

ABORTION IS A WOMAN'S RIGHT TO DECIDE

Relevant for: Developmental Issues | Topic: Rights & Welfare of Women - Schemes & their Performance, Mechanisms, Laws Institutions and Bodies

Given the phenomenal expansion in feminist jurisprudence over the last decade, particularly on the issue of a woman's right to choose to have an abortion, it now appears quite plain that the central government's amendment to the abortion laws not only retains the traditional notion that the state must intervene and decide for women as to when and in what circumstances abortions may be carried out, but even the pathetic measures set out in the [Medical Termination of Pregnancy \(Amendment\) Act 2021](#) are too little and have come too late.

This government seems to be incompetent in understanding a woman's right over her own body. The government's conduct is particularly appalling since it comes after over a decade of procrastination and obstruction where indigent women in difficult circumstances tried to have abortions done and were stonewalled by government officials and prosecutors. The passing of this Act marks a new phase of the struggle to assert the absolute right of a woman over her body.

The Medical Termination of Pregnancy Act, 1971 (MTP) may have been considered progressive at that time considering that provisions in the Indian Penal Code regarding termination of pregnancy were enacted over a century ago in keeping with the British law on the subject. Abortions were made a crime and the woman concerned and her doctor would invariably land up in jail. Section 3 (<https://bit.ly/3dFBgZH>) put an outer limit of 20 weeks on the length of the pregnancy and required two doctors to certify that the continuation of the pregnancy would involve a risk to the life of the woman or grave injury to her physical or mental health or that there was a substantial risk that the child born would suffer from such physical or mental abnormalities as to be seriously handicapped.

Explanation 1 dealt with rape cases where it was to be presumed that the anguish caused would constitute a grave injury to the mental health of the woman. Explanation 2 laid down that any pregnancy occurring as a result of failure of contraception would likewise be presumed to constitute a grave injury. Account needed to be taken of the pregnant woman's actual or reasonably foreseeable environment. Section 5 created an exception to the 20 week limit whenever such an abortion was immediately necessary to save the life of the pregnant woman.

The 1971 Act was based on "The Report of the Shantilal H. Shah Committee to Study the Question of Legislation of Abortion" 1967, which set out the limitations of technology which made it hazardous for women to have abortions done after the 20th week. This limitation disappeared with the phenomenal improvement in technology and processes rendering it possible to carry out abortions safely right up to full term. Thus the excuse of "safety of the woman" was no longer tenable to be used for restricting women's rights.

The central government has been criminally negligent in allowing the law to stand as it has for five decades. It has pushed women seeking abortions underground where terminations are carried out in unhygienic and dangerous places, and in horrific situations. Even today about 800,000 illegal and unsafe abortions are performed every year in India, many of them resulting in morbidities and death. The government has not cared. Political parties of all hues had one thing in common; women dying do not matter.

The decision of the Bombay High Court in *Nikita Mehta vs State of Maharashtra*, saying that it was not open for the courts to double guess the statutory restrictions, sparked the debate

around the right to abortion in India. From 2008 onwards, over 300 petitions were filed in the Supreme Court and the High Courts. Given the gruesome context from which these petitions sprung the Supreme Court generally responded well by ignoring the statutory provisions as it was patent that not allowing abortions to take place would have caused grave injustice to the woman. The Court then routinely allowed abortions way past the 20 week limit. In *Murugan Nayakkar vs Union of India & Ors*, the abortion was permitted at 31 weeks, very close to full term.

The Medical Termination of Pregnancy (Amendment) Act 2021 fails miserably on the main count while introducing few collateral progressive measures. First, the Act fails to recognise the absolute right of a woman over her body in taking decisions regarding abortions and reproductive health. It still reserves to the state the right to dictate to the woman that she cannot have an abortion at will. Second, even though the limit has been pushed back from 20 to 24 weeks, this comes with the same state conditionalities as before. Third, 24 weeks is not rational given today's technology where abortions can be done safely up to full term.

By far the biggest failure of the government lies in enacting section 3(2B) which requires the pregnant woman to approach a medical board in cases of substantial foetal abnormalities and where she has crossed the 24 week limit. These boards impose insurmountable obstacles to the woman seeking late abortions. First, what used to be an exchange between the pregnant woman and her gynaecologist who would take a decision as to safety, has now been replaced by a board of a minimum of three doctors. This is totally unnecessary and breaches privacy.

Second, and this is indicative of complete non-application of mind, the Act provides in section 3(2C) for a single board for a State. Given the millions of abortions taking place in India past the deadline, it is impossible for one board to handle all cases. Third, assuming multiple boards will be established, the records show that no State has the finances or the human resources to maintain the operation and functioning of these boards. Fourth, the right to seek termination is restricted to "such category of women as may be prescribed by rules". One wonders what categories of women would be permitted termination of pregnancies!

The main objection remains; that boards are totally unnecessary and an invasion of privacy, and pregnant women, like they used to do, should be left alone to consult their gynaecologist in late term pregnancies and carry out their abortion under the certificate of their own gynaecologist that the abortion can be performed safely. This is the trend worldwide and in the courts. The Indian government needs to wake up and educate itself on women's emancipation worldwide.

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To reassure Indian Muslims, the PM needs to state that the govt. will not conduct an exercise like NRC

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