



ILE

LEX SPECULUM

VOLUME 1 AND ISSUE 1 OF 2023

INSTITUTE OF LEGAL EDUCATION



ILE LEX SPECULUM

APIS – 3920 – 0036 | ISBN – 978-81-964391-3-2

(Free Publication and Open Access Journal)

Journal's Home Page – <https://ls.iledu.in/>

Journal's Editorial Page – <https://ls.iledu.in/editorial-board/>

Volume 1 and Issue 1 (Access Full Issue on – <https://ls.iledu.in/category/volume-1-and-issue-1-of-2023/>)

Publisher

Prasanna S,

Chairman of Institute of Legal Education (Established by I.L.E. Educational Trust)

No. 08, Arul Nagar, Seera Thoppu,

Maudhanda Kurichi, Srirangam,

Tiruchirappalli – 620102

Phone : +91 94896 71437 – info@iledu.in / Chairman@iledu.in



© Institute of Legal Education

Copyright Disclaimer: All rights are reserve with Institute of Legal Education. No part of the material published on this website (Articles or Research Papers including those published in this journal) may be reproduced, distributed, or transmitted in any form or by any means, including photocopying, recording, or other electronic or mechanical methods, without the prior written permission of the publisher. For more details refer <https://ls.iledu.in/terms-and-condition/>

AN ANALYSIS OF SOCIO-LEGAL ASPECTS OF ABORTION IN INDIA

AUTHOR – SAMRIDHI SOUMYA, STUDENT AT UNIVERSITY OF ALLAHABAD

BEST CITATION – SAMRIDHI SOUMYA, AN ANALYSIS OF SOCIO-LEGAL ASPECTS OF ABORTION IN INDIA, *ILE LEX SPECULUM (ILE LS)*, 1 (1) OF 2023, PG. 529-535, APIS – 3920 – 0036 | ISBN – 978-81-964391-3-2.

I. ABSTRACT

There has been significant development in human rights around the globe. Countries and their governments have a basic responsibility to safeguard and protect their citizens and grant them their rights to their own bodies. The right to make decisions about one's own self is a basic recognized expression of human rights. Men and women have been treated unequally in a gender-biased society which is still visible in the current day scenario. Choosing one's body and making decisions for it should be the basis of legislation around the globe as the right to have autonomy over one's own body is the essence of human rights.

The patriarchy has established many socio-cultural views behind a woman's right to life. Traditionally a woman's responsibility has only been accepted as of a homemaker and child-bearer, denying them ever the right to make decisions for their own selves. As conclusive from the upcoming topics in this paper, this is the existing scenario still persisting in many countries. The idea behind human rights is linked to the perseverance of their dignity. A woman's decision on whether or not to bear a child is related to their dignity, as such denying a woman such freedom and independence to the autonomy of her body is an infringement of her human rights.

KEYWORDS: Abortion, Pro-life, Pro-choice, termination of pregnancy, MTP Act, Medical Termination of pregnancy, illegal abortion, right to life, right to privacy

II. INTRODUCTION

The right to have autonomy over one's own body is the essence of human rights. Owing to the significant development in human rights around the globe, more and more countries are coming forward to implement laws that safeguard their citizens. Article 3 of the Universal Declaration of Human Rights declares that 'everyone has the right to life.' The argument in favour and against abortion always concludes with 'pro-choice' and 'pro-life' respectively. This dual contest between the two grounds is based on the following notion- For the 'Pro-choicer', the right to terminate a pregnancy should be the decision of the woman, as it is her body and ultimately her right to personal liberty. If a woman is unhappy with the pregnancy and has to bear the child, there could be negative psychological implications on both the mother and the child in future in terms of resentment and grief. Whereas, for 'pro-lifers', abortion is the

same as murder. They view the foetus as already full of life and consider aborting life a sin.

