MEDICAL TERMINATION OF PREGNANCY ACT- AN ARCHAIC SOCIETY OR AN ARCHAIC STATUTE?

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Abortion as a term and as an idea permeates many fields, be it human rights, medicine, law, technology. A subject that has found its place in numerous discussions world wide, be it in human rights forums, in women's group discussions, in the recent US Presidential campaigns… the list is just endless. Simply put, abortion is the termination of pregnancy. The Merriam-Webster dictionary[1] defines abortion as, "the termination of a pregnancy after, accompanied by, resulting in, or closely followed by the death of the embryo or fetus; induced expulsion of a human fetus."

And this much debated topic is still an issue in controversy, with the opinions of the world divided into various camps. While some countries absolutely ban abortion, terming it as taking away the life of an unborn, others are more liberal towards it, upholding the basic idea of abortion, while still others openly accept and promote the idea. While countries like Ireland fall into the first category, India and the United States are examples of members of the second and third category.

Abortion around the world

As mentioned earlier, the world, essentially, is divided into four camps when it comes to approaching abortion. One group allows abortion at any time during

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[1] http://www.merriam-webster.com/dictionary/abortion

pregnancy, for whatever reasons. In such countries, like Australia, or the United States currently, abortion is completely legal. Diametrically opposed to this, is the camp that puts a blanket ban on abortion. The only time it is allowed in such countries would be to save the life of the mother of the child or to protect her physical health. Pakistan, Afghanistan, many African countries like Congo, Libya, Angola and some South American countries like Peru, Chile and Venezuela are included in this group. The third group is slightly more relaxed, but they hold a tight rein over their abortion laws. It is legal only in "hard cases", such as rape, incest, and/or deformed child. Countries like Brazil, Mexico, Sudan, Iran etc fall into this category.

The last group attempts to strike a via media between the above extreme views. It legalizes abortion, but caveats it with time frames and makes it illegal beyond a period of time. India, Russia, China, New Zealand are some of the countries following this principle.[2]

The paradoxical question- Medical Termination of Pregnancy Act, 1971: an archaic act or an archaic society?

To answer this question, we need to look at the structure of the Act as well as its working. The construction of sections, the reasons for passing the Act, the comprehensiveness of the Act on the one hand, and the cases that have come up before the court regarding this Act and how they have interpreted these sections, on the other hand, would lead us to the ultimate conclusion of the question that has now been posted.

[2] World Abortion map in http://www.pregnantpause.org/lex/world02map.htm

This article's first attempt is to dissect the Act and look into its various provisions. Then a recent case is presented to analyze how the judiciary has interpreted certain provisions of the Act. Examining both of these, the article shall attempt to conclude this topic.

THE MEDICAL TERMINATION OF PREGNANCY ACT, 1971

The act at a glance

The Medical Termination of Pregnancy Act 1971 regulates the law relating to abortion in India. The Act is encapsulated in 8 sections, concisely setting forth the law on this subject. While the first two sections set out the scope and clarify certain terms in the Act, the operative section would be the third, which lays down the conditions when pregnancy may be terminated by a medical practitioner. Section 4 defines the place where pregnancy may be terminated while the fifth section sets out cases where sections 3 and 4 would not apply. Section 6 and 7 empower the Central Government to make rules and regulations respectively while section 8 protects any action taken or any damage caused under this Act by any registered medical practitioner acting in good faith.

Analyzing Section 3 and 5 of the Medical Termination of Pregnancy Act, 1971

Section 3 of the Medical Termination of Pregnancy Act is titled, "when pregnancy may be terminated by registered medical practitioners". It goes onto say,

"(1) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under

that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.

(2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner, -

(a) Where the length of the pregnancy does not exceed twelve weeks if such medical practitioner is, or

(b) Where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioner 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 to her 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 to be seriously handicapped.

The two explanations appended to this sub-section set out what constitutes grave injury in this case.

(3) In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant women's actual or reasonable foreseeable environment.

