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# Impact of the 2023 Landmark Supreme Court of India Judgment upon Abortion Laws, Implementation and Limitation

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## ABSTRACT

*In October 2023, the Hon`ble Supreme Court of India gave a landmark ruling in regards to the eligibility, implementation and limitations inherent in the MTP Act,1971 wherein the rules have been amended in 2021 to afford greater eligibility and their ease of application of the rules in eligible cases. The Apex Court, so to say has laid down law I relation to abortions permitted and has interpreted law harmoniously with the MTP Act and with the existing medical evidence as evidenced. The proceedings also brought out the power of the medical professionals and medical boards who exercise great caution in giving a balanced opinion based on medical recommendations and best medical evidence. For the first time, the Hon`ble Apex Court has drawn a clear distinction between simply `permitting an abortion` and `actual stopping of the neonatal heart` if the child is born alive despite the termination procedure. This article revisits the provisions of the MTP Act and discusses the implications of the Hon`ble Apex Court ruling on clear interpretation of the above Act. The rights of the unborn foetus as per Indian law is discussed and how the MTP Act is at crossroads with various rights of the unborn foetus. A discussion is also made in reference to and reasons therefor for overturning of Roe vs Wade judgment by the U.S Supreme Court in 2022. The implications of the MTP Act and the what the provisions mean in constitutional, ethical, moral and religious terms is outlined, particularly applicable to our country, with its rich traditions, religious and cultural heritage. The rights of the intending father, or the lack of it has been discussed with a commentary on how a woman`s decisions to otherwise is administered in most democratic countries*

**Keywords:** Abortion, Roe vs Wade.

## I. INTRODUCTION

**`No Immediate Threat to Mother's Life; No Foetal Abnormality': Supreme Court Rejects Married Woman's Plea to Abort 26-Week Pregnancy** screamed the national dailies in India. The Hon`ble Supreme Court of India, on the 16<sup>th</sup> October 2023 gave a landmark and progressive

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ruling on the requirements and the limitations imposed on late abortions. <sup>1</sup> Pertinent to note in the judgment is that the concept of foetal viability and the rights of the unborn child have been mentioned during the hearings, but which were not hitherto taken up by the courts in India.

A 27-year-old woman had petitioned the Hon`ble Supreme Court of India for permission to procure an abortion at 26 weeks of pregnancy. 2-judge women bench on hearing the matter, gave a verdict allowing the woman to proceed with the abortion, directing the hospital in New Delhi to carry out the same. Interestingly, the very next day, one of the doctors on the medical board who had evaluated the patient, being dismayed by the verdict emailed the Learned Assistant Solicitor General (ASG) to express his discontent in writing. This matter was swiftly taken up by the same 2-judge bench which resulted in one of the Hon. judges withdrawing her consent to her own verdict on the ground that in her `judicial conscience` could not allow her to terminate the foetal heartbeat of the unborn child and thus gave a dissenting judgment. This in a hung verdict which was petitioned by the Ld. ASG before a larger 3-judge bench who set aside the previous verdict and thus disallowed the abortion on the grounds that the advanced age of gestation was outside what was legally and medically allowed under the Medical Termination of Pregnancy, 2021 (MTP Act).<sup>2,3</sup> Additionally, the court took note of the clear medical opinion, that, there was no risk to the mother or the foetus thus disqualifying her from the criteria as laid down in the MTP Act.