The patriarchy has established many socio-cultural views behind a woman's right to life. Traditionally a woman's responsibility has only been accepted as of a homemaker and child-bearer, denying them ever the right to make decisions for their selves. Moreover, the criminalization of abortion is contrasting with the philosophy of the right to privacy and the right to life. Article 21 of the Indian Constitution also states that nobody shall be denied his right to life unless provisions are prescribed by law, thus claiming that both the mother and the unborn child have a right to life. Furthermore, the illegality of abortion leads to unethical and secret practices of inducing termination of pregnancy which causes death in many women. Women often seek help from inexperienced street abortionists who perform

abortion in severely unhygienic and crude environments following harsh methods which poses a severe threat to the life of women.

III. ABORTION- Understanding the concept

The word Abortion is derived from the Latin word 'Aboriri (abortio)' which means to 'miscarry.' In general terms, abortion is defined as the act of removing the foetus or embryo from the uterus, resulting in its death. Termination of pregnancy by various acts or means is called Abortion. Section 2(e) of the MTP Act, 1971 defines 'termination of pregnancy' as a procedure to terminate a pregnancy by using medical or surgical methods.

There are usually 2 types of abortion- spontaneous and induced. Spontaneous Abortion occurs, as the name suggests, spontaneously and is generally referred to as 'miscarriage'. Such miscarriages are often unavoidable and result in huge grief for the woman. Induced abortion is a wanted termination of pregnancy that is caused by either surgery or pills.

A. The Socio-ethical Stigma

The social stigma behind sex and sex-related matters is a huge taboo in India. In the traditional culture of India, a foetus is believed to have life since its conceiving and as such, society views abortion as a sin as well. There are many stigmas related to bearing a child by a woman. Women who can't bear a child is shamed by society and shunned and deemed worthless, owing to the fact that women, in a patriarchal society, is mostly viewed as a homemaker and for child-bearing purposes. A similar scenario is observed for women who miscarry, i.e., in this case, spontaneous miscarriage. Miscarriage is also looked down upon unfavourably and the women are taunted and again shamed by society including their own families. In a patriarchal society, a woman who cannot and does not bear a child is not regarded with dignity, as child-bearing is deemed as her only duty in life and marriage.

Another social notion behind abortion pertains to unmarried women. Virginity is

regarded as an important aspect and symbol of honour and purity of a maiden's family⁷⁶⁸. Sex before marriage in Indian society is regarded as a disgraceful act, and it leads to a connection between the legalization of abortion with 'loose morals.' Hence, the argument arises forward that if abortion is legalized, more and more unmarried people would resort to having sex and terminating illegitimate pregnancies.

However, such arguments against abortion are narrow-minded. The right to induce pregnancy should be made available to every woman regardless of their married or unmarried status.

Another social obstruction is observed in the cases of rape victims. Many rape victims pertain to resort to unsafe abortions as a secretive method in regard to social stigma. Also, many women including rape survivors are denied an abortion at the hands of medical professionals on the count of seeking consent from their husbands.

B. Grounds of Abortion in global standards

Abortion has always been a controversial subject in different societies, cultures and traditions. Different countries have their viewpoint on its legalization; as such, every country varies in their abortion policies. With the advancement of technology and the development of societies, governments around the world have started to recognize women's rights. More and more legislatures surrounding guarding women's rights have started to come up, including the right to induce abortion. However, there are still many countries which consider abortion as a crime not withholding the circumstances of inducing the abortion.

According to the *Center for Reproductive Rights*⁷⁶⁹, 24 countries fall into the category where abortion is illegal including under any circumstances (Category I); 41 countries where abortion is only permitted when a woman's life is at risk (Category II); 48 countries provide for

⁷⁶⁸ Ishita Chakraborty, "Virginity and Purity in the Indian Mindset: A Complex and Evolving Concept" *Transcontinental Times*, Apr 23, 2023.

