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Abortion Laws in India: An Analytical Study

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ABSTRACT

Abortion laws in India have evolved significantly since their inception. This paper provides a comprehensive analysis of the legal framework regulating abortion in the country. Additionally, the authors address the inconsistency between individual autonomy over one's body and the selective privileging of certain pregnancy sub-classifications permitted by current Indian abortion laws. The Medical Termination of Pregnancy Act of 1971 was enacted when such laws were largely absent in most other countries. It represented a major breakthrough, especially given that prenatal sex determination and female foeticide were illegal at the time due to India's cultural preference for male fetuses over female fetuses. The study also explores the scope and justification of state intervention as parens patriae to protect the health of both the mother and the embryo in the context of abortion.

I. INTRODUCTION

In India, the history of abortion dates back to ancient times, preceding Indian civilization. Although abortion is a global practice, nearly all social systems and cultures strive to regulate and control it through laws, regulations, moral standards, and religious beliefs.[3] S. Radhakrishnan, a renowned Indian philosopher and expert on Hinduism, noted in his work *The Hindu View of Life* that traditional texts disagree on questions concerning the beginning and end of life. Ancient Indian texts such as the Rig Veda, Dharma Sutras, and Smritis all mention and condemn the practice of induced abortion as a sin. This condemnation appears to be based on the prevailing Hindu belief, as evidenced by ancient scriptures, that women are objects of honor and dignity.[4] In 1964, an abortion study committee was established in response to recommendations made by the central family of the Indian government. The committee's report included various suggestions for liberalizing abortion laws. Consequently, the Medical Termination of Pregnancy Act of 1971 was enacted as a progressive and liberal abortion policy. The Act provides registered allopathic medical practitioners with complete protection against

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[3] Mohan, Raj Pal, & Raj Pa Mohan, "Abortion in India," *Social Science,* Vol. 50, No, 3, P. 141 (1975), Retrieved from: https://www.jstor.org/stable/41885953
[4] Mohan, Raj Pal, & Raj Pa Mohan, "Abortion in India," *Social Science,* Vol. 50, No, 3, P. 141 (1975), Retrieved from: https://www.jstor.org/stable/41885953

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any criminal or legal proceedings for any harm done to a woman seeking an abortion in good faith in accordance with the provisions of the Act.[5]

Abortion has been extensively discussed at both national and international levels. It remains a highly complex and divisive issue, central to legal, moral, and social debates in numerous countries worldwide. Human rights organizations have emphasized the necessity of decriminalizing abortion, arguing that state obligations to eliminate discrimination against women and protect women's health and fundamental human rights include ensuring access to abortion services in line with human rights standards. Different legal systems operate within distinct cultural, social, and political contexts, leading to varied interpretations and protections of this right. In India, this right can be inferred from Article 21 of the Indian Constitution, which states that no person shall be deprived of their life or personal liberty except according to the procedure established by law.[6] This implies that such procedures must be fair, reasonable, and not arbitrary. Justice Bhagwati, in the Francis Coralie case, observed: "we think that the right to life includes the right to live with human dignity and all that goes along with it, namely the bare necessities of life."[7]

II. EVOLUTION OF ABORTION LAWS IN INDIA

Throughout history, women have employed various birth control methods and have sought abortions. The Indian Penal Code (IPC) of 1860, which established the legal framework for British India during the colonial period, criminalized abortion and categorized it as an offense. Sections 313 to 316 of the IPC addressed issues related to miscarriages, harm to fetuses, infant exposure, and the concealment of births. These sections explicitly defined and detailed the crime of 'causing miscarriages,' covering actions intended to terminate a pregnancy, whether during gestation or afterwards.[8] The colonial authorities imposed penalties on those involved in such acts, regardless of whether the woman had consented to the abortion. However, exceptions were made for medically necessary abortions performed in 'good faith' to save a woman's life, indicating a recognition of the importance of preserving women's health and well-being within the restrictive legal framework of the time.[9]

