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CRIMINALIZATION OF ABORTION IN INDIA: EXAMINING THE CONFLICT BETWEEN LEGAL PROVISIONS AND WOMEN'S PERSONAL LIBERTY

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PREFACE

This article explores the complex relationship between Indian law and reproductive rights, focusing on the impact of Section 88 of the Bharatiya Nyaya Sanhita (formerly Section 312 of the IPC) and the Medical Termination of Pregnancy (MTP) Act, 1971. Despite the MTP Act's intent to protect women's health, its restrictive conditions often undermine women's reproductive autonomy, a fundamental right under Article 21 of the Indian Constitution.

By analyzing key legal cases and the 2021 amendments to the MTP Act, the article critiques the law's failure to align with international standards and its contradictions with other Indian laws. It highlights the chilling effect these legal provisions have on medical practitioners and the broader implications for women's access to safe and legal abortions. The article calls for urgent legal reforms to ensure that women's rights are fully respected and protected in India.

INTRODUCTION

Abortion laws in India have long been a subject of intense debate, caught between the country's historical commitment to life and the evolving understanding of women's rights. Section 88 of the Bharatiya Nyaya Sanhita (BNS), previously Section 312 of the Indian Penal Code (IPC), criminalizes abortion, subjecting women to prosecution under penal law. The Medical Termination of Pregnancy (MTP) Act of 1971 was introduced as a progressive exception to this criminalization, allowing for safe abortions under specific conditions. However, the Act, despite its amendments,

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continues to impose restrictive conditions that undermine women's reproductive autonomy a crucial aspect of personal liberty under Article 21 of the Indian Constitution.

This article delves into the legal complexities surrounding abortion in India, critically analyzing how the MTP Act intersects with Section 88 of the BNS and other related laws. It examines key judgments and amendments, highlighting the tensions between safeguarding women's health and preserving their fundamental rights. The discussion also considers the broader implications of these laws, including their chilling effect on medical practitioners and their alignment (or lack thereof) with international standards on reproductive rights.

THE BHARATIYA NYAYA SANHITA (BNS) AND MEDICAL TERMINATION OF PREGNANCY ACT, 1971

Section 88² of Bharatiya Nyaya Sanhita (BNS) (formerly Section 312 of the IPC) criminalized abortion in India, making it possible for a woman herself to be prosecuted under penal law. The Medical Termination of Pregnancy (MTP) Act, introduced in 1971, was established as an exception to Section 312 to allow for safe abortions in specific situations. The MTP Act permits abortion when the physical or mental health of the woman is at risk, but only under certain conditions. The MTP Amendment Act 2021 aimed to extend the statute's benefits to all women, including single and unmarried women. Coming into effect on September 24, 2021, it brought significant changes to Section 3 of the MTP Act by increasing the upper limit for permissible pregnancy termination from 20 to 24 weeks for specific categories of women, based on the opinion of two registered medical practitioners (RMPs).

Additionally, the Amendment broadened the legal presumption of grave injury to mental health due to contraceptive failure. Previously, this presumption applied only to "married women or their husbands." The Amendment replaced this with "any woman or her partner," thus extending protection to pregnancies outside of marriage. This change clarified that the law now covers all women, regardless of marital status. In 2021 MTP amendment act extended the limit of However, the decision to terminate a pregnancy ultimately rests with the doctor, which undermines a woman's personal liberty to decide whether or not to continue her pregnancy—a liberty that is considered a fundamental aspect of Article 21 of the Indian Constitution, which guarantees personal freedom to all citizens.

The MTP Act authorizes registered medical practitioners to perform abortions up to 20 weeks of gestation, but only if certain criteria are met as outlined in Section 3. These include: (1) the risk to the woman's life, (2) the possibility of serious injury to her physical or mental health (considering her current or foreseeable circumstances), or (3) significant fetal abnormalities. Explanation 1 to this section specifies that the mental trauma caused by a pregnancy resulting from rape is considered a grave injury to mental health. Explanation 2 allows a married woman to obtain an abortion if a contraceptive method used by her or her husband fails. However, by specifically providing for married women, the Act intentionally excludes unmarried women from accessing abortion service

VIOLATION OF ARTICLE 21 OF CONSTITUTION OF INDIA

The provision in MTP act criminalize even consensual abortion unless it meet the stringent conditions posed by the act which violate the right to reproductive autonomy, Decisional autonomy of women which has explicitly been recognized as a facet of the right to privacy, dignity and bodily integrity under Article 21. In Para 22 of the landmark case **of Suchita Srivastava v. Chandigarh Admn., (2009) 9 SCC³**, this Hon'ble Court held that court held that

“Women right to decide reproductive choice is a dimension of personal liberty guaranteed under article 21 of Constitution of India Reproductive choice can be exercised to procreate and abstain from procreation, The crucial consideration is that a woman right to privacy, dignity and bodily integrity should be respected”

Right to make reproductive choice was further reaffirmed by the case **of K.S.Puttaswamy (Privacy-9J.) v. Union of India, (2017) 10 SCC 1⁴**. As a part of right to privacy guaranteed under article 21 of Constitution of India in para 248

“248. Privacy has distinct connotations including (i) spatial control; (il) decisional autonomy; and (il) informational control. Spatial control denotes the creation of private spaces. Decisional autonomy comprehends intimate personal choices such as those governing reproduction as well as choices expressed in public such as faith or modes of dress.”

