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***Title: The Evolution of Abortion Legislation and Reproductive Rights
of Women In India: A Critical Examination of Medical Termination of
Pregnancy (MTP) Act, 1971, Authored By: Ms. Maynoor (B.A.LL.B (Hons),
Faculty of Law, Jamia Millia Islamia,
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***“Reproductive freedom is not just the ability not to have a child through birth
control. It is the ability to have one if and when you want¹.”***

-Pamela Madison

ABSTRACT

“Law is a dynamic phenomenon that changes in response to societal demands and moral standards. This paper explores how India's abortion laws evolved both prior to and following the implementation of the Medical Termination of Pregnancy Act of 1971. This paper also examines the MTP Act in depth and considers how legal shortcomings have contributed to the occurrence of illegal abortions. This paper discusses the limitations of current law regarding access to abortion and significance of reproductive autonomy. This paper also discusses about the problem faced by the rape victims and unmarried women in accessing the services of abortion under the Act. In this paper, the author has analysed the Medical Termination of Pregnancy Act, 1971, the major issues that the Act has failed to rectify have been looked into. The Act does not recognise women's fundamental right to make reproductive choices. The author has reasoned as to why the right to life of a foetus should not supersede that of its mothers. The author suggests that the 'compelling interest of the State' should be limited to protecting an individual's right to make their own choices, rather than determining what those choices should be. The recently introduced Amendment Act 2021, along with the previous amendment acts, has also been examined, with particular focus and critique directed towards the 2021 amendment. A comparative analysis with the USA and India's Abortion laws also has been made accompanied with some relevant argument. The author's suggestions are presented towards the end”.

Keywords: MTP Act, Pregnant Woman, Abortion, Reproductive Autonomy, Amendments.

¹ See Goodreads, <https://goodreads.com/quotes/7345004-reproductive-freedom-is-not-just-the-ability-not-to-have>.

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I. RESEARCH QUESTIONS:

1. *How does the act limit women's reproductive autonomy?*
2. *What are the challenges faced by women specially Rape victims in accessing services under MTP Act, 1971?*

I.I RESEARCH METHODOLOGY:

The quality and value of research depends upon the proper and particular methodology adopted for the completion of research. The methodology applied in the study is both doctrinal and analytical. An attempt has also been made to discuss, critically evaluate different provisions under The Medical Termination of Pregnancy Act, 1971, and the problems and flaws therein are identified. Greater emphasis, in this study, has been on secondary data. Various books, articles, reports, research papers, journals, decided cases etc. were collected, assembled and analysed to trace the development of the idea of reproductive freedom. Bluebook 20th Edition is the citation style used for citing sources in the footnotes.

I.II LITERATURE REVIEW:

I.II.I THE MEDICAL TERMINATION OF PREGNANCY ACT, **1972 – A CRITICAL ANALYSIS, APARNA S:**

In this paper, the author has analysed the Medical Termination of Pregnancy Act, 1972. The major issues that the Act has failed to rectify have been looked into. The Act does not recognise women's fundamental right to make reproductive choices. It also makes an unreasonable classification between married and unmarried women when it comes to the matter of exercising the said choice. The author has proposed that the 'compelling interest of the State' should extend only to safeguard the autonomy of an individual to make their respective choices and not to dictate what the choice should be.

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I.II.II LEGAL BARRIERS TO ACCESSING SAFE ABORTION SERVICES IN INDIA: A FACT-FINDING STUDY, APARNA CHANDRA MRINAL SATISH SHREYA SHREE MINI SAXENA:

Authors describe the statutory framework on abortion contained in the IPC and the exceptions to these provisions contained in Section 3 of the MTP Act. Author examines how these provisions impact access to safe abortion services. Section 3 of the MTP Act governs abortions up to 20 weeks of gestation. Beyond this time period, an abortion is permitted only when it is immediately necessary to save the life of the pregnant woman. In Chapter 3, we discuss abortions that are sought post 20 weeks of gestation, and the legal and institutional barriers that women face in accessing such abortions. The MTP Act provides that adult women who are not mentally ill, do not require the consent of any other person, apart from a *RMP (or two RMPs as the case may be)* to terminate her pregnancy. These requirements place additional barriers for women in accessing safe abortion services under conditions of confidentiality, particularly in the case of women who may not have appropriate familial support, those who are undocumented, and for women with disabilities who are often deemed, both by the law and in practice, to not have the capacity to consent to their own abortions.

I.II.III BEYOND BARS, COERCION AND DEATH: RETHINKING ABORTION RIGHTS AND JUSTICE IN INDIA, DIPIKA JAIN:

The legal framework governing abortion in India is fundamentally a patriarchal structure, utilising a punitive criminal justice system to control the bodies of pregnant individuals. This paper discusses about the Legal framework on abortion in India, Prosecution and intimidation for abortions under IPC A rendition of the salient features of the MTP Act shows that it only provides limited exceptions to IPC provisions that criminalize abortion and is not a rights-based legislation granting primacy to the pregnant person's wishes, Arguments against

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criminalization of abortion, Reproductive justice and decriminalisation, at end author provides conclusion.

I.II.IV ABORTION LAWS IN INDIA: THE PARAMOUNT NEED FOR CHANGE, RISHIKA RISHABH:

This article analyses the MTP Act 1971 Act and its lacunae from a legal and social standpoint, in an attempt to determine whether the existing legal provisions are adequate to govern abortions in the country. The need for amendments to the existing laws is crucial and this article examines this taking into consideration the prevailing social conditions and mindset in the country, this paper talks about the abortion laws in India: the paramount need for change, Autonomy and abortion as a matter of right, Personal Law and State Interference, Discrimination against unmarried women, international conventions and laws, at the end conclusion.

I.II.V LEGISLATION REVIEW - MEDICAL TERMINATION OF PREGNANCY ACT, 1971, KANU PRIYA:

Abortion is a kind of regulation of human conduct by sanctions enforced by the state through the process of law ultimately becoming the central theme for discussion of this paper. Abortion may be classified into various categories depending upon the nature and circumstances under which it occurs. For instance, it may be either natural, accidental, spontaneous, artificial or induced abortion. The author analyses the provisions of the MTP Act 1971, constitutionality of the act, proposed amendments of 2021, critical analysis, and at the end some suggestions.

I.II.VI LIFTING THE VEIL OVER THE LEGAL ARCHITECTURE ON ABORTION IN INDIA: A CRITICAL LEGAL ANALYSIS, RIYA GOEL:

Women have been fighting the struggle for reproductive rights for centuries. Women Reproductive Rights and Abortion rights are a global issue. The ability to reproduce has been

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given to women, and this ability differentiates women from men. Various rights have been given to women, and besides everything Right to Abortion has been recognized as the most essential and fundamental Right. It is the woman's body that will give birth, so it should be the choice of hers only to give birth to a child or not. Author gives a brief introduction of Abortion, Legislative Provisions, reference of art. 21 of the constitution of India, further comparative analysis with other countries, role of judiciary in the interpretation of the abortion right, problems of abortion with rape victims, at the end conclusion and suggestions.

I.II.VII REPRODUCTIVE FREEDOM A HUMAN RIGHTS ISSUE

WITH SPECIAL REFERENCE TO INDIA, DHIR, SHWETA:

This thesis focuses on the importance of freedom and its meaning and analyses the definitions and concept of reproductive freedom. Also talks about Conceptual understanding of Human Rights which includes human dignity, privacy, equality, right to health, nutrition, rights of individuals infected with HIV/AIDS, rights of disabled persons etc. It further describes the historical context in which reproductive rights have been framed as human rights in the international sphere, Reproductive Right with Reference to Right to Conception and Found a Family, Discussion of the issue of abortion invariably gives rise to questions relating to the rights of the foetus as well as the rights of the woman and in case of conflict between the women's right of autonomy and the right to life of the unborn, whose right will prevail is analysed in this study, International Standards relating to Reproductive Freedom, Indian Constitutional, Legislative and Policy Framework, Reproductive Freedom with the Ethical Issues, and conclusion.

II. YOUTUBE CHANNELS:

1. Study go with Zeenat, Medical Termination of Pregnancy Act 1971 | Medical Termination of Pregnancy Amendment Act 2021, YouTube (Dec. 30, 2022), (<https://www.youtube.com/watch?v=pqbrwGkkiqQ>) (last visited sept. 2, 2024) In this video the youtuber explained the enactment and all provisions and sections of the

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- MTP, Act, 1971 then some regulations further also explain the MTP, Amendment Act, 2021.
2. Study IQ JUDICIARY, Medical termination of pregnancy Act, 1971, You Tube (Dec. 13 2022), (<https://www.youtube.com/watch?v=CcYGqX4RYfk>) (last visited Aug. 28, 2024), in this video the author explains the historical development of the MTP Act, 1971 formation of shanti Lal shah committee all the Amendments analysis all both analytically and critically.
 3. Study IQ JUDICIARY, All Women have Right to Safe and Legal Abortion | MTP Act | Judiciary, You Tube (Sept. 29, 2022),(https://www.youtube.com/watch?v=OPUDp_xjZ4M), (last visited sept. 5, 2024), The Author Explains about the recent case of x v. The principal secretary, Health & Family Welfare Department, Govt. of NCT Delhi in which the court broadened the scope of the Act and given the abortion rights to unmarried women as well as marital rape women by invoking art 14 of the constitution which guarantees equality to all.
 4. Study IQ JUDICIARY, Why Abortion Should be Fundamental Right? | Abortion Laws in India, You Tube (July 10, 2024) (<https://www.youtube.com/watch?v=O7909w4bGUk>), (last visited sept.15, 2024), The author in this session explains the all provisions related with abortion in India comparison with other countries, reproductive autonomy, stigma against the women with regard to abortion, debate between pro-life and pro-choice and making the abortion as a fundamental rights for women.
 5. Medical Termination of Pregnancy Act,1971
 6. Indian Penal Code, 1860

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CHAPTER 1

INTRODUCTION:

Abortion is a topic that has been widely debated both nationally and internationally. It remains a contentious issue around the globe. Everyone struggles with the question of whether an unborn child has a right to life or if a mother can end her pregnancy whenever she wants.² The core of it all is the right to life, which is also a quite broad concept. In India, the right to life is protected under Article 21 of the Constitution, which states that no person shall be deprived of their life or personal liberty except in accordance with the law. In this context, the word “person” refers to both men and women. The right to an abortion is regarded as one of the most fundamental and important rights among the many that a woman can have. The right to an abortion is protected as part of the right to privacy, which itself is a component of personal liberty and stems from the right to life.³

1.1 MEANING OF ABORTION:

Abortion is the term used to describe the artificial or spontaneous ending of a pregnancy before the embryo or foetus is capable of surviving outside the woman's uterus.⁴ Reproductive rights generally refer to the goal of creating a society where both men and women have the freedom and autonomy to make their own choices regarding reproduction. In everyday terms, this includes the right to decide whether to marry the person of their choice, determine the number of children they wish to have, make decisions about abortion, and access assisted reproductive technologies. All of these aspects fall within the scope of reproductive rights.⁵

² Sai Abhipsa Gochhayat, *Understanding of Right to Abortion Under Indian Constitution*, MANUPATRA (Sept.10,2024, 9.29 PM), <https://manupatra.com/roundup/373/articles/presentation.pdf>.

