

## Abortion: Unfolding Paradigm of Laws in India

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### Abstract

One topic that has been heavily explored on both a national and international level is abortion. It is now a contentious topic everywhere in the world. The question of whether an unborn child has a right to life or a mother has the freedom to end her pregnancy whenever she pleases is one that confounds everyone. Abortion is a delicate and complicated topic, and various nations have varied laws governing it. India's abortion laws have changed significantly throughout the years in an effort to protect women's health and reproductive rights. This article covers the pertinent portions of the Indian Penal Code (IPC), gives a broad description of abortion and miscarriage, and discusses abortion regulations in India. It also emphasizes the importance of the Medical Termination of Pregnancy Act, 1971. The Indian Supreme Court has been crucial in interpreting the constitutional clauses pertaining to access to safe abortion and reproductive rights over the years. The Constitution's guarantees of the right to life, personal liberty, privacy, and equality have been extended to cover healthcare and reproductive autonomy. The article will also provide a list of significant rulings concerning medical pregnancy termination. Thus, at last in the paper, conclusion and suggestions have been provided. In the process of making this research paper, several journals, books and articles were referred and taken into consideration. Internet has also been a support in this process. Hence, this paper is a result of Doctrinal Research Methodology.

**Keywords-** abortion, unborn child, miscarriage, IPC, constitution, Supreme Court

## INTRODUCTION

*“No woman can call herself free who does not have control over her own body”*

The medical process used to terminate a pregnancy is referred to as an "abortion," also known as a "induced abortion." The practice of abortion and the regulations that permit it have long been contentious due to differing traditions, moral views, and other factors. A woman's unalienable right to an abortion is seen by some, while others regard it as the murder of the unborn since they think it is capable of feeling pain from the minute it develops within her body. It has been heavily explored on both a national and international level. It is now a contentious topic everywhere in the world. The question of whether an unborn child has a right to life or a mother has the freedom to end her pregnancy whenever she pleases is one that confounds everyone.

The most fundamental of all concepts, the right to life, is quite wide. Article 21 of the Indian Constitution states that "No person shall be deprived of his life and personal liberty except according to procedure established by law," which recognizes the right to life. Here, "person" refers to both genders. The right to an abortion<sup>1</sup> is regarded as one of the most important and fundamental rights that women have among many other rights. The right to privacy, which is a component of the right to personal liberty and which derives from the right to life, has acknowledged the right to an abortion. However, the topic of whether or not to recognize an unborn child as a human being and provide them the status of a person constantly comes up.

Religious, ethical, moral, and legal principles are only a few of the factors that influence the abortion rights. Every faith strongly opposes abortion. Nevertheless, the question of whether the woman has the right to an abortion or the child has the right to life inevitably comes up. This is what we will be going to understand in this paper.

### **Abortion and Miscarriage: Meaning**

To put it simply, an "**abortion**" is a pregnancy termination operation that ends in the death of the embryo or fetus. It is the fetus being extracted from the uterus, whereas, the term "**miscarriage**" refers to the release of the embryo or baby from the womb prior to the whole gestational period.

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<sup>1</sup> Sai Abhipsa Gochhayat, "*Understanding of Right to Abortion under Indian Constitution*", MANUPATRA, <https://manupatra.com/roundup/373/articles/presentation.pdf>

To put it simply, it refers to giving birth to a child before it is viable or completely formed, which causes the child to die.

In medicine, there are three words that refer to the removal of a fetus depending on the stage of gestation at which the removal or termination of pregnancy occurs: abortion, miscarriage, and preterm labor. When a pregnancy is ended before the placenta forms, that is, within the first three months of pregnancy, it is referred to as an abortion; in contrast, a miscarriage occurs when the fetus is expelled during the first four to seventh months of gestation before it is viable or developed. Preterm labor<sup>2</sup>, which is the third word, refers to the delivery of a preterm infant who may be able to survive.