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[5] Siddhivinayak S Hirve, S. S. Abortion Law, Policy and Services in India: A Critical Review. Reproductive Health Matters, 12 (sup24), 115 (2004), Retrieved: https://doi.org/10.1016/S0968-8080(04)24017-4 : 23.05.2024

[66] J. N. Pandey, *Indian Constitutional Law* p.no. 281, (Central Law Agency, Allahabad, 56th edn., 2019)

[7] *Francis Coralie v. Delhi*, AIR 1981 SC 746,753 : (1981) 1 SCC 608, M. P. Jain, *Indian Constitutional Law* p.no., 1123 (New Delhi: LexisNexis, 2016)

[8] B. Gupta, Meenu Gupta, "The Socio-Cultural Aspect of Abortion In India: Law, Ethics and Practise" *ILI Law Review* Winter Issue 2016, page no. https://ili.ac.in/pdf/p10_bhavish.pdf

[9] Hirve S, "Abortion Law, Policy And Services In India: A Critical Review" (*Taylor & Francis*, 2005) https://www.tandfonline.com/doi/full/10.1016/S0968-8080%2804%2924017-4

In the 1960s, India faced the problem of unsafe and illegal abortions, leading to increased rates of maternal mortality and morbidity. In response, the Indian government established the Shantilal Shah Committee in 1964 to examine the issue of abortions and to consider the need for legislative action. The committee was tasked with investigating various aspects of the problem and providing recommendations on the legalization of abortion in India. Following extensive research and consultations, the Shantilal Shah Committee recommended the legalization of abortion under specific conditions in their 1966 report. Based on the Committee's findings, a Medical Termination Law was introduced in both the Lok Sabha and the Rajya Sabha, and it received parliamentary approval in August 1971. Consequently, the Medical Termination of Pregnancy (MTP) Act came into effect on April 1, 1972.

III. RELEVANT PROVISIONS OF MEDICAL TERMINATION OF PREGNANCY ACT (MTP), 1971

The MTP Act is a crucial piece of legislation in India that ensures women's rights to legally access abortion services, thereby protecting their reproductive rights. This Act has eight provisions and is a significant milestone in the development of social policy in India, aiming to provide freedom from unintended and unwanted pregnancies. This law marks a significant advancement in protecting women's reproductive rights by providing them with legal access to abortion in India. Section 3 of the Act states the conditions under which a pregnancy may be terminated by a registered medical practitioner:

1. If the duration of the pregnancy does not exceed twenty weeks, a single registered medical practitioner may perform the termination.
2. If the pregnancy duration is between twelve and twenty weeks, the opinion of at least two registered medical practitioners is required. They must agree in good faith that:
    a. Continuing the pregnancy would pose a risk to the life of the pregnant woman or cause serious harm to her physical or mental health, or
    b. There is a substantial risk that the unborn child would suffer from severe physical or mental abnormalities.

The Act further specifies that the distress caused by a pregnancy can be considered a significant threat to the mental health of the pregnant woman in situations where the pregnancy occurs due to the failure of any contraceptive method or technique employed by the woman or her partner to limit family size or prevent pregnancy.[10]

[10] Ibid.

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The MTP Act has undergone numerous revisions over the years to address emerging issues and align with global standards. The latest update to the Medical Termination of Pregnancy (MTP) Act occurred in 2021. Before this amendment, new regulations were introduced in 2003, allowing medical abortion up to seven weeks of gestation using the then-newly approved abortion drug, misoprostol. In 2020, significant amendments to the original MTP Act were proposed, leading to the revised Act's implementation in 2021. The Medical Termination of Pregnancy (Amendment) Act, 2021, permits abortion under specific conditions with a medical opinion. Notably, the 2021 Act extended the maximum gestational age for a medical abortion to 24 weeks, an increase from the previous limit of 20 weeks set by the 1971 Act. This change means that if a pregnancy exceeds 24 weeks and an abortion is necessary due to rape, the only option is to file a writ petition.

