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## Women’s Autonomy over her Body: Right to Abortion

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*Abortion means the removal of a fetus from the uterus before it has reached the stage of viability (in human beings, usually about the 20<sup>th</sup> week of gestation).<sup>1</sup> In the earlier times of 1860, abortion was criminalized under Section 312-316 Indian Penal Code 1860. In India, the evolution of Reproductive rights began with the Medical Termination of Pregnancy Act of 1971, later it was amended several times, and finally with the Medical Termination of Pregnancy Act 2021. This article mainly focuses on the Indian laws related to abortion. It also focuses on an in-depth analysis of the Medical Termination of Pregnancy Act, and the historical evolution of abortion laws, examining how societal attitudes and legal framework have shaped reproductive rights. It follows an in-depth study of the Medical Termination of Pregnancy Act 2021. Also, it tries to have a critical exploration of landmark legal cases and legislative developments that provide a positive step towards balancing the struggle for women’s autonomy over their bodies with concerns about the fetus.*

**Keywords:** *abortion, medical termination of pregnancy, fetus, women, evolution.*

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### INTRODUCTION

Abortion is the expulsion of a fetus from the uterus before it can survive on its own. Abortion can be done in different ways. Spontaneous abortion at the earlier stages is called miscarriage,

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<sup>1</sup> ‘Abortion’ (Britannica, 20 July 1998) <<https://www.britannica.com/science/abortion-pregnancy>> accessed 05 February 2024

induced abortion also takes place due to medical intervention in case of rape, medical complications that arise during the pregnancy, and also to prevent childbirth due to serious medical problems<sup>2</sup>. In 1971, with the introduction of the MTP Act 1971, abortion was legalized. The Medical Termination of Pregnancy Act was introduced to safeguard women subjected to unsafe abortion and also make provisions that are essential to safeguard women. The Shanti Lal Committee established the Ministry of Health and Family Welfare in 1964 to look into the reasons behind the rising number of abortion cases. Then in 1970 as per the recommendation by the committee in August 1971, The Medical Termination of Pregnancy Act was formulated. After the MTP Act passed there were several amendments to the act in 2002,2003 and finally in 2021. The Medical Termination of Pregnancy Act 2021 covered the limitations of all the previous acts and increased the scope of the act. The Constitution of India provides the Right to life and personal liberty which should be available to all citizens regardless of their sex. Abortion rights play an important role in today's world as this plays a significant part in women's empowerment. The evolution of abortion laws has significantly reduced the rate of death of women due to unsafe pregnancy. Therefore, the evolution of abortion laws plays a vital role in society.

## LITERATURE REVIEW

Pushpendra Singh, in an article titled 'RIGHT TO ABORTION UNDER INDIAN CONSTITUTION' has specifically mentioned the concept of abortion and laws related to abortions from an Indian perspective. This study was mainly focused on the concept of abortion and the evolution of abortion laws. The main objective of this study was to find out the legislative framework of abortion in India and also to understand whether abortion should also be considered as a matter of fundamental right. This paper also considers the balancing of rights between fetus and mother.<sup>3</sup> Andreea Mihaela Niță and Cristina Ilie Goga in their article titled 'A RESEARCH ON ABORTION: ETHICS, LEGISLATION, AND SOCIO-MEDICAL OUTCOMES.CASE STUDY: ROMANIA' delves into the concept of abortion from a theoretical

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<sup>2</sup> 'Abortion Summary' (*Britannica*, 24 July 2021) <<https://www.britannica.com/summary/abortion-pregnancy>> accessed 05 February 2024

<sup>3</sup> Pushpendra Singh, 'Right to Abortion under Indian Constitution' (2023) 5(1) *Indian Journal of Law and Legal Research*

and empirical point of view. This study has also undergone studies that include analysis of abortion through medical and social documents and also focused mainly on the case study of Romania and its legal perception of abortion.<sup>4</sup> Sneha Kumari and Jugal Kishore in their paper titled 'MEDICAL TERMINATION OF PREGNANCY (AMENDMENT BILL, 2021) IS IT ENOUGH FOR INDIAN WOMEN REGARDING COMPREHENSIVE ABORTION CARE??', the researcher mainly focused on the MTP Act 2021 and also the 1971 act which was the first Abortion Act. This study also focused on the challenges of achieving abortion care and also provided insights to improve the conditions related to abortion.<sup>5</sup>

## **METHODOLOGY**

In this research paper, the methodology adopted is primarily doctrinal. The doctrinal research involves using of books, case laws, statutes, and available secondary sources that include articles, research papers, etc.