Viewed from any aspect, this judgment comes as a refresher and so to say the Hon. Court has rightly interpreted law harmoniously with available medical evidence and medical recommendations, and thus, has laid down the law removing any ambiguity which was governing such judgements in the lower courts across the country. It is a fact borne from records that several High Courts have in the past misinterpreted the provisions of the MTP act and seem to have allowed abortions on clearly what could be termed on untenable and unacceptable grounds. This may be construed as judicial officers without any substantial knowledge, experience or expertise in medicine allowing termination of life well beyond what is safe and acceptable medical recommendations arising from research studies, validated scientific data and expert medical opinions. Viewed from a solemn angle and pro-life supporters, it may variously be interpreted as award of a death penalty to the unborn child without any charge or conviction brought against or proven against an unborn child, punished for the actions of others. The record of the Nuremberg Tribunal<sup>4</sup> shows that abortion was recognised as a crime against humanity, not just when the procedure was carried out for eugenic reasons or under compulsion. The decriminalisation of abortion itself was considered an “inhumane act” and “an act of extermination”. This concept is uncomfortable, yet true and thus a `direction to abort or allow

abortion` particularly in the period beyond the MTP Act and against medical recommendations for questionable reasons is alien to every area of jurisprudence.

## II. THE MTP ACT

The MTP Act is a law that regulates the termination of pregnancy in India. It was enacted in 1971 and amended in 2021 to expand the access to safe and legal abortion services for women. Here are some key points about the MTP Act:

- The MTP Act allows a woman to terminate her pregnancy up to **20 weeks** of gestation with the opinion of one registered medical practitioner.
- The MTP Act also allows a woman to terminate her pregnancy up to **24 weeks** of gestation under certain circumstances, such as rape, incest, foetal abnormalities, or other vulnerable situations, with the opinion of two registered medical practitioners.
- The MTP Act does not apply any upper gestation limit for cases of substantial foetal abnormalities diagnosed by a medical board.
- The MTP Act protects the confidentiality and privacy of a woman who undergoes an abortion. Her name and other particulars cannot be revealed except to a person authorised by law.
- The MTP Act recognises the failure of contraception as a valid ground for abortion, regardless of the marital status of the woman.

The MTP Act aims to provide universal access to reproductive health services and empower women by giving them more choice and autonomy over their bodies. It also seeks to reduce maternal mortality and morbidity caused by unsafe abortions. The MTP Act is considered one of the most progressive laws on abortion in the world.

The history of the MTP Act is a fascinating topic that reflects the changing attitudes and policies towards abortion in India. Here is a brief summary of the main events and milestones in the evolution of the MTP Act:

- Before 1971, abortion was illegal in India under Section 312 of the Indian Penal Code, 1860, which was enacted by the British colonial government. The only exception was when the life of the woman was in danger<sup>1</sup>.
- In 1966, a committee headed by Shantilal Shah was set up by the government to review the abortion law and suggest reforms. The committee recommended legalising abortion on various grounds, such as rape, incest, contraceptive failure, social and economic

factors, and foetal abnormalities.

- Based on the committee's report, the MTP Act was introduced in Parliament in 1970 and passed in August 1971. The MTP Act came into force on April 1, 1972, and allowed a woman to terminate her pregnancy up to 20 weeks of gestation with the opinion of one registered medical practitioner. The MTP Act also recognised the failure of contraception as a valid ground for abortion, regardless of the marital status of the woman.
- The MTP Act was amended in 2002 to simplify the procedures and increase the availability of safe abortion services. The amendment also introduced provisions for the constitution of a medical board to decide on cases beyond 20 weeks of gestation and for the registration of approved places for providing abortion services.
- The MTP Act was further amended in 2021 to expand the access to safe and legal abortion services for women. The amendment increased the gestation limit to 24 weeks for certain categories of women, such as rape survivors, minors, incest victims, and those with physical or mental disabilities. The amendment also removed any upper gestation limit for cases of substantial foetal abnormalities diagnosed by a medical board. The amendment also reduced the requirement of two medical practitioners' opinions to one for up to 20 weeks of gestation.

The MTP Act is considered one of the most progressive laws on abortion in the world, as it aims to provide universal access to reproductive health services and empower women, married or unmarried, by giving them more choice and autonomy over their bodies. It also seeks to reduce maternal mortality and morbidity caused by unsafe abortions.