⁷⁶⁹ Center for Reproductive Rights. "The World's Abortion Laws - Center for Reproductive Rights." Center for Reproductive Rights, 21 Apr. 2023, <https://reproductiverights.org/maps/worlds-abortion-laws/>.

abortion under health or therapeutic grounds, i.e., to preserve health (Category III); 13 countries have legalized abortion on social and economic grounds (Category IV); and 75 countries fall into the category where abortion is acceptable on a woman's request (Category V).

1) **Recognized Grounds for Abortion:**

Various countries falling over the above-mentioned categories have different acceptable grounds for abortion. The countries which have legalized abortion follow the policy of different gestational limits for different grounds.

Some of the legal grounds for abortion include-

- Risk of life to mother: About 90% of countries have permitted abortion if the pregnancy poses a threat to the mother's life⁷⁷⁰. International Human Rights Law establishes that abortion shall be made available when a woman suffers from pain and risks to her life and health.
- Risk to Health: Another ground that's recognised under legislation from different countries is Health. Under Category III, health factors vary on broad spectrums. Some countries only allow abortion if a woman's physical health is at risk, while some include risks to mental health as well.
- Rape: Sexual assault on a woman provides a solid ground for abortion in most legislatures around the world. Some countries don't directly include rape as a distinct ground but can be interpreted under mental health grounds. Incest could be read along with rape in most cases, as incest is permissible for abortion in many territories.
- Foetal Impairment: In scenarios where there is a risk of a disabled foetus, such as serious or permanent impairments to the foetus even after birth, abortion is permitted.

IV. ABORTION LAWS IN INDIA

Abortion has always been viewed as a negative action by society as well as the law. Although the Indian legal system permitted

abortion on the ground that the mother's life was at risk, it was still an ambiguous area of law. Prior to the enactment of the MTP Act in 1971, abortion was illegal and the offence was regulated through different sections of the Indian Penal Code, 1860.

Section 312⁷⁷¹ read: "Causing miscarriage- Whoever voluntarily causes a woman with a child to miscarry, where the miscarriage was not induced in good faith to save the life of the mother, shall be punished with imprisonment of a term which may extend to three years, or fine, or with both; and if a woman causes herself to miscarry, shall face imprisonment for a period which may extend up to seven years, or shall be liable to pay fine."

Section 313⁷⁷² reads: "Causing miscarriage without a woman's permission: Whosoever commits abortion on a woman without her consent shall be imprisoned with- a life imprisonment, imprisonment of term extending up to ten years, or be liable to pay fine."

Section 314⁷⁷³: "Death caused by act done with the intent to miscarriage if not done due to the woman's consent: Whosoever with any intent to cause the miscarriage of a woman, does any act which results in the death, shall be punished with a term extending up to ten years, or liable to pay the fine; however, if the death is caused without the consent of the woman, shall be imprisoned for life."

Section 315⁷⁷⁴: "Act done with the intention to prevent the child being born alive or to cause it to die after birth: Whosoever does any act preventing the child being born alive, or causing it to die right after its birth, and if the act is not performed for the intent of good faith to save the life of the mother, shall be imprisoned with a term that may extend up to ten years, or be liable to pay fine."

Following the rising incidents of unsafe abortions among women in the mid-60s, where women were risking their lives by having

⁷⁷⁰ Ibid.

⁷⁷¹ The Indian Penal Code, 1860.

⁷⁷² Ibid.

⁷⁷³ Ibid.

⁷⁷⁴ Ibid.

abortions in unhygienic conditions by untrained people, a committee was organized by the Central Family Planning Board to discuss the scope and liberalization of abortion in the country⁷⁷⁵. The committee was headed under the chairmanship of Dr Shantilal Shah, and it was called the Shantilal Shah Committee.