A landmark judgment in 2009 reaffirmed that while it is impossible to precisely define the limits of "personal liberty," this liberty must consider the public interest.[11] The right of women to make reproductive choices has been recognized as a crucial aspect of "personal liberty" under Article 21 of the Constitution.[12] In the case of Suchita Srivastava, an orphaned woman aged between 19 and 20 living in a government-run welfare home, was found to be pregnant, possibly due to rape. The Punjab and Haryana High Court ordered the pregnancy to be terminated based on the Medical Termination of Pregnancy Act, 1971, following the recommendations of an expert committee. However, the victim wished to continue with her pregnancy. The Supreme Court was asked whether the victim's fundamental right under Article 21 had been violated by the application of the 1971 Act. The Supreme Court affirmed that it had, stating:

> There is no doubt that a women's right to make reproductive choices is also a dimension of 'personal liberty' as understood under article 21 of the constitution of India. It is important to recognize that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a women's right to privacy, dignity and bodily integrity should be respected."[13]

Part III of the constitution ensures the right to privacy as one of the freedoms, and Article 21 preserves the right to privacy as an essential component of the right to life and personal liberty.[14] The Kharak Singh case, which determined that privacy is a part of the freedoms guaranteed by part III of the Constitution and is right to life and personal liberty under Article 21, set the legal

[11] M. P. Jain, *Indian Constitutional Law* p.no., 1126 (New Delhi: LexisNexis, 2016)
[12] Suchita Srivastava v. Chandigarh Administration, 2009 9 SCC 1: AIR 2010 SC 235
[13] M. P. Jain, *Indian Constitutional Law* p.no. 1126 (New Delhi: LexisNexis, 2016)
[14] J. N. Pandey, *Indian Constitutional Law* p.no. 299, (Central Law Agency, Allahabad, 56th edn., 2019)

position.[15] According to Justice Dr. D.Y. Chandrachud, an individual's right to exercise control over his or her personality is concomitant with privacy.[16] In Justice *K.S. Puttaswamy (Retd) and Anr. v. Union of India and Ors*., the Supreme Court upheld a woman's constitutional right to make reproductive decisions as part of her personal liberty under Article 21 of the Indian Constitution.[17] However, even though this case established a strong body of precedent regarding women's privacy and reproductive rights, it does not fundamentally change the balance of power from the doctor to the abortion-seeking patient.

More recently, in a significant judgment of *X v. The Principal Secretary Health and Family Welfare Department & Anr* (*2021*)[18], decided by a three-judge bench of the Supreme Court, the anonymous Petitioner learned that she was pregnant in June 2022. On 5 July 2022, an ultrasound revealed an intra-uterine pregnancy of 22 weeks. She filed a plea with the Delhi High Court requesting that her pregnancy be terminated by registered medical professionals at a government or private facility or hospital by July 15, 2022, within the statutory period of 4-weeks. Her prayer to the Court was to expand the application of Section 3(2) (b), which controls the termination of pregnancies between 20 and 24 weeks of gestation, to unmarried women. The High Court determined that the Petitioner's case is 'clearly not covered' by provisions of Rule 3B of the MTP Rules because she is an unmarried woman whose pregnancy resulted from a consensual relationship. Her request to be terminated was consequently turned down. The Supreme Court then received a Special Leave Petition and determined that the rule of statutory interpretation is that statute language must be interpreted in the context of the whole legislation.