### **III. RESONANCE WITH THE OVERTURNING OF THE *ROE V WADE* RULING BY US SUPREME COURT**

On 24 June 2022, the US Supreme Court overturned *Roe v Wade*, issuing a ruling that upheld a Mississippi law, banning most abortions after 15 weeks of pregnancy, and striking down constitutional protections for abortions. The ruling from *Roe v Wade* had previously in 1973 affirmed a constitutional right for an abortion through the 14th Amendment's fundamental "right to privacy" provision. The decision had given women total autonomy to terminate a pregnancy up to about 24 weeks, and allowed some state influence over abortions in the second and third trimesters. This overturning has come as a huge victory for pro-life activists. The USCCB<sup>5</sup> advanced several Legal Reasons as to why *Roe vs Wade* was flawed when it was

pronounced then, and overturned now.

1. The Court's original decision in *Roe v. Wade* exceeded its constitutional authority. Under the legal system established by the U.S. Constitution, power to make laws is vested in Congress and state legislatures. It cannot be the role of the Supreme Court to substitute their own policy preferences over those laws enacted by the people's elected representatives. In *Roe v. Wade* a `right to abort` was nowhere in the Constitution nor was derivable from values embodied therein.

2. The Court misrepresented the history of abortion practice and attitudes toward abortion. It is a widely created but a wrong impression that abortion had been widely practiced even in the prudishly Victorian 19th century. It put undue pressure and gave unfair legal directions upon the physicians who took the Hippocratic Oath which states, "I will give no deadly medicine to anyone if asked, nor suggest any such counsel; and in like manner I will not give to a woman a pessary to produce abortion."<sup>6</sup> This enduring standard was followed until the *Roe* era and is also reflected in Declarations of the World Medical Association in 1968, "I will maintain the utmost respect for human life, from the time of conception..."<sup>7</sup>

3. The majority opinion in *Roe* wrongly characterized the common law of England regarding the status of abortion. The original ruling in *Roe vs Wade* inferred, albeit wrongly that the law allowed women great latitude to abort their children in the early months of pregnancy. This is akin to claiming that people had a general right to spread computer viruses before such acts were criminally prosecuted.

4. That the Court distorted the purpose and legal weight of state criminal abortion statutes. In the 19th century, procedures permitting abortion were considered only if necessary to preserve the mother's life. The primary reason for stricter abortion laws, was to afford greater protection to unborn children. This reflected a appreciation of prenatal life based on medical knowledge.

5. A `private right` to decide to have an abortion has no foundation in the text or history of the Constitution. *Roe v. Wade* locates a pregnant woman`s `constitutional` right of privacy to decide whether or not to abort her child either` attributed to the US 14<sup>th</sup> Amendment's concept of personal right and choice`. The Fourteenth Amendment was never intended to create any new rights, but only to secure the rights and liberties already guaranteed by the Constitution.

6. Right of the man: A pregnant woman's right to abort nullifies the male right to procreate which means the man no longer has a right to bring children into the world, but only a right to fertilize an ovum, which his partner can then destroy at will and without his knowledge or consent.

7. The commonest reasons for sanctioning abortions by the state and indeed the Courts border upon unreasonable arguments i.e., “Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by childcare.” By this reasoning, *Roe's* liberty can also extend to include destroying unwanted toddlers!

8. Although it reads the 14<sup>th</sup>. Amendment extremely expansively to include a right to abort a child, the Court in *Roe* adopts a very narrow construction of the meaning of "persons" to exclude unborn children. The difficult question is determining when life begins." This is determined by science, not the courts. But while seeming to sidestep the question, the Court in fact resolved the question at birth, by allowing abortion to be legal throughout pregnancy. Strangely, most countries punish for even hurting a pregnant animal<sup>8</sup> while allowing human abortions.

9. The *Roe* Court assumed the role of a legislature in establishing the trimester framework. The key elements of the *Roe* framework – trimesters and viability – are not found in the text of the Constitution. The trimester framework gave the Courts self-bestowed power of "ex officio medical board" with powers to approve or disapprove medical and operative practices and standards throughout the US.

