



## **Abortion law in India: The debate on its legality**

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### **Abstract**

Despite 30 years of liberal legislation, the majority of women in India still lack access to safe abortion care. This paper critically reviews the history of abortion law and policy in India since the 1960s and research on abortion service delivery. Amendments in 2002 and 2003 to the 1971 Medical Termination of Pregnancy Act, including devolution of regulation of abortion services to the district level, punitive measures to deter provision of unsafe abortions, rationalisation of physical requirements for facilities to provide early abortion, and approval of medical abortion, have all aimed to expand safe services. Proposed amendments to the MTP Act to prevent sex-selective abortions would have been unethical and violated confidentiality, and were not taken forward. Continuing problems include poor regulation of both public and private sector services, a physician-only policy that excludes mid-level providers and low registration of rural compared to urban clinics; all restrict access. Poor awareness of the law, unnecessary spousal consent requirements, contraceptive targets linked to abortion, and informal and high fees also serve as barriers. Training more providers, simplifying registration procedures, de-linking clinic and provider approval, and linking policy with up-to-date technology, research and good clinical practice are some immediate measures needed to improve women's access to safe abortion care.

**Keywords:** abortion law, liberal legislation, MTP act

### **Introduction**

The fact is that women have been trapped. Reproduction is used, consciously or not, as a means to control women, to limit their options and to make them subordinate to men... We must seek to liberate women."

-Dr. Nafis Sadik Executive Director, UN Population Fund

Human Rights are those rights, which should be available to every individual without any discrimination of any kind. Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom. The most important right of a Human is the right to life. It is the supreme human right from which no derogation is permitted. It is inalienable. The Article 6(1) of the International Covenant on Civil and Political Rights prohibit the arbitrary deprivation of life. But there are some controversial issues related to this supreme right. One such issue is the question of Right to abortion. Among other rights of women, it is believed that every mother has a right to abortion for her very own interest or by her choice, it is a universal right. Earlier the right to abortion was not permitted and it was strongly opposed by the society. The termination of pregnancy was termed to be a murder of the foetus. But due to the change in time and technology, nowadays this right has been legally sanctioned by most of the nations after the famous decision of Roe Vs. Wade by the US Supreme Court which became one of the most politically significant Supreme Court decisions in history, reshaping national politics, dividing the nation into "pro-choice" and "pro-life" camps, and inspiring grassroots activism. This is a landmark United

States Supreme Court decision establishing that most laws against abortion violate a constitutional right to privacy, thus overturning all state laws outlawing or restricting abortion that were inconsistent with the decision. In Roe v. Wade, the plaintiff wanted to terminate her pregnancy because she contended that it was a result of rape. Relying on the current state of medical knowledge, the decision established a system of trimesters that attempted to balance the state's legitimate interests with the individual's constitutional rights. The Court ruled that the state cannot restrict a woman's right to an abortion during the first trimester, the state can regulate the abortion procedure during the second trimester "in ways that are reasonably related to maternal health," and in the third trimester, demarcating the viability of the foetus, a state can choose to restrict or even to proscribe abortion as it sees fit. In response to Roe v. Wade, several states enacted laws limiting abortion, including laws requiring parental consent for minors to obtain abortions. But the oppositions are still present and people do believe that it should be legally prohibited.

Even though the right to abortion is now available to women in majority of the countries throughout the world, the level of restriction imposed on the realization of the same varies. Feminist groups associate the right to abortion with right to equality, bodily integrity and self-determination<sup>[1]</sup>. The idea that women in particular must be able to decide whether, when and how to have children originated in the feminist birth control movements that developed in the 1830s. Phyllis Schlafly, an American constitutional lawyer and leader of the conservative movement criticized the women's liberation movement as a total assault on the role of woman as a wife

and mother, and on the family as a basic unit of the society [2]. With the emergence of the pro-life groups, abortion was criticised on the ground that 'it infringes the right to life of a foetus'. Feminists viewed this argument as another way of attempting to regulate the bodies of women [3]. With the growth in the liberation movement, the pro-life groups shifted from the policy of complete ban on abortion to a permissive policy of permitting abortion in certain circumstances. The other side of the debate i.e. the pro-choice groups advocate a permissive policy allowing a woman to choose. Dr. P Saullin talks about the existence of another group which opines that abortion should be permitted in some situations and restricted in others and classified them as situationalists [3].

Solinger contends that in the 1960s and 1970s, abortion rights advocates initially used the term "rights" rather than choice. He believes that rights are available to all uniformly whereas the concept of choice depends on the possession of resources thus creating a hierarchy among women [4]. He further states that "Choice" also became a symbol of middle-class women's arrival as independent consumers. Middle-class women could afford to choose. They had earned the right to choose motherhood, if they liked. Women belonging to the lower class had not earned the right to choose [5]. Solinger is of the opinion that while pro-choice camp contends that pro-life position diminishes the rights of women in favour of rights of the foetus, pro-choice position does not ascribe inherent right to women either. Rather, reproductive choices are available only to those who can afford them. According to Luker, most women who favour 'choice' are employed outside their homes, and compete with men because they are better educated and have been successful in the competition for higher-status jobs, where they can earn substantial incomes that make it possible for them to support a comfortable independent life style [6]. According to the Luker women who take a pro-life position are both practically and symbolically declaring that women's reproduction roles should be given social primacy [7].

The pro-life position is in favour criminalization of abortion. In third world countries like India, where contraception are not easily available to rural women, abortion might be their only way for addressing unwanted pregnancies. Criminalization encourages illegal, backdoor abortions. Thus, the major flaw in the pro-life position is not so much its claim that the foetus is a life, but its assumption that because the foetus is a life, abortion should be criminalized [8]. The debate is not only restricted to where life begins, it expands the meanings of women's lives and the role reproductive autonomy plays in shaping her place in the world.

The two terms pro-life and pro-choice, overlap to the extent that they share the goal of reducing the number of abortions. Different countries, different activists expand the definition of the two terms depending on which side they advocate. Therefore the two terms are vulnerable to varied interpretations. It is necessary to move beyond these terms in order to understand reproductive justice better. Consequently, it is critical that reproductive advocates develop a framework that does not rest on the pro-choice versus pro-life framework [9]. According to Meserve, the pro-life movement needs a new name that will be descriptive of its concerns. It is not pro-life, it is anti-birth control and anti-abortion on a fixed and

legalistic foundation without regard with its social consequences of its policies [10].

## Causes and Need of Abortion

### Pro- Life v. Pro- Choice debate in light with state policies

Developing countries felt a need to bring about abortion reforms due to reasons of overpopulation, poverty, women mortality, sex selection etc. In developed countries, emancipation of the status of women was seen as the primary reason for abortion reforms. State intervention has resulted in the removