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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **THE STATUS AND LEGALITY OF ABORTION IN INDIA:** **AN OVERVIEW**

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## **Abstract: The Status and Legality of Abortion in India**

The issue of whether a mother's rights should take precedence over those of an unborn child is complicated and contentious. On the one hand, a mother's right to bodily autonomy and self-determination is widely acknowledged and legally protected. However, the rights of an unborn child are also protected, particularly in the context of abortion laws. One argument in favor of a mother's rights prevailing is that a woman should have the right to make decisions about her own body, including the right to terminate a pregnancy if she so desires. This is supported by the US Supreme Court's recognition of the right to privacy and reproductive autonomy in the landmark judgment- *Roe v. Wade*. Opponents of this position, on the other hand, argue that an unborn child has a right to life and that this right should be protected regardless of the mother's wishes. This is based on the argument that an unborn child is a separate individual with its own rights, as evidenced by the recent state overturning of the *Roe v Wade* ruling. When we discuss India, On the surface, it has one of the highest abortion rates in the world and some of the most progressive abortion laws, but this masks a tangle of issues that prevent many women from accessing safe abortion, such as social stigma and religious outrage. Furthermore, India has seen its own set of debates regarding a woman's right to abortion and determining the appropriate gestational period during which a woman should be allowed to terminate her pregnancy. To sum up, whether a mother's right should take precedence over an unborn child's right is a complex and contentious issue that has raised significant ethical and legal concerns around the world. Finally, it is a question that requires careful consideration of both the mother's and the unborn child's rights, and that may be guided by factors such as the stage of pregnancy, the mother's health, and the circumstances surrounding the pregnancy. Given this context, our research aims to employ the doctrinal method of research, which will analyze a range of sources related to this particular issue, with the core idea of our research revolving around whether it is a mother's right to prevail over the right of an unborn child or not, with special emphasis on the legality of abortion in India.



**Keywords-** bodily autonomy, Roe v. Wade, abortion laws, compensation, social stigma, gestational period

### **The History of Abortion Laws: Indian and International Contexts**

The idea and understanding of the need for abortion originated long before there were any laws to regulate, prohibit or allow abortion. Abortion was, in most cases, a very deadly and crude procedure which risked the lives of women who undertook abortion.

It was only in the late 18th century where we saw anti-abortion laws arise in Britain and the U.S. which made abortions illegal except in certain exceptional cases. In reality, the goal of "protecting" women from the risks of abortion was to control and limit them to the conventional child-bearing role.

In India, early abortion laws were sought to be more progressive and appealing towards women's rights and bodily autonomy. Before the laws, abortion in India was criminalized under section 312 of the Indian penal code, besides that there was also the social stigma around abortion that prevailed in India where casteism and patriarchy had a greater say towards a woman's right to undertake abortion. The practice of abortion in India can also be traced back to the ancient texts such as manusmriti. The notion and mentality towards abortion seemed very stigmatized and needed legal reforms. The only time abortion was allowed was when it was necessary to save the mother's life.

In 1971, The medical termination of pregnancy act [MTP 1971] was passed in India where women had the right to terminate their pregnancy up to a time period of 20 weeks. It was also impactful in allowing abortion in cases of rape and fetal abnormalities. The act also established certain conditions under which abortion can be performed such as that of the consent of the woman and it should be done under the guidance of an expert doctor.

In other parts of the world, Japan for example, Midwives were not allowed to perform abortions under Meiji law. Yet, this law did not forbid a pregnant woman from having an abortion. Abortion became illegal in 1882 after a revision to the penal code was made in 1880. This law stipulated that medical or surgical abortion resulted in a one- to six-month prison sentence. penalty for abortion this law went into effect in 1908. Whether the abortion was performed by a pregnant woman herself or by a third



party, it had the same legal weight.<sup>1</sup>

The earliest anti-abortion laws in the United States were passed in the middle of the 19th century, but they were frequently restricted to outlawing abortion after quickening, which is the time when a pregnant woman can feel fetal movements. The 1960s and 1970s saw the beginning of the reform of abortion legislation as a result of developing social attitudes regarding sex and reproduction as well as developments in medical technology.

