

COMPARATIVE STUDY OF THE RIGHT OF THE FOETUS VERSUS THE RIGHT OF THE MOTHER IN THE LIGHT OF ABORTION LAWS PREVAILING IN INDIA

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ABSTRACT

Abortion is the termination of the pregnancy or the end of the pregnancy by different methods. In India, abortion is legal in certain situations for women who are unmarried, married, or rape victims. When the termination occurs before the legal period, it is referred to as abortion; when it occurs after the legal period ends, it is referred to as foeticide. The MTP Act makes abortion legal while also safeguarding the mother's and foetus's rights. It took so many decades to legalise abortion; in the British era, it was illegal to abort, and punishments with prison sentences were given to those who would attempt it. It was in 1971 that legislation took steps and made a separate law on reproductive rights as the Medical Termination of Pregnancy (MTP) Act, 1971,1971 which was drafted and passed by the Indian Parliament.

This article delves into abortion laws, which were initially established for women irrespective of their marital status. Numerous amendments have been made over time to improve the justice system and ensure that the rights of both foetuses and women are protected. Despite these changes, many countries around the world still have strict abortion laws, considering it a crime due to the moral and ethical beliefs held in those nations. This perspective varies depending on the country, with some Christian-majority countries vehemently opposing abortion under any circumstances, deeming it a sin. However, contemporary awareness is growing regarding a woman's right to choose whether to have a child or not. This awareness extends to situations such as medical necessity and cases of sexual assault.

Keywords: *Abortion, Foetus, Pregnancy, Reproductive rights and Termination.*

1. INTRODUCTION

In India, abortion is legal for unmarried and married women who are above the age of 18 without any guardian's consent¹. She can terminate the pregnancy by giving her own written consent. If she is below the major age, then her own consent as well as that of her guardian is mandatory to terminate her pregnancy for some reliable reasons.

Previously, before the laws were enacted, abortion was not legal, and society as a whole opposed it. Murdering a foetus was considered to be the same as murdering a human being. It has always been a debatable and controversial topic throughout the history of the world. An individual's position on abortion may be defined by the combination of moral beliefs and ethical limits that have been implemented by the legislation.

Abortion in India is legal under certain circumstances. The Medical Termination of Pregnancy (MTP) Act of 1971 in India balances the rights of the foetus and the mother². The Act recognises the mother's legal right to terminate her pregnancy under certain conditions, but it also imposes restrictions on that right in order to protect the interests of the foetus. This act was a significant milestone in India's abortion laws.

2. ABORTION: MEANING, CONCEPT AND TYPES

Abortion is the termination of a pregnancy that doesn't result in the birth of the child. It can be done in two ways: by surgery or by pill. Abortions are done mostly in cases when pregnancy is unplanned or unwanted. In India, abortion is legal for girls above the age of 18 years and allowed for unmarried women, married women, rape victims, and in certain cases, When pregnancy is terminated after the prescribed legal period in India, this type of termination is called foeticide. And when the termination of pregnancy is done before the prescribed legal period, it is called an abortion. Medical abortion, or abortion by pill, is done when a woman is less than seven weeks pregnant under the guidance of a physician. Surgical abortion is done when a woman is pregnant beyond seven weeks. This article sheds light on the abortion laws that acknowledge both the rights of the mother and the rights of the foetus

¹ Ahona Mukherjee, Apurba Pattanayak and Priyansha Mohanty, Abortion Laws in India, 3 INT'L J. L. MGMT & HUMAN. (2020)

² Medical Termination of Pregnancy Act 1971, No. 34, Acts of Parliament, 1971 (India).

as established by legislation. The historical evolution of abortion laws reflects changing perspectives on women's rights.

3. LAWS GOVERNING ABORTION IN INDIA

3.1 Medical Termination of Pregnancy (MTP) Act of 1971

The Medical Termination of Pregnancy (MTP) Act of 1971 governs the procedure of abortion in India³. Here are some of the key provisions of the MTP Act:

The Act allows for abortion up to 20 weeks of gestation. In cases where the pregnancy poses a threat to the life of the mother or could cause physical or mental harm to her, an abortion can be performed at any stage of the pregnancy. If the pregnancy is a result of rape or incest, an abortion can be performed up to 20 weeks of gestation. If there is a substantial risk of the child being born with physical or mental abnormalities, an abortion can be performed up to 20 weeks of gestation. In order to perform an abortion, a woman must obtain the approval of a registered medical practitioner. If the pregnancy is between 12 and 20 weeks, the approval of two medical practitioners is required. This provision gives priority to the mother's right to life and health. The State has an interest in protecting the life of the foetus after this stage, while also ensuring that the mother's right to life and health is not compromised.