³ Kanu Priya, *Medical Termination of Pregnancy Act, 1971*, 2 ILECR.1, 1-2 (2022).

⁴ THE LAW DICTIONARY, <https://thelawdictionary.org/abortion/#:~:text=The%20artificial%20or%20spontaneous%20termination,own%20outside%20a%20woman%20uterus> (last visited sept. 6, 2024).

⁵ SHODGANGA, https://shodhganga.inflibnet.ac.in/bitstream/10603/477712/5/05_chapter1.pdf (last visited sept.25, 2024).

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Medically, abortion refers to the removal of the ovum within the first three months of pregnancy, miscarriage is the loss of pregnancy between the 4th and 7th months, and premature delivery is when a baby is born after seven months but before full term. Nowadays, the terms "miscarriage," "abortion," and "premature labour" are used interchangeably in law to describe any pregnancy ending before full term.

1.2 DEFINITIONS OF ABORTION:

Abortion is derived from the Latin term aboriri, which means "failure to be born." Abortion is described as the spontaneous, therapeutic, or induced termination of a pregnancy before the foetus has become viable outside the uterus or is capable of having a life outside of the womb.

- Abortion is defined as the termination of a pregnancy by any manner (natural or induced) before the foetus has matured sufficiently to survive on its own (foetus less than 20 weeks of pregnancy).
- The birth of a newborn or foetus weighing less than 500 grammes is another definition
- Another (clinical) definition is the spontaneous or induced ejection of the conceptus product prior to viability⁶.

1.3 CLASSIFICATION OF ABORTION:

Abortion may be classified into various categories depending upon the nature and circumstances under which it occurs. For instance, it may be either,

1. Natural
2. Accidental
3. Spontaneous
4. Artificial or induced abortion.

⁶ Trishi Anand, et al., *Abortion Laws in India: A Critical Analysis* 7 IJME 61,62(2022).

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While induced abortion is illegal unless specifically exempted by law, abortions that fall within the first three categories are not penalized. *Natural abortion* is a relatively common occurrence that may take place for a variety of reasons, including poor health, abnormalities in the mother's reproductive organs, shock, fear, joy, etc. Accidental trauma is a common cause of *accidental abortions*. The ovum, embryo, or placenta is always dislodged from its natural connection by some direct or indirect hard impact on the uterus during accidents. *Spontaneous abortion* sometimes pathogenic factors may cause pregnancy to end before the foetus is fully developed, causing the uterus to empty. This may happen because of metabolic circumstances or accumulation of poison which interferes with the development of embryo and advancement of pregnancy. Criminal abortion is destruction and expulsion of the foetus unlawfully and the wrongdoer is punishable according to criminal law. It is generally induced between second and third months of pregnancy, but occasionally between the fourth and fifth months of pregnancy when the woman is certain of her condition. In India, induced abortion is defined in law as any abortion, which does not come under the rules of the *Medical Termination of Pregnancy Act 1971*, although performed by qualified doctors, and the doctors are liable for prosecution and punishment⁷.

1.4 THE IDEA OF REPRODUCTIVE AUTONOMY:

Women still experience significant barriers to fully exercising their reproductive rights, such as inadequate health care and denials of women's decision-making authority, despite India being one of the first countries in the world to establish legal and policy frameworks ensuring access to abortion and contraception. Reproductive autonomy is a fundamental right that includes the freedom for all couples and individuals to choose the number, spacing, and timing of their children in a responsible and free manner and to have the knowledge and resources necessary to make such decisions. In India, the reproductive decision is significantly influenced

⁷ Ibid at 61-62.

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by cultural, social, and ethical norms. The fundamental right to life, liberty, and the pursuit of happiness now includes the right to reproductive autonomy. The concept of reproductive autonomy is surrounded by a plethora of words, including '*reproductive choice*,' '*reproductive rights*' '*procreative liberty*' and '*reproductive justice*'. Autonomy implies the capacity to make decisions about one's own life and self in accordance with values, morals, aspirations, and beliefs. The definition of reproductive autonomy is quite broad and includes a variety of associated concerns along with abortion. However, autonomy cannot exist until a person is allowed to make and follow their own decisions. Therefore, the freedom to procreate and also the right to refrain from procreating are included in reproductive choices and this is known as reproductive autonomy⁸. The decision of U.S Supreme Court in *Roe vs. Wade*⁹, has been incalculable, both in the U.S.A and around the world. In its opinion, the Supreme Court acknowledged that a woman's right to decide whether to terminate her pregnancy was protected under the constitutional principles of individual autonomy and privacy.

ABORTION AND AUTONOMY AS A RIGHT:

In India, a woman does not have the right to end her pregnancy just because she wants to, abortion is not a legal right. A medical expert's assessment of the risk to the woman's health determines whether an abortion is acceptable. Insofar as it requires medical professionals to certify that continuing the pregnancy would endanger the woman's life, seriously harm her physical or mental health, or result in a significant risk of fetal abnormality, Section 3(2)(a) of MTP, Act violates the fundamental right to privacy and the right to reproductive choice, which the Supreme Court upheld in the cases of Justice (Retd.) *K.S. Puttaswamy vs. Union of India*¹⁰. A medical expert's opinion should not be used to decide whether to terminate a pregnancy because doing so takes away a woman's autonomy and gives it to a medical professional or

⁸ SHODHGANGA, https://shodhganga.inflibnet.ac.in/bitstream/10603/584494/5/05_chapter%201.pdf.pdf (last visited sept.29, 2024).

⁹ *Roe v. Wade*, 1973 SCC OnLine US SC 20: 35 L Ed 2d 147: 410 US 113 (1973).

¹⁰ *K.S Puttaswamy v. Union of India*, (2017) 10 SCC 1, AIR 2017 SC 416.

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Medical Board. The High Court of Madras and the Supreme Court have both upheld women's autonomy when it comes to carrying a pregnancy whether or not. Suchita Srivastava vs. Chandigarh Administration¹¹. According to the Supreme Court's unambiguous ruling, a woman's reproductive rights are protected by the state as part of her Article 21 right to privacy, dignity, and personal liberty. A significant and landmark ruling in the case of Joseph Shine vs. Union of India¹², the Hon'ble Supreme Court while decriminalizing adultery under Section 497 of the Indian Penal Code has upheld the absolute sexual autonomy of a woman. Denying women the right to choose the number of children they have and to terminate a pregnancy, often justified by the common saying that '*prevention is better than cure*' and the blame placed on women for becoming pregnant unintentionally, conceiving an unwanted pregnancy ultimately undermines their sexual autonomy.¹³

CHAPTER-II

EVOLUTION OF ABORTION LAWS

Earlier, Abortion did not consider a serious offense. Abortion in ancient India was rated as a lesser evil than usurious practice, which was punishable by exclusion from the caste and denial of the right to libation by water. This stance persisted until the British introduced the Indian Penal Code in 1860. Abortion laws in India were made harsher by the Indian Penal Code, which has been influenced by Christian Common Law's Morality & Brought severity to the Abortion Laws in India. The History of criminalising abortion goes back to 1803, when in Britain and Ireland, performing an abortion on a woman who was "*quick with child*" was resulted in the death penalty. Thereafter, the death penalty was removed by the Offences Against the Person Act (OAPA) in

¹¹ Suchita Srivastava v. Chandigarh Admn., (2009) 13 S.C.R. 989.

¹² Joseph Shine v. Union of India (2019) 3 SCC 39, AIR 2018 SC 4898.

¹³ Rishika Rishabh, *Abortion Laws in India: The Paramount Need for Change*, 19 ISSN 393,396 (2020).

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1837, which however, widened the scope of the offence by covering abortions before as well as after the stage of “*quickening*” of the foetus. The OAPA was further amended in 1861, prescribing a maximum punishment of life imprisonment for persons trying to obtain illegal abortions (Keown 2002). However, in 1856, the law's scope was clarified, and it was only enforced in cases where the pregnant individual died, no matter how far along they were in their pregnancy. This development resulted in the colonial version of the IPC, which included a broad range of offences related to abortion, each carrying different levels of penalties and punishments. Under Indian criminal law, it is considered illegal to do anything that leads to a pregnant woman's miscarriage unless it is done in an effort to save her life. Therefore, even pregnant individuals could be prosecuted for causing a miscarriage if the act was not carried out in good faith to save the life of the pregnant woman (Indian Penal Code, 1860). Crucially, the law also distinguished between actions that resulted in a miscarriage when carried out with the pregnant woman's agreement and those that resulted in a pregnancy being terminated by force, with the latter carrying a harsher penalty.¹⁴

To understand the evolution of law, two major cases are of significant importance:

Roe vs. Wade¹⁵, The case was a significant milestone in the United States, challenging the Texas law that banned abortion except when it was necessary to save the woman's life. In 1969, Jane Roe, a pseudo name used to hide the identity of Norma McCorvey filed a federal lawsuit against Henry Wade, the district attorney of Dallas County, Texas, where Roe lived. In 1973, the supreme court ruled with a majority of 7-2 and struck down the Texas law. In the judgement, Justice Harry Blackmun stated that the right to abortion was guaranteed to a woman under right to privacy granted by the 14th amendment. The court further divided the pregnancy in three trimesters, and stated that abortion in the first trimester was solely at the discretion of

¹⁴ Dipika Jain, *Beyond Bars, Coercion and Death: Rethinking Abortion Rights and Justice in India*, 14 OSLS .99, 104-105 (2024).

¹⁵ *Roe v. Wade*, 1973 SCC OnLine US SC 20: 35 L Ed 2d 147: 410 US 113 (1973).

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the woman, whereas in the second trimester abortion can be regulated by the government and in the third trimester abortion can be prohibited by the state in regard with the viability of the foetus¹⁶.

2.1 HISTORICAL BACKGROUND OF THE ACT:

Section 312 of the Indian Penal Code prohibited abortion in India until it was abolished in 1971. Prior to 1971, the Indian Penal Code made abortion illegal, with the exception of situations in which an abortion was performed to save the life of the expectant mother. The provisions for abortion incorporated in Sections 312 to 318 under the Indian Penal Code, were enacted a century ago, in conformity with the English law. Anyone voluntarily causing a woman to miscarry, including the pregnant woman herself, which is not in good faith is subject to the punishment prescribed under the IPC. The only miscarriages that were free from punishment were those that were performed in order to save the pregnant woman's life. With this basis in mind, the Medical Termination of Pregnancy Act was passed in 1971. India's abortion laws were relaxed in 1964 when the Ministry of Health revealed a high rate of maternal death. Women who had resorted to risky abortion techniques were frequently observed by doctors. To create a report and offer recommendations for the creation of Draft for an abortion law in India, the Shah Committee was established in 1964 under the leadership of Shantilal Shah. The Committee reviewed abortion's legal, medical, and sociocultural aspects and made a recommendation to legalize the procedure. It suggested to the government that the old and inadequate miscarriage provision found in Section 312 of the Code be liberalized. It noted that regardless of the moral and ethical opinions that the general public may have regarding induced abortion, it is an undeniable fact that some mothers are willing to put their lives in danger by getting an illegal abortion rather than bringing that specific child to term. As a result, the Medical Termination of Pregnancy Act was passed in 1971, changing the nation's abortion

¹⁶SCCONLINE, <https://www.seconline.com/blog/post/2023/02/13/the-emerging-dimensions-of-medical-termination-of-pregnancy-act-1971/> (last visited sept. 23, 2024).

