

# Right To Abortion As A Fundamental Right: Constitutional Analysis

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The emerging jurisprudence on reproductive rights of a woman acknowledges the right to bodily integrity of a woman and includes her reproductive choice as a dimension of her right personal liberty. The right of a woman to have access to safe and legal abortion has been recognized under the right to privacy. In India the first step towards the reformation and liberalization of laws relating to abortion started in the year 1964 with the recommendation of the Shanti Lal Shah Committee which led to the passing of the “Medical Termination of Pregnancy Act, 1971”. Along with legislative framework there has been high judicial activism in the area pertaining to right to abortion. In *K.S. Puttaswamy v Union of India*, the court recognized the constitutional right of the women to make reproductive choice as a part of the personal liberty under Article 21 of the Constitution of India. The role played by the judiciary over the years have recognized that all women irrespective of marital status have equal rights to access abortion which is a significant step towards the woman’s rights in India. Despite laying a robust jurisprudence on reproductive rights of woman, there is no fundamental shift in power from the medical practitioner to the women seeking abortion. The core constitutional principle highlights the decisional autonomy of women concerning her reproductive choice, yet the legislative framework is still silent on this issue. Even though India’s abortion law and policy are progressive, still effective steps needed to be taken to adopt the rights based approach and to make safe and legal abortion accessible to all. The present paper shall highlight on the abortion law in India and its shortcomings, constitutional recognition to right to abortion in India and the judicial approach towards the right to reproductive choice of a woman.

**Keywords:** Reproductive Choice, Abortion, the Constitution, Decisional Autonomy, Privacy

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## Introduction

The developing and the transforming jurisprudence on the right to abortion recognize the right to bodily integrity and reproductive choice of a woman as a dimension of her personal liberty. The reproductive health of women is an important part of a woman’s life and rights and liberty of a woman is meaningless without having access to the reproductive rights. The reproductive rights of women implies “*the right of women to achieve the highest standard of sexual and reproductive health, which includes the right to make her own decision regarding her body and her reproductive life, right to procreation and to have family, right to decide the number and spacing of children, right to adequate education and information in this respect, right to have access to safe and effective methods of family planning of their choice as well as other methods of their choice for the regulation of fertility etc.*”.

The right of the woman to make reproductive choices gets violated when she is denied access to legal and safe abortion which leads to an increasing trend in maternal morbidity and mortality rates. The complexities associated with the act of abortion, which is a consummation of many facets such as system of laws, religion, morality continues to be a matter of academic discussion and debate both nationally and internationally.<sup>1</sup> The

general question around which the discourse revolves is of the pro-choice and pro-life movements. The pro-choice rule believes in absolute right of a woman over her body and it opposes any kind of restriction upon the act of abortion. On the other hand, the pro-life rule mandates the protection of a foetus from the moment of its conception.<sup>2</sup>

Abortion is derived from the Latin word 'aboriri' which means, "to get detached from the proper site".<sup>3</sup> The Oxford Dictionary defines an abortion as, "an operation or other procedure to terminate pregnancy before the foetus is viable or the premature termination of pregnancy by induced expulsion of a non-viable foetus from the uterus."<sup>4</sup> Abortion may be either spontaneous<sup>5</sup> or induced.<sup>6</sup> The legality of an induced abortion depends on the particular law in force in a country and despite the broad indications for legal abortion, illegal and unsafe abortions are very common in India.

### Contours of right to abortion

Under the International Covenant on Economic, Social and Cultural Rights, "the right to sexual and reproductive health is an integral part of the right to health found under Article 12". It has been observed that a right to reproductive health of a woman includes the access to legal and safe abortion procedures, post abortion care, reforming and liberalising the restrictive laws on abortion, ensuring the availability of effective health care service providers, and to provide protection from illegal and unsafe abortions. The Committee on the Elimination of Discrimination against Women has stated that infringement of the sexual and reproductive health and rights of women such as criminalizing the act of abortion, denial or delay to the service of safe abortion, continuation of the pregnancy under coercion are forms of gender based violence amounting to atrocious or inhuman and degrading treatment.<sup>7</sup> In 2018, the United Nations Human Rights Committee, stated that "the availability of safe, legal and effective access to abortion is a human right and a part of life under the Covenant". The Committee has discussed the contours of right to abortion which include the following facets:<sup>8</sup>

- 1) Access to safe and legal abortion services as provided by the State.
- 2) Any women seeking abortion and the medical service providers providing the abortion services shall not be subjected to any kind of criminal sanctions.
- 3) Removal of obstacles or inconsistencies in accessing abortion by any state.
- 4) Stigmatization relating to the issue of termination of pregnancy should be countered.
- 5) Women undergoing the procedure the abortion shall be provided with reliable pre-natal and post-abortion health care services.