10. The Court describes the right to abortion as `fundamental`. It is perverse to claim that abortion is deeply rooted in history or traditions or that "ordered liberty" implicitly demands the rights to destroy one's child. It the Court's duty to reverse wrongly decided rulings. Pertinent to note that US Supreme Court has overruled in whole or part 34 of its previous constitutional decisions in past 21 years.

#### **IV. IS PAIN EXPERIENCED BY THE UNBORN FOETUS?**

In the past decade, there has been a gradual shift in the literature concerning foetal pain, from disputing the existence of foetal pain to debating the significance of foetal pain.<sup>9</sup> As the medical evidence has shifted in acknowledging foetal pain perception prior to viability, generally defined as 22–24 weeks gestation, this knowledge has important implications for foetal procedures and abortions. Abortion rights advocates assert that foetal pain legislation seeks to erode the autonomy of the pregnant woman and claim that the foetus is not a ‘person’ protected by constitution. It must be noted that even in such arguments, it has never been explicitly denied that such procedures may cause pain during abortions. Such arguments, too simplistically, place woman rights above all else.

Until the late 1990s, foetal pain was largely un- recognized and untreated. It is now seen that foetal pain capacity beginning in the first tri-mester, potentially as early as 8–12 weeks

gestation, is now more likely than not. Increasingly, scientists believe that it is possible for a foetus to feel pain as early as 12 weeks (3 months) into its development. Much of the disagreement focus on whether certain parts of the brain and nervous system must be fully developed before a foetus can feel pain. Researchers can't know for certain if a foetus feels pain but conversely, they also don't know that it does not!

Neuro-developmental basis of foetal pain<sup>10</sup> relies on understanding brain development to what is considered necessary for pain experience. At 12 weeks' gestation there are the first projections from the thalamus into the cortical subplate. The subplate is a transient developmental structure that forms underneath the cortical plate proper. Neurons destined for the cortical plate first migrate into the subplate where they sufficiently mature and then the neurons migrate to their mature position in the cortex. Thus, current neuroscientific evidence supports the possibility of foetal pain well before the "consensus" cut-off of 24 weeks.

Foetal response to unpleasant or painful stimuli includes withdrawal reflexes, whole body movements away from the noxious stimulus, and facial grimacing. Facial musculature develops by 16 weeks gestation, and facial movements are observable on 4-D ultrasound at 20 weeks.

## **V. RIGHTS OF THE UNBORN CHILD IN INDIAN LAW**

In Indian law, a person is defined as "any being to whom law regards as capable of rights and duties".<sup>11</sup> This includes both human beings and legal entities such as corporations that are recognized by law as subjects of rights and duties. The concept of legal personality is a fiction of law that has been created for the purpose of bestowing the character and properties of individuality on a collective body of persons. Thus, the unborn child is considered a 'legal person' under Indian law and enjoys a right to property of their parents under Section 13 of the Transfer of Property Act 1882 and right to life under Article 21 of the Indian Constitution. The Indian Succession Act, 1925, The Indian Penal Code, 1860, The Hindu Succession Act, 1956, and The Code of Criminal Procedure, 1973 also provide some rights to the unborn child.

### **(A) Ethical and Moral considerations**

People feel particularly strongly about abortion because there is no way of getting any opinion from the foetus who is the potential 'victim' and is an entirely innocent and defenceless being. The common issues before an individual are under what circumstances, if ever, can we take an 'innocent' human life or is any other right more important than the right to life - for example, right of a woman to decide what to do with her own body even at the cost of extinguishing another life. The most common reasons against abortions are that deliberately killing innocent human beings is wrong and it certainly hangs over one's conscience. Undeniably deliberate



killing of any innocent lifeform is wrong and therefore, abortion is wrong is the logical conclusion. It throws up further dilemmas such as is abortion wrong, if, it serves some right of the mother and is that more important than the foetus' right to life? Does a right to life outweighs another person's right to control her own body or disregard the man who is potential father of the foetus.