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regulations.¹⁷ In India Central Family Planning Board, a policy making body, appointed an 11 members committee under the leadership of Shantilal Shah, then health minister of Maharashtra, in 1964 and a committee report submitted in 1966 supported the legal abortion. In 1967 Central Family Planning Council under Ministry of Health and Family Planning, consisting health ministers from 17 states, accepted the recommendation of the committee with some modifications. Then, using the English Abortion Act of 1967 as a model, the Medical Termination of Pregnancy Bill of 1969 was approved by parliament, the president signed it into law in 1971, and it came into effect on April 1st, 1972. In order to streamline the approval process and increase accessibility to services, the implemented rules and regulations were updated again in 1975.¹⁸

2.2 PRO-LIFE AND PRO-CHOICE DEBATE:

This topic sparks discussion among advocacy groups divided into two sides. Those who are against legal restrictions on abortion describe themselves as pro-choice while those who are in favour of prohibition of abortion are considered as pro-life advocates. Most those who support life think that human life should be respected from conception or implantation until natural death. They consider abortion equivalent of murder as the human embryo or foetus is an innocent human being and is entitled to be born. Hence, it is the God who is the giver of life and death, and not the parents. On the other hand, pro-choice means to be in favour of allowing women to decide whether to have a child or not. She should be able to choose whether or not to get pregnant, and if she is Pregnant, she should be able to choose whether to end the pregnancy or abort the child. Thus, "pro-choice" activists contend that people should have unrestricted control over their own reproductive systems so long as they do not infringe upon

¹⁷ Anushka Kumari, Abortion Laws In India, 1 BLJ.(2020),<https://burnishedlawjournal.in/wp-content/uploads/2020/11/Abortion-Laws-in-India-by-Anushka-Kumari.pdf>.

¹⁸ SHODGANGA, https://shodhganga.inflibnet.ac.in/bitstream/10603/584494/6/06_chapter%202.pdf. (last visited sept. 22, 2024).

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the rights of others.¹⁹ Pro-choice individuals accept that women should have complete control over fertility and pregnancy. It is the personal choice of a woman to have or not to have children as it affects her body, personal health and future. Therefore, they are in favour of contraception and abortion being legally available and accessible to those who want to use them without any interference of other people or the government. These are two extreme opinions. One perspective is against abortion, while the other allows the expectant mother to end her pregnancy even after the foetus is viable. Ironically, the pro-life movement does not want to discuss the rights of mothers as well. It is not only about a child's birth, it is also about a mother's right to good health and the enjoyment of her life.

ARGUMENTS BY THE PRO-LIFE ADVOCATES WHICH FAVOUR PROHIBITION OF ABORTION:

Abortion is a grave evil; the reason it is a grave evil is because we believe on the basis of both logic and natural law that human beings have inherent value. If you believe that human beings are special then you have to believe that your specialness began at the time you were conceived. Where else would it begin, that is the point of biological contact. It is Pertinent to preserve the innate value of human life if we want to become a better country²⁰. Arguments by the pro-life advocates which favour prohibition of abortion,

- *The unborn human has a natural inherent capacity (the essence) that will enable them to operate as a person in the near future, just as the momentarily unconscious and reversibly comatose will do due to their inherent natural capacity.*
The unborn are people with a lot of potential, even though they are not potential people.
- *Further abortion is not morally and ethical acceptable according to certain communities.*

¹⁹ Dhir Shweta, *Reproductive freedom a human rights issue with special reference to India*, SHODHGANGA. 1,145-147, (2015), https://shodhganga.inflibnet.ac.in/bitstream/10603/182869/9/09_chapter%204.pdf.

²⁰ Sudhanshu Jatav. *Abortion Laws: Pro Choice Arguments From The Lens Of Morality* (last visited sept.28, 2024), <https://supremoamicus.org/wp-content/uploads/2021/05/Sudhanshu-Jatav.pdf>.

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- *The killing of an innocent is a crime and the foetus is also an innocent life and by undergoing abortion foetus feels immense pain. So, it should not be allowed. But this argument does not hold good because now the doctors give an injection into the foetus to slow its heart until it stops so that the foetus would not suffer any pain.*
- *Many women suffer significant emotional trauma after having an abortion²¹.*
- *There is also some evidence that having an abortion may increase a woman's risk of breast cancer in later life. Some other complications include damage and or infection to the uterus and the Fallopian tubes making a woman infertile. Menstrual disturbance can also occur.*
- *Aborting fetuses because they may be disabled sends an implicit message of rejection to people with disabilities.*
- *From the moment of conception, an embryo (or in later stages of development, a foetus) is a human being entitled to protection and that's way, has a right to life that must be upheld.²².*

According to this argument, abortion is homicide.

ARGUMENTS BY THE PRO-CHOICE ADVOCATES WHO FAVOUR ABORTION:

Every woman is having the right to control her own body; no woman should be compelled to carry her pregnancy against her will. There cannot be any equality unless the woman has the right to control her fertility.

²¹ Anushka Kumari, Abortion Laws in India, 1 BLJ.(2020),<https://burnishedlawjournal.in/wp-content/uploads/2020/11/Abortion-Laws-in-India-by-Anushka-Kumari.pdf>.

²² Dhir Shweta, *Reproductive freedom a human rights issue with special reference to India*, SHODHGANGA. 1,148, (2015),https://shodhganga.inflibnet.ac.in/bitstream/10603/182869/9/09_chapter%204.pdf.

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- *Our right to privacy is vast enough to include right to marry, right to form a family, right to or not to have children, the right to be or not to be a parent etc. without unnecessary government interference. Abortion is therefore a personal privacy issue.²³*
- *If a woman is restricted from lawful aborting of the child, then she will have to resort to illegal abortion, thereby, causing many deaths as they are frequently performed by those who are not competent to do so.*
- *Unmarried girls are at a higher risk than married women when trying to end a pregnancy caused by illicit relations, as there is a strong desire to get an abortion, even from someone who is not qualified due to social stigma attached towards unmarried females.*
- *If abortion is banned, then the people get it done by paying hefty amounts to medical practitioners which will give rise to the emergence of some kind of black market in medical services which is against medical ethics.*
- *Illegal services cause illegal organization of all those who are concerned with illegal abortions. It also promotes police corruption.*
- *The procedure of terminating a pregnancy to protect the mother's life occurs when it is determined that, without intervention, both the mother and the foetus would perish; The argument here is that aborting the foetus can guarantee the woman's survival, not that the foetus is less valued than the mother.²⁴*

2.3 ABORTION AS A 'PRIVACY RIGHT' UNDER ARTICLE 21

OF THE CONSTITUTION:

²³ Anushka Kumari, Abortion Laws in India, 1 BLJ.(2020),<https://burnishedlawjournal.in/wp-content/uploads/2020/11/Abortion-Laws-in-India-by-Anushka-Kumari.pdf>.

²⁴ Dhir Shweta, *Reproductive freedom a human rights issue with special reference to India*, SHODHGANGA. 1,149, (2015),https://shodhganga.inflibnet.ac.in/bitstream/10603/182869/9/09_chapter%204.pdf.

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The right to abortion is inherently linked to an individual's privacy, which is considered a part of Article 21 of the Constitution that protects the right to life and personal liberty, except in cases where process established by law is followed.

The right to privacy is not explicitly stated in Article 21, instead, it has been established through a series of judicial decisions. Notable cases addressing this issue include the following²⁵:

- **Khark Singh vs. State of U. P²⁶**, it was held that the expression life is not limited to bodily freedom from restraint or confinement to imprisonment but something more than mere animal existence. The petitioner was charged in a dacoity case but was released as there was no evidence against him, but he was kept under the police surveillance which also included the domiciliary visits at night. Domiciliary visits mean visits by the police at Night to the private house making sure whether the suspect is staying at home or not. The Supreme Court (SC) deemed the visits to be an intrusion on the petitioner's privacy and personal freedom.
- **Govind vs. State of M. P²⁷**: M. P Regulations 855 and 856 were framed by the Govt. under section 46(2)(e) of the police act. The petitioner challenged these regulations as violative of right to privacy as a part of Art. 21 of constitution. The Supreme Court determined that the regulations are legitimate and carry the authority of law.
- **R. Rajagopal v. State of T. N²⁸**: popularly known as Auto Shankar case, The Supreme Court affirmed that the right to privacy, or the right to be left alone, is protected under Article 21 of the Constitution. Individuals have the right to protect the privacy of themselves, their families, marriages, procreation, motherhood, and childbirth. No one is permitted to publish any information regarding these matters, whether positive or negative.

²⁵ DR. J.N PANDEY, CONSTITUTIONAL LAW OF INDIA, 291(Central Law Agency 2023).

²⁶ *Khark Singh v. State Of U.P.*, (1964)1 SCR 332, AIR 1963 SC 1295.

²⁷ *Govind v. State of M.P.*, AIR 1975 SC 1378.

²⁸ *R. Rajagopal v. State of T.N.*, (1994) 6 SCC 632.

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- **Madhukar Narain v. State of Maharashtra²⁹**: In this Case, a police inspector went to the home of a woman in uniform and asked to have sex. She refused, and when he attempted to compel it, she screamed. He argued in court that since she was a woman of easy virtue, her testimony should not be trusted. The court dismissed this argument and found him accountable for infringing her right to privacy under Article 21. It further stated that ladies of easy virtues also have the right to privacy.³⁰
- **Mr. 'X' v. Hospital 'Z'³¹**: In this case the appellant was suffering from AIDS when the appellant was asked to donate blood for a patient his blood samples was found to be HIV. The appellant marriage was fixed with miss 'y' but called off on the ground of blood test. The appellant said his right to privacy has been infringed. The SC held that the right has not been infringed as privacy is not an absolute right and restrictions can be imposed on public health, morals and order.
- **Ms. X v. Mr. Z³²**: The wife filed a petition for dissolution of marriage on the ground of cruelty and adultery against the husband on the other hand husband asserted that his wife had adulterous affairs with one person and said pregnancy of wife was terminated in the AIMS and records are preserved in the Hospital, husband filed application for seeking DNA test. By stating that the right to privacy is not an absolute right and that once it has been incorporated into a public document, an individual can't claim that such a test would violate their right to privacy, the court permitted the same.
- **Surjeet Singh Thind v. Kanwaljit Kaur³³**: In order to prove that the wife was not virgin, the husband filed an application for her medical examination. The court held that a medical examination of a woman's virginity violates her right to privacy³⁴.

²⁹ Madhukar Narain v. State of Maharashtra, AIR 1991 SC 207.

³⁰ DR. J.N PANDEY, CONSTITUTIONAL LAW OF INDIA, 292-293 (Central Law Agency 2023).

³¹ Mr. X v. Hospital Z, AIR 1999 SC 494.

³² Ms. X v. Mr. Z, AIR 1999 SC 495, (1998) 8 SCC 296.

³³ Surjeet Singh Thind v. Kanwaljit Kaur, AIR 2003 P&H 353.

³⁴ Supra note 23 at 293-295.