The two names mentioned above are frequently used interchangeably. When discussing these two terms—abortion and miscarriage—the Apex Court ruled in *Jacob George v. State of Kerala*<sup>3</sup> (1994) that miscarriage refers to "spontaneous abortion," whereas abortion is defined as "miscarriage produced by unlawful means." The Court went on to say that an abortion or miscarriage involves the taking of a fetus's life.

### **Abortion in India: Legal or Not**

In the 2009 case of *Suchita Srivastava & Anr v. Chandigarh Administration*<sup>4</sup>, the Supreme Court ruled that a woman's freedom to choose her reproductive path falls under the purview of Article 21 of the Indian Constitution. The Court went on to say that having children and not having children are equally included in this freedom to make reproductive decisions. Nonetheless, the Court stated that these limits should be interpreted in light of the MTP Act, 1971, and that the Act's stipulations should be regarded as reasonable limitations, taking into account the circumstances of a woman throughout her pregnancy.

The Apex Court stated that a woman has the right to make decisions about her reproductive health and related issues in the 2017 case of *Justice K. Puttaswamy v. Union of India and others*<sup>5</sup>. In highlighting this, the Court said that as it pertains to the right to privacy, dignity, and

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<sup>2</sup> Diksha Paliwal, "Abortion Law in India", BLOG IPLEADERS (July 19<sup>th</sup>, 2023), <https://blog.ipleaders.in/abortion-law-in-india/>

<sup>3</sup> 1994 SCC (3) 430

<sup>4</sup> (2009) 9 SCC 1

<sup>5</sup> (2017) 10 SCC 1

physical integrity—all of which are protected by Article 21 of the Indian Constitution—it is a constitutional right. However, the current situations show how ineffective the authorities are at properly enforcing the laws and court precedents that are in place regarding abortion, even in spite of these legal frameworks and judicial precedents. It is imperative that these clauses be implemented effectively and that the abortion laws are approached from a right-based perspective in order to make access to them simple and maybe save the lives of many women.

## Constitutional Provisions

The basic rights contained in the Indian Constitution are the primary source of the Constitution's provisions pertaining to abortion. The Indian Constitution does not specifically include the right to an abortion, but the courts have construed various basic rights in relation to women's healthcare and reproductive rights. The Indian Constitution's *Article 21* protects everyone's right to life and personal freedom. The Supreme Court has given this right a broad interpretation that encompasses the freedom from discrimination and healthcare throughout pregnancy. In *Suchita Srivastava's case*<sup>6</sup>, the Supreme Court ruled on August 28, 2009, that reproductive rights are an essential component of Article 21's right to life and personal liberty.

The question now becomes whether, in accordance with Article 21, an unborn child is regarded as a person and has the right to life. *Section 20 of the Hindu Succession Act*, 1956 governs the rights of the fetus and states that the life of the fetus must be safeguarded from the moment of conception. In addition, the unborn child shall be treated as a born person for the purposes of all rights granted, within the bounds set by the law.

Furthermore, some restrictions pertaining to abortion are also highlighted in Article 14 of the Indian Constitution. *Article 14* forbids discrimination and ensures the right to equality. Gender equality has been included in the interpretation of the right to equality, and the SC has stressed the need of guaranteeing women's equal access to healthcare services, including safe and legal abortion.

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<sup>6</sup> Supra 4

## Law under Indian Penal Code (IPC)

The English legislation<sup>7</sup> that was in effect at the time was in line with the laws passed under the IPC. According to the Code, abortion was illegal unless it was performed to save a mother's life. Except in cases when it was carried out in good faith, the mother and the abortionist were found guilty of the aforementioned offense in order to carry out the act of abortion. The Code's *Sections 312-316* define abortion to be illegal, unless it is performed to preserve the life of the pregnant woman.