## **HYPOTHESIS**

The right to abortion is a woman's right to decide on her own body and future.

## **OBJECTIVES**

This study mainly focuses on:

- 1) What are the provisions of IPC 1860 related to abortion?
- 2) What are Constitutional Provisions regarding Abortion?
- 3) What are the legal provisions regarding abortion in India, especially focusing on MTP Act 2021?
- 4) What is the difference between the MTP Act 2021 & 1980?

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<sup>4</sup> Andreea Mihaela Niță and Cristina Ilie Goga, 'A research on abortion: ethics, legislation and socio-medical outcomes. Case study: Romania' (2020) 61(1) Romanian Journal of Morphology and Embryology 283–294 <<https://doi.org/10.47162/RJME.61.1.35>> accessed 05 February 2024

<sup>5</sup> Sneha Kumari and Jugal Kishore, 'Medical Termination of Pregnancy (Amendment Bill, 2021): Is it Enough for Indian Women Regarding Comprehensive Abortion Care??' (2021) 46(3) Indian Journal of Community Medicine 367–369 <[https://doi.org/10.4103/ijcm.IJCM\\_468\\_20](https://doi.org/10.4103/ijcm.IJCM_468_20)> accessed 05 February 2024

## PROVISION OF THE INDIAN PENAL CODE 1860 WITH REFERENCE TO ABORTION

In the Indian Penal Code, abortion was a criminal offence under sections 312-316 under IPC 1860:

**Section 312 IPC 1860:** Sec 312 criminalizes 'causing miscarriage' especially unlawful termination of Pregnancy and states that, "Whoever voluntarily causes a woman with child to miscarry, shall if such miscarriage is not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."<sup>6</sup> Therefore, this section allows termination of pregnancy only to save the life of the mother.

**Section 313 IPC 1860:** As per Sec 313, "anyone who commits the offence defined in Section 312 without the woman's consent is punished with imprisonment for life or imprisonment that may extend to 10 years and a fine".<sup>7</sup> Women's consent was also a necessary element for abortion and this was mainly dealt with in this section of IPC.

**Section 314 IPC 1860:** Section 314 defines that "if any individual with an intention to cause miscarriage to a woman with a child, who does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and also the act mentions that if the act is done without a woman's consent then the offender is punished either with imprisonment for life or with imprisonment that may extend to 10 years and a fine".<sup>8</sup>

**Section 315 IPC 1860:** The Sec 315 of IPC mainly dealt with 'An act which is done with the intent to prevent a child from being born alive or cause it to die after birth' and states that "Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth and does by such act prevent that child

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<sup>6</sup> Indian Penal Code 1860, s 312

<sup>7</sup> Indian Penal Code 1860, s 313

<sup>8</sup> Indian Penal Code 1860, s 314

from being born alive or causes it to die after its birth, shall, if such act is not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.<sup>9</sup>

**Section 316 IPC 1860:** “According to this section of 316 IPC ‘Causing the death of quick unborn by the act will amount to culpable homicide’: - “Whoever does any act under such circumstances, that if he thereby caused death, he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine”.<sup>10</sup>

During the last few years, most countries have liberalized Abortion laws. In India, the Medical Termination of Pregnancy Act of 1971 was introduced to uphold the rights of women, protect them, and prevent them from unsafe abortions. This was a First step towards the stringent laws that prevailed earlier and to safeguard the lives of women.

## CONSTITUTIONAL PROVISIONS

### PROTECTION OF LIFE AND PERSONAL LIBERTY: ARTICLE 21

Article 21 of the Constitution states, ‘No person shall be deprived of his or personal liberty except according to the procedure established by law’.<sup>11</sup> Before Maneka Gandhi’s decision, ‘Article 21 guaranteed the right to life and personal liberty to citizens only against the arbitrary action of the executive and not from legal action. The state could interfere with the liberty of citizens if it could support its action by a valid law. But after Maneka Gandhi’s decision, the Right to life and personal liberty was not only from the Executive action but also from the legislative action.’<sup>12</sup>

Under Article 21, the Right of Women to produce a child: -In the case ‘Suchitra Srivastava v Chandigarh administration’<sup>13</sup>, this was a case of rape and the girl was ‘mentally retarded’ and an orphan having no one else to look after. The expert’s opinion is that she was only suffering