A. **The Shantilal Shah Committee**

The Central Family Planning Committee met on its 16th meeting to discuss the problems revolving around the impact of the illegalization of abortion that was resulting in rising cases of unsafe and unhealthy termination of pregnancy among women. The problem at hand had a complex nature and contributed to legal, social, economic, moral, medical, and religious impacts⁷⁷⁶. By combining data and statistics from different countries and seeking different legislations around the world, the committee made the following recommendations⁷⁷⁷:

- The committee considered the provisions guiding abortions in the IPC, i.e., sec 312 too restrictive and recommended the liberalisation of abortion on the grounds that the foetus is surrounded by health risks after birth, or that the pregnancy is the result of rape, incestuous relations, etc.

- That the medical practitioner shall give notice of the termination as may be prescribed, and the information shall not be made public to anyone else except the police officer authorised to obtain the information.

- The committee also put forward the notion that although it might be hard to distinguish genuine cases from non-genuine cases, the probability of non-genuine cases shall not limit the protection of a larger number of genuine cases.

Following the recommendations of the Committee, a medical termination of pregnancy bill was passed in parliament in 1971 which was then approved and enacted in 1972.

⁷⁷⁵ Sarosh Framroze Jalnawalla, "Medical Termination of Pregnancy Act A preliminary report of the first twenty months of implementation" 24 *Journal of Obstetrics and Gynecology of India* 588 (1974). https://jogi.co.in/articles/files/filebase/Archives/1975/oct/1975_588_592_Oct.pdf.

⁷⁷⁶ Government of India, "Report of the Committee to study the question of Legalisation of Abortion" (Ministry of Health and Family Planning, 1965).

⁷⁷⁷ Ibid.

V. **THE MEDICAL TERMINATION OF PREGNANCY ACT, 1971**

A milestone in the area of social legislature came with the enactment of the Medical Termination of Pregnancy Act in 1972 through the act of parliament. It only consists of 8 sections.

The main objective of the Act is to provide for the termination of certain pregnancies by registered medical practitioners and for connected matters. Overall, it aims to reduce the various negative implications that surround unsafe abortion in women, including mortality rate, illegal practitioners, etc. and regulate medical institutions thus allowing for more liberalisation of inducing abortion⁷⁷⁸. By further providing women with a Right to Privacy, the legalization of abortion allows women to live with dignity as they have the right to their bodies⁷⁷⁹.

1) **When pregnancies may be terminated:**

Section 3 of the MTP Act 1971 lays down the following conditions under which pregnancies can be legally terminated by a medical practitioner-

- When the gestation period has not exceeded twenty weeks,

- When the term of pregnancy has exceeded twenty weeks but not more than twenty-four weeks, in cases of categories of women prescribed under this act,

- If the continuance of pregnancy possesses a risk to the life of the mother or grave injury to her mental and physical health,

- If there is a substantial risk that if the child is born, it would suffer from serious health risks.

- Any woman who has not yet attained the age of 18 years, and is of unsound mind, shall have her pregnancy terminated without the written consent of her guardian.

2) Section 4 of the Act determines the places **where abortion can be performed**. a

⁷⁷⁸ Trishi Anand, Aishwarya Chauhan, Mansi Sharma, Radhey Shyam Jha, "Abortion laws in India: a critical analysis" 7 *International Journal of mechanical engineering*, 61 (2022).

⁷⁷⁹ K.D Gaur, "Abortion and the law in India", 15 *Cochin University Law Review*, 123-143, (1991).

hospital established or maintained by the government; or any place which is approved by this Act of parliament for the following purpose for the time being.

3) **Limitations of this Act:**

Although abortion is advocated to be a human right pertaining to a woman's right to privacy and dignity, the MTP Act doesn't completely work accordingly. The MTP Act revolves around the termination of only certain pregnancies, and only providing this privilege to a certain group of women. The MTP Act only allows for termination in cases of life and health risks, and if the gestation period is below 24 weeks among married women. In such cases, women who are unmarried and past the age of gestational limit resort to unsafe abortion practices.

In cases of rape survivors, where termination of pregnancy extends the period of 24 weeks, the termination is provided on therapeutic grounds instead of a legal human right of the women⁷⁸⁰.

