



MTP After 20 weeks: When & How?

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Abstracts

Medical Termination of pregnancy is a common gynaecological procedure. Unlike other procedures, this procedure has ethical, moral and legal overtones. Medical termination of pregnancy is governed strictly by the Medical Termination of pregnancy Act (MTP Act). The law allows termination of pregnancy [TOP] for “certain” indications and only until “certain” weeks of pregnancy. This poses serious dilemma in front of the gynaecologist. Judicial activism by the author paved way to significant relaxations and amendment to the law. These amendments, when applicable, will enable women and their care givers to undergo legal termination of pregnancy even after twenty weeks in certain situations. The MTP Act has been amended in 2021 by the parliament. After the rules and regulations are amended, it is likely to get applicable soon. The new law has resolved few dilemmas and created new ethical and legal issues.

Keywords Abortion · Medical Termination after 20 weeks · Nikhil Datar Vs Union of India · Late abortions

Introduction

Under the colonial rule, India was averse to the concept of abortion. In those days, maternal mortality and morbidity caused due to illegal abortions was high. In order to avoid this damage to maternal health, Indian parliament enacted the Medical Termination of Pregnancy Act 1971 (MTP Act) on the lines of the Abortion Act 1967 of the UK. Interestingly, the word “abortion” does not feature anywhere in the Indian law. This may be due to the socio-religious-political scenario at that time in the country. With the passage of the MTP Act in 1971, India has departed from the “pro-life” ideology per say. This law co-exists with the Indian Penal Code (IPC). The provisions of the IPC, more particularly Section 312 state that the termination of pregnancy is a criminal offence. The MTP Act has carved out an exception to the provisions of the IPC. Thus the MTP Act, although selectively, allows women to undergo termination of pregnancy legally.

MTP Act, amendments and implications of it's violation:

The MTP Act legitimizes termination of pregnancy in certain conditions and until certain weeks of pregnancy. Section 3 [1] (B) (i) of MTP Act (1971) states that if the continuation of pregnancy poses a risk to the life of the pregnant woman or grave injury to her physical or mental health, it is a valid indication for termination of pregnancy (TOP). Termination to “immediately save the life of the woman” may be done at any time. When there is grave injury to the woman’s physical or mental health or if there is a substantial risk that foetus may have serious physical or mental handicap, TOP was allowed only till 20 weeks according to the MTP Act of 1971. This provision is now amended in MTP Act 2020 [2]. The new law will allow TOP for “special category of woman” (may include rape survivors etc.) till 24 weeks. For substantial foetal anomalies, subject to the permission of the medical board, termination can be done even after 24 weeks. Thus, if termination is done after 20 weeks for “failure of contraception” or after 24 weeks for rape survivor, it will still be considered as violation of the MTP Act. In such a case, Section 312 of IPC will come into force. The police may fix criminal charges on the doctor, leading to arrest, imprisonment or the cancellation of licence to practice.

Thus, even if there is a valid indication, terminating the pregnancy after specific weeks of pregnancy (20 or 24 weeks

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based on the indication) poses a major legal challenge for the doctor (exception when done to immediately save the life of the mother). Precisely for this reason, it is medicolegally safe to abide by the MTP Act in strict sense.

Termination of Pregnancy in later part of pregnancy: Is it a Medical Challenge?

Methods of doing late terminations have changed dramatically over last 50 years. Intra /Extra-amniotic instillation of saline or aspirotomy are not performed anymore. With advent of prostaglandins, abortions are induced and products of conception deliver through vaginal route. Obstetricians around the world are experienced in inducing labour at various stages of gestation for maternal and foetal indications to save the mother and the baby. Although the intent of induction of labour and termination of pregnancy are diagonally opposite to each other, the medical procedure to cause expulsion of products of conception remains the same. Procedures of inducing expulsion of the fetus, whatever the intent may be, are safe and have been used for a long time. The evidence based on clinical guidelines titled “The Care of Women Requesting Induced Abortion” published by the Royal College of Obstetricians and Gynaecologists states:

Women should be informed that abortion is a safe procedure for which major complications and mortality are rare *at all gestations*. [3].

The risk of TOP may increase as the gestational age advances. There is a tendency amongst Obstetricians to compare the risk of complications in later gestation with early gestation. If termination is not done at that point, the woman will have to undertake full term delivery. Thus, risk of TOP in late gestation has to be compared with risk of childbirth. It may be deduced that the risk of complications in TOP even at late gestation is, at best, same as that in the child birth and not more. Thus termination at late gestation is not a medically challenging procedure at this point of time.

Termination of Pregnancy After 20 Weeks: Is it a Moral/Ethical Challenge?