- **Section 312:**

According to Section 312 of the IPC, an individual who intentionally induces a miscarriage, also known as a spontaneous abortion, faces criminal charges for the miscarriage offense. The one caveat to this section is that if someone causes a miscarriage to save the life of a pregnant woman, they will not be prosecuted. The aforementioned clause addresses two types of miscarriages: those that result from a woman becoming pregnant and those that occur when a woman becomes pregnant quickly. The second scenario occurs when the fetus begins to move (usually after 15–16 weeks after conceiving). When there is the first type of miscarriage, the accused faces a maximum sentence of three years in jail and a fine; in the second scenario, the accused faces a maximum sentence of seven years in prison and a fine. If the woman is the one who caused the miscarriage, she is likewise liable under this rule.

- **Section 313:**

It addresses miscarriage caused without the woman's permission. It does not matter if the pregnant lady gave birth quickly or not under this section; the punishment carries a 10-year maximum sentence that can be extended to life in prison and a fine.

- **Section 314:**

It addresses the scenario in which a miscarriage results in a woman's death. Any act that is done with the goal to cause a miscarriage, which ultimately results in the woman's death, is considered a crime. If found guilty of the aforementioned offense the offender faces a maximum 10-year sentence in addition to a fine; The clause further states that the

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<sup>7</sup> Anonymous, “*Abortion Laws in India*”, FREE LAW (November 3<sup>rd</sup>, 2023), <https://www.freelaw.in/legalarticles/Abortion-laws-in-India>

perpetrator of the conduct will face life in jail or a maximum of ten years in prison if the lady is not consulted before the act is carried out. Additionally, it declares that an offender need not have known that their conduct may result in the pregnant woman's death in order to be found guilty under this section.

- **Section 315:**

Section 315 of the Indian Penal Code addresses an act that results in the death of a child shortly after delivery or an act that prevents a kid from being born alive or in a stillbirth. A sentence of up to 10 years in jail, with or without blame, is imposed for such an act. A good-faith attempt to save the pregnant woman's life is exempt from this rule.

- **Section 316:**

Section 316, the next clause, addresses an act that qualifies as culpable murder. Any conduct under such conditions that results in the quick child's death and, consequently, the child's death will be prosecuted under this offense. The clause stipulates a maximum sentence of 10 years in jail and a fine.

## **Law under the Medical Termination of Pregnancy (MTP) Act, 1971**

The Medical Termination of Pregnancy Act, 1971 is a significant legislation enacted with the primary objective to provide women with safe and legal access to abortion services, under certain specified conditions. It aims to protect the health and well-being of women. Prior to its enactment, unsafe and legal abortions were rampant, leading to numerous complications and even deaths among women. By legalizing abortion under specific circumstances, the Act ensures that women can seek medical assistance from trained professionals, reducing the risks associated with unsafe procedures.

The Act also recognizes a woman's right to make decisions about her own body. It acknowledges that every woman has autonomy over her reproductive choices<sup>8</sup> and should have access to safe abortion services if she desires it. This empowers women by giving them control over their own lives and bodies.

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<sup>8</sup> Satvik N Pai and Krithi S Chandra, "Medical Termination of Pregnancy Act of India: Treading the Path between Practical and Ethical Reproductive Justice", NATIONAL LIBRARY OF MEDICINE, NATIONAL CENTER FOR BIOLOGICAL INFORMATION (July 14<sup>th</sup>, 2023), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10470576/>

Furthermore, the MTP Act addresses social issues such as population control and family planning. By allowing for legal abortions in certain situations, it helps prevent unwanted pregnancies which may lead to overpopulation or strain on resources. It also provides an avenue for individuals who may not be ready or able to raise a child responsibly, ensuring that they have options available to them. It also contributes towards reducing gender inequality by recognizing women's reproductive rights. It acknowledges that unwanted pregnancies can disproportionately affect women's lives and opportunities compared to men. By providing legal access to safe abortions, it helps level the playing field by giving women more control over their reproductive choices.

Therefore, the object and purpose of enacting the Medical Termination of Pregnancy Act are multi-faceted protecting women's health, promoting individual autonomy, addressing social issues such as population control and family planning while also contributing towards reducing gender inequality.

