

Supreme Court judgment on abortion

October 7, 2022

Manifest Pedagogy:

A bench presided by Justice D Y Chandrachud held while the 1971 Act was concerned with married women, the statement of objects and reasons to the 2021 amendment does not differentiate between married and unmarried and therefore, “all women entitled to safe and legal abortion”. The situation in India is far from perfect when it come to the matter of abortion and we should take this moment to reflect and learn from progressive practices around the world.

In News: The Supreme Court of India recently ruled that all women, married or not, are entitled to safe and legal abortion under the Medical Termination of Pregnancy Act, 1971.

Placing it in the Syllabus: Social Justice

Static Dimensions

- What is India’s law on abortion?
- Procedure for abortion

Current Dimensions

- Supreme Court ruling
- What are the issues related to the MTP Act?
- Significance of the ruling

Content

Various reports have suggested that over **50 per cent** of all unintended pregnancies worldwide end in abortions.

Supreme Court ruling

- The Supreme Court Thursday ruled the rights available to

married women under the **Medical Termination of Pregnancy Act, 1971**, to abort a foetus will also be available to unmarried ones.

- If **Rule 3B(c)** is understood as only for married women, it would perpetuate the stereotype that only married women indulge in sexual activities. This is not constitutionally sustainable.
- The bench said the artificial distinction between married and unmarried women cannot be sustained and that women must have the autonomy to have free exercise of these rights.
- While stressing reproductive autonomy is closely linked to bodily autonomy, the court ruled that the right to choose contraception, the number of children and whether or not to abort have to be taken without the influence of social factors.
- The consequences of unwanted pregnancy on a woman cannot be undermined and the health of the foetus depends on the mental wellbeing of the mother.
 - The court held the interpretation of the MTP Act has to reflect the societal realities.
- The bench referred to parliamentary debate statistics on unsafe abortions and to a Global Health Study by the British Medical Journal which had concluded that **67 per cent of abortions were unsafe**.
 - It added that denying access to safe abortion will increase people resorting to unsafe abortions.
- Pointing to the abortion rights for rape survivors, the court said married women may also form part of a class of survivors of sexual assault and rape as it is quite possible that a woman may become pregnant on account of a non-consensual act by the husband.
- In this context, the court said the meaning of rape must include the meaning of marital rape solely within the meaning of the MTP Act and Rules.
 - The court also held the MTP Act and **Protection of Children from Sexual Offences (Pocso) Act** has to

be read harmoniously and there is no need to disclose the identity of minors under the MTP Act.

- The bench ruled pregnancy is the sole prerogative of a woman and the circumstances may vary for each and various economical, cultural or social factors play a part in this.

What is India's law on abortion?

- **Section 312 of the Indian Penal Code, 1860**, criminalises voluntarily “causing miscarriage” even when the miscarriage is with the pregnant woman’s consent, except when the miscarriage is caused to save the woman’s life.
 - This means that the woman herself, or anyone else including a medical practitioner, could be prosecuted for an abortion.
- In 1971, The Medical Termination of Pregnancy Act (MTP Act) was introduced to “liberalise” access to abortion since the restrictive criminal provision was leading to women using unsafe and dangerous methods for termination of pregnancy.
- The MTP Act allowed termination of pregnancy by a medical practitioner in two stages.
- For termination of pregnancy **up to 12 weeks** from conception, the opinion of one doctor was required.
- For pregnancies between **12 and 20 weeks old**, the opinion of two doctors was required – they would have to determine “if 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 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” before agreeing to terminate the woman’s pregnancy.
- In 2021, Parliament amended the law and allowed for a termination under the opinion of one doctor for

pregnancies up to 20 weeks.