In general, aim of medical care is to preserve the human life. Abortion and euthanasia are relatively new concepts which favour quality of life instead of sanctity of life. Some attribute status of a “live human being” right at the time when embryo is formed at conception. Different people may attribute “live human” status at various thresholds of intrauterine development. Some may argue

that foetus has right of survival independent of the mother when it attains “viability”. There is no doubt that live birth is the visible and most agreed upon point at which the foetus accrues all the rights of a human being. English law accepts the same position. It does not provide any status to the foetus independent of the mother [1]. Indian law, by legal fiction, recognises the unborn as a “person” but the rights devolve upon it only after being born alive.

Viability and its effect on termination of pregnancy

“Viability” is a point of maturation of the foetus after which there is a potential chance of independent survival, if born alive. Obstetricians are trained to resuscitate the baby born after the age of viability to provide best chance of survival. It by no means, provides any legal right per say to the foetus. Viability is a variable point during the gestational period. The period of viability is directly linked to the quality of neonatal care available. Obstetricians, in the past, considered an arbitrary cut off of 28 weeks as “age of viability”. With the advances and availability of good neonatal care, it is now considered at 24 weeks. Even as on date, the age of viability has not been lowered down to 20 weeks anywhere in the world. Thus, it may be concluded that cut off of 20 weeks laid down way back in 1971 had no connection to age of viability. The Shantilal Shah committee, in its report, had not suggested any such cut off per say. Thus, it can be concluded that 20 weeks cut off in the MTP Act 1971 was arbitrary cut off and has no explanation to it.

Although not supported by law, some may attribute “human hood” or human rights to a foetus above the age of viability. In that case, there is no moral dilemma to terminate the pregnancy below 24 weeks. The real moral dilemma is faced when pregnancy is advanced beyond 24 weeks and there is a substantial and serious foetal abnormality. In this case termination of pregnancy may result into a live born foetus. This would lead to an absurd and complex situation.

MTP Act: The Mismatch

Medical science has advanced significantly in last fifty years. Diagnostic science has advanced more than therapeutic science. An Obstetrician is able to diagnose foetal anomaly and provide accurate prognosis. Yet there is either no treatment (for example in anencephaly) or treatment may merely cause “meaningless prolongation of life (for example Arnold Chiari Type II/ single ventricle of the heart). If a woman decides to terminate such a pregnancy, the MTP Act of 1971, did not permit the obstetrician to provide termination of pregnancy. The woman was left with only two choices, either to continue the pregnancy against her wish and suffer mental and physical agony or risk her life by attempting illegal termination. The

MTP Act is a classic example of law that has not kept pace with the advances in science and technology.

Judicial Activism: *Dr Nikhil Datar Vs Union of India* and Other Cases

Faced with similar situations, the author filed a petition *Dr Nikhil Datar & others Vs Union of India* (famously known as the “Niketa Mehta case”) in 2008 in the Hon’ble Bombay High Court. The author appealed against the impugned order of the High Court under Article 136 in the Hon’ble Supreme Court of India (Civil appeal 7702/2014).

In this petition, the author prayed to the Hon’ble court to relax the limit of 20 weeks and consider the specific part of Section 3 of the MTP Act as a violation of a woman’s fundamental rights under Article 21 of the Constitution of India.

The author filed many cases such as *Miss X and Dr Nikhil Datar Vs Union of India* and assisted more than 200 petitioners in their legal battle to seek legal termination of pregnancy beyond 20 weeks. These constituted mainly women with severe foetal anomalies and pregnant minor rape survivors. The Hon’ble apex court vide order dated 15.12.2016 directed the Union Government to file an affidavit on what the government proposes to do in this matter. The Union of India in its affidavit dated 11.09.2019 stated as under:

“The very issues raised by the petitioner are being considered and addressed through appropriate amendments to the MTP Act.”

The Ministry of Health and Family Welfare wide circular D.O No: M/12015/58/2017-MCH dated 14.08.2017 had directed all the states and union territories to establish permanent medical boards to examine cases when referred by the courts for considering requests of termination beyond 20 weeks. Further, operational and technical guidelines have also been disseminated. These include detailed “Guidance notes for medical boards for termination of pregnancy beyond 20 weeks”. In order to assist the boards in deciding whether the anomaly is serious, the ministry has enlisted nearly 67 major anomalies in the guidance note. The amended bill was introduced in Lok sabha and was passed on 17th March 2020. The bill was also passed in Rajya Sabha on 16th March 2021. The said bill has now received the assent of the President of India. After the rules and regulations are amended suitably, the amended MTP Act will be implemented in the country.