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- **Royal M Bhuvaneswari v. Nagaphamender Royala³⁵**: The petitioner filed a divorce petition in court against his wife. He produced a hard disc relating to conversation of his wife recorded in the U.S with others. The court ruled that the act of the husband secretly listening to his wife's conversations with others violates her right to privacy as guaranteed by Article 21 of the constitution, and even if the discussions are truthful, they cannot be accepted as evidence.
- **People's Union for Civil Liberties v. Union of India³⁶**: The Supreme Court ruled that Section 5(2) of the Indian Telegraph Act, 1885, which permits the central or state government to intercept phone calls, constitutes a significant violation of the private rights of individuals as guaranteed by Article 21. This measure should only be utilized by the state in situations of public emergency or for the sake of public safety.
- **M. P. Sharma and Ors v Satish Chandra³⁷**, Regarding the authority of search and seizure, the Supreme Court's constitutional bench ruled that the Indian Constitution does not recognize the idea of privacy.
- **K. S Puttaswamy v. Union of India³⁸**, The Supreme Court issued a landmark decision on August 24, 2017, declaring that the right to privacy is a fundamental element of Part III of the Indian Constitution. The Bench determined that Article 21 of the Indian Constitution includes an inherent right to privacy. In delivering this ruling, the Apex Court set aside the decisions in M.P. Sharma and Kharak Singh regarding their failure to explicitly acknowledge the right to privacy.

The Supreme Court, however, determined that the Right to Privacy is a qualified right rather than an 'absolute right.'

³⁵ Royal M Bhuvaneswari v. Nagaphamender Royala, AIR 2008 AP 98.

³⁶ People Union for Civil Liberties v. Union of India, AIR 1997 SC 568, (1997) 1 SCC 301.

³⁷ M. P. Sharma and Ors v. Satish Chandra, (1954) 1 SCR 1077.

³⁸ K.S Puttaswamy v. Union of India, (2017) 10 SCC 1, AIR 2017 SC 416.

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Despite the Puttaswamy decision's remarks and relevance to Indian women's abortion rights, one would be hard-pressed to find subsequent case law under the MTP Act relying on the Puttaswamy decision.

CHAPTER III

MEDICAL TERMINATION OF PREGNANCY ACT, 1971:

"An Act designed to allow registered medical practitioners to terminate individual pregnancies and to address

related matters or those ancillary to it" is what the MTP Act, 1971's preamble states."

It has a three-pronged objective. It has been envisaged:

1. *as a measure for improving the physical and mental health of women*
2. *as a humanitarian aid when pregnancy is the resultant of any sex crime and*
3. *on grounds of eugenics, to prevent children from being born diseased and deformed.*

3.1 AN ANALYSIS OF PRE-MTP ACT, ERA AND PRIMITIVE SOCIETY:

Up until the 1960s, it was against the law for women to have abortions, and under Sec. 312 IPC, they may be sentenced to three years in prison or fined. Prior to the implementation of the Medical Termination of Pregnancy (MTP) Act in 1971, abortion was considered a criminal act in India as per the Indian Penal Code (IPC) established in 1860.³⁹ The IPC led to many unsafe abortions performed by non-medical personnel, resulting in many deaths. The Central Family Planning Board formed a committee chaired by Shri Shanti Lal Shah, who was the health minister of Maharashtra at the time, to examine the potential for legalizing abortion in response to a rise in the number of unsafe abortions carried out by unqualified individuals in unhygienic

³⁹ Veronica Arora & Ishwar C Verma, *The Medical Termination of Pregnancy (Amendment) Act, 2021: A step towards liberation*, IJME. 1,1(2021)
<https://ijme.in/articles/the-medical-termination-of-pregnancy-amendment-act-2021-a-step-towards-liberation/?galley=html>.

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conditions, posing serious risks to women's lives and health. The recommendations made by this committee resulted in the enactment of the Medical Termination of Pregnancy Act in 1972.⁴⁰ Abortion in Primitive Society Until the 19th century, there is no historical record of abortion being completely banned or criminal in the primitive society. *"Up to five months, it was permitted, at which point the foetus was considered viable, as indicated by some indirect references to the Vedas."* Even though Kautilya's economists imposed severe penalties on a slave woman for undergoing an abortion, the Charaka Samhita does not address the topic of abortion, nor has either religion or the state historically taken a definitive stance on it. After gaining independence, the Medical Council of India adopted a Code of Ethics in 1956 that continued the colonial legacy. *"I will honour human life from the moment of conception until natural death"*, and I will stand against abortion. Kautilya's Artha Shastra states that a penalty of 1,000 Panas is imposed for causing a miscarriage through physical violence, a fine of 500 Panas for inducing a miscarriage with medication, and a charge of 250 Panas for miscarriage resulting from strenuous labour. Now we may go on to another aspect of abortion's history. Miscarriage is the loss of a foetus as a result of an unneeded pregnancy. It is one of the oldest and most widely used techniques of reproductive control. This has been accomplished and completed in every corner of the globe. Induced abortions are legal in some civilizations and are governed by laws or policies. Those policies and laws are a product of the nation's legal legacy, as well as its political, economic, social, spiritual and cultural institutions.⁴¹

3.2 AN OVERVIEW OF THE KEY PROVISIONS OF THE ACT:

The Medical Termination of Pregnancy (MTP) Act, enacted in 1971, ensures a woman's right to decide to undergo an abortion based on her own informed choice, along with her mental and physical wellbeing, and the wellbeing of her unborn baby. Consequently, a woman's mental and physical health will dictate the legal basis for a medical termination.

⁴⁰ Sai Abhipsa Gochhayat, *Understanding of Right to Abortion Under Indian Constitution*, MANUPATRA (Sept.10,2024, 9.29 PM), <https://manupatra.com/roundup/373/articles/presentation.pdf>.

⁴¹ Trishi Anand, et al., *Abortion Laws in India: A Critical Analysis* 7 IJME 61,62(2022).

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- According to Section 3 of the MTP Act, 1971 if a pregnancy lasts 12 weeks, it can be terminated based on the opinion of one "registered medical Practitioner" if continuing the pregnancy would put the woman's life at risk or cause serious harm to her "physical or mental health," or if there is a good chance that the baby would be born with severe physical or mental defects.
- According to Section 4 of the Act, it is clearly stated that any abortion performed under this Act must take place in hospitals that are either maintained by the Government or granted approval by them.
- To end a pregnancy that has continued 12 to 20 weeks, the consent of two certified physicians is required.
- The two explanations of section 3 of the MTP Act, 1971 create a presumption that if a pregnancy results from rape or from contraceptive failure by a married couple, it can be assumed that the distress resulting from the pregnancy would harm the woman's mental well-being.
- It is important to emphasize that the reasons for termination specified in Section 3 of the MTP Act 1971, with the exception of Explanation II, are applicable to all women, regardless of their marital status. Therefore, the terms 'pregnant woman' or 'pregnancy' are utilized, which do not reflect the marital status of the pregnant woman.⁴².
- Regardless of the length of the pregnancy, the opinion of one medical professional will be sufficient under section 5 if the termination is required to preserve the woman's life. The MTP Act of 1971 asserts that abortions can only be done up to 20 weeks into a woman's pregnancy. After that, unless a court had said otherwise, or abortions can only be done if

⁴² Sudhanshu Jatav. *Abortion Laws: Pro Choice Arguments From The Lens Of Morality* (last visited sept.28, 2024), <https://supremoamicus.org/wp-content/uploads/2021/05/Sudhanshu-Jatav.pdf>.

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the woman's life is in danger. Even with this limit, doctors are often hesitant to do abortions because they are afraid of being investigated and charged⁴³.

- As per the Act, 'a medical practitioner who holds any recognized medical qualification as outlined in clause (h) of Section 2 of the Indian Medical Council Act, 1956, whose name is registered in a state medical register and who has the requisite experience or training in gynaecology or obstetrics as specified by rules established under this Act, is allowed to perform the termination of pregnancy.' Allopathic doctors who are properly registered with the State Medical Council have the authority to conduct abortions. In contrast, practitioners of homeopathy, Ayurveda, Unani medicine, and unqualified practitioners including RMPs and quacks are not authorized to perform abortions. Among allopathic doctors, only those meeting one or more of the following qualifications are permitted to carry out Medical Termination of Pregnancy (MTP). Once a doctor meets the necessary qualifications, they automatically qualify to perform abortions without needing to seek approval from any authority. A doctor cannot decline to perform abortions based on religious belief, doing so may result in their name being removed from the Medical Council. For government doctors, refusal may also lead to departmental repercussions.*
- After 20 weeks of pregnancy, a woman is required to file a writ petition in either the High Court or the Supreme Court of India, using Article 226 or Article 32 of the Indian Constitution. The Court then directs the formation of a medical board, which is tasked with collecting information and preparing a report for the Court. Based on this report, the Court makes a decision regarding the woman's request for a medical termination. Although the*

⁴³ Veronica Arora & Ishwar C Verma, *The Medical Termination of Pregnancy (Amendment) Act, 2021: A step towards liberation*, IJME. 1,1-2(2021)
<https://ijme.in/articles/the-medical-termination-of-pregnancy-amendment-act-2021-a-step-towards-liberation/?galley=html>.

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2021 amendment act has altered some aspects, the fundamental procedure remains the same.⁴⁴.

There have been a number of cases wherein the petitioners approach the Court for permission to terminate their pregnancy after the gestational period limit but in the long-drawn process of a suit and Court proceedings, gives birth to the child before the Court ever comes to a decision. In Meera Santosh pal v. Union of India⁴⁵, A woman in her 24th week of pregnancy approached the Supreme Court to aid her to terminate the pregnancy medically. The Supreme Court established a medical board, which determined that continuing the pregnancy would not only cause grave harm to the woman's physical and mental health but also that the foetus would be unable to survive extra-uterine life due to abnormalities. In this case, the Court permitted the woman to undergo medical termination of pregnancy in accordance with the provisions of the MTP Act. In Sarmistha Chakraborty v. Union of India⁴⁶, The Supreme Court set up a medical panel that concluded it was an abortion case since the woman would experience significant mental harm if the pregnancy were to persist. Additionally, if the child were born alive, it would need dangerous cardiovascular surgery immediately after birth. Based on this finding, the Court approved the petitioner's request to have her pregnancy terminated medically. In Savita Sachin Patil v. Union of India⁴⁷, A woman who was 26 weeks pregnant sought approval from the Supreme Court to terminate her pregnancy. The Court formed a medical board, which provided a report stating that there was no significant risk to the mother by continuing her pregnancy, and if the baby was delivered with 'Trisomy 21,' it would 'likely' experience mental and physical challenges. The Supreme Court refused the request for permission because the medical report did not confirm that the particular foetus would endure emotional difficulties, instead suggesting it is 'not only 'probable' to occur, but the woman's life was not in danger.

⁴⁴SHODHGANGA, <https://shodhganga.inflibnet.ac.in/bitstream/10603/214275/12/chapter%204.pdf> (last visited oct.2, 2024).

⁴⁵ Meera Santosh pal v. Union of India, AIR 2017 SC 461.

⁴⁶ Sarmistha Chakraborty v. Union of India, (2018) 13 SCC 339.

⁴⁷ Savita Sachin Patil v. Union of India, (2017) 13 SCC 436.

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Also, in Savita Sachin Patil v. Union of India⁴⁸, “The Supreme Court refused to allow a medical termination based on the report from the medical board, which stated that the board could not ascertain the timeframe in which the baby might survive without posing a risk to the mother's life, even though there was a strong possibility that “the baby could be born alive and survive for an uncertain duration.”