### **Amendments to the MTP Act**

A recent modification<sup>9</sup> to the MTP Act is the Medical Termination of Pregnancy (Amendment) Act, 2021. It amends the MTP Act in a number of ways with the goals of improving women's reproductive rights, increasing access to safe abortion services, and addressing some of the shortcomings and issues raised by the earlier law. The following are some significant changes:

- The Amendment Act's expansion of the gestational restriction for abortion is one notable modification. Under very particular conditions, it permits women to seek an abortion up to 20 weeks with the opinion of one licensed medical professional and beyond 20 weeks with the opinion of two licensed medical professionals.
- Married and single women alike are permitted to end a pregnancy up to 20 weeks in the event that no technique or contraceptive device is ineffective.
- One licensed medical professional's opinion is required for the termination of a pregnancy up to 20 weeks of gestation.

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<sup>9</sup> Dipika Jain, "Supreme Court of India judgment on abortion as a fundamental right: Breaking new ground", NATIONAL LIBRARY OF MEDICINE, NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION (July 3<sup>rd</sup>, 2023), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10321178/>

- When a pregnancy is between 20 and 24 weeks gestation, two licensed medical professionals must agree on the pregnancy's termination.
- If a pregnancy is terminated after 24 weeks, the state medical board's opinion must be obtained.
- The highest gestation restriction has been raised to 24 weeks for some groups of women, including rape survivors, incest sufferers, and other vulnerable women.
- It highlights the importance of protecting the privacy and secrecy of women seeking abortions; all information pertaining to an abortion, including the name of the woman, should be kept private and not be shared with other parties without the woman's agreement, unless it is mandated by law.

### Supreme Court's View on Abortion in India

The 2021 changes attempted to eliminate a number of oddities and flaws in the previous legislation, reflecting a progressive legislative approach. The revisions unquestionably extended the time frame during which an abortion is permissible and included women who are not married, thereby expanding the access to reproductive healthcare. The intervention of constitutional courts<sup>10</sup> became essential even as the new law attempted to address various situations, as abortion is not just a medical-technical matter that must be decided within the confines of the law, but rather is a matter of decision-making and ideology that sets off a struggle between a number of factors, including the State, the family, motherhood, and women's autonomy. A number of recent Supreme Court judgments have highlighted the intricate legal system and the obstacles women confront in obtaining safe and authorized abortions.

- In *Suchita Srivastava and Anr v. Chandigarh government*<sup>11</sup> (2009), the Supreme Court ruled that a woman's freedom to choose her reproductive path is a component of "personal liberty," as defined by Article 21 of the Indian Constitution. It's critical to understand that reproductive decisions may be made in order to procreate or not reproduce. It said that respecting a woman's right to privacy, dignity, and bodily integrity is essential.

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<sup>10</sup> Utkarsh Anand, "Explained: Abortion Laws in India", HINDUSTAN TIMES (October 12<sup>th</sup>, 2023), <https://www.hindustantimes.com/india-news/explained-abortion-laws-in-india-101697097757306.html>

<sup>11</sup> Supra 4

- In *Z v State of Bihar*<sup>12</sup> (2018), the highest court criticized the “negligence and carelessness” of the authorities in failing to terminate the pregnancy as allowed by law, acknowledging the disastrous effects of needless delays and a lack of promptitude in the attitude of authorities when dealing with pregnancies.
- The Supreme Court of India allowed the termination of post-20-week pregnancies in *X v. Union of India*<sup>13</sup> and *Meera Santosh Pal v. Union of India*<sup>14</sup> (2017), *Mamta Verma v. Union of India*<sup>15</sup> and *Sarmishtha Chakraborty v. Union of India*<sup>16</sup> (2018), and other cases where the court recognized that carrying a pregnancy to term posed a serious risk to the mental health of the expectant mother.
- The top court expanded the reach of the MTP Act when it decided in *Shaikh Ayesha Khatoon v. Union of India*<sup>17</sup> (2017) and *Vaishali Pramod Sonawane & Others v. Union of India*<sup>18</sup> (2019) that a pregnancy can be ended after 20 weeks if there is a significant risk that the unborn child will have severe physical and mental defects.
- In *XYZ v. State of Maharashtra*<sup>19</sup> (2021), the court permitted a minor to end her pregnancy in the 26th week after taking into account her socioeconomic status and the potential negative effects of carrying the pregnancy to term on her mental health.
- In *Deepika Singh v. Central Administrative Tribunal*<sup>20</sup> (2022), the Supreme Court questioned the prevailing interpretation of the term of a "family," both in law and in culture, emphasizing that familial connections might take the shape of domestic, single partnerships or homosexual relationships. The ruling emphasized how the MTP Act requires legal recognition in order for people with non-traditional family arrangements to have access to safe abortions.