(4) (a) No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a lunatic, shall be terminated except with the consent in writing of her guardian.

(b) Save as otherwise provided in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman.

Succinctly summarizing the main provisions of the Act, Section 3, at the outset absolves registered medical practitioners of guilt if they have performed the termination of pregnancy in accordance with the directions given by the Act.

The second sub section is the operative section of the Act and the one that lays down the time during which the termination could be performed. It allows termination of pregnancy within 12 weeks of conception. If it exceeds such period, but is within 20 weeks, then a special case should be shown to be present, as provided by the section. Thus, abortion beyond the prescribed statutory limit of 20 weeks would be illegal.

Section 4 specifies two types of places wherein an abortion can be performed, namely,

(a) A hospital established or maintained by Government, or

(b) A place for the time being approved for the purpose of this Act by Government.

Section 5 is more in the nature of an emergency provision, over riding the conditions set out in its preceding sections by saying that, "The provisions of section 4, and so much of the provisions of sub-section (2) of section 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman."

In such emergency cases, no time line applies. What one can consider here is whether the condition, 'to save the life of the pregnant woman' is the only condition that warrants an emergency provision overriding other operative sections of the Act? Is it complete in itself? Should there be a provision for the child's health when there is a provision for the dangers to the mother's health?

The inclusion of an emergency provision widen the scope of the Act, nonetheless, but such provision should be of a nature so as to include within its ambit a wide variety of cases that will promote judicial activism and not limit Judges by their conditions.

In the case we shall consider below, Nikita Mehta's[3] case, we shall see how the reach of section 5 may be slightly restricted.

Nikita Mehta's case[4]

A case that made it to the front pages of the newspapers in recent times, this unique case brought the scope of this section under the viewer. The brief facts of the case are as follows: Nikita Mehta was around 25 weeks pregnant when she discovered that her child has a congenital heart block and would require a pacemaker from birth onwards.

She, along with her husband approached the High Court praying for permission to abort the child, who, if born, would be severely incapacitated. This sensational case sparked off various ethical, medical and legal debates. The High Court, relied upon reports from an expert team of doctors, constituted for this purpose at the J J Hospital, and other medical reports to aid them conclude the case. After perusing various reports, the High Court refused permission to the Mehtas to abort their child.

Addressing various points, the court felt that, "In the circumstances, the petitioners have not placed on record even any material which could perhaps justify

[3] WRIT PETITION (L) NO.1816 OF 2008
[4] WRIT PETITION (L) NO.1816 OF 2008

the exercise of our discretion in writ jurisdiction to allow the petitioner No.3 (here, Mrs. Nikita Mehta) to terminate the pregnancy. No exceptional case in that regard has been made out so as to exercise discretionary jurisdiction under Article 226 of the Constitution of India to issue any writ in the matter."[5]

Section 5 (1) of the Act reads, "The provisions of section 4, and so much of the provisions of sub-section (2) of section 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman."

The Petitioners, through the application sought a declaration that Section 5 of the Act does not include the eventualities specified under Section 3(2)(b)(ii) of the said Act is ultra vires and that, therefore, the Section 5(1) of the said Act should be read down to include the said eventualities, and consequently should be read to include the following words "and when 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"[6].

The High Court while refusing to interpret Section 5 (1) in this way reasoned that this would virtually amount to legislating upon the Act, a function the Courts are not empowered to perform. In the words of the Hon'ble Court, "The Court cannot add words to a statute or read words into it which are not there. Assuming there is a

[5] Point 22 in the judgment by R M S Khandeparkar, A A Sayed, JJ
[6] From the judgment by R M S Khandeparkar, A A Sayed, JJ

defect or an omission in the words used by the legislature, the Court could not go to its aid to correct or make up the deficiency."[7]

It further went on to say,

"It cannot be disputed that in the matter of procedure, in the absence of any specific provision in that regard, nothing prohibits this Court from laying down certain guidelines whenever required for effective implementation of any statutory provision. However, that would not include the power to frame law relating to substantive rights of the parties."[8]