The validity of MTP Act was challenged in the case of Nand Kishore Sharma v. Union of India⁴⁹. It was contended that the Act, especially Section 3(2)(a) and (b) along with Explanation I and II to Section 3, was unethical and in violation of Article 21 of the Constitution of India. In this case, the court needed to ascertain when a foetus is considered to be alive, and whether the aforementioned provisions infringe upon its right to life. However, the court opted not to engage in a discussion regarding the moment when a foetus attains life or the broader ethical implications concerning abortion, stating that it was “only focused on the legality of the pertinent provisions of the Act.” The court declined to address the issue of granting the foetus the status of a “person” and upheld the legality of the MTP Act, asserting that it aligned with the goals and intentions of Article 21 of the Constitution rather than opposing it.

3.3 CRITICISMS OF MTP ACT, 1971:

- *The MTP Act of 1971 was established, providing an exception to the abortion offense defined in the Indian Penal Code of 1860, allowing abortion under certain restricted conditions. The law's primary objective was population control and family planning, and it lacked a framework recognizing basic human rights.*
- *The law is doctor-centric and allows excessively medicated abortion, depriving pregnant women of bodily and decisional autonomy.*
- *The MTP Act established a 20-week gestational limit for abortion, allowing procedures beyond this timeframe only if the pregnant woman's life was at risk. Although this part of*

⁴⁸ Ibid.

⁴⁹ Nand Kishore Sharma v. Union of India, AIR2006 RAJ 166.

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the Act was progressive, it did not fully integrate a rights-based approach. The MTP Act aimed to offer a conditional right to abortion, treating pregnancy termination as an option that was never normalized for expectant mothers, thus undermining the autonomy of the pregnant individual.

- The enforcement of regulatory framework was lacking. Ironically, most women in India underwent abortions outside of the legal system. This was a result of the strict limitations on registered facilities and the requirement for doctors' approval established by the MTP Act, as well as the absence of services, inadequate application of the Act by healthcare providers, and a general lack of awareness among women about their legal entitlements.*
- The MTP Act reflected a patriarchal perspective on family planning, focusing on population control rather than empowering women to manage their own reproductive choices.*
- The challenges related to the enforcement of the MTP Act were further intensified by sex-selective abortions. Societal preferences for sons result in sex-selective abortions, which contributes to female foeticide. Since abortion was legal in India before 20 weeks of pregnancy, it was not possible to outright ban female foeticide; therefore, there was a need for a new law to curb the exploitation of the MTP Act for sex-selective abortions, leading to the enactment of the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act in 1994.⁵⁰*

CHAPTER IV

AMENDMENTS AND REFORMS

To address evolving needs and transform the procedure, several amendments have been made to the MTP Act of 1971, taking into account women's rights and advances in technology.

⁵⁰ Kanu Priya, *Legislation Review - Medical Termination of Pregnancy Act, 1971*, 2 ILECR 1, 4-5(2022).

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4.1 MTP (AMENDMENT) ACT, 2002:

It added following changes in the Act:

- In section 2 of the Medical Termination of Pregnancy Act, 34 of 1971, (hereinafter known as the principal Act), - (i) In clause (a), the term lunatic shall be replaced with the phrase mentally ill person.
(ii) In place of clause (b), the following clause shall be inserted, specifically: -(b) a mentally ill person refers to an individual requiring treatment due to any mental disorder, excluding mental retardation.
- In section 3, sub-section (4), of clause (a), the term lunatic shall be replaced with the phrase mentally ill person.

The following section shall replace section 4 of the principal Act:

No pregnancy termination under this Act may be performed anywhere other than

- (a) a government established or maintained hospital, or
- (b) a location at the moment authorized by the government or a district-level committee formed by that government, with the chief medical officer or district health officer serving as the committee's chair.

The District Level Committee must have a minimum of three members and a maximum of five, including the Chairperson, as determined by the Government periodically.

- In section 5 of the main Act, sub-section (2) and its Explanation shall be replaced with the following, namely:
(2) Regardless of any provisions in the Indian Penal Code, if a person who is not a registered medical practitioner performs an abortion, it shall be considered a crime subject to rigorous imprisonment for a minimum of two years and a maximum of seven years under that Code, and that Code shall, to this extent, stand modified.

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3) Anyone who ends a pregnancy in a Place not specified in section 4 shall face rigorous imprisonment for a minimum of two years, which may be extended to a maximum of seven years.

(4) Any individual who owns a place that is not authorized under clause (b) of section 4 shall face rigorous imprisonment for a duration of at least two years, which may extend up to seven years.

Explanation 1:

For the purposes of this section, "owner" refers to anyone who serves as the administrative leader or is

otherwise in charge of the operation or management of a hospital or location, under whatever name it may be known, where a pregnancy may be terminated in accordance with this Act.

Explanation 2:

For the purposes of this section, the aspects of clause (d) of section 2 concerning the experience or training in gynaecology and obstetrics that is required for registered medical practitioners shall not be applicable.⁵¹

The main aim of the aforementioned amendment is to update the MTP Act, 1971 to be more applicable to the current context in India, to eliminate provisions that have been discriminatory towards women, to enforce stricter and heightened penalties for breaches of the Act, to safeguard registered medical practitioners from the Indian Penal Code, and to legalize pregnancy termination based on various socio-medical reasons.⁵²

4.2 MTP (AMENDMENT) BILL, 2014:

⁵¹ MINISTRY OF HEALTH & FAMILY WELFARE,
(<https://mohfw.gov.in/?q=acts-rules-and-standards-health-sector/acts/mtp-act-amendment-2002> (last visited sept.19, 2024).

⁵² Trishi Anand, et al., *Abortion Laws in India: A Critical Analysis* 7 IJME 61,65(2022).

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The Medical Termination of Pregnancy (Amendment) Bill, 2014 was introduced in October 2014 with the aim of significantly reforming the current abortion legislation in the nation, and to finally shift the discourse from medical professionals to women. Such a shift decreases the vulnerability of women within the clinical setting and frees them from subjective interpretations of abortion law.

The Bill suggested several major changes:

1. *The term 'medical practitioners' was replaced by 'health care providers. This was done to include other fields of medicine into the purview. The term health care providers included medical qualifications of Ayurveda, Unani, Siddha, Homeopathy and nurses or auxiliary nurse midwives*
2. *The Bill sought to extend the timeframe for legally terminating a pregnancy from twenty weeks to twenty-four weeks.*
3. *It also provided women the autonomy to terminate pregnancies within the first twelve weeks. This allowed women who were twelve weeks pregnant or less to have an abortion upon request without needing the approval of a medical professional.*
4. *The Bill added a provision stating that the duration of the pregnancy would not be relevant in cases where the termination was required due to the diagnosis of any significant foetal abnormalities as may be defined.*
5. *It contained a provision aimed at safeguarding the privacy of women who have undergone a termination of pregnancy under the Act.*
6. *The Explanation to Section 3(2) was revised to extend protection regarding contraceptive failures or device to all women and their partners, rather than just to married women.*
7. *The addition of other field of medicine was fiercely debated, with arguments suggesting it could compromise the safety of medical procedures and lead to unsafe and negligent abortions. Conversely, it was argued that this inclusivity would benefit women in rural*

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areas who have limited access to hospitals. Additionally, reports from the World Health Organization indicate that a significant number of abortions worldwide are safely and efficiently carried out by nurses and midwives⁵³.

This amendment bill seeks to amend section 3 of the MTP Act, 1971 *“it states that the time limit for terminating pregnancy will not apply in cases where serious fetal abnormalities are detected. In such, situations abortion may be allowed regardless of how long the pregnancy is based on medical opinion”*. The terms *“registered health care professionals”* have been added to this definition of *“registered pregnancy termination,”* replacing *“registered medical practitioners”*⁵⁴. The Bill was a huge step forward towards achieving legal recognizance of women’s autonomy over their bodies and safe and healthy abortions. The Bill, however, was not passed. A draft Bill was introduced and suggestions from the public and all stakeholders were invited, however, no changes were ever deliberated or introduced to the Bill. Numerous petitions were submitted to the Courts requesting the enactment and enforcement of the 2014 Bill, and the Ministry of Health and Family Welfare was repeatedly tasked with compiling reports and discussions on the matter.

4.3 MTP (AMENDMENT) ACT, 2017:

This Act may be defined as the Medical Termination of Pregnancy (Amendment) Act, 2017 which talked about following changes:

In sub-section (2) of section 3 of the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as the Principal Act), the word 'twenty' in clause (b) shall be replaced with 'twenty-four'. In sub-section (3) (i) of section 6 of medical Termination of pregnancy Act, 1971, after the““rds “one session or in two” the words “or more” shall be included, and for sub-section 3 (ii) for the words *“in which it is so laid or the session immediately following”* the words

⁵³ Rishika Rishabh, *Abortion Laws in India: The Paramount Need for Change*, 19 SMJ 393,400 (2020).

⁵⁴ Trishi Anand, et al., *Abortion Laws in India: A Critical Analysis* 7 IJME 61,65(2022).

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“immediately following the session or the successive session” aforesaid shall be substituted.⁵⁵
Unfortunately, *The Medical Termination of Pregnancy (MTP) Amendment Act of 2017 was not imposed & forced which was having the following broad objectives:*

- *This legislation was introduced to decrease the incidence of illegal abortions and reduce maternal mortality and morbidity.*
- *It was enacted in response to pleas from advocates aimed at making safe abortion more readily available.*
- *The law was established to ensure women have access to safe abortions under specific circumstances.*
- *The act was aimed to empower women by offering comprehensive abortion care to everyone.*

4.4 MTP (AMENDMENT) ACT, 2021:

1. *Earlier, as per the MTP Act of 1971, women who were more than 20 weeks pregnant and wish to terminate their pregnancy had to submit a writ petition to the relevant High Court or Supreme Court. But with the amendment of the Act in 2021, a woman who is 20 weeks pregnant and wants to end her pregnancy must now obtain the opinion of just one registered medical practitioner, which is a positive change that reduces the mental, physical, and financial stress on women.*
2. *This Amendment Act extended the gestation period from 20 weeks to 24 weeks for "special categories of women," including rape survivors and other vulnerable women.*
3. *If the duration of the pregnancy ranges from 20 to 24 weeks, the woman is required to get the opinion of two registered medical practitioners before proceeding with the termination. However, the Amendment includes the wording “in the case of these categories of women” as specified by rules established under this Act, suggesting that this option is available*

⁵⁵SANSAD, <https://sansad.in/getFile/loksabhaquestions/annex/11/AS340.pdf?source=pqals> (last visited oct.8, 2024).

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solely to women who meet the criteria outlined in the MTP Rules. Further, the MTP Amendment Rules, 2021 introduced specific "categories of women" whose exceptional circumstances would permit them to consult two medical practitioners to request an abortion between 20 and 24 weeks of gestation. These categories consist of survivors of sexual assault, rape, or incest, minors, individuals undergoing a change in marital status during their pregnancy, women with physical and mental disabilities, cases of foetal malformation, and pregnant women in humanitarian contexts, disasters, or emergency situations as declared by the Government.⁵⁶

4. The Amendment Act 2021 mandates the formation of a medical board under the Act's provisions, and if the pregnancy has reached 24 weeks or more, a medical termination is allowed only if the medical board identifies a case of "substantial fetal abnormality" and deems the termination necessary. It is important to highlight that in this situation, the allowance for medical termination is based solely on the abnormalities of the foetus. Consequently, a woman is not required to seek Court approval to terminate a pregnancy that exceeds 24 weeks if there is a presence of fetal abnormality.⁵⁷
5. However, a woman must file a writ petition in the appropriate court if her pregnancy is longer than 24 weeks and she wants to end it without a fetal defect.
6. In the past, medical boards were established by the court handling women's writ petitions seeking
 - a. approval for termination of pregnancy rather than by statute.