The historic *Roe v. Wade* ruling, handed down by the U.S. Supreme Court on January 22, 1973, declared that a woman's choice to keep her pregnancy unborn is covered by the "right to privacy...founded on the Fourteenth Amendment's concept of personal liberty." The Court ruled that only a pregnant woman and her doctor have the legal authority to decide whether to undergo an abortion up until the conclusion of the first trimester of pregnancy. Only when it is in the woman's best interest can states prohibit abortions in the second trimester. Only during the third trimester is a "viable fetus" (one that can survive outside the womb) protected. A pregnant woman cannot be made to prolong the pregnancy if her life or health are in danger.

The history of abortion laws may seem progressive and strong but with the push towards anti-abortion bills and the overturning of *Roe v Wade*, how long will it take for the world to have a common consensus on abortion is one its history fails to explain.

### **Abortion within the Indian Socio-Cultural Context**

In India abortion is considered to be a taboo and it is not socially acceptable. This stems out of the religious belief that life is a gift of a god and no person has the right to decide whether another being should come to life. Abortion is considered as an act which goes against the principles of nature.

In the Maha Narayana Upanishad, it is mentioned that committing abortion is equal to crimes such as breaking one's chastity. Apart from this, there are many texts which compare abortion to acts such as killing a priest or killing one's own parents. All these clearly highlight the gravity of sin attached to abortion according to religious scriptures. The core function of a marriage according to the Hindu

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<sup>1</sup> *Women's rights?: The politics of eugenic abortion in modern ... - JSTOR* (no date). Available at: <https://www.jstor.org/stable/j.ctt46n2d4> (Accessed: April 11, 2023).

traditions is procreation. It is considered that it is a public duty of the couple and not an individual choice and abortion goes against this. Any couple who commits abortion are considered to have disregarded their public duty and hence committed a wrong.

Another important factor which influences the perception of abortion is the status accorded to the fetus. According to Hindu traditions, the fetus is considered to have life once it is conceived and not after the completion of 28 weeks, as advocated by the present-day medical practitioners. Hence, the entire argument that when the fetus is aborted before 28 weeks it does not amount to taking a life does not hold good in this context. There is an instance in one of the stories of Puranas about Prahlada and a demon named Hiranyakashipu where the fetus when it is in the womb of the mother learns and imbibes the things it hears from Narada. Here, Narada preaches about the greatness of Lord Vishnu to the fetus and once the baby is born, he becomes a great devotee of Lord Vishnu and this is attributed to the teachings of Narada when the baby was in the womb of Lord Vishnu.

Buddhism is a religion which rests on the tenet of Ahimsa or non-violence and as an offshoot of the same, abortion is considered as a sin and the same goes with other religions like Sikhism and Jainism. In the case of the Toda tribe of the Nilgiris in southern India, a singular system can be observed. In Toda's, a father of a kid is the person who most recently gave the mother of the child the traditional bow during the ceremonial performance of a ceremony known as pursuit. Because of this, physical paternity in the case of Today is irrelevant for legal purposes. Today's provision has reduced the number of abortions that would have happened in rape victims' circumstances. A man who is designated as the kid's adoptive father figure is awarded custody of the child prior to the birth of any such illegitimate child, even those born to rape victims. As a result, the culture and tradition of this particular tribe had their own special method for determining a father substitute who may be made the legal spouse of the child's mother. As a result, it is also evident in this instance that the mother and infant need some consideration, as without this, many unhappy moms might have been forced to abort their children.

Hence, this establishes that the different dimensions of Indian philosophy condemn the practice of abortion strictly. However, it is important to note that some scriptures in Hinduism has provided one exception allowing abortion which is when the life of the mother is in danger but others have told that the life of the child should be prioritized over the life of the mother.