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<sup>9</sup> Indian Penal Code 1860, s 315

<sup>10</sup> Indian Penal Code 1860, s 316

<sup>11</sup> Constitution of India 1950, art 21

<sup>12</sup> Dr. J. N Pandey revised by Dr. Surendra Sahai Srivastava, *Constitutional Law of India* (59th edn, Central Law Agency 2022)

<sup>13</sup> *Suchita Srivastava v Chandigarh Administration* Civ App No 5845/2009

from mild mental retardation and physically capable of continuing pregnancy and she also completed the 19th week of pregnancy in this case she had not given consent for her termination of pregnancy as required under the MTP Act 1971. The high court ordered the termination of the pregnancy invoking parents' patriae doctrine.

Further in this case the Supreme Court quashed the order of the high court and held that - "A woman has the right to choose to have Therefore, termination of pregnancy is only when conditions specified in the applicable statute have been fulfilled. Hence, 1971 can also put reasonable restrictions on the exercise of reproductive choices. The Act makes a distinction between 'mental illness' and 'mental retardation'. In case of mental illness, the guardian's consent is necessary for the termination of pregnancy but based on mental retardation, the woman herself is capable of having her consent. In this case, the woman has not given her consent for termination of pregnancy. The doctrine of parents partriae invoked by the High Court is applicable in the case of those persons who are minors or those who are found mentally incapable of making informed decisions for personal liberty. there should be no restriction on the exercise of reproductive choice".<sup>14</sup>

### **MEDICAL TERMINATION OF PREGNANCY ACT 2021**

The Medical Termination of Pregnancy Amendment Act 2021 made new provisions and widened the scope of the act. According to the new amendment act new provisions were inserted which include abortion rights for unmarried women, this amendment has increased the access of women to safe abortion. The gestation limit was increased from 20 to 24 weeks under this Act. A single registered medical practitioner can do a pregnancy termination under this Act for a maximum duration of 20 weeks. In the case of a 24-week pregnancy, two registered medical practitioners are required for cases involving rape, incest, or sexual assault, minors, fluctuating woman's marital status while she is still pregnant, women with physical disabilities, mentally ill women, complications during childbirth, and even if the child has physical or mental abnormalities that could result in a serious handicap. Additionally, the act guarantees that

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<sup>14</sup> *Ibid*

women whose pregnancies have been terminated will remain anonymous.<sup>15</sup> The MTP Act 2021 has made provisions in such a way that it covers the limitations that existed in the previous act.

### **COMPARISON OF MEDICAL TERMINATION OF PREGNANCY ACT 1971 AND 2021**

There was a lot of difference between the Medical Termination of Pregnancy Act 1971 and the MTP Act 2021. In MTP Act 1971 was only focused on abortion cases which were only limited to married women and the gestation limit was 20 weeks for all cases of abortion in a limit of 12 weeks opinion of one doctor is required and in cases of 20 weeks the opinion of two doctors is required. The MTP Act Overcome all those limitations that were there in the MTP Act 1971 and other further amendments.<sup>16</sup>

### **CASES LAWS RELATED TO ABORTION IN INDIA**

The case, Justice K Puttuswamy v Union of India (2017), emphasized the women's right to make choices related to reproductive health. The court also observed that this right is also about the right to dignity, privacy, etc which is covered under Article 21<sup>17,18</sup>. In Suchita v Chandigarh Administration, this was a case under Article 21 of the constitution i.e. “No person shall be deprived of his life or personal liberty except according to a procedure established by law”. In this, the Supreme Court also upheld that a woman’s right to make reproductive choices will fall under Article 21. In the case Meera Santosh Pal v Union of India, Meera was a woman who was in her 24th week of pregnancy, approached the Supreme Court, and filed a petition before the honorable Supreme Court with a plea to undergo a medical termination of Pregnancy. As per the plea The Supreme Court directed a medical board to be set up and the board thought that continuation of the pregnancy would not only result in grave injury to the physical and mental health of the woman but the fetus would not be able to survive “extra-uterine life” due to abnormalities. Based on the expert opinion the Supreme Court directed that the woman can undergo medical termination of pregnancy as per the provisions of the MTP Act.