The Supreme Court while delivering the above landmark judgment emphasized that in a gender-equal society, it is imperative that interpretation of the MTP Act and Rules consider current social realities. Speaking for the bench, Justice Chandrachud noted:

> *"A changed social context demands a readjustment of our laws. Law must not remain static and its interpretation should keep in mind the changing social context and advance the cause of social justice."*

This decision and the most recent Amendment Act have substantially widened the availability of abortion in India. The Court upheld the right to reproductive decision-making autonomy for all pregnant Indians, including transgender and gender non-conforming individuals. This includes the right to reproductive health care, which includes family planning alternatives that

[15] *Kharak singh v. state of U.P*., AIR 1963 SC 1295
[16] Dr. J. N. Pandey, *Indian Constitutional Law* p.no. 299, (Central Law Agency, Allahabad, 56th edn., 2019)
[17] Justice K.S. Puttuswamy (Retd) & anrs v. union of india and ors., AIR 2017 SC 4161
[18] *X v. Principal Secretary, Health and Family Welfare Department,* (2022) SCC online SC 1321

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are safe, effective, and reasonably priced as well as sex education and access to contraception. It also guarantees equal access to abortion rights for victims of rape. Nonetheless, there are still many obstacles standing in the way of providing everyone with safe and authorised abortion services, especially in the countryside.

IV. ABORTION RIGHTS: CONSTITUTIONAL AND HUMAN RIGHTS PERSPECTIVE

Article 1 of the Universal Declaration of Human Rights (UDHR) states that all human beings without any exception are born free and equal in dignity and rights.[19] The term “born” was intentionally used to exclude fetuses and any application of human rights during pregnancy. It was emphasized that the phrase "all human beings are born free and equal" means these rights are inherent from birth, not conception. Therefore, the Universal Declaration of Human Rights does not grant rights to a fetus. The term “everyone,” which is deliberately gender-neutral, applies specifically to biological individuals and is used throughout the Declaration to designate human rights holders. Similarly, the notion that the right to life, as guaranteed by Article 6(1) of the International Covenant on Civil and Political Rights, extends before birth is also rejected by the Covenant.[20] Consequently, the Human Rights Committee has repeatedly highlighted the dangers abortion prohibitions pose to women's lives by compelling them to seek unsafe abortions. The Human Rights Committee interprets and monitors States parties’ compliance with the International Covenant on Civil and Political Rights. The Convention on the Rights of the Child (CRC) does not acknowledge the right to life before birth, as clarified by its expert treaty body. Paragraph 9 of the CRC's Preamble states: "Bearing in mind that, as indicated in the Declaration of the Rights of the Child, the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." This statement has been incorrectly used to argue that the right to life extends before birth.[21]

At most, this indicates that the state is responsible for supporting a pregnant woman's health, nutrition, and other needs to maximize her child's chances of survival and thriving after birth. The Committee on the Rights of the Child thus denies the fetus a right to life. The Committee has consistently expressed concerns about adolescent girls' access to safe abortion services and has urged states to provide access to sexual and reproductive health services, including safe

[19] United Nations Universal Declaration on Human Rights, UN GAOR, Art.1, G.A. Res.217, UN Doc. A/810, 1948.
[20] International Covenant on Civil and Political Rights, 16 December 1966, 993 UNTS 171, entered into force 23 March 1976
[21]UN Commission on Human Rights, Report of the Working Group on a Draft Convention on the Rights of the Child, 45th Session, E/CN.4/1989/48 at p.10 (1989), quoted in Jude Ibegbu, Rights of the Unborn in International Law 145 (2000)

abortion. In its Concluding Observations on various State reports, the Committee has recognized that safe abortion is part of teenage girls' right to adequate health under Article 24 of the Convention.[22] It has noted that high maternal mortality rates, largely due to illegal abortions, significantly contribute to poor local health standards for children. Furthermore, the Committee has specifically requested a review of state practices under existing legislation that authorizes abortions for therapeutic reasons to prevent illegal abortions and improve the protection of girls' mental and physical health. Article 21 of the Constitution of India declares that no person shall be deprived of their life or personal liberty except through a procedure established by law.[23] The Supreme Court of India has interpreted this right to encompass women's autonomy and choice regarding their reproductive systems.[24] According to Section 2(b) (c) of the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002, a "foetus" is defined as a human organism that is in the process of developing from the fifty-seventh day after fertilization or creation (not including any period during which its development has been suspended) to labour and delivery.[25]