The MTP Act merely work to restrict the conditions surrounding abortion, instead of making it a basic human right that is accessible to all.

A. **Landmark Judgements**

The Supreme Court in the landmark judgement of *KS Puttaswami v Union of India*⁷⁸¹, accepted that the reproductive choice of a woman is her personal liberty under Art. 21⁷⁸². She has a right to her privacy and her personal choice, dignity and bodily integrity must be respected. Following is the list of important judgements related to the MTP Act in India:

i. *Dr. Nikhil D. Dattar & Ors. v. Union of India*⁷⁸³

The petitioner, in her 22nd week of pregnancy, discovered that the foetus had abnormalities, i.e., heart blockade, which risked the child being born with health conditions. The doctor confirmed the risks in the 24th week of the

gestational limit and suggested an abortion, however at this stage this was beyond the provisions of the MTP Act, 1971. The petitioners filed a petition in Bombay High Court and the Court passed the judgement keeping in view the medical reports regarding the risks of foetus abnormalities in future, the reports suggested that the foetus possessed a very low chance of being born with symptomatic heart defects. Thus, the court rejected the plea of the petitioners to induce termination of the pregnancy.

ii. *Surjibhai Badaji Kalasva v. The State of Gujarat*⁷⁸⁴

This case surrounds a minor girl (13 years old) who was a victim of rape. The rape accused was an 8th-grade student. Upon noticing the growing size of the abdomen of the victim by her parents, and her continuous concerns over abdomen pain, the parents visited a hospital which determined upon medical checkup that the victim was already 31 weeks pregnant. The parents filed a writ petition to a sessions court under POCSO Act and upon the contention of both the petitioners and councils on behalf of the state, it was declared that terminating a pregnancy at 31 weeks was against the provisions of the MTP Act, and this could lead to potential harm on the victim's body. The Petitioners contested that if inducing abortion shall be done upon the consent of the women, then not intending upon completing pregnancy shall also be the choice of the woman herself. However, the judgement denied the termination of the pregnancy as it was contested against the provisions of the MTP Act.

iii. *X v Principal Secretary Health & family welfare department*

This was a recent judgement on abortion in India which shaped new grounds for abortion legislation. The facts of the case read as follows: The petitioner was a 25 years old unmarried woman who approached the Delhi high court to induce an abortion on her 22 weeks of pregnancy term. The pregnancy was induced in a consensual relationship. The Delhi High Court

⁷⁸⁰ Ambika Gupta, "A critical analysis of the shortcomings under the MTP (Amendment) Act, 2021" 1 Vishwakarma University Law Journal, 86 (2021).

⁷⁸¹ (2019) 1 SCC 1.

⁷⁸² The Constitution of India.

⁷⁸³ [S.L.P (C) 5334 of 2009].

⁷⁸⁴ AIR 2003 SC 638.

rejected the petitioner on the ground of the MTP Act, as the gestational limit was only allowed for 24 weeks among married women. The petitioner approached the supreme court and contested that such a decision would lead to the permanent social stigma that occurs with unmarried women with a child, and stated the grave risk of mental illnesses that would come along with it. The Court declared that it should be the decision of a woman to make choices regarding her personal liberty, as it's her basic right to privacy as provided under Art 21 and denying an unmarried woman her basic right to safe abortion violates her right to privacy and freedom.

The MTP Act, 1971 only allowed for pregnancy termination among married women, leaving unmarried women with little protection often resorting to unsafe practices. Thus, following the amendment of 2021, the term 'married women' was changed to 'any woman', and 'husband' was replaced by 'partner'.