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<sup>15</sup> Satvik. N Pai and Krithi S. Chandra, ‘Medical Termination of Pregnancy Act of India: Treading the Path between Practical and Ethical Reproductive Justice’ (2023) 48(4) Indian Journal of Community Medicine 510–513 <<https://doi.org/10.4103/ijcm.ijcm.540.22>> accessed 05 February 2024

<sup>16</sup> *Ibid*

<sup>17</sup> Constitution of India 1950, art 21

<sup>18</sup> *Justice K S Puttaswamy v Union of India* WP (Civ) No 494/2012

In the case, *Sarmishtha Chakraborty v Union of India*, the petitioner approached the Supreme Court seeking the termination of her pregnancy. As per the direction of the Supreme Court, a medical board was set up and the board concluded that the case justified termination of the pregnancy due to the woman's risk of serious mental harm if the pregnancy were to continue, the child's need for complex cardiac corrective surgery if born alive, and the high rate of death and morbidity linked with these staged surgeries. As a result, the woman was permitted to have a medical pregnancy abortion and the Supreme Court approved the petitions requested in the case. In *Savitha Sachin Patel v Union of India*, the petitioner approached the Supreme Court to seek the medical termination of pregnancy in her 26th week of pregnancy. Under the direction given by the Supreme Court, a medical board was set up and according to the evaluation made by the medical board it was opined that there was no physical risk to the mother for the continuation of pregnancy and if the baby is born with 'Trisomy 21', it is 'likely' to have mental and physical challenges. The Supreme Court held the view that since the medical report does not observe that this particular fetus will have severe mental and physical challenges and simply states that it is 'likely' to have these challenges and also because there was no danger to the life of the woman, the prayer to undergo medical termination was declined by the Supreme Court.<sup>19</sup>

## **RIGHT OF MOTHER AND FETUS**

This is a very debatable topic as it has continued till now. There were several research papers carried out on this topic from both points of view. Women have rights that everyone has but this was one of the opinions whether a fetus in the womb can be considered as a human being or whether rights are available to them. There are many perspectives to this opinion, one of the opinions that, "The detection of individual DNA after only a few days of fertilization, according to researchers, incontrovertibly indicates that the offspring, no difference how tiny, 'is human life; it is potential life or potentially human life'. As per this concept, the fetus in the womb is also entitled to have the same legal right that everyone holds.

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<sup>19</sup> Prachi Dutta, 'Women and the Law: An Analysis on the medical termination of pregnancy law in India vis-à-vis the Medical Termination of Pregnancy Act, 1971 and the Medical Termination of Pregnancy (Amendment) Bill, 2020' (*SCC Online*, 09 January 2021) <<https://www.sconline.com/blog/post/2021/01/09/women-and-the-law-an-analysis-on-the-medical-termination-of-pregnancy-law-in-india-vis-a-vis-the-medical-termination-of-pregnancy-act-1971-and-the-medical-termination-of-pregnancy-amendment-bill/>> accessed 12 February 2024



Another perspective towards this opinion is that an 'embryo is not a legal person, it has no rights'. A fetus when it develops in the womb of the mother it is survived due to the placental and umbilical cord that connects the fetus and the mother. Therefore, it cannot be considered that the fetus is another entity, as it could not live without the mother. So, it should be the mother's right over her body and decide upon the matters related to abortions. It is her right to life; each woman has the legal authority to decide on her own body.<sup>20</sup>

## **SUGGESTIONS**

There should be more laws related to abortion that do not take away the rights of women and it should not be influenced by any societal or religious accept. It should be free from all sought of taboos and it should uphold the rights of women. Awareness also plays a crucial role in matters related to abortion; this can help in removing the negative aspects related to abortion. There should be more improved healthcare services provided for women which provide them with safe treatments, and access to healthcare should be of priority by the government.

## **CONCLUSION**

The right to abortion should be a woman's right over her body During the early time before the introduction of MTP acts there was a large number of abortion cases as it was criminalized under the Indian system. The women's right to abortion is also a part of the constitution as Article 21 of the constitution provides anyone the right to life, right to dignity, and right to liberty. It states that 'no person shall be deprived of his life or personal liberty except according to the procedure established by the law'. So, it should be considered that it's the right of women to make choices regarding their bodies. The laws regarding abortion were an important step taken by the state as it would reduce the number of death cases that happened due to complicated pregnancies. There should be more measures and more rights regarding abortion as there should be proper rights given to women to decide on their bodies.

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<sup>20</sup> Singh (n 3)