Ronald Dworkin claims that a foetus lacks interest prior to the third trimester. A fetus's brain is not fully developed until late pregnancy, at which point it is unable to experience pain.[26] For Dworkin, the state could not declare corporations to be persons by granting them separate votes and thereby reducing the voting power of citizens, just as it could not declare the foetus to be constitutional by adopting foetal protection laws, which would then apply to all or most female citizens. Because of this, the question of whether abortion is against the fetus's interests relies on whether it has any interests of its own. An lifeless object is incapable of having interests. The foetus doesn't begin to have interests until the third trimester, at which point it may begin to exist on its own.[27] But the Supreme Court recently turned down a request to let a pregnancy to end at 27 weeks, stating that the foetus also has a right to live. The petitioner, a 20-year-old single woman, filed an appeal with the Supreme Court on May 3, 2024, after the Delhi High Court rejected her plea request, stating that there was no congenital abnormality in the foetus and no risk to the mother's health that would have required the foetus to be terminated.[28]

[22] Article 24 of The Convention on the Rights of The Child
[23] J. N. PANDEY, *INDIAN CONSTITUTIONAL LAW* P.NO. 281, (CENTRAL LAW AGENCY, ALLAHABAD, 56TH EDN., 2019)
[24] https://www.legalserviceindia.com/legal/article-1691-constitutionality-of-abortion-laws-in-india.htmlgoogle_vignette (last visited on 24 May, 2024)
[25] The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002.
[26] Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution
[27] E M. Dadlez,William L. Andrews, Not Separate, But Not Equal: How Fetal Rights Deprive Women of Civil Rights, p.no.: 104 & 105
[28] https://thewire.in/law/supreme-court-refuses-to-allow-widowed-woman-to-terminate-32-week-pregnancy (last

V. LACUNAS IN THE ACT

While clearing up the misunderstandings held by lawmakers and law enforcement authorities, the Supreme Court's ruling in X v. The Principal Secretary Health and Family Welfare Department & Anr is unquestionably a step in the right direction. All the same, the Act's restrictions are strict and forbid abortion on demand.[29] Special categories of "vulnerable women," such as those who have been the victims of sexual assault or rape, juveniles, widows, divorcees, crippled, or mentally ill women, are "considered eligible" for a pregnancy abortion for a maximum of 24 weeks, according to Rule 3B of the Act. Until this verdict, the general consensus was that women could only get abortions if they met certain requirements. However, the recent decision has clarified and expanded Rule 3B of the Act, stating that its goal is to give people the choice to terminate a pregnancy in the event of a "change in material circumstances" while the pregnancy is still ongoing. However, this raises two problems:

Rule 3B of the Act provides for special groups of “vulnerable women” such as those who have experienced sexual assault or rape, minors, widows, divorcees, disabled, or mentally ill women, are “considered eligible” for a pregnancy termination for a period of up to 24 weeks. It was widely accepted prior to this ruling that only women who fit the designated criteria might obtain an abortion. Nonetheless, the current ruling has made Rule 3B of the Act clearer and more expansive, holding that the purpose of Rule 3B of the said Act is to provide persons the option to end a pregnancy if there is a “change in material circumstances” while the pregnancy is still going on. But this presents two issues: the Court has not provided a clear definition of a "change in material circumstances and that the courts and medical officers will have the last word on whether or not to grant an abortion to a woman requesting one in the absence of judicially controllable requirements.