## Abortion Laws in India and Implications

Previously we have already discussed how abortion continues to be a contentious issue worldwide, with different countries having different laws and regulations regarding the procedure. Further, we've also had a look at the socio-cultural setup within which the legal framework governs abortion. In this section of the article, we aim to discuss the legality of abortion in India and its implications. In India, the legality of abortion is governed by the Medical Termination of Pregnancy (MTP) Act, which was enacted in 1971 and amended in 2021. Under the MTP Act, abortion is legal in India up to 20 weeks of pregnancy. However, in certain circumstances, such as a risk to the woman's life or physical or mental health, or in the case of fetal abnormalities, abortion may be permitted up to 24 weeks. Additionally, in cases of rape, the gestational limit is extended to 20 weeks from the date of conception. The MTP Act also requires that abortions be performed by a registered medical practitioner in a hospital or clinic that has been approved by the government.

While speaking of the MTP act, it becomes rather crucial to analyze the case laws or decisions that have significantly contributed to the evolution of the legal framework and in broadening the interpretation of a woman's fundamental right to bodily autonomy. There have been several cases that have shaped the interpretation and application of the MTP Act, such as :-

1. In 2017, the Supreme Court of India allowed a 13-year-old rape survivor to undergo an abortion beyond the 20-week limit set by the MTP Act. The court held that the **right to life and physical integrity** of the mother superseded the 20-week limit in cases of severe fetal abnormalities or where the mother's life was at risk.<sup>2</sup>
2. In 2018, the Bombay High Court allowed a 26-year-old woman to terminate her pregnancy at 23 weeks, despite the fact that the fetus had no abnormalities, and the pregnancy was unplanned. The court held that the woman's mental health was at risk and that her right to autonomy and privacy should be respected.<sup>3</sup>
3. In 2019, the Karnataka High Court allowed a 25-year-old woman to terminate her pregnancy at 24 weeks, despite the fact that the MTP Act only allows for termination up to 20 weeks. The court held that the fetus had severe abnormalities and that the woman's mental health was

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<sup>2</sup> <https://reproductiverights.org/sites/default/files/documents/Post-20-Week-Access-to-Abortion-India-0218.pdf>

<sup>3</sup> <https://timesofindia.indiatimes.com/life-style/parenting/pregnancy/bombay-high-court-allows-woman-to-abort-pregnancy-at-23-weeks-favouring-her-mental-health/articleshow/85037953.cms>



at risk.<sup>4</sup>

What these cases demonstrate is that the interpretation and application of the MTP Act is evolving, with courts increasingly recognizing the importance of women's reproductive rights and their right to autonomy and privacy. However, access to safe and legal abortion remains a challenge in India, particularly for women in rural areas or from marginalized communities who may not have access to quality healthcare services.

Further, one of the most significant cases that shaped the abortion laws in India is the case of **Dr. Nikhil Dattar v. Union of India (2008)**,<sup>5</sup> which challenged the constitutionality of Section 5 of the Medical Termination of Pregnancy (MTP) Act, 1971, which required a second doctor's opinion for abortion beyond 12 weeks of pregnancy.

In this case, the petitioner argued that this requirement violated a woman's right to privacy, autonomy and dignity, and created unnecessary obstacles in accessing safe and legal abortion services. The petitioner further argued that the requirement of a second doctor's opinion was arbitrary and discriminatory, and that it violated the right to equality and non-discrimination.

The court in its judgment held that the requirement of a second doctor's opinion for abortion beyond 12 weeks was unconstitutional and violated a woman's right to privacy, autonomy and dignity. The court held that the MTP Act was enacted to ensure safe and legal abortion services to women and that the requirement of a second doctor's opinion beyond 12 weeks was an unnecessary obstacle.

The court further held that the right to reproductive autonomy is a fundamental right under Article 21 of the Indian Constitution and that women have the right to make decisions about their own bodies and reproductive health. The judgment also recognized the importance of confidentiality and privacy in accessing safe abortion services and directed the government to take necessary steps to ensure that women's reproductive rights were protected. This landmark judgment in that sense, has played a significant role in shaping the interpretation and application of the MTP Act and has helped to establish the right to reproductive autonomy as a fundamental right. The judgment has also helped to

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<sup>4</sup> [https://loksabhadocs.nic.in/Refinput/New\\_Reference\\_Notes/English/02122022\\_130549\\_1021205190.pdf](https://loksabhadocs.nic.in/Refinput/New_Reference_Notes/English/02122022_130549_1021205190.pdf)

<sup>5</sup> <https://reproductiverights.hrln.org/nikhil-dattar-vs-union-of-india-a-long-drawn-struggle/>

ensure that women have access to safe and legal abortion services, without unnecessary obstacles and interference.