### Role of Legislative Instrument in the area promoting the reproductive rights of women

In India the act of abortion has always been subjected to discussions due to the existence of numerous interdictions associated with it. In context to the increasing trend in the incidence of maternal mortality due to unsafe abortions, the liberalisation of abortion law in India began in 1964 with the appointment of the Shah Committee to carry out a comprehensive review of abortion. In consequence to it, the Medical Termination of Pregnancy Act, 1971 was enacted as a measure to design certain exception to Section 312 of Indian Penal Code which criminalises abortion except in circumstances under which the medical practitioners are obliged to save the life of a pregnant woman. Criminalizing all forms of abortion without any exceptions or limitations leads to a greater risk to health including high mortality and morbidity rates in women. Therefore, the Medical Termination of Pregnancy Act has recognised certain broad objectives: i) Protection to the health of concerned woman ii) Taking into consideration certain humanitarian reasons such as pregnancy arising from rape and iii) Giving due recognition to the eugenic grounds such that the child so born shall suffer from deformities or abnormalities. The Act<sup>9</sup> has permitted and allowed abortions only

<sup>1</sup>Bhavish Gupta and Meenva Gupta, *The Socio-Cultural Aspect of Abortion in India: Law, ethics and practise*, ILILR 143 (2016).

<sup>2</sup> Robert M Baird and Staurt E Rosenbaum, *The Ethics of Abortion: Prolife v Prochoice 200* (Prometheus Books, 3<sup>rd</sup>edn., 2001).

<sup>3</sup>Webster's New Dictionary and Thesaurus 1995.

<sup>4</sup>Definition of abortion, Oxford Lexico, <https://en.oxforddictionaries.com/definition/abortion> (last visited 25 July, 2022).

<sup>5</sup>Spontaneous abortion is one that occurs naturally as a result of certain pathological condition often beyond the control of a pregnant women and physician. It is also termed as miscarriage.

<sup>6</sup>An induced abortion can be divided into legal or illegal and it is the deliberate interruption of pregnancy by a service provider and it has been divided into two types- (1) Therapeutic Abortion- An abortion which is induced to preserve the health of the mother when her life is in danger or when it is found that the child if born will be a disabled one at time it is termed as therapeutic abortion. (2) Elective Abortion- An abortion induced for any other reason

<sup>7</sup>General recommendation 35 (2017) on gender based violence against women.

<sup>8</sup>General Comment ICCPR (n10)

<sup>9</sup>The Medical Termination of Pregnancy Act, 1971, No.34, Acts of Parliament, 1971 (India).

under certain state sanctioned prescribed conditions and by empowering the immediate authority concerning the expulsion of the fetus or the embryo, primarily with the registered medical practitioner and not with the women which highlights the needs based approach of the legislative instrument rather than the rights based approach.<sup>10</sup> Thus from critically analysing the Act and the sections of Indian Penal Code, it is explicitly recognised that the practise of abortion is regulated by the State by vesting the authority with the registered medical practitioner. A pregnant woman cannot claim the right to abortion on request as a matter of right which undermines her reproductive autonomy. The Act does not adequately recognise the social and economic implications of unwanted pregnancies and their impact on women. However, the Medical Termination of Pregnancy Act, 1971 was amended in the year 2002 and 2021 respectively which made certain liberal provisions highlighting the reproductive rights of women viz. increasing the gestation time period concerning the termination of pregnancy<sup>11</sup>, organisation of the medical board, substitution of the words “married woman and her husband” by the words “women and her partner”, safeguarding the right to privacy of the pregnant women etc. which paves the way for a transformative and progressive reforms towards furthering the right to abortion of women.

The shortcomings of the Act that need to be addressed are as follows:

- 1) The Act does not formally recognise the medical termination of pregnancy as a matter of right of the woman.
- 2) The Act permits abortion to be carried out only by a registered medical practitioner in a hospital established and maintained by the State but does not refer to any guidelines and norms for safe pre and post abortion care and service.
- 3) It can be seen that the law recognises termination of pregnancy only under certain conditions but does not take into account other factors such as economic reasons, personal considerations, forced pregnancy etc. which reflects that the issue of abortion is always subjected to state-sanctioned conditions that restricts the women’s exercise of reproductive choice.
- 4) According to the Medical Termination of Pregnancy (Amendment) Act of 2021 termination of pregnancy beyond the period of 24 weeks is allowed only in cases of substantial foetal abnormalities. But the enactment is silent on the point as to whether this statutory provision can be expanded to include other categories of women within its ambit such as minors, mentally ill, disabled, survivors of sexual assault or rape and women undergoing change of marital status during the on-going pregnancy (widowhood and divorcee).
- 5) The Act is silent on the issue concerning its overlapping with other enactments such as PCPNDT Act of 1994 and POCSO Act, 2012.
- 6) The Act is silent regarding the consequences that arise due to conflicting opinions of the two registered medical practitioners in case of termination of pregnancy post the 20<sup>th</sup> week.
- 7) The Act fails to address the demand for expansion of provider base for abortions.