The MTP Act's notable medical bias has drawn harsh criticism. The "physicians only" restriction does not apply to mid-level healthcare providers or practitioners of alternative medical systems. The MTP Act mandates that abortion services be provided by all state-run facilities. However, because public health institutions are exempt from the need for approval, the public sector is not bound by the same regulatory processes that apply to the private sector. a significant void in abortion research.[30] Moreover, the MTP Act restricts abortion rights to a maximum of 20 weeks of pregnancy, and to a limited group of "women" between 20 and 24

visited on May 23, 2024)

[29] *X v. Principal Secretary, Health and Family Welfare Department*, (2022) 2022 SCC online SC 1321

[30] Siddhivinayak S Hirve, Abortion Law, Policy and Services in India: A Critical Review, Retrieved from: https://doi.org/10.1016/S0968-8080(04)24017-4, page no.: 116

weeks. These are arbitrary limitations that call for one medical professional's opinion for the former and two medical professionals' opinions for the latter. If there are serious foetal abnormalities, a pregnancy that is above 24 weeks may be terminated under the MTP Act, provided that a medical board consisting of at least four members makes the diagnosis. Medical professionals' permission is arbitrarily given precedence under the MTP Act and Rules as they are the only ones who may determine whether or not a person may have an abortion. Thus, the ability to have an abortion remains dependent on the opinion of medical practitioners in all circumstances and the decision of the courts in certain cases.

Therefore, in actuality, this right still depends on the judgement of medical professionals, the decision of the courts, and "changes in material circumstances," notwithstanding the Supreme Court's firm ruling that a woman "alone has the right over her body and is the ultimate decision maker on the question of whether she wants to undergo an abortion." Given the considerable discretionary authority that courts and medical professionals possess, it is imperative that India's reproductive justice system be completely redesigned, including the decriminalisation of Section 312 of the Indian Penal Code among other changes. Abortion therapy should be treated with the same respect as other medical procedures, and patients have a legal right to all information on the procedure or treatment plan, including a risk assessment. The patient should have the final say over whether or not to proceed with the abortion.

Sections 3 and 5 of the Medical Termination of Pregnancy Act, which the Supreme Court established as components of the right to privacy in a landmark decision in Justice K.S. Puttaswamy (Retd) and Anr. v. Union of India And Ors, obviously violate women's reproductive rights.[31] If women choose to have an abortion on their own, they are unable to exercise their rights to physical integrity and the ability to make decisions about their bodies at any point throughout a pregnancy. The final word over a woman's body and whether to undergo an abortion at any stage of her pregnancy belongs to the physicians.

VI. CONCLUSION

In India, the Medical Termination of Pregnancy (MTP) Act represents significant progress in acknowledging women's reproductive rights. However, accessibility issues and social stigma persist. Consequently, the government's role in abortion procedures should be limited to ensuring a straightforward and safe process. This is crucial because abortion is deemed necessary and vital, especially in scenarios where it is either completely banned or allowed only to save a woman’s life or health. To establish safe and fair abortion laws for all pregnant

[31] *Justice K.S. Puttuswamy (Retd) & Anrs v. Union of India and Ors*., (2017) 10 S.C.C 1

individuals, it is essential to ensure safe access to abortion, provide modern contraceptives, make medical abortion drugs available in primary healthcare facilities, guarantee complete autonomy for abortion on request, and offer comprehensive post-abortion services. Therefore, passing safe and equitable abortion legislation by following this approach is important. Moreover, it would be beneficial for the government to expand the definition of "vulnerable women" to encompass all women, not just those who have experienced rape, incest, or have disabilities. This broader definition would allow consideration of women from diverse backgrounds, rather than being limited by a narrow definition. The law grants state governments the authority to regulate abortion providers. Although states have amended these laws, their application and interpretation differ. In efforts to ensure safety and prevent unsafe abortions, some states have introduced unnecessary procedures, administrative delays, and excessive controls. For example, Maharashtra has an unreasonable rule that requires a blood bank to be located within five kilometers of any clinic performing abortions. Generally, these states focus on controlling abortion services rather than facilitating them. When such regulations are imposed only on the private sector and not on the public sector, it becomes evident that these overly strict regulations have a discriminatory intent. Despite not being revolutionary, recent changes in law and policy still represent progress in securing a woman's right to a safe abortion.

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