⁵⁶ Veronica Arora & Ishwar C Verma, *The Medical Termination of Pregnancy (Amendment) Act, 2021: A step towards liberation*, IJME. 1,2-3(2021)
<https://ijme.in/articles/the-medical-termination-of-pregnancy-amendment-act-2021-a-step-towards-liberation/?galley=html>.

⁵⁷ Rishika Rishabh, *Abortion laws in India: the paramount need for change* (last visited oct.10,2024),<https://supremoamicus.org/wp-content/uploads/2020/07/A1-49.pdf>.

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7. *It is commendable that the MTP Act 2021 has revised the Explanation to Section 3 (2) to incorporate unmarried women by substituting the phrase "married woman" with "any woman" and replacing the word "husband" with "partner."*
8. *The newly added Section 5A states that a registered medical practitioner is prohibited from disclosing the name or any identifying details of a woman whose pregnancy has been terminated, except to someone legally authorized by any law for the time being in force. Noncompliance with this provision can result in imprisonment, fine, or both.⁵⁸*

4.5 CRITICISMS OF MTP (Amendment) ACT, 2021:

1. *The Amendment Act of 2021 continues to prioritize social Darwinism over women's health, and when a subject of women's health comes, it appears to be a minor concern.*
2. *The Amendment Act 2021 has extended the maximum period for terminating a pregnancy from 20 weeks to 24 weeks for only specific groups of women and it also has relaxed this limit in instances of serious fetal abnormalities beyond 20-24 weeks based on board's opinion.*
3. *Lack of a women-focused perspective, the legislation embodies a heteronormative-patriarchal perspective on family planning, treating it as a mechanism for controlling population rather than as an act of reproductive autonomy. It does not significantly contribute to the progress of a pregnant women's rights or acknowledgment of their identity. The confidentiality provision allows the sharing of a pregnant individual's information with "authorized by law" persons, undermining the individual's right to privacy.*
4. *The Amendment Act 2021 broadens the scope of abortion grounds by including any "woman or her*

⁵⁸ Supra note 53 at 66.

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5. Partner” rather than just “married women”. “This provision will therefore grant many unmarried women the right to a legal abortion, especially those from underrepresented categories like sex workers. However, the phrase “partner” implies that women will still need to provide relational justifications for their abortion request. Furthermore, transgender, intersex and gender diverse people are not included in this provision, as it still uses the term “woman”.⁵⁹
6. There is no timeframe for the Medical Board's decision-making process, according to the Amendment Act 2021, if the Medical Board finds that there are serious fetal abnormalities, the pregnancy may be terminated after 24 weeks. The deadline for the board to make a decision and turn in the report is not mentioned.
7. Unavailability of experienced medical professionals capable of conducting MTP procedures, the objective of the Act is to expand women's access to legal and safe abortion services in order to reduce maternal mortality and morbidity and other serious comorbidities. As per the National Health and Family Survey (2015-16), merely 53% of abortions are carried out by a qualified physician, while the rest are undertaken by a nurse, auxiliary nurse midwife, dai, family member, or through self-administered methods.
8. Third-party authorization, the Act requires third-party authorization for abortions after 24 weeks from the medical boards composed of at least five experts. The majority of specialists reside in urban areas. As a result, seeking authorization from these boards incur significant costs and delays for marginalised individuals, particularly those living in rural areas. This causes a disproportionate impact on groups such as Dalits and Adivasis who already face multiple barriers to accessing quality healthcare.

⁵⁹ Veronica Arora & Ishwar C Verma, *The Medical Termination of Pregnancy (Amendment) Act, 2021: A step towards liberation*, IJME. 1,3-4(2021), <https://ijme.in/articles/the-medical-termination-of-pregnancy-amendment-act-2021-a-step-towards-liberation/?galley=html>.

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9. In India, the Transgender Persons (Protection and Rights) Act, 2019 acknowledges transgender individuals as a distinct gender. Some medical research suggests that transgender may become pregnant after undergoing hormone therapy to transition from female to male, which raises the need for access to termination services. As the Amendment Act pertains provisions specifically to women, it remains uncertain whether transgender individuals will be legally protected under its provisions or not.⁶⁰
10. Thus the 2021 amendment Act is a step forward in the rights of women over their bodies. However, it is doctor centric and doesn't provide abortion to women at their will.

CHAPTER V

AVAILABILITY OF ABORTION SERVICES

5.1 PROBLEMS FACED BY RAPE VICTIMS UNDER THE ACT EVEN AFTER THE AMENDMENT ACT, 2021:

The Medical Termination of Pregnancy (MTP) Amendment Act, 2021, is considered a reformative measure that seeks to overcome the shortcomings of the MTP Act, 1971, which regulates abortions in India. One significant alteration is found in Section 3, which increases the permissible timeframe for terminating a pregnancy under specific conditions from the previous maximum limit up to 20 weeks to 24 weeks in the present amendment Bill of 2021. But Abortions conducted between 20 to 24 weeks must be supported by the opinions of two medical professionals. These healthcare providers should "in good faith" believe that continuing the pregnancy poses a danger to the woman's life or a serious threat to her physical or mental well-being, or that there is a considerable likelihood that the child, if born, would experience a severe physical or mental abnormality. Rule 3B of the MTP Act 2021 identifies

⁶⁰ Ambika Gupta, A CRITICAL ANALYSIS OF THE SHORTCOMINGS UNDER THE MTP (AMENDMENT) ACT, 2021, 1 VULJ. 86,90-95 (2021), <https://vulj.vupune.ac.in/archives/8.pdf>.

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seven groups of women who are eligible to terminate pregnancies between 20 and 24 weeks as per Section 3(2) (b) of the MTP Act 2021. *These groups include: (i) survivors of sexual violence, including rape or incest; (ii) minors; (iii) women whose marital status has changed during their pregnancy due to divorce or becoming a widow; (iv) women with physical disabilities; (v) women with mental health issues, including those with intellectual disabilities; (vi) women whose foetus is diagnosed with serious malformations that may lead to non-viability or, if born, could have significant physical or mental disabilities; and (vii) women who find themselves pregnant in humanitarian crises, or during emergencies or disasters.*⁶¹

A significant shortcoming in the revised Act pertains to its handling of abortions in pregnancies resulting from rape. According to the Act, pregnancies that extend beyond 24 weeks can only be terminated if “*the diagnosis of any of the substantial fetal abnormalities*” is determined by a Medical Board or situations where there is a serious risk to the mother's life after 24 weeks, the courts have allowed for abortions in particular cases.

For example, in the case of *Shaikh Ayesha Khatoon vs. Union of India*⁶², in 2018, the Bombay High Court permitted the petitioner to proceed with a medical termination of pregnancy (MTP) at her own risk due to severe foetal abnormalities that were causing distress to the expectant mother. In a different case, *XYZ vs. State of Maharashtra*⁶³, an unmarried minor was granted permission to have an MTP at 26 weeks of pregnancy, overriding the Medical Board's recommendation on the basis that for a young girl, carrying an unwanted child could result in devastating consequences for her future, affecting not just her but her entire family as well. Still a survivor of rape wishes to terminate a pregnancy that has surpassed 24 weeks, the sole

⁶¹ Supra note 58 at 2.

⁶² Shaikh Ayesha Khatoon v. Union of India, 2018 Lawsuit (Bom) 23.

⁶³ XYZ v. State of Maharashtra, 2022 Live Law (SC) 676.

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option available to her is to pursue a court order. This goes against the spirit of the amended Section 3(2), Explanation 2, which clearly states how rape affects the mental health of the survivor and states that a pregnancy *"shall be presumed to constitute a grave injury*

to the mental health of the pregnant woman" if it is claimed that the rape was the cause.

In various instances, Indian courts have recognized women's bodily autonomy in relation to their reproductive rights. In the significant Supreme Court case of KS Puttaswamy vs. Union of India⁶⁴, the right to bodily autonomy was deemed an integral aspect of the right to privacy.

In High Court on its own motion vs. State of Maharashtra⁶⁵, the Bombay High Court determined that forcing a woman to carry an unwanted pregnancy infringes upon her bodily autonomy and negatively affects her mental well-being. This position was reaffirmed in the pivotal 2009 case of Suchita Srivastava & Anr vs. Chandigarh Administration⁶⁶, where the Supreme Court stated that choices regarding reproduction come under the purview of the rights to bodily integrity, privacy, and dignity. Nevertheless, as previously mentioned, the legislation continues to limit abortion in pregnancies longer than 24 weeks, despite this increasingly rights-based approach. Sexual assault is a severe infringement on a woman's right to control her own body and maintain her dignity. Therefore, a pregnancy resulting from rape should not be regarded as comparable to typical pregnancies, and compelling a survivor to carry such a pregnancy to term constitutes a breach of her right to live with dignity. The revised MTP Act does not adequately consider the specific circumstances surrounding pregnancies that occur due to rape, especially when the survivor is either a minor or lacks the cognitive ability to grasp the seriousness of the situation. Additionally, survivors of rape often experience significant trauma from both the assault and the associated societal stigma, which can lead to delays in revealing the incident to their family, deciding to report it,

⁶⁴ KS Puttaswamy v. Union of India, AIR 2017 SC 4161.

⁶⁵ High Court on its own motion v. State of Maharashtra, (2024) 3 BDLR 1244.

⁶⁶ Suchita Srivastava & Anr v. Chandigarh Administration, (2009) 14 SCR 989.

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and facing difficulties in having a complaint filed. Due to these factors, the entire process can extend beyond 24 weeks. Compelling the survivor to navigate the additional step of approaching the Court or enduring an unwanted pregnancy would only exacerbate their trauma. This is demonstrated by the case of *Alakh Alok Srivastava vs. Union of India & Ors*⁶⁷, in which a 10-year-old rape survivor from Chandigarh sought the court's permission for an abortion after her pregnancy had surpassed the 20-week allowed limit. The survivor endured repeated sexual assaults over a span of seven months by her two maternal uncles. The parents only became aware of the pregnancy when the survivor expressed experiencing stomach pain, and her pregnancy was already several weeks along. Ultimately, the Supreme Court declined to grant permission, and the survivor was unable to attain justice despite the prolonged ordeal.⁶⁸ A pregnancy arising from a consensual relationship & from any other cause should not be compared to one that results from rape. Survivors of rape should not face the same limitations when seeking an abortion. Rape inflicts both physical and psychological harm, which also affects the socio-economic status of the survivors. The law should be expanded to incorporate the principle of “parens patriae,” where the State serves as a guardian for vulnerable survivors. The revised MTP Act of 2021 has the potential to include the directives from the Bombay High Court in *XYZ (Minor) through her father vs. State of Maharashtra*, in which a survivor, who was 25 weeks pregnant, allowed to terminate her pregnancy. The Court subsequently ordered the State to provide all necessary medical support and to permit rape survivors to have abortions even beyond the 24-week limit, provided that medical reports confirm that the survivor's life would not be at risk. Therefore, the Act should include clear provisions that make it easier for rape survivors to obtain abortions, thereby creating a rights-based healthcare system and it

⁶⁷ Alakh Alok Srivastava v. Union of India & Ors, (2018) 17 SCC 291.