- For pregnancies **between 20 and 24 weeks**, the amended law requires the opinion of two doctors.
- For the second category, the Rules specified seven categories of women who would be eligible for seeking termination.
 - **Section 3B** of Rules prescribed under the MTP Act reads: “The following categories of women shall be considered eligible for termination of pregnancy under clause (b) of subsection (2) Section 3 of the Act, for a period of up to twenty-four weeks, namely:
 - (a) survivors of sexual assault or rape or incest;(b) minors;(c) change of marital status during the ongoing pregnancy (widowhood and divorce);(d) women with physical disabilities [major disability as per criteria laid down under the Rights of Persons with Disabilities Act, 2016(e) mentally ill women including mental retardation;(f) the foetal malformation that has substantial risk of being incompatible with life or if the child is born it may suffer from such physical or mental abnormalities to be seriously handicapped; and(g) women with pregnancy in humanitarian settings or disaster or emergency situations as may be declared by the Government.”
- While the law recognises change in circumstances of the relationship status between a pregnant woman and her spouse – in the case of divorce and widowhood – it does not envisage the situation for unmarried women.

What are the issues related to the MTP Act?

- While the law recognizes changes in a pregnant woman’s marital status with her spouses – such as divorce and widowhood – it does not address the situation for unmarried women.

- It is a highly regulated procedure whereby the law transfers the decision-making power from the pregnant woman to the Recognized Medical Practitioner (RMP) and provides great discretion to the RMP to determine whether abortion should be provided or not.
- When it comes to foetal abnormalities and pregnancies resulting from rape, this time limit is proving to be a hurdle for both the woman and the provider.
- Women seeking an abortion after the legal gestation limit often have no option but to appeal to the courts for permission to terminate the pregnancy.
- The act uses the word “woman”, thereby leaving out pregnant transgender and non-binary persons who are biologically capable of bearing children.
- As the law does not permit abortion at will, critics say that it pushes women to access illicit abortions under unsafe conditions.
 - Statistics put the annual number of unsafe and illegal abortions performed in India at **8,00,000**, many of them resulting in maternal mortality.
 - According to **United Nations’ Population Fund’s (UNFPA)** State of the World Population Report 2022, around **8 women die each day** in India due to unsafe abortions.
- The MTP Act requires abortion to be performed only by doctors with specialisation in gynaecology or obstetrics.
 - 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.

Procedure for abortion

- There are majorly two types of abortion practises applied in India – medical abortion (using abortion pills) and surgical abortion (in-clinic procedure).

- Abortions, regardless of a woman's marital status, are now safe, legal, and easily accessible.
- To maintain anonymity and safety, women are given a unique medical ID and all details are kept confidential.
- 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.

Significance of the ruling

- Abortion is essential healthcare and women's basic right.
- The ruling marks a positive shift at a time when the abortion rights of women continue to be a point of contention across the globe.
- Safe abortion practice has been a concern in our country, and with this judgement, we can expect a reduction in morbidity and mortality associated with unsafe abortion practice.
- A sound health policy with personal choice should equally be respected in growing times. Nonetheless, awareness on contraceptive measures and safe sexual practices need to be a sustained and continued practice.
- If women with unwanted pregnancies are forced to carry their pregnancies because of legal constraints, it would affect the generations that are going to come.
- Irrespective of marital status a woman should have the right to decide whether to continue the pregnancy or not. Abortion is essential healthcare and women's basic right.
- Legalisation of abortions will also discourage the illegal practice of abortions done through untrained, unauthorised paramedics which are hazardous for the health and future fertility of the child bearer.

Wayforward

- It is essential for healthcare workers, dais, and Asha workers to “spread the message to all women across the board about availability of accredited termination clinics both in the government and in the private sector.
- Bodily autonomy and reproductive rights must be viewed from three lenses – legal, medical, and social.
 - Only when women and non-binary pregnant people enjoy absolute autonomy over their own bodies by these parameters, can one claim that India is showing the way to the West.
- We should strive for inclusivity, complete bodily autonomy, and reproductive equity.
- There is a need for a serious rethink in public policy making, also accommodating all the stakeholders to focus on women and their reproductive rights, rather than drawing red lines those medical practitioners cannot cross while performing abortions.

Mould your thoughts

1. India’s abortion laws are one of the most progressive across the world. In light of recent supreme court judgement critically analyse abortion laws in India. (250 words)

Approach to the answer.

- Introduction about progressive nature of abortion laws in India
- Abortion laws in India
- Supreme court judgement
- Issues with India’s abortion laws
- Significance of the court ruling
- Way forward and conclusion.