J. 163 (2004).

<sup>37</sup> Siddhivinayak Hirve, *Abortion Policy In India: Lacunae and Future Challenges*, Abortion Assessment

Project India, CEHAT REPORT, available at <http://www.cehat.org/aap1/policyreview.pdf>, Last visited on 27.07.2018.



sufficiently developed before then. The scientists have agreed that foetal brain will be sufficiently developed to feel pain from approximately the twenty sixth weeks.<sup>38</sup> Thus, whether abortion is against the interest of a foetus must depend on whether the foetus itself has interests, not on whether interests will develop if no abortion takes place. Something that is not alive does not have interests. Also, just because something can develop into a person does not mean it has interests either. Once a foetus can live on its own it may have interests. This is only after the third trimester.<sup>39</sup>

Perinatal hospice is put forward as an alternative for parents faced with the decision to terminate their pregnancy where the infants are brought to term by treating them as beings conceived with a tangible future. This alternative is preferred because of post-termination psychological distress and because biblical teachings emphasise the dignity and worth of each foetus.<sup>40</sup> According to Ronald Dworkin, a foetus has no interest before the third trimester. Further a foetus cannot feel pain until late in pregnancy, because its brain is not sufficiently developed before.<sup>41</sup>

#### THE MTP (AMENDMENT) BILL, 2014

The Medical Termination of Pregnancy (Amendment) Bill of 2014 proposes to expand the definition of registered medical

practitioner with registered healthcare provider to include practitioners from other streams of medicine, such as Ayurveda and homeopathy. Under the Bill, nurses and auxiliary nurse midwives can also perform abortions. The Bill also proposes to extend the length of the period during which abortion may be conducted from 20 weeks to 24 weeks. The bill further involves extending the permissible period for abortion from 20 weeks to 24 weeks if the healthcare provider believes the pregnancy involves a substantial risk to the mother or the child. If substantial foetal abnormalities are detected, the amendment also allows an exception on the time limit for pregnancies to be terminated.<sup>42</sup> Though the Bill echoes the High Court judgment in parts, a specific provision on women's autonomy and their right to self-determination in the matter of abortion would reduce women's vulnerability in clinical settings.<sup>43</sup>

#### COMPARATIVE ANALYSIS WITH U.S.A

In *Roe v. Wade*<sup>44</sup>, the U.S. Supreme Court decided by a 7-2 majority that an implied constitutional right to privacy, whether based on the Fourteenth Amendment's concept of personal liberty or in the Ninth Amendment's reservation of rights to the people, was sufficiently broad to encompass a woman's right to terminate her pregnancy, but it again set limitation for States to declare the outer limit to carry out the procedure.<sup>45</sup> Later, in the case of *Planned Parenthood v. Casey*<sup>46</sup>, the Court rejected

<sup>38</sup>See C.Grobstein, *Science and the unborn: choosing Human futures* (Basic Books, 1988), 13.

<sup>39</sup>R. Dworkin, *Freedom's Law: The moral reading of the American constitution*, 90 (Oxford University Press ed., 1999)

<sup>40</sup>Supra, at 28.

<sup>41</sup>R. Dworkin, *Freedom's Law: The moral reading of the American constitution*, 90 (Oxford University Press ed., 1999)

<sup>42</sup>Supra 15.

<sup>43</sup>Supra 11.

<sup>44</sup>*Roe v. Wade*, 410 US 113 (1973)

<sup>45</sup>Supra 1.

<sup>46</sup>*Planned Parenthood v. Casey*, 505 U.S. 833 (1992).



Roe's trimester framework while affirming its central holding that a woman has a right to abortion until foetal viability. The Roe decision defined "viable" as "potentially able to live outside the mother's womb, albeit with artificial aid". Justice Casey acknowledged that viability may occur at 23 or 24 weeks, or sometimes even earlier, in light of medical advances.

In U.S.A., following propositions may be deduced so far from the judicial decisions as regards to the status of the foetus:

- a. The word 'person' in the 14th Amendment means a human being after birth and not foetus. It follows that the right to life does not begin from the conception.
- b. It cannot be denied, however that there is a potentiality of life in the embryo from the moment of conception, so that the state may take this into consideration in regulating the mother's right to abortion.<sup>47</sup>

So, woman has right to abort until foetal viability and if there is any danger of life of mother or child or both.