⁶⁸ Indian Journal of Medical Ethics, <https://ijme.in/articles/right-to-abortion-of-survivors-of-rape-in-india/?galley=print> (last visited oct. 20,2024).

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would alleviate their challenges in exercising their right to abortion and help mitigate some of their trauma.⁶⁹

5.2 CONTRADICTION WITH THE POCSO ACT, 2012:

A restrictive environment around adolescent abortion is established through state monitoring and punishment, as seen by the legal ambiguities surrounding the joint interpretation of the MTP Act and the POCSO Act. The purpose of the POCSO Act is to shield minors under the age of eighteen from sexual offenses such as harassment, assault, and pornography. All sexual activity involving a "child" is illegal under the law, and anyone who fails to notify law enforcement of their knowledge or suspicion of a violation of the Act faces penalties. Anyone who knows or suspects that an offense has been committed, including the survivor, is also Required to notify the police. The law's mandatory reporting requirement becomes a significant obstacle to pregnant adolescents' access to abortions because they are not considered capable of giving consent. Due to their innate fear of being prosecuted, medical professionals are reluctant to perform abortions on teenage pregnant patients. As it would be a violation of POCSO'S mandatory reporting requirement if they perform abortion without intimation. Teenagers are then compelled to use risky abortion techniques.⁷⁰ The overregulation of adolescent sexuality negatively affects adolescent health, seen in situations such as the arrest of two nurses and a doctor in Arvi, Wardha district of Maharashtra in 2021, for providing an abortion to a 13-year-old. The Rape was a cause of pregnancy, as per a statement given by the pregnant adolescent's mother, who accused a 17-year-old boy of the same. The POCSO Act ensured that the 17-year-old boy was arrested for rape, and his parents were arrested for harassment of the pregnant girl's mother (Express News Service 2022). In another case, a 16-year-old was found to be over 20 weeks

⁶⁹ Supra note. 66.

⁷⁰ Ambika Gupta, A CRITICAL ANALYSIS OF THE SHORTCOMINGS UNDER THE MTP (AMENDMENT) ACT, 2021, 1 VULJ. 86,96 (2021), <https://vulj.vupune.ac.in/archives/8.pdf>.

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pregnant, because of rape in May 2020. Given the advanced gestational stage, the girl's doctors filed an FIR for rape using the POCSO Act. Additionally, the father of the girl petitioned the High Court for judicial authorization to have an abortion, and the request was granted on the grounds that no pregnant individual whose pregnancy, regardless of gestational period, poses a risk to their mental and physical health & can't be forced to continue their pregnancy.⁷¹ Since POCSO'S necessary reporting requirement establishes a monitoring framework even within healthcare facilities, pregnant teenagers who seek abortions from safe healthcare professionals incur the possibility of their consensual sexual partners facing rape charges. In these circumstances, mothers who are adolescents may be forced to have unsafe abortions or to carry their pregnancy to term without access to healthcare services, even after giving birth, which could have serious consequences for their mental and physical health.⁷²

5.3 RELIGIOUS VIEWS IN ABORTION AND SOCIAL STIGMA:

HINDUISM:

Abortion was forbidden in pre-historic Hindu scriptures. sources affirm this by stating that abortion has generally been prohibited in Hindu scriptures and traditions, except in cases where the mother's life is at risk. The foetus, according to Hinduism, is a living, conscious individual who requires and deserves protection. In Hindu literature, abortion is referred to as *garbha-hattya* (womb murdering) and *bhroona hatya* (killing the growing soul). The Rig Veda has a hymn that asks for "foetus protection." "A comparison between abortion and the slaughter of one's parents" is drawn by the Kaushitaki Upanishad. "The foetal slayer...is among the biggest of offenders," says the Atharva Veda.

ISLAM:

⁷¹ Dipika Jain, *Beyond Bars, Coercion and Death: Rethinking Abortion Rights and Justice in India*, 14 OSLS .99, 108-109 (2024).

⁷² Aparna S, *The Medical Termination of Pregnancy Act, 1972 – A Critical Analysis*, 9 CNLULJ ., 174, 182-183 (2021).

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"The habit of burying female newborns under the Arabian sand," Mohammed Saheb protested. The embryo was mentioned in his first Quranic revelation. Abortion was an "unforgivable evil" in ancient Iran, at least for a time. During the Avesta period, using devices for abortion was not permitted, and those who attempted it faced the harshest penalties, according to the Avesta.

BUDDHISM:

Buddhism in the past was *"anti-abortion."* According to Daniel Maguire, author of Sacred Choices. In ten world religions, including early Buddhism, there were significant theological bans on contraception and abortion. Anon harshly stated in The Apocalypse of Peter that those who perform abortions are condemned to eternal torment in hell as decreed by God, while Athenagoras viewed abortion as *"murder,"* for which individuals are answerable to God. Clement of Alexandria and Tertullian concurred, asserting that *"there is no distinction between taking the life of a child who has already been born and that of one who is in the process of being born"*. Hyppolytus referred to it as *"feticide murder,"* while Minicius Felix labelled it "infanticide". *"The woman and anyone who supplied her with abortifacients are murderers",* stated Saint Basil the Great. *"The impoverished reveal their offspring," remarked Saint Ambrose, "while the affluent terminate the lives of their own progeny in the womb, fearing the division of their wealth. They destroy their own children in the womb using horrific toxins, leading to the annihilation of life before it has even begun."*⁷³.

SOCIAL STIGMA:

The stigma associated with abortion, prevalent in various contexts, continues to have a detrimental impact on women's health and overall well-being. Stigma is also an important reason why data on induced abortion are so scarce and unreliable. Due to the fear of experiencing shame or judgment, women across the globe refrain from reporting their

⁷³ Trishi Anand, et al., *Abortion Laws in India: A Critical Analysis* 7 IJME 61,62-63(2022).

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abortions. study, for example, found that 72% of women reported at least three reasons for why they had an abortion. Socio-economic issues are the most commonly mentioned reasons, followed by the desire to cease childbearing and the intention to delay or space out a birth. Additional significant reasons encompass partner-related and health-related factors, which exhibit considerable variation in prevalence across different countries. The established statistical reasons include financial, maturity, age, health, violence and relationship concerns. Not all pregnant women can afford childcare and all the costs that come with raising a child. Unintended pregnancies cause great financial strain and it is among the primary factors contributing to abortions. Adolescent pregnancies present significant challenges as the young women involved often rely on their parents for financial support and typically lack the maturity and emotional stability necessary to bear and nurture a child. In India, specifically, the social stigma and disgrace attached to being an unmarried pregnant woman is a huge factor in abortion numbers. Unmarried mothers face great difficulties in every sphere due to a preconceived notion about their perceived state of disgrace. A study conducted in Nigeria indicates that insufficient partner support regarding the decision to undergo an abortion is associated with both relatively late (second-trimester) abortions and the engagement of untrained providers. Consequently, it has become a priority to design interventions aimed at reducing stigma, as well as to develop research tools that assess stigma from the viewpoints of both providers and women.⁷⁴.

CHAPTER VI

REPRODUCTIVE RIGHTS IN INDIA AND AMERICA

The conservative states are enacting legislation that may limit abortion access. The disclosure of Dobbs v Jackson's draft Judgement Women's Health Organization by the US Supreme Court indicated that, if it would be implemented, states would determine a woman's rights, effectively

⁷⁴ Rishika Rishabh, *Abortion Laws in India: The Paramount Need for Change*, 19 ISSN 393,397 (2020).

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pushing the nation towards a regressive trajectory. On the contrary, India is advancing on a progressive path, as evidenced by the recent amendments of 2021 to the Medical Termination of Pregnancy Act, 1971, which clearly indicate that the country is moving forward. In India, the rights of women are being upheld by the judiciary. Conversely, in the USA, abortions are not being authorized even in non-medical circumstances. The Texas Heartbeat Act imposes a restriction on any abortion after six weeks; an increasing number of regulations are being implemented to limit a woman's right to choose to have an abortion.⁷⁵

6.1 COMPARATIVE ANALYSIS BETWEEN USA AND INDIA'S

STANCE ON RIGHT TO ABORTION USA'S STANCE:

The Convention on the Elimination of Discrimination Against Women (CEDAW) is the Convention which is considered to be the sole near-universal treaty that focuses on the protection of women's human rights, including their rights related to reproductive and sexual health. Article 12 of the CEDAW Convention addresses the right to health, which also covers safeguarding women's right to bodily autonomy. The International Covenant on Economic, Social, and Cultural Rights (ICESCR) in Article 12 asserts that the right to sexual and reproductive health constitutes a fundamental aspect of the right to health. General Comment No. 22 of 2016 was aimed at assisting States parties to implement the Covenant and comply with their reporting obligations under it. This primarily relates to the obligation of States parties to ensure that every individual can fully enjoy their right to sexual and reproductive health, as specified in article 12. The Committee on Economic, Social, and Cultural Rights (CESCR), responsible for overseeing the implementation of the International Covenant on Economic, Social and Cultural Rights by its State parties, has also acknowledged the necessity for abortion services to be financially accessible. It has recommended that States either lower the cost of abortion services or offer financial assistance

⁷⁵ Debleena Pal at.el., *A Comparative Study between US and India Abortion Laws*, 3 IJRPR. 2238, 2238(2022), <https://ijrpr.com/uploads/V3ISSUE11/IJRPR8086.pdf>.

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when required. The United States of America, often considered the most advanced nation globally, is among the seven countries in the world that is not a party to the CEDAW Convention. The United States had signed the CEDAW Convention in 1980, however it was never ratified. In a similar manner, the United States of America signed the ICESCR in 1977; however, it did not proceed to ratify the covenant. Signing the covenant establishes an obligation for the state, whereas ratification legally commits the state to enforce the Convention. Being a signatory to the covenant simply indicates that the state is required to avoid actions that would undermine the object and purpose of the treaty.⁷⁶ One of the fundamental principles of abortion law in the United States was established in Roe vs. Wade⁷⁷, decision, which recognized the right to abortion as a matter of privacy and has remained a pioneering case in this regard. This landmark ruling affirmed the constitutional right to an abortion until the foetus reaches viability, typically around 22 to 24 weeks of gestation. The Court weighed the State's interest in safeguarding potential human life against the privacy rights of women seeking abortions. It determined that the constitutional right to privacy, derived from the Due Process Clause of the Fourteenth Amendment, encompasses the right to make decisions regarding one's pregnancy. The Court also acknowledged that a mandated pregnancy poses significant risks to a woman's physical and mental health, as well as financial and social challenges. Following the death of Justice Ruth Bader Ginsburg and the coming into office of Donald Trump, the US Supreme Court has been filled with conservative judges. On June 24, 2022, in the case of Dobbs vs. Jackson's⁷⁸ Women's Health, which challenged the abortion statute in Mississippi and the validity of Roe vs. Wade⁷⁹, in a 6:3 majority overturned the Roe's 1973

⁷⁶ Aayushi Sibal & Rutvee Mendhekar, *Abortion As A Human Rights Concern: Where Do India And Usa Stand?*, 3 LJIRL.1, 6(2023), <https://ijirl.com/wp-content/uploads/2023/05/ABORTION-AS-A-HUMAN-RIGHTS-CONCERN-WHERE-DO-INDIA-AND-USA-STAND.pdf>.