Late Termination Leading to a Live Baby: Moral and Legal Problem

When a child is born alive all the human rights including that of survival are accrued. Thus even if termination of pregnancy

is done resulting into the birth of a live baby, the child needs to be provided treatment in the best interest. Most ethicists believe that decisions that lead to “intolerable existence” are not appropriate in the best interest of the foetus/ child as well as the woman. [1] The Royal College of Paediatrics & Child Health have published a practice frame work to assist physicians in taking crucial decisions to withdraw the life support or treatment if the baby is extremely sick. The frame work tries to quantify the severity of the condition of the baby. “Intolerability” can be construed when there is ‘no chance’, ‘no purpose’ and ‘unbearable’. [4] Indian law regarding withdrawal of treatment, leading to death or passive euthanasia is still evolving. In Aruna Shanbhag’s case [5], the Hon’ble Supreme Court while allowing passive euthanasia by withdrawing life supports has laid down stringent criteria. Compliance with these criteria is difficult though not impractical. Thus, after termination of pregnancy if the child is born alive, it may pose serious questions regarding resuscitation and further treatment. In fact it brings about a very absurd situation for both doctor as well as woman.

Role of Feticide

Abortion is defined as termination of pregnancy that leads to or hastens the death of the embryo [6]. Use of ultrasound guided intra cardiac injection of potassium chloride can ensure that the foetus is still born. It abolishes the chance of foetus being born alive and legal complications that may arise after it. The Royal College of Obstetricians & Gynaecologists recommends that when TOP is planned after 21⁺⁶ weeks, USG guided feticide should be routinely considered and offered to parents [7]. The guidelines issued by the Ministry of Family Welfare by Union Government to the permanent medical boards have categorically mentioned that procedure of feticide can be used in terminating late term pregnancies. The amended rules and regulations will be drafted on the same lines as that of this guidance note. Thus after permission of the medical board, USG guided feticide will be a legitimate alternative in India. The author has performed feticide while performing TOP by court’s order in few cases till now.

Termination of pregnancy Beyond 20 Weeks after implementation of the amended law:

Till such time, the government of India does not implement the amended law, the MTP Act (1971) shall stay in force. Thus, if a woman is diagnosed to have substantial fetal anomaly or if she is a case of sexual assault and needs to terminate the pregnancy after 20 weeks, she will have to file a writ petition in the High Court of the respective state. The

court directs the petitioner to the permanent medical board for examination and opinion. As per the guidance from the Ministry of Health and Family Welfare, the board satisfies itself that the abnormality is of a serious nature. The board provides its opinion to the court. The High Court gives its final verdict on the petition. This has been a standard practice in almost two hundred cases so far in the country.

Courts have taken around 7–10 days to deliver the verdict. (The author's experience is based on over 180 cases at the Bombay High Court). In one complex case of a woman with twins with one chromosomally abnormal foetus, appeal to the Hon'ble Supreme Court had to be preferred. The apex court allowed termination after selective feticide.

After the amended law will come in force, women will not need to approach the courts. It must be noted that "cut off" for TOP in case of failure of contraception continues to remain at 20 weeks. MTP rules will define a special category of women (which may include rape survivors, single women, fetal anomalies etc.). For this category TOP will be possible upto 24 weeks after taking opinion of two RMPs. For substantial fetal anomalies diagnosed after 24 weeks, women will have to approach the medical boards. The board may refer to the list of substantial anomalies published by the government and allow TOP. It is clear that amended law, has allowed TOP at any gestation only for two reasons, namely, "to immediately save the life of the woman" and "for substantial fetal anomaly, permitted by the medical board". For many other indications, say, rape survivors, the amended law has put restriction at 24 week. This restriction is arbitrary. The author, after the amendment was passed, had two cases of minor rape survivors who were pregnant and were beyond 24 weeks of gestation. The author helped them to move the high court and court permitted TOP for them.

Conclusion

Termination of pregnancy beyond 20 weeks is safe in modern days. Although medically safe, it was illegal to terminate the pregnancy after 20 weeks (exception "save the life of the woman"). Diagnosing severe foetal anomaly but not providing termination of pregnancy after woman's request due to a legal hurdle is an unfortunate situation for an Obstetrician and the woman both. After multiple litigations, the Parliament has finally amended the MTP Act [3]. Until the new law is implemented, women have no alternative but to approach the High Court for seeking permission for TOP. Judicial activism has carved out systematic mechanism to get legal permission for termination after the limit set by the law. While terminating the pregnancies after 24 weeks, procedure to stop the fetal heart sounds may become a norm. This will overcome the moral, ethical and legal dilemmas

faced by the doctors conducting such terminations. When TOP is needed, even after limits permitted by the law, courts can be approached for the same.

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Declarations

Conflict of interest There is no conflict of interest.

Human and Animal Rights There was no research involving human participants or animals.

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