### **(B) Religion and abortion**

All religions have uniformly similar and strong positions on abortion; they believe that the issue encompasses profound issues of life and death, right and wrong, human relationships and the nature of society, that make it a major religious concern. People involved in an abortion are usually affected very deeply not just emotionally, but often spiritually, as well. They often turn to their faith for advice and comfort, for explanation of their feelings, and to seek atonement and a way to deal with their feelings of guilt.

The prevailing view in the Catholic faith is that life begins at conception. In Islam, abortion law is dependent on the various schools of thinking. Some sects will believe that life begins at conception so any abortion is `haram` and illegal, while other schools of thought allow abortions upto 120 days. Most schools agree that abortion is warranted when the mother`s life is in danger. In Hinduism, it is strongly believed that life begins once the embryo is conceived in the woman. Proponents of the *Garbhsanskar*<sup>12</sup> i.e., techniques to positively influence the growth of the foetus and protect the wellbeing of the mother claim that life starts from conception itself. In fact, various `ragas` or musical notes and chanting have been identified to improve the outcome of the pregnancy. Though the atheist may scoff at such practices, *Garbhsanskar* is being increasingly studied and supported by modern western independent medical research and outcomes in prospective trials. The famous mythological character of `Abhimanyu`<sup>13</sup> described several hundred years ago bears testimony that work had been done by age-old practitioners on this subject.

### **(C) Fathers' rights**

In some cases, the husband or the partner of the woman may agree to the abortion. The abortion issue is largely devoted to dealing with the rights of the foetus and the mother. The rights and concerns of the father are rarely discussed and often sidelined and their pleas are discarded. The most common case concerning fathers and abortion is when the father wants the mother to have an abortion and she doesn't. Equally the woman may want an abortion and the man wants her to have the baby. Is abortion morally wrong because it transgresses the father's rights? The examples below are replete with such controversial and what is seen as regressive provisions

for law against men in general.

- in 2002, a new Chinese law introduced a controversial but progressive provision in law which now puts a man's right to have a child on an equal footing with the right of his wife, making both spouses within the marriage equally responsible for family planning.
- Indian, American as well as English courts and indeed in most democratic societies in the world, the courts have consistently held that a woman's right to an abortion cannot be interfered with by her husband, partner or ex-boyfriend and also that a woman doesn't have to notify the father that she intends to have an abortion
- In 1987 and 2001 men attempted in the UK courts to prevent their former partners having abortions but failed.

#### **(D) Harm to the father**

Fathers' rights have not been much discussed. Armin A. Brott famously observed that, 'A woman can legally deprive a man of his right to become a parent or force him to become one against his will. If the man has a morally legitimate interest in having a child, and the mother misleads the father into believing that she will give him a child if he does certain things, and the father does those things for the specific purpose of having a family, then is it wrong for the mother deliberately to prevent the father from having that child. There are no significant clinical studies undertaken to assess how deeply this may affect men, but it is no one's case that abortion does not harm the man psychologically, morally and financially. The most controversial issues arise when, cases involve deliberate deception by the woman when:

#### **(E) Child maintenance and Courts**

In most countries men have no right to insist that the woman carrying an unborn child from him must continue to full term. Conversely, the State does not allow him to induce her for an abortion citing rights of the woman and free choice. The rights of the man remain largely unprotected and trampled upon by the Courts and laws supporting woman rights, freedom and free choice. Painfully, the right of the foetus itself remains unheard. Yet, when a child is born, legal systems don't allow a father to escape responsibility for his child and for paying to support that child; but the converse is not true. Further, it is a well-known fact that men generally are discriminated against by the courts when it comes to custody issues and visitation rights. Hence the right of abortion or otherwise is a contentious issue for men in financial, emotional, psychological, moral and social terms.

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