The legal framework surrounding the abortion law in India also saw a turning point in September 2022 when the Supreme Court upheld women's right to reproductive and decisional autonomy by eliminating the "artificial distinction" between married and single women and granting judicial

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<sup>12</sup> Civil Appeal No 10463 of 2017

<sup>13</sup> W.P (CRL) 1505/ 2021

<sup>14</sup> (2018) 13 SCC 339

<sup>15</sup> (2018) 14 SCC 289

<sup>16</sup> (2018) 13 SCC 339

<sup>17</sup> AIR 2017 SC 1055

<sup>18</sup> (2019) 5 Bom Cr 478

<sup>19</sup> Writ Petition (ST) No 10908 of 2021

<sup>20</sup> Civil Appeal No 5308 of 2022

recognition to "marital rape" for the purposes of abortion. The court was asked to consider whether the MTP Act's regulations distinguished between married and single women. Married women were permitted by the MTP Rules to abort for up to 24 weeks due to various reasons, such as mental distress, sexual assault, and medical issues, while single women were not permitted to do so. The problem started when a Manipur-born single lady, 25, asked to end her 22-week pregnancy in a relationship that was consenting. Giving the law a purposeful reading, the Supreme Court decided that an unmarried woman has the same freedom to decide whether or not to have a child as a married woman thanks to her rights to reproductive autonomy, dignity, and privacy under Article 21. Justice Dhananjaya Y. Chandrachud wrote the historic ruling, which held that the MTP Act's interpretation should take into account modern social realities rather than being constrained by traditional mores from bygone eras. The September 2022 judgment established a precedent for a judiciary that appeared prepared to adjust and develop in tandem with shifting social norms and emerging rights to protect women's bodily autonomy, privacy, and dignity. However, the current impasse in the nation's highest court pushes the boundaries of jurisprudence and justice while once again placing women's reproductive rights at the center of a contentious public debate.

## Conclusion

India's abortion laws aim to safeguard women's reproductive rights, promote their health and welfare, and alleviate societal injustices<sup>21</sup>. The MTP Act offers a legal framework for safe and controlled access to abortion services, in conjunction with pertinent parts of the IPC. India works to create a climate where women may make educated decisions about their pregnancies while prioritizing their health and well-being by acknowledging their autonomy and offering them reproductive alternatives.

The MTP Act, 1971, was passed, legalizing abortion in India. It was an offense covered by Sections 312-316 of the IPC prior to this. Pregnancy termination was permitted under the 1971 Act within the strict parameters set forth in the Act. Enacting rules and regulations that support women's reproductive choices is crucial since acknowledging this right is fundamental to a free

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<sup>21</sup> Adsa Fatima and Sarojini Nadimpally, "Abortion Law in India: A step backward after going forward", SUPREME COURT OBSERVER (November 17<sup>th</sup>, 2023), <https://www.scobserver.in/journal/abortion-law-in-india-a-step-backward-after-going-forward/>

nation. It is desired that women have the right to safe abortions, and it is crucial that the government not impede on that right unless there are extraordinary circumstances.

Though we still have a long way to go, India's progressive stance on abortion-related problems is praiseworthy given that our laws are far more lax than those of most other nations. It is evident from a number of cases that women living in cities have the benefit of easy access to abortion. Better resources for reducing unintended births are still unavailable to women living in rural regions. It is vitally important to make safe abortion readily available to all women, regardless of their background, marital status, or other circumstances.

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