### **DRAWBAKS OF PROVIDING COMPLETE AUTONOMY IN SECOND TRIMESTER**

One of the grim realities that must be faced is that the MTP Act is being rampantly misused to carry out sex-selective abortions as is evident from the highly skewed sex ratios in the country. India as a country has been persistently biased towards the girl child. Whether it would be justified under such circumstances to give further time to

parents to consider gender-based termination of pregnancy and provide an enlarged legal umbrella towards acts that are detrimental to the society is a question definitely to be deliberated upon.<sup>48</sup>

Second trimester abortions carry relatively more risk and account for a greater proportion of complications than first trimester abortions, even when the procedure used is safe, the provider skilled and the quality of care high. This is because abortion procedures and pregnancy itself are riskier as pregnancy progresses.<sup>49</sup> The main reason behind the recent low figures of second trimester abortion deaths is the availability of trained professionals and more and more women seeking out their help. This development cannot really be attributed to the Indian diaspora as Indian women continue to resort to services from untrained professional help.

Furthermore, the MTP Act mandates for a second doctor's approval in case of abortions beyond 20 weeks which is impractical from the service delivery point of view especially in rural areas. Getting a second doctor's approval, especially in a rural setting, would be punitive and restrictive in effect, if indeed it is adhered to.

### **POSSIBLE MIDDLE GROUNDS**

- The right of a woman to choose what to do with the foetus has to be balanced with the right of the foetus to survive

<sup>47</sup>Amit Pathak, *Right to Life of Foetus or Right to abortion of a Surrogate Mother*, LEGAL INDIA, (Dec 7, 2011), <https://www.legalindia.com/right-to-life-of-foetus-or-right-to-abortion-of-a-surrogate-mother/>.

<sup>48</sup>Supra 1.

<sup>49</sup>M. Berer, *A Critical Appraisal of Laws on Second Trimester Abortion*, E. caderonosces, (06.04.2009), Available at: <http://journals.openedition.org/eces/248#bodyftn3>, last seen on 28.07.2018.



- There could be no two opinions that a victim of rape shall be allowed the choice to abort, but this choice shouldn't be made at a time when the foetus is viable and the termination of pregnancy could imperil the safety of the mother and the life of the foetus.
- A pregnancy which may result in the child being born with a disability should be terminated only after devising an inclusive approach of dignity to the unborn child.
- In Germany, the law permits abortion after mandatory counselling and a three-day waiting period. Rather than criminalising abortion, German law focusses on counselling, employment security, social welfare, and financial support to persuade pregnant women to give birth to their children. In this way, German law successfully achieves some degree of protection for the unborn by obtaining voluntary recognition of personal responsibility and respect for the personhood of the unborn. India can adopt features from countries having such progressive legislations.
- An urgent need to define what a foetus and when it becomes a "person" entitled to protection under the law.
- In case of foetal abnormalities: It might be suggested here that the adverse ramifications of giving birth to handicapped children may be minimized by creating effective state mechanisms for adequate support to such children and families, both financial and otherwise. Instead of giving a blanket cover to all cases, expert committees may be constituted to evaluate cases beyond twenty weeks on merit so that selective sanction for abortion at this stage is given.
- For a liberalized law like the MTP Act to deliver on its promise of safe and humane abortions, it needs to be accompanied by other social inputs like superior empowerment of women - especially in the matter of the degree of control exercised over their bodies and sexuality.
- No other barriers or hurdles should be imposed on women seeking second trimester abortion. In-depth, country-based research is needed, to bring out the facts on second trimester abortion, as evidence of why it should be treated as a legitimate form of women's health care and supported in public health policy.<sup>50</sup>

### CONCLUSION

Every person has the freedom to make choices. But this freedom ends when there are no longer choices but a single passage of life that is established through arbitrary and unreasonable laws. The right to abortion is as important as every other right and therefore no law can exist that takes away a woman's right to choose over whether to go ahead with the abortion or not. Therefore when s.3 of the MTP Act decides for everyone that an unborn foetus has been in the womb for 20 weeks or more could not be aborted.

The state has their own reasons for such framing of laws but at the end of the day it is not the state has to live life protecting a child who could have mental or physical impairments that could lead to financial and mental trouble to the mother. It is not in the states power to be aware of each and every

<sup>50</sup>Ibid.



---

such child born in this country and it shall continue to stay the same through the existence of s.3. Therefore if the state is in fact unable to ensure the betterment through the enforcement of such a provision then naturally the right to decide must be given to the child's biological mother and no one else. The right to decide on an abortion must be a right that stays protected for years to come and it is up to the government to start now.

\*\*\*\*\*