Furthermore, we come to the analysis of some of the main implications of the MTP Act. The first rather significant and positive implication is that it has reduced the number of unsafe abortions in India. Prior to the enactment of the Act, many women were forced to seek out illegal and often unsafe abortion services. These services were often provided by untrained individuals in unsanitary conditions, which resulted in a high number of complications and deaths. By legalizing abortion and providing guidelines for its safe and regulated practice, the MTP Act has saved countless lives and reduced the number of complications associated with the procedure.

However, despite the legalization of abortion, access to safe and legal abortion services remains a challenge in India. Many women, particularly those living in rural areas or belonging to marginalized communities, do not have access to the necessary healthcare facilities or information about their reproductive rights. Additionally, stigma and social taboos surrounding abortion often prevent women from seeking out the procedure or receiving adequate post-abortion care. This lack of access to safe and legal abortion services is a major public health issue that needs to be addressed.

Another challenge that India faces regarding the legality of abortion is the issue of sex-selective abortions. Due to a preference for male children and the low status of women in some parts of Indian society, many families choose to abort female fetuses. Sex-selective abortions are illegal in India, but they continue to occur, particularly in rural areas. The MTP Act has been amended to address this issue by requiring that all ultrasound clinics and facilities that offer pregnancy-related services be registered with the government and comply with certain standards. Additionally, the Act prohibits the communication of the sex of the fetus to the pregnant woman or her family, in order to prevent sex-selective abortions.

All in all, the legality of abortion in India is governed by the MTP Act, which permits abortion up to 20 weeks of pregnancy, and up to 24 weeks in certain circumstances. The Act has been effective in reducing the number of unsafe abortions and improving the overall health of women in India. However, access to safe and legal abortion services remains a challenge, particularly for marginalized communities. Additionally, the issue of sex-selective abortions persists in some parts of the country.

Addressing these challenges will require a concerted effort from the government, healthcare providers, and civil society organizations to ensure that all women have access to safe and legal abortion services, and that sex-selective abortions are eliminated.

## **Overview Of The Right To Abortion In India And The Appropriate Gestational Period**

One of the primary concerns in the debate on abortion throughout history has been the question of whether the right of the mother prevails over the right of the unborn baby in the termination of pregnancy. The Vedas, Upanishads, and Smriti literature which form the source of Indian culture and traditions, condemn abortions and termination of pregnancy as considered an immoral act. Keeping in view the religious, moral, social, and ethical background of the Indian community, the Indian Penal Code of 1860 punished induced abortion under sections 312 to 316. But the Medical Termination of Pregnancy Act 1971 provides certain grounds on which abortion can be considered legal. This shows that the right of mothers over their bodies has to some extent been recognized in the Indian legal system. But the extent and rationale behind this right to abortion have its basis in the debate over the conflict between the rights of mothers and the unborn child.

Religious, cultural, and moral sensibilities continue to influence the arguments opposing the recognition of the right to abortion. Termination of pregnancy is considered a moral wrong as it is a form of killing an innocent life that is supposed to have human rights and deserves to live. This argument raises the question of whether a fetus should be considered a human being and provided with all the basic human rights. The moral argument is that the embryo gets its rights as a human being from the time of conception. But as a fetus does not feel pain or have developed functions till the third trimester, it does not have interests and thus should not be considered a human being. Only after the third trimester does the fetus undergo specialized brain development and develops certain sensations and pain. This shows that the fetus till a period of time cannot be provided with the same human rights as that of others. Even if the argument that the fetus should have all the rights is taken into consideration, a pragmatic view should be adopted to realize that the right of life of the mother and her bodily autonomy should be valued more than that of the fetus. This is because the birth of a baby unwarranted or when it is deformed has a huge tendency to severely affect the physical and psychological well-being of the mother. This can prolong postpartum depression, increase its severity or cause its permanence. These problems create a need for the obligation of the State to protect the



right to life of the mother, which also includes the right to bodily autonomy, the right to personal liberty, and the right to privacy.