⁷⁷ Roe v. Wade, 1973 SCC OnLine US SC 20: 35 L Ed 2d 147: 410 US 113 (1973).

⁷⁸ Dobbs v. Jackson, 597 U.S. 215 (2022).

⁷⁹ Supra note.76.

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landmark judgment. The State argued that although Roe case upheld women's independence and their equality, it has been the centre of critique ever since the decision came out. Moreover, the whole case had been controversial from the beginning and hence could not be relied upon as established law. In its ruling, the court noted that abortion was not mentioned in the constitution and that it was not 'deeply rooted in this Nation's history and tradition' as well. While contending that the reasoning behind Roe was 'exceedingly weak', the court also indicated that the State had 'legitimate interests' in regulating abortion, specifically in safeguarding the life of a pre-natal at all stages of development.⁸⁰. The regressive decision in Dobbs although did not mean that abortion would be immediately banned in all of the USA. It granted the member states of the USA the power to establish their own legislation governing the termination of pregnancy. Abortion was restricted by way of TRAP, which is Targeted Regulation of Abortion Providers, which would single-out physicians providing abortion care and would reprimand them for the same by imposing on them legal requirements which would be more burdensome than those placed on other physicians. Here are 13 states so far that have banned abortion and 5 states that have placed a gestational limit on terminating a pregnancy, ranging from 6 to 20 weeks. The most shocking aspect of these bans is that the majority of states that have prohibited abortions do not permit exceptions for cases of rape and incest, despite allowing exceptions for pregnancies that pose a threat to the mother's life. Therefore, in the absence of centralized legislation and without the ratification of CEDAW and ICESCR, thus

States now have the freedom to enact their own abortion legislation without necessarily breaking their treaty responsibilities, as a result to the overturning of *Roe vs. Wade*. While certain states implemented comprehensive bans on abortion without any alteration in public sentiment, others unexpectedly enacted bans on abortion, and some had triggered bans that were promptly

⁸⁰SHODHGANGA, https://shodhganga.inflibnet.ac.in/bitstream/10603/527450/7/07_chapter%204.pdf (last visited 25 oct.2024).

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halted, illustrating the significant shift in opinion. Consequently, at present, the United States is predominantly denying its women the right to abortion, which in turn infringes upon their fundamental human rights, including bodily autonomy, access to safe healthcare, and social justice. Abortion is either entirely illegal in some states, or heavily restricted in others, with gestational bans (*posing health risks, as discussed above*) and *familial and social consent barriers (which challenge a woman's own authority on her body)*. The denial to legalize abortion even in unjust and cruel situations like rape is practically punishing a woman for being raped⁸¹.

INDIA'S STANCE:

Abortion was subject to penalties in India during British rule in 1860, which included imprisonment, fines, or both. It was in 1971 that a specific law addressing reproductive rights was established and enacted by the Indian Parliament, known as the Medical Termination of Pregnancy (MTP) Act, 1971. Nevertheless, this Act for a considerable period systematically excluded unmarried women engaged in consensual relationships. Through an amendment to the Act in 2021, the term "any woman or her partner" was substituted for "married woman or her husband," reflecting the legislature's intention to extend the protective scope of the law to include pregnancies that occur outside the bounds of marriage as well.⁸² India's dedication to recognizing safe, legal abortions as every woman's constitutional right was demonstrated in September 2022 when the supreme court of India issued a progressive verdict that brought all women regardless of marital status under the purview of MTP Act. The court has re-evaluated Rule 3B of the Medical Termination of Pregnancy Rules 2003, as per which only certain categories of women were permitted to seek a termination of their pregnancy between 20-24

⁸¹ Debleena Pal at.el., *A Comparative Study between US and India Abortion Laws*, 3 IJRPR. 2238, 2243(2022), <https://ijrpr.com/uploads/V3ISSUE11/IJRPR8086.pdf>.

⁸² Aayushi Sibal & Rutvee Mendhekar, *Abortion As A Human Rights Concern: Where Do India And Usa Stand?*, 3 LJIRL. 1, 10-11(2023), <https://ijirl.com/wp-content/uploads/2023/05/ABORTION-AS-A-HUMAN-RIGHTS-CONCERN-WHERE-DO-INDIA-AND-USA-STAND.pdf>.

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weeks, under certain extraordinary circumstances. The court conducted a comprehensive examination of all the sub-clauses outlined in Rule 3B and reached the determination that none of these clauses explicitly state that the woman involved must be married, they only specify the circumstances a woman may face in which she can avail an abortion, such as sexual assault or change in marital status, among others. The court additionally observed that it would be in violation of the constitution, to distinguish between women based on their marital status for them to qualify for protection under a law. The court determined that the MTP Act must be interpreted in alignment with societal realities, recognizing that allowing only married women the right to terminate their pregnancies would be conventional and stereotypical, implying that unmarried individuals do not partake in sexual relations. The Court emphasized the fundamental right to bodily autonomy, is right to which every woman is entitled. India has also signed and ratified the CEDAW Convention along with the ICESCR, which bind it to the internationally established obligation of safeguarding a woman's right to reproductive freedom and bodily autonomy, and ensuring that she is not subjected to discrimination on any basis while legally exercising this right⁸³. In the discussion surrounding the pro-choice and pro-life perspectives, particularly regarding gestational bans and the Right to Life of an unborn foetus, which was traditionally acknowledged after a specific stage of pregnancy, it is important to note that while the MTP Act allows for abortion only up to 24 weeks, a woman who is beyond this period still has options available. She may seek recourse by petitioning the High Court or Supreme court for the termination of her pregnancy.⁸⁴ In the matter of *Indulekha Sreejith vs. Union of India*⁸⁵ a woman approached the Kerala High Court seeking to terminate her 31-week pregnancy. The Court underscored the rights of the unborn foetus, equating them with those of a born child, and affirmed the foetus' Right to life as stipulated in Article 21. Similarly, the

⁸³ Id.at 12.

⁸⁴ Supra note 79.

⁸⁵ Indulekha Sreejith v. Union of India, AIRONLINE 2021 KER 1285.

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Calcutta High Court, in *Re: Suparna Debnath and Anr. vs. State of West Bengal*⁸⁶, (2019), determined that the right to life of a 26-week-old foetus supersedes the mother's mental distress and financial limitations.⁸⁷ Consequently, it is clear that much of the Indian legislation concerning abortion is influenced by situational factors and varying opinions from numerous High Courts throughout the country. Nonetheless, at its essence, abortion remains a consistently protected right across India, as there exists specific legislation at the Central level that is MTP which upholds the right to terminate a pregnancy. While this right is not without limitations and is balanced against other factors, India has overall succeeded in creating a comparatively safer reproductive environment for women than the USA.



CHAPTER VII

7.1 SUGGESTIONS AND RECOMMENDATIONS:

Given the ongoing issues related to the MTP Act and the various legal obstacles to obtaining safe abortion, as outlined in this paper, I present my recommendations for reforming India's abortion laws and practices to enhance women's access to safe and comprehensive abortion care. my recommendations are as follows:

- ***Decriminalize and recontextualize abortion within a rights-oriented healthcare framework:*** There exists an immediate necessity to decriminalize abortion to guarantee access to safe abortion services. This action will remove abortion from the realm of criminal law, ensuring that no individual, including the pregnant individual, service providers, or any accompanying or attending persons, shall face criminal liability for engaging in a voluntary abortion process. I advocate for the establishment of rights-based

⁸⁶ Suparna Debnath v. State of W.B., A.S.T. No. 3 of 2019 (Cal HC Jan. 29, 2019).

⁸⁷ SHODHGANGA, https://shodhganga.inflibnet.ac.in/bitstream/10603/527450/7/07_chapter%204.pdf (last visited 25 oct.2024).

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legislation that grants individuals the right to abortion as an integral part of their right to live with dignity, their right to health, reproductive autonomy, privacy, and equality.

- ***Conduct an audit of medical education and provide training for officials to combat biases and stigma surrounding abortion:*** *It is essential to audit medical education, particularly medical textbooks, to eliminate biases and prejudices that infiltrate the medical profession through foundational learning and training. To counteract these biases, the Ministry of Health and Family Welfare should emphasize the removal of problematic content identified in medical textbooks within its Comprehensive Abortion Care Guidelines.*
- ***I suggest eliminating the obligation to report underage sexual activity to law enforcement under the POCSO Act:*** *A reassessment of the mandatory reporting stipulation within the POCSO Act is advisable. Alternative frameworks for ensuring accountability in cases of child sexual abuse, such as reporting to support services instead of the police, should also be considered.⁸⁸*
- ***There should be no limitations on the medical termination of pregnancy:*** *Regardless of the stage, if the foetus has significant abnormalities or if continuing the pregnancy poses a risk to the physical or mental well-being of the mother. The 24-week restriction, as outlined in the Amendment Act of 2021, seems unreasonable in other circumstances. If a woman believes she is unable to bring a child into her life, that alone should be considered a valid reason for terminating the pregnancy. The persistence of an unwanted pregnancy can adversely affect a woman's mental health.*
- ***Rape constitutes a severe infringement on a woman's right to bodily autonomy and dignity:*** *Therefore, a pregnancy resulting from rape should not be equated with other pregnancies, and compelling a survivor to carry such a pregnancy represents a breach of*

⁸⁸ Aparna Chandra, et al., *Legal Barriers to Accessing Safe Abortion Services in India: A Fact-Finding Study*, CCLG.3,160-163(2021).

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her right to live with dignity. Consequently, rape survivors ought to be permitted to undergo abortion without any procedural restrictions or limitations imposed by the Act.

7.2 CONCLUSION:

One could argue that if a pregnant woman finds her foetus unbearable, she should have the “personal liberty to destroy it herself”. Forcing a woman to carry on an unwelcome pregnancy is tantamount to enslaving her, or at the very worst, violating her dignity and sense of self-respect. The unborn child might have a right to life, but it does not have the right to remain inside a woman's body without her consent. After all, the foetus has fewer claims to life, than the host i.e. the mother. Therefore, the unborn baby inside the womb isn't considered a separate person from its mother in the ordinary sense. The pregnant women, after all, are not two beings with equal rights; it is a unique entity that cannot conform to individualism- a life within a life, one reliant on the other. So, the foetus is fully dependent on the mother, and it is the mother who takes care of him on a minute-to-minute basis. Even if the foetus is considered a person, it could be argued that pregnant women have the right to defend themselves to protect against the physical intrusion of an unwanted pregnancy. If the mother does not wish to have the baby, then it's her decision. If she considers herself that she cannot take care of a child, then it's better to have abortion. Therefore, the decision to have an abortion should be left entirely to the woman. India ought to adopt more liberal abortion laws, as any legislation that restricts or bans abortion clearly infringes on a woman's rights. Such laws violate women's rights to health, dignity, freedom, and privacy. Legalising abortion is essential to safeguarding these fundamental rights of women.

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