³ Suchita Srivastava v. Chandigarh Admn., (2009) 9 SCC, Para 22

⁴ K.S.Puttaswamy (Privacy-9J.) v. Union of India, (2017) 10 SCC 1 para 248

Criminalization of abortion further violate the right to dignity as has been established by this Hon'ble Court in the landmark case of **Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 SCC 608**⁵ in Para 7 & 8, wherein the Court held,

The right to life under Article 21 of the Indian Constitution extends beyond mere physical survival, encompassing much more than just animal existence. This was emphasized in the case of Kharak Singh v. State of U.P., where it was held that "life" includes all faculties through which life is enjoyed, such as thinking and feeling. Any act that damages or interferes with these faculties, whether permanently or temporarily, violates Article 21.

Moreover, the right to life includes the right to live with human dignity, which involves access to basic necessities like adequate nutrition, clothing, shelter, and the ability to express oneself and interact with others. Any act that impairs human dignity, including torture or cruel, inhuman, or degrading treatment, is prohibited under Article 21. Such acts cannot be justified by any law or procedure, as they would be unconstitutional and violative of both Articles 14 and 21. The protection against such treatment is also in line with Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights.

CRITIQUE OF THE MEDICAL TERMINATION OF PREGNANCY (AMENDMENT) ACT, 2021

The Medical Termination of Pregnancy (Amendment) Act, 2021, while a step forward in improving access to abortion services in India, has raised significant concerns regarding its limitations, vagueness, and potential violations of constitutional rights. The key issues with the Act, focusing on its failure to recognize various circumstances for late-stage abortions, its vague legal provisions, and contradictions with other laws and international standards

The MTP Amendment Act, 2021, under Section 3(2B)⁶, lifts the upper limit for abortion in cases of substantial fetal abnormalities. However, it fails to recognize other critical circumstances, such as economic hardships, personal crises (e.g., the death of a spouse, divorce), medical illnesses, or financial emergencies, which may lead a pregnant person to seek a late-stage abortion. This narrow focus on fetal abnormalities disregards the broader spectrum of reasons that might necessitate an abortion beyond the statutory limit.

⁵ Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 SCC 608 in Para 7 & 8

⁶ Medical termination of pregnancy amendment act 2021

THE ACT'S VAGUENESS AND VIOLATIONS OF ARTICLES 14 AND 15

The Act's purported objective of protecting the prospective child is legally ambiguous and inconsistent with established standards, as a fetus is not legally recognized as a child. This position was affirmed in the case of **High Court on its Own Motion v. State of Maharashtra (2016 SCC OnLine Bom 8426)**, where the Court accepted international standards regarding fetus rights, clarifying that a fetus does not possess the legal status of a child.

This vagueness leads to violations of Articles 14 and 15 of the Indian Constitution, which guarantee equality and non-discrimination. By extending protection to a non-legal entity (the fetus), the Act creates arbitrary distinctions, infringing upon the fundamental rights of individuals, particularly women, by imposing undue burdens without a clear legal foundation.

Additionally, the Act fails to meet the doctrine of proportionality as established in *Maneka Gandhi v. Union of India* (1978 AIR 597). The restrictions imposed by the Act are not proportionate to its aims, and they fail to balance the rights of the mother against the supposed protection of the fetus, rendering the Act unconstitutional and in need of reconsideration.

The primary objective of the Medical Termination of Pregnancy (MTP) Act was to reduce maternal mortality rates and decrease the number of unsafe abortions in India⁷. However, this aim has not been fully achieved. Instead, the Act has had adverse effects on both women and medical practitioners. According to the **World Health Organization's 2022 report and guidelines titled "Abortion Care Guideline,"**⁸ criminalizing abortion does not reduce the number of abortions performed. Instead, it pushes women towards unsafe abortion practices, thereby failing to meet the Act's original goals.

CONTRADICTIONS BETWEEN SECTION 19 OF POCSO ACT AND MTP REGULATIONS

In **Surjeet Khanna vs. State of Haryana**⁹, the court held that the word 'shall' used in the section 19 of POCSO act clear the intention of legislation that any person who is with the knowledge of

⁷ X Vs. The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi and Ors. Para-54

⁸ <https://www.who.int/publications/i/item/9789240039483>

⁹ *Surjeet Khanna vs. State of Haryana*

sexual offence committed against a minor is under the obligation to report such incident to the police, assuming the pregnancy resulted from rape. This mandatory reporting requirement conflicts with Rule 4 of the medical termination of pregnancy Regulations¹⁰, which is intended to protect the confidentiality and privacy of women seeking abortions.