Although the Act brings about some progressive reforms in the law of abortion, it does little to change the doctor-centric framework of the Act whereby the decision of abortion vests with the doctor and not the pregnant women. Consequently, abortion remains a conditional provision and not an absolute right. It fails to give the women reproductive autonomy they deserve and continues to provide abortion using themneed based approach rather than the rights based approach. Any intervention in matters of choice is not only against the principles of equality but also an infringement of the fundamental right to privacy of women.

To ensure the accessibility of human rights to women and to promote the development, several international committees and fraternity as a whole have acknowledged the fulfilment of reproductive rights of women. In order to follow the international mandate, governments from all over the world have recognized the significance of reproductive autonomy and reproductive rights of women. To fulfill its commitment government enacted formal laws and policies that are prime indicators in promoting reproductive rights. Thus it can be reiterated that all over the world each and every woman has an unconditional right to have control over her own body. In theory, right to abortion have a nexus with the fundamental right of life and liberty under Article 21 of the Constitution of India. Right to abortion has been recognized under right to privacy which is a part of personal liberty and dignity emanating from right to life.

<sup>10</sup>Siddhivinayak S Hirve, *Abortion Law, Policy and Services in India: A Critical Review*, 12 IJSRHR 116 (2004).

<sup>11</sup>The Medical Termination of Pregnancy Act, 1971, S. 3- A pregnancy may be terminated by a registered medical practitioner,— (a) where the length of the pregnancy does not exceed twenty weeks, if such medical practitioner is, or (b) where the length of the pregnancy exceeds twenty weeks but does not exceed twenty-four weeks in case of such category of woman as may be prescribed by rules made under this Act, if not less than two registered medical practitioners are, of the opinion, formed in good faith, that— (i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or (ii) there is a substantial risk that if the child were born, it would suffer from any serious physical or mental abnormality.

### Judicial Approach

In 2006, the constitutional validity of the MTP Act was challenged in the case of *Nand Kishore Sharma & Ors. v Union of India*,<sup>12</sup> where the petitioner argued that “*Sec 3(2) of the Act wherein the time limits of the pregnancy and the requirement of opinion from registered medical practitioners are provided is violative of Article 21. The High Court observed that since the objective of the Act is to save the life of the pregnant woman or relieve any injury to her physical or mental health, the Medical Termination of Pregnancy Act is in consonance with Article 21 of the Indian Constitution*”.

In light of the apparent danger to the lives of the pregnant women, Justice S. A. Bobde in *Meera Santosh Pal v. Union of India*<sup>13</sup> observed that the pregnancy can be discontinued only when a committed and a registered medical practitioner is satisfied that the continuation of the pregnancy would cause injury to the health of the women both physically and mentally and threatening the life of the mother.

In the case of *Suchita Srivastava v. Chandigarh Administration*<sup>14</sup>, the Supreme Court of India observed that in the case of pregnant women there is also a “compelling state interest in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled.” Hence, the provisions of the Medical Termination of Pregnancy Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices. In a recent judgement of the Supreme Court in *Puttaswamy v. Union of India*<sup>15</sup>, which respectively recognised “*the right to privacy, and a woman’s right to reproductive choices as essential to the core of liberty and personal autonomy under Article 21. Lastly, they also emphasise the right to health under Article 21, which constitutionally protects the right of a woman to choose a course which is least detrimental to her health.*”