This is one of those cases that set the wheels of the judicial system in motion. An entirely new interpretation of the section was presented. However, on the counter-balance were other social factors. While it could be argued that the Mehtas deserve to have the law on their side and be allowed to abort, setting a precedent of this kind could prove counter productive to the judiciary. Would people take the easy way out and cite this precedent to aid their case every time they want to abort beyond the prescribed statutory limit? Will people use this case as an excuse for aborting a child with 'minor' problems before giving him or her, a chance to survive in the world? In this quest for perfection, will the decision prove to be a bane for the judiciary? These are all questions that the Judges had to consider before they pronounced their judgment on the case. The question was not confined to Mr. and Mrs. Mehta and their problems. It is a wide social issue and a decision of this nature could have many, often unforeseen ramifications.

On the other hand, are the Mehtas justified in their claim? They were courageous enough to approach the Courts and take the legal route instead of going

[7] Point 25 in the judgment by R M S Khandeparker and A A Sayed, JJ
[8] Point 24 in the judgment by R M S Khandeparker and A A Sayed, JJ

to the dime-a-dozen 'quick-fix' clinics that are available. Bringing a child into this world and rearing it is amongst the hardest jobs for a person to do. And if the child is going to be suffering from the moment of birth, if he or she is going to feel the cold table of a surgeon instead of loving, warm maternal hands as its first earthly experience, then are we fair in granting such a life to the child? Medical services, as we all know, are expensive. Can a middle class family bear the expenses that are incidental to this child's survival for the rest of the child's life? Is it fair to impose such a condition on them?

There was a lot on the balance and to weigh the factors against each other and still see that justice is done was a tough task indeed. Going by newspaper reports, various blogs and personal statements, there are many in the general public who condemn the Judges decision. However, the Judges have striven to consider every factor, be it social, ethical, legal and their implications and in a neatly justified statement, pronounced a judgment that could only come with a lot of thinking.

MTP: ARCHAIC STATUTE OR SOCIETY?

The word 'archaic' is defined to mean, "No longer current or applicable; antiquated.[9]"

Thus, what must be examined now is whether the provisions of the act or the ideas of the society are outmoded. To correctly answer this question, let us look into how much each of these entities affects the entire process of abortion.

[9] http://www.answers.com/topic/archaic

Indian society has always leaned towards the conservative. Abortion is not something that is taken very well in Indian society, especially induced abortions. The decision is usually kept within the family and close ones.

And according to a report by the National Organization for Women in the United States[10], women are just as likely to abort children whether it is legal or otherwise. A World Health Organization (WHO) report along with AGI found in 2007 that abortion rates are "virtually" equal in rich and poor countries.[11] The same article details abortion statistics in countries where it is being performed openly, although disallowed by the law. Nikita Mehta's case is among the few ones on the Medical Termination of Pregnancy Act that has addressed the Act specifically and attacked its provisions. Clinics openly flouting the provisions laid down by the legislature are not uncommon.

Having said the above, let us also proceed to examine the scope of the Act. Until now there have hardly been any cases which have brought up the reach of the Medical Termination of Pregnancy Act into question. One major reason for this may be the easier, cheaper, faster, more clandestine way of just running into some clinics and getting over with the process instead of fighting for better legal protection. But now that the question has come up for all, is the Act really 'antiquated and archaic'?

[10] http://www.nowfoundation.org/issues/reproductive/050808-abortion_worldwide.html
[11] Supra at note 9

STATEMENT OF OBJECTS AND REASONS FOR THE ENACTMENT OF MEDICAL TERMINATION OF PREGNANCY ACT, 1971:

The provisions regarding the termination of pregnancy in the Indian Penal Code which were enacted about a century ago were drawn up in keeping with the then British Law on the subject. Abortion was made a crime for which the mother as well as the abortionist could be punished except where it had to be induced in order to save the life of the mother. It has been stated that this very strict law has been observed in the breach in a very large number of cases all over the country. Furthermore, most of these mothers are married women, and are under no particular necessity to conceal their pregnancy.