This legal contradiction can have severe consequences, particularly for adolescents engaged in consensual sexual activity. The fear of mandatory reporting to the police may deter pregnant adolescents from seeking safe and legal abortion services, potentially forcing them into unsafe procedures. This inconsistency undermines the MTP Act's objectives and violates the rights of adolescent girls, necessitating urgent legal reform to resolve this conflict.

FAILURE TO ALIGN WITH JUVENILE JUSTICE ACT AND INTERNATIONAL CHILD RIGHTS

The MTP Act fails to recognize the protections provided by **the Juvenile Justice Act, 2015**¹¹, and **Article 3.1 of the UN Convention on the Rights of the Child (CRC)**¹², which mandates that the best interests of the child be the primary consideration in all actions concerning children.

The Juvenile Justice Act, designed to protect and care for children, should inherently consider the specific needs of adolescent girls, including access to safe abortion services. Although the Act does not explicitly address pregnancy termination, its mandate to prioritize the welfare and best interests of children should extend to safeguarding the health and well-being of pregnant adolescents.

Article 3.1 of the CRC emphasizes the protection of core rights and the participation of children in decisions affecting them. The CRC calls on states to review their laws to protect the best interests of pregnant adolescents, ensuring their access to confidential reproductive health services. Indian law should align with these international principles to fully protect the rights of pregnant adolescents.

¹⁰ Medical termination of pregnancy regulations 2003, Rule-4

¹¹ Juvenile Justice Act, 2015

¹² Article 3.1 of the UN Convention on the Rights of the Child (CRC)

CONTRADICTION WITH INTERNATIONAL JURISPRUDENCE ON REPRODUCTIVE RIGHTS

The MTP Act stands in direct contradiction with established international jurisprudence on reproductive rights, as well as with the decisions of the Supreme Courts of Nepal, Canada, and the laws of countries like Vietnam and Singapore.

In **Lakshmi Dhikta v. Nepal (2009)¹³**, the Supreme Court of Nepal held that a woman cannot be forced to continue with a pregnancy and recognized a woman's right to abortion.

In **R v. Morgentaler (1988)¹⁴**, the Supreme Court of Canada ruled that forcing a woman to carry a fetus to term interferes with her right to life, liberty, and security of the person as guaranteed under the Canadian Charter of Rights and Freedoms.

Vietnam's Law on Protection of Public Health (1989) recognizes the right to abortion without any upper limit, and **Singapore's Termination of Pregnancy Act (1974)** allows abortion on request up to 24 weeks. These international precedents highlight the MTP Act's shortcomings and the need for Indian law to reflect a more progressive and rights-based approach to reproductive health.

THE CHILLING EFFECT ON SAFE ABORTION SERVICES

The MTP Act, coupled with the harsh penalties under the Indian Penal Code (IPC) and the Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994 (PCPNDT Act), creates a chilling effect, perpetuating fear among medical practitioners of prosecution. This fear often leads to refusals to provide abortion services, particularly for adolescent girls, without a court order. This is also observed in the case of **X v. State (NCT of Delhi), (2023) 9 SCC433 (Para 20)¹⁵**

“... Since women's right to access abortion is conditional on the approval by an RMP, the denial of services by an RMP compels women to approach courts or seek abortions in unsafe conditions. A fear of prosecution under this complex labyrinth of laws, including linking of the MTP Act with IPC, acts as a major barrier to safe abortion access, by having a chilling effect on the behaviour of RMPs. The chilling effect historically associated with protection of freedom of speech and expression under Article 19 has an impact on the decision-making of medical professionals

¹³ Lakshmi Dhikta v Nepal 2009

¹⁴ R v Morgentaler 1998

¹⁵ X v. State (NCT of Delhi), (2023) 9 SCC433 (Para 20)

acting under the MTP Act and consequently impedes access to safe and legal abortions and the actualisation of women's fundamental right to reproductive autonomy.”

This situation forces many women to seek unsafe abortions, risking severe health consequences, and even death. The involvement of the court in abortion decisions, as observed by the UN Human Rights Committee in **LMR v. Argentina**¹⁶, violates the right to privacy. The World Health Organization also recognizes that requiring third-party authorization undermines women's ability to make autonomous decisions regarding their reproductive health.

CONCLUSION

The legal framework governing abortion in India, though intended to protect women's health, falls short of recognizing and safeguarding their full spectrum of reproductive rights. The interplay between Section 88 of the Bharatiya Nyaya Sanhita and the Medical Termination of Pregnancy Act reveals significant gaps and contradictions that compromise women's autonomy and personal liberty. The 2021 amendments to the MTP Act represent progress but still leave much to be desired in terms of inclusivity and clarity.

As the article has demonstrated, the current legal provisions create a chilling effect that deters medical practitioners from providing safe abortion services, thereby pushing women towards unsafe practices. This situation not only violates women's rights under Article 21 but also stands in stark contrast to international standards on reproductive health. There is an urgent need for comprehensive legal reform to ensure that women's reproductive rights are fully protected and respected in India, aligning domestic laws with global human rights norms.

¹⁶ Rights Committee in LMR v. Argentina