In the case of *X v Principal Health Secretary, Health and Family welfare Department, Govt of NCT of Delhi*<sup>16</sup>, a three-judge bench comprising Justices D.Y Chandrachud, A.S Boppana and J.B Pardiwala pronounced a landmark and remarkable judgement on right to abortion in India pertaining to the Medical Termination of Pregnancy(Amendment) Act, 2021. A petition was filed in the Delhi High Court for terminating the pregnancy of unmarried women. By strictly abiding the Rule 3B of the legislation which has no mention of the providing the abortion services to an unmarried women, the High Court rejected the petition. However, the Apex Court has passed an order permitting unmarried women to terminate pregnancy of 24 weeks. The judicial interpretation of the Supreme Court evidently reflects a gap between Section 3 of the Medical Termination of Pregnancy (Amendment) Act of 2021 which reflects the parliamentary intent to cover unmarried woman and Rule 3B which recognizes categories of women eligible for termination of pregnancy such as divorcees, widows, minors, disabled and mentally ill persons and survivors of sexual assault or rape but does not cover a situation involving unmarried woman. This inconsistency evidently highlights the restrictive interpretation and lacunae in the existing law. The ‘change of marital status’ clause have included under its ambit all categories of unmarried and single women recognising her rights to legal abortion and reproductive bodily autonomy. The judgement also shed light on the exception clause of Section 375 of the IPC. ‘*We need to understand the lived realities of many women who suffer from sexual violence perpetrated by their husbands*’ quotes the judgement. The rape and sexual assault survivors were already entitled to abortion under the 20-24 weeks category but the legislation was silent on its marital aspect. This particular judgement has filled up the gap and inconsistency. The Bench also held that the meaning of rape must include “marital rape” for the purpose of widening the MTP Rules. The court identified marital rape as a legal category which is not recognised by the Indian Penal Code. Irrespective of the fact that the intercourse has occurred in the context of marital relationship, a woman may become pregnant by her own husband without her voluntary will or consent. With this landmark judgement, the Apex Court of India has widened the scope of the right to abortion of women irrespective of marital status.

It reduces every chances of inconsistency and discrimination among women in seeking pre and post legal abortion care services. The judgement have bridged the gap in accessing abortion for all women irrespective of their marital status, age and consent factor. It also extended the interpretation of ‘grave injury to mental health’ to not ‘only psychological illness but also to any kind of forced and unwanted pregnancy’. The judgement called into veracity the practice of third party authorization by the medical practitioners. It held that the woman is herself an ‘ultimate and absolute decision maker’ as far as the termination and continuation of her pregnancy is concerned. Thus, the transforming jurisprudence acknowledges a woman’s sacrosanct right to bodily integrity and includes her reproductive choices as a dimension of her ‘personal liberty’.

<sup>12</sup> Nand Kishore Sharma and Ors v Union of India , AIR 2006 Raj. 166.

<sup>13</sup> Meera Santosh Pal v Union of India, (2017) 3 SCC 462.

<sup>14</sup> Suchia Srivastava v Chandigarh Administration, (2014) 9 SCR 989.

<sup>15</sup> Puttaswamy v Union of India, AIR 2017 SC 416.1

<sup>16</sup> X v Principal Health Secretary, Health and Family Welfare Department, Govt of NCT of Delhi, Special Leave Petition (Civil0 No. 12612 of 2022 and Civil Appeal No. 5802 of 2022 .

### Conclusion

According to the Alan Guttmacher Institute's global map of abortion legislation, "India has one of the most liberal laws but in reality, however, women face a lot of structural, cultural, legal barriers in accessing safe abortion services. Multiple socio economic inequalities and cultural stigma make women facing an unwanted pregnancy even more vulnerable. Such barriers may contribute to delay in accessing abortion services or a complete denial of such services, consequently negating women's right to reproductive autonomy". Thus, it can be stated that in order to increase the availability of safe and legal abortion services for women, it has been recommended to increase the provider base, increase the upper gestation limit for legal medical termination of pregnancies and increasing the access to legal abortion services for women. Measures should be adopted to resolve the lack of clarity in laws other than the Medical Termination of Pregnancy Act that creates a hindrance on access to safe abortion services due to fear of prosecution amongst providers and stigma and risk of criminalization. The attitude of registered medical practitioners towards abortion indicates that decriminalization is necessary but not sufficient in securing the access to safe abortion service. The state is responsible for proactively eliminating the barriers to abortion access.

Before concluding it would be relevant to understand the basic aim behind legislating with regards to abortion. The prime objective is to provide all women with accessible and safe abortion care services. It can be carried out by means of mobilising human, financial and material resources for providing safe abortion procedure and increasing the number of trained persons and equipped abortion centers. In addition to this, efficiency to safe abortion care services can be increased by integrating abortion services into primary and community health centers, increasing investment in public amenities, broaden the base of abortion providers by training paramedics to do first trimester abortions, simplifying registration procedures, link policy with up-to-date technology, addressing the need for appropriate post-abortion care etc. In the light of right to reproductive justice and decisional autonomy, it is the woman alone who has the right over her body and is the ultimate decision maker on the question of whether she wants to undergo an abortion.

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