In recent years, when health services have expanded and hospitals are availed of to the fullest extent by all classes of society, doctors have often been confronted with gravely ill or dying pregnant women whose pregnant uterus have been tampered with, a view to causing an abortion and consequently suffered very severely.

There is thus avoidable wastage of the mother's health, strength and, sometimes, life. The proposed measure which seeks to liberalize certain existing provisions relating to termination of pregnancy has been conceived (1) as a health measure when there is danger to the life or risk to physical or mental health of the woman; (2) on humanitarian grounds such as when pregnancy arises from a sex crime like rape or intercourse with lunatic woman, etc., and (3) eugenic grounds Where there is substantial risk that the child, if born, would suffer from deformities and diseases.

On a plain reading of these reasons, it is clear that the Act intended to serve very noble and social causes. These causes are as prevalent now, as they were 40 years ago and are as important to be held on to. We have analyzed the Act hereinabove. The provisions of the Act too, are pretty comprehensive. What is now needed is a little tweaking to keep up with times. We are now living in a sort of jet-age. Technologically and economically we have advanced phenomenally in the last 40 years but medically, there are new problems that have come to ail us. 'Lifestyle diseases' was a term unheard of in the 1970s, but it is very much a part of our lives now. Contraception methods, various contraceptives and antibiotics that aid contraception have modified the rules of conception. But it is not only the changing times that warrant an amendment in the law as it stands today on this topic. Just like every mother has a recognized right to abort the child if it threatens her physical health, every child should have the right to choose, whether or not to enter this world if their world is going to be one of pain and suffering. And this choice, they make vicariously, through their parents.

The present Act under section 5 (1) provides only for dangers to the mother's health. What needs to be added is another sentence, providing for the child's health, 'when 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.[12]'

Of course this clause needs to be used with caution. However, we are now concerned with the construction of the section so that it includes within its ambit a wide variety of cases instead of restricting its scope, and maybe, deny justice to future Mehtas.

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[12] The Petitioners, Dr Nikil Dattar, Mr. and Mrs. Mehta had prayed in their plaint to read down Section 5 (1) of the MTP Act, 1971 so that it includes this clause.

Childbirth and child rearing is amongst the most meaningful activities in a human being's existence, and they should also have the right to decide whether or not this experience could be handled by them or not. Taking care of a physically sick child for the rest of his or her life a tough job. It requires patience, financial sources, and a lot of sacrifice. Not everyone is blessed with these traits or the ability to accomplish this task.

As for our society, views are changing towards the institution of marriage. Society is essentially a collection of people, and gradually, with education and an increased Western influence, a more liberal outlook is developing, and people are gradually letting go of rigid, conventional values.

CONCLUSION

The Medical Termination of Pregnancy Act, 1971, as it stands now could use some changes. It has effectively managed to fit in regulating provisions without making the Act very rigid. At the same time, there are provisions that have limited the scope of the Act.

In the light of the recent Nikita Mehta case, there were suggestions that the statutory limit mentioned in section 3 should be increased from 20 to 24 weeks like it stands in some other countries. It could be argued that extending the prescribed limit by another four weeks is not going to make any real difference. They are just ball park figures. However, another way of looking at this would be giving time to the parents and the doctors to decide about the health of the child growing inside the womb. A child would be better formed at 24 weeks than at 20 weeks and this is a suggestion that could be incorporated by the legislature.

"The test of the morality of a society is what it does for its children."
Dietrich Bonhoeffer (1906 - 1945)

The judiciary and the legislature are as much included within the realm of 'society' as are the general public. What **is** our society going to do for its children? What should the society do for its children, for its expectant mothers and fathers? How high will our society rank on the moral scale with respect to this issue? Its time to tweak the nuts and bolts of the Act to bring it in consonance with the present.