Right of Unborn Child

Why in news?

Recently, the Supreme Court refused to permit the married woman to terminate her 26 week pregnancy, thereby upholding the right of unborn child.

Medical Termination of Pregnancy(Amendment) Act 2021

• The Act expands the access to safe and legal abortion services on therapeutic, eugenic, humanitarian and social grounds to ensure universal access to comprehensive care.
• **Upper gestation limit**- It is expanded from ***20 to 24 weeks*** for termination of pregnancy under specific conditions such as foetal abnormalities, sexual assault, rape, or minors.

Abortion window period	Provisions of the act
20 weeks of pregnancy	Termination of pregnancy is allowed on the advice of 1 doctor
20-24 weeks of pregnancy	The right to seek abortion is determined by 2 registered medical practitioners as an exception, but only under certain categories
Beyond 24 weeks	It is mandatory to form medical board at approved facilities to give opinion termination of pregnancy beyond 24 weeks owing to foetal abnormalities

• **Medical Board** - It will be formed by all States and Union Territories and the State government shall appoint its members.
• **Unmarried women**- It allows them to terminate pregnancy due to failure of contraceptive method or device, which was previously only applicable to married women.
• **Privacy**- The act protects the confidentiality of women who undergo abortion.

> *Unsafe abortions continue to be the 3rd leading cause of maternal mortality. 60% of abortions carried out in India are unsafe.*

What is the recent Supreme Court ruling about?

- **Petition** - A 27-year-old married woman, who already has two sons, has pleaded that the current pregnancy was unplanned.
- It was stated that the petitioner was physically, mentally, financially and medically unable to carry, deliver or raise a child.
- **Counter arguments-** The medical reports show a healthy foetus with no abnormalities.
- It also said the woman was well past the abortion *limit of 24 weeks* under the Act.
- This is no longer a case of pro-life [life of the child] or pro-choice [reproductive autonomy of the woman].

- The government is willing to undertake the expenses of the delivery at the appropriate time and if the parents desire the centre would facilitate the adoption of child.
- **Court ruling**- It noted that the medication taken by the woman for her mental condition had not affected the foetus.
- The Court made it clear that the *woman cannot claim an "absolute, overriding right" to abort,* especially when multiple reports from the AIIMS medical board have confirmed that the pregnancy was neither a cause of immediate danger to her life nor that of the foetus.
- **Condition for pregnancy termination**- Section 5 of the Medical Termination of Pregnancy Act prescribes medical termination if the pregnancy was "*immediately necessary to save the life of the pregnant woman*".
- The court's concern expand beyond the pregnant women to embrace the rights and well-being of the unborn child.
- The court said the term 'life' used in this provision cannot be equated to the broader meaning in which life is used in Article 21.

Article 21 - Fundamental Right to a Dignified and Meaningful Life

What are the concerns with the recent court ruling?

- **Foetal viability** – Foetal viability is time after which a foetus can survive outside the womb.
- The test of "foetal viability" as a benchmark to allow abortion is new in India.
- The landmark *1973 US Supreme Court verdict* made abortion a constitutional right allowed abortion up to the point of foetal viability.
- Foetal viability in 1973 was pegged at *28 weeks* (7 months), which is now lowered at *23-24 weeks* (6 months). It has been argued, that foetal viability is an arbitrary standard.
- **Criticism of MTP Act**- The decision to terminate after 20 weeks is shifted to doctors and not the woman.
- **Right of unborn child**- The Indian legal framework on reproductive rights tilts to the side of the woman's autonomy to decide and choose more than towards the rights of the unborn child.
    - No international law recognises the right of the foetus or right of the unborn child.
- In 2005, Rajasthan High Court in *Nand Kishore Sharma vs Union of India* rejected a challenge to the constitutional validity of the MTP Act on the grounds that it violates the fundamental right to life of an unborn child.
- The right of an unborn child has formed the basis of legislation that deal with succession or the law banning sex-determination of foetus.
- *Section 416 of the Code of Criminal Procedure* also provides for postponement of the death sentence awarded to a pregnant woman.

Previous Supreme Court Rulings on Pregnancy Termination Beyond 26 Weeks

• Recently a Bench headed by Justice Nagarathna held a special sitting to allow termination of pregnancy of a rape survivor whose pregnancy was beyond 27 weeks.
• The Bench cited *"transformative constitutionalism"* that promotes and engenders societal change, and said that the law must remain cognizant of the fact that changes in society have ushered in significant changes in family structures.
• *Bhatou Boro v State of Assam (2017)-* The Guwahati High Court overruled the medical board's refusal to give an opinion for termination of pregnancy of over 26 weeks of a minor rape survivor.

References

1. The Hindu- Supreme Court refuses to terminate pregnancy
2. Indian Express- What is foetal viability
3. WHO- India's MTP amendment makes abortion safe and more accessible

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