The State has recognized this right and has provided means to terminate pregnancies that would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health as per Section 3 of the MTP Act 1971. The Supreme Court has increased the gestational period from 20 to 24 weeks and has done away with the differential treatment of unmarried women. This shows the willingness of the State to prioritize the right of the mother over that of her unborn child.

The law considers the ideal gestational period for abortion to be 24 weeks and allows a further extension in extremely critical conditions. This time period is considered to be ideal because any time beyond this is critical for both the mother and the unborn baby. This risk includes deformity, disability, or death of the baby as well as the death of the mother, which is the rationale behind considering this gestational period to be appropriate to allow termination of pregnancy. However certain exceptions to this in cases of emergency can be allowed for the welfare of the child and the mother.

### **Key Takeaways and Conclusion**

The history of abortion laws shows that the idea and need for abortion existed long before any laws regulating, prohibiting or allowing it were put in place. Anti-abortion laws emerged in Britain and the US in the late 18th century with the aim of controlling and limiting women to the conventional child-bearing role. In India, early abortion laws were criminalized under the Indian penal code, and the only time abortion was allowed was when it was necessary to save the mother's life. However, the Medical Termination of Pregnancy Act was passed in India in 1971, allowing women to terminate their pregnancy up to 20 weeks and in cases of rape and fetal abnormalities. Japan's Meiji law didn't allow midwives to perform abortions, but it didn't forbid a pregnant woman from having an abortion until it became illegal in 1882. In the US, the earliest anti-abortion laws were passed in the middle of the 19th century, but Roe v. Wade in 1973 declared that a woman's choice to keep her pregnancy unborn is covered by the right to privacy. Despite a seemingly progressive and strong history of abortion laws, the world's common consensus on abortion is uncertain with the push towards anti-abortion bills and the overturning of Roe v. Wade.

Moreover, The Medical Termination of Pregnancy (MTP) Act, enacted in 1971 and amended in 2021, governs the legality of abortion in India. Abortion is legal up to 20 weeks of pregnancy, or up to 24 weeks in certain circumstances, such as a risk to the woman's life or physical or mental health, or in the case of fetal abnormalities. The Act has been effective in reducing the number of unsafe abortions in India, but access to safe and legal abortion services remains a challenge, particularly for marginalized communities. Additionally, the issue of sex-selective abortions persists in some parts of the country. Addressing these challenges will require a concerted effort from the government, healthcare providers, and civil society organizations to ensure that all women have access to safe and legal abortion services, and that sex-selective abortions are eliminated.

The debate on abortion centers around the conflict between the rights of mothers and the unborn child. While religious, cultural, and moral sensibilities continue to influence opposing arguments, the Indian legal system has recognized the right to abortion to some extent. The moral argument is that the embryo gets its rights as a human being from the time of conception, but a pragmatic view should be adopted to realize that the right of life of the mother and her bodily autonomy should be valued more than that of the fetus. The State has recognized this right and has provided means to terminate pregnancies that would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health. The ideal gestational period for abortion is 24 weeks, and certain exceptions to this in cases of emergency can be allowed for the welfare of the child and the mother.

To conclude, the history of abortion laws shows that the right to access safe and legal abortions is a contentious issue that varies across different countries. In India, the Medical Termination of Pregnancy Act permits abortions up to 20 weeks of pregnancy, and up to 24 weeks in certain circumstances. While the Act has been effective in reducing the number of unsafe abortions, access to safe and legal abortion services remains a challenge, particularly for marginalized communities. Additionally, the issue of sex-selective abortions persists in some parts of the country. Addressing these challenges will require a concerted effort from the government, healthcare providers, and civil society organizations to ensure that all women have access to safe and legal abortion services, and that sex-selective abortions are eliminated.

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