VI. CONCLUSION

In India, the legality of abortion is employed under restricted and limited conditions. Following the report by the Shantilal Shah Committee in 1966, the Medical Termination of Pregnancy Act was enacted in 1971 which aims at reducing the risks of unsafe pregnancy among women and also towards controlling a family planning effect. However, the societal stigma that lurks behind the concept of abortion has grave effects and together with the restrictive legal policies, does not offer much positive outlook towards respecting the various rights of a woman. In a society where sex is seen as disgraceful, many unmarried women have to resort to unsafe abortions as the law only allows the termination of pregnancy up to the gestational period of 20 weeks, even among many victims of rape, abortion is denied if the gestational limit has crossed 24 weeks unless the pregnancy possesses a risk on life and health of the mother and unborn baby. Such limitations end up restricting abortion as a privilege among

women, contradictory to the policies of human rights such as the Right to Privacy, and their right to personal dignity.

VII. REFERENCES

- K.D Gaur, "Abortion and the law in India", 15 Cochin University Law Review, 123-143, (1991).
- Bhate-Deosthali, Padma, and Sangeeta Rege. "Denial of Safe Abortion to Survivors of Rape in India." Health and human rights vol. 21,2 (2019): 189-198.
- Trishi Anand, Aishwarya Chauhan, Mansi Sharma, Radhey Shyam Jha, "Abortion laws in India: a critical analysis" 7 International Journal of mechanical engineering, 61 (2022).
- Tozzi, P. (2010) International law and the right to abortion. Available at: <https://ssrn.com/abstract=1567128>.
- Mahawar, S. (2022d) Medical Termination of Pregnancy Act, 1971 - iPleaders. Available at: <https://blog.ipleaders.in/medical-termination-of-pregnancy-act/>.
- Sarosh Framroze Jalnawalla, "Medical Termination of Pregnancy Act A preliminary report of the first twenty months of implementation" 24 Journal of Obstetrics and Gynecology of India 588 (1974).
- Abortion in India, Wikipedia, available at, https://en.wikipedia.org/wiki/Abortion_in_India#Abortion_law_in_India.
- "Abortion Laws in India: A Look Back At The Timeline" *Outlook*, Aug 1, 2023.
- Government of India, "Report of the Committee to study the question of Legalisation of Abortion" (Ministry of Health and Family Planning, 1965).
- Bhavish Gupta, Meenu Gupta "The Socio-cultural aspect of abortion in India: law, ethics, and practise" winter issue *III Law Review*, 140(2016).
- Ishita Chakraborty, "Virginity and Purity in the Indian Mindset: A Complex and Evolving Concept" *Transcontinental Times*, Apr 23, 2023.
- The Medical Termination of Pregnancy Act, 1971.
- Ambika Gupta, "A critical analysis of the shortcomings under the MTP (Amendment) Act,



2021" 1 Vishwakarma University Law Journal, 86 (2021).

- Rai, D. (2020) Abortion under the Medical Termination of Pregnancy Act. Available at: <https://blog.ipleaders.in/abortion-under-the-medical-termination-of-pregnancy-act/>.
- Srishti Juneja, "Termination of Pregnancy: Law and Morality" 2 *Journal on Contemporary Issues of Law*, 1.
- Justice K.S. Puttaswamy and Anr. vs. Union of India (UOI) and Ors. (2019) 1 SCC 1
- Lath, A. and Lath, A. (2022) "The Supreme Court of India's landmark abortion ruling, explained - Bill of health," Bill of Health - The blog of the Petrie-Flom Center at Harvard Law School, 14 October. Available at: <https://blog.petrieflom.law.harvard.edu/2022/10/17/india-abortion-supreme-court-ruling/>.
- Deswal, V. (2023) "Changing dimensions of law relating to abortion in India," Times of India Blog, 2 March. Available at: <https://timesofindia.indiatimes.com/blogs/legal-ly-speaking/changing-dimensions-of-law-relating-to-abortion-in-india/>.
- Legal Service India (no date) Right to Abortion in India - legal right to Terminate pregnancy. Available at: https://www.legalserviceindia.com/articles/adp_tion.html.

GRASP - EDUCATE - EVOLVE