3.2 Medical Termination of Pregnancy (Amendment) Act of 2021

The Amendment Act 2021 allows unmarried women to terminate the pregnancy upto 20 weeks gestation period in case of failure of Contraceptive Method or Device⁴. The Act of 1971 allowed only married women to terminate their pregnancy due to this reason. The Amendment Act also raises the maximum gestation period from 20 weeks to 24 weeks for certain categories of women, including rape survivors, incest victims, and other vulnerable women like women with disabilities and minors⁵. Recently, a minor rape victim approached the Allahabad High Court with her mother for the issuance of directions to terminate her daughter's 25-week pregnancy⁶.

³ Medical Termination of Pregnancy Act 1971, No. 34, Acts of Parliament, 1971 (India).

⁴ Medical Termination of Pregnancy (Amendment) Act, 2021, No. 08, Acts of Parliament, 2021 (India).

⁵ Medical Termination of Pregnancy (MTP) Amendment Act, 2021, DRISHTI IAS (August 2, 2023, 6:00 PM) <https://www.drishtiias.com/pdf/1632732643-medical-termination-of-pregnancy-mtp-amendment-act-2021.pdf>

⁶ X vs. State Of U.P. And 4 Others 2023 LiveLaw (AB) 215

"In the case of sexual assault, denying a woman the right to say no to medical termination of pregnancy and fastening her with the responsibility of motherhood would amount to denying her human right to live with dignity, as she has a right in relation to her body, which includes saying Yes or No to being a mother," the bench of the Allahabad High Court observed.

The Amendment Act allows the termination of pregnancy beyond the period of 24 weeks with the opinion of the State-level Medical Board only in cases of substantial foetal abnormalities⁷.

Overall, the MTP Act recognizes the right of the mother to make decisions about her own body and health, while also taking into account the interests of the foetus. It aims to strike a balance between the two rights and ensure that women have access to safe and legal abortion services when needed.

4. OUTLOOK OF THE COURTS

It is important to note that even though abortion is legal in India, many women still face significant barriers to accessing safe and legal abortion services, particularly in rural areas. The stigma surrounding abortion also often leads to women being shamed or excluded for seeking the procedure.

Abortion is a woman's personal choice and right to her liberty, her life, and her happiness. There have been several landmark cases related to abortion laws in India that changed the course of women's rights in a society where the stigma of abortion is common and rigid.

Suchita Srivastava vs. Chandigarh Administration, 2009⁸: This case dealt with the issue of access to safe and legal abortion services. The Supreme Court of India ruled that women have a right to privacy, which includes the right to make decisions about their own bodies, including the decision to terminate a pregnancy.

Another such case was **Dr. Nikhil Datar vs. Union of India, 2014**⁹. This case was about expanding access to safe and legal abortions. The Supreme Court of India stated that women

⁷ Swanith Kapoor, Abortion: Comparative Study between Indian Laws and US Laws, SSRN (August 3, 2023, 5:00 PM), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4404250

⁸ Suchita Srivastava vs. Chandigarh Administration, (2009) 14 SCR 989

⁹ Dr. Nikhil Datar vs. Union of India, SLP (C) 5334 of 2009

have the right to terminate a pregnancy if the foetus has a serious abnormality, even if the pregnancy has progressed past the 20-week limit.

5. CONCLUSION

The decision of a mother whether or not to keep her kid should not be influenced by the law or society, which allows unrestrained court interference in a situation that should be strictly under the supervision of a medical practitioner. Legal acknowledgement of their right to terminate the pregnancy is essential to freeing women from the long-standing fear that their abortion will be considered negatively, criticised, and criminalised. There is no doubt about the fact that India's legislation is laudable, especially given that it has come at a time when sexual and reproductive rights are being considered a rather contentious issue across the globe. The Medical Termination of Pregnancy Act of India fundamentally acknowledges a mother's freedom to determine what's best for her own body and well-being. Concurrently, it also considers the welfare of the developing foetus. Its objective is to harmonize these two rights, guaranteeing women the availability of secure and lawful abortion services whenever the situation demands.

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