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Abortion Law

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Why is in news? In SC, questions of foetal viability and rights of unborn child

The Supreme Court is hearing a married woman's request to end her 26-week pregnancy.

The case has travelled to two different Benches of the SC, **raising crucial questions** on the **decisional autonomy of a woman to abort**, and the **legislative framework**.

About the case:

The 27-year-old married woman, who already has two boys, has argued that the pregnancy was unplanned.

She has said that her family income is insufficient to support another child, and that she is under medication for post-partum depression after the birth of her second child.

On October 9, a two-judge Bench of Justices Hima Kohli and B V Nagarathna, after interacting with the petitioner through video conferencing, **allowed the termination of the pregnancy**.

The court reasoned that an **unwanted pregnancy due to failure of contraceptive methods** is the **same as a forced pregnancy** for which **termination is allowed up to 24 weeks**.

However, AIIMS, Delhi, wrote to the SC that it would need a directive on whether a foeticide (stopping the foetal heart) can be done before termination since the foetus is "currently viable".

On October 11, after the AIIMS report, the same Bench was split on allowing the abortion, and the case went before a three-judge Bench headed by Chief Justice of India (CJI) D Y Chandrachud. The Bench called for a fresh medical report to indicate the foetal health and medical condition of the woman.

Has the court allowed termination beyond 26 weeks?

Yes, in several cases.

In August, the Supreme Court Bench headed by Justice Nagarathna held a **special sitting to allow termination** of pregnancy of a rape survivor whose pregnancy was at **27 weeks and three days**.

However, the difference in this case seems to be the marital status of the woman, which indicates that the conception is consensual and not a forced pregnancy in that sense.

In September 2022, a Bench led by Justice Chandrachud allowed abortion for an unmarried woman who was **24 weeks pregnant, and was in a consensual relationship**.

The Bench cited "**transformative constitutionalism**" that promotes and engenders societal change, and said that "the law must remain cognizant of the fact that changes in society have ushered in significant changes in family structures".

Kamaraj IAS Academy

Plot A P.127, AF block, 6 th street, 11th Main Rd, Shanthi Colony, Anna Nagar, Chennai, Tamil Nadu 600040

Phone: **044 4353 9988 / 98403 94477 / Whatsapp : 09710729833**

There are also **instances in which courts have overruled the decision of the medical board** to allow termination.

What about the rights of unborn child?

The observations by the CJI-led Bench oscillated between the rights of a woman “must trump” when it comes to abortion, and the need to “balance out the rights of the unborn child”.

“There is no doubt that our law is far ahead of other countries. We will not have a **Roe versus Wade situation** here. **Our law is liberal and pro-choice**,” the CJI observed.

While courts have read the MTP Act liberally, the test of “foetal viability” as a benchmark to allow abortion is new in India.

The **landmark 1973 US Supreme Court verdict in Roe v Wade** that **made abortion a constitutional right** allowed abortion **up to the point of foetal viability**, that is, the time after which a foetus can survive outside the womb.

Foetal viability in 1973 was pegged at 28 weeks (7 months), which is now with scientific advancement lower at 23-24 weeks.

The **criticism of India’s law** is that the **decision to terminate after 20 weeks is shifted to doctors and not the woman**. While this aspect is not challenged in court, frequent cases of women approaching the court at the eleventh hour point to a legislative gap.

The Indian legal framework on reproductive rights **tilts to the side of the woman’s autonomy** to decide and choose more than towards the rights of the unborn child.

In 2005, Rajasthan High Court in **Nand Kishore Sharma versus Union of India** rejected a challenge to the constitutional validity of the MTP Act on the grounds that it violates the fundamental right to life of an unborn child.

The **right of an unborn child** has, however, formed the basis of legislation that deal with succession or the law banning sex-determination of foetus.

Section 416 of CrPC also provides for postponement of the death sentence awarded to a pregnant woman.

Law for abortion in India:

Section 312 of the Indian Penal Code, 1860, **criminalises voluntarily “causing miscarriage”**.

The **Medical Termination of Pregnancy Act, 1971** (“MTP Act”) was passed due to the progress made in the field of medical science with respect to safer abortions.

India amended the MTP Act 1971 to further empower women by providing comprehensive abortion care to all.

The **new Medical Termination of Pregnancy (Amendment) Act 2021** expands the access to safe and legal abortion services on therapeutic, eugenic, humanitarian and social grounds to ensure universal access to comprehensive care.

MTP Act, 2021:

The **Medical Termination of Pregnancy Act (MTP Act), 2021** allows termination of pregnancy in **three stages**.

Termination of pregnancy **up to 20 weeks** is allowed on the **advice of one doctor**.

If a **pregnancy is 20-24 weeks**, the right to seek abortion is **determined by two registered medical practitioners** as an exception, but **only under certain categories**.

Section 3B of the Rules under the MTP Act lists **seven categories of forced pregnancies**, including statutory rape in case of minors or sexual assault; women with disabilities; or when there is a change in marital status of women during pregnancy.

After 24 weeks, a **medical board** must be set up in “**approved facilities**”, which may “allow or deny termination of pregnancy” only if there is substantial foetal abnormality.

The **upper gestation limit does not apply** in cases of substantial **foetal abnormalities** diagnosed by the Medical Board.

Name and other particulars of a woman whose pregnancy has been terminated **shall not be revealed** except to a person authorised in any law for the time being in force.

Unmarried women can also access abortion under the above-mentioned conditions because it does not mention the requirement of spousal consent. If the **woman is a minor**, however, the **consent of a guardian is required**.

Significance of the MTP Act:

The **reproductive choice** is personal liberty **guaranteed under Article 21** of the Indian constitution.

The laws provide **greater reproductive rights and dignity to women** as abortion is considered an important aspect of the reproductive health of women.

The **rape victims and vulnerable victims** are also **benefitted from Privacy Clause**.

Deaths and injuries from unsafe abortions are largely preventable provided services are performed legally by trained practitioners.

The procedures are performed under proper medical and surgical supervision if done in the hospital setting.

If termination pills are taken at home, it must be under medical supervision and follow up.

Concerns with MTP act:

No right to abortion at will: It has various conditions for the termination of pregnancies.

No recourse for rape victims: For the termination of pregnancies beyond 24 weeks, rape victims cannot approach the Medical Board (can approach in case of ‘substantial foetal abnormalities’ only). So, the only recourse remains is through a Writ Petition.

No time frame for the medical board: Bill doesn’t provide the time frame within which the Medical board must make its decision – any delays may lead to further complications for women.

Transgender and unmarried, if they require abortion beyond 20 weeks, are not considered in the bill

Potential for executive overreach: Special categories of women whose gestation limit will be increased from 20 to 24 will be decided by the central government –and not by a sovereign body like parliament

Shortage of medical staff: According to a 2018 study in the Lancet, 15.6 million abortions were accessed every year in India as of 2015. However, the Ministry of Health and Family Welfare’s 2019-20 report on Rural Health Statistics indicates that there is a 70% shortage of obstetrician-gynaecologists in rural India.

Non-sync with other laws: The new law is **not in sync with other central laws** such as the laws on persons with disabilities, on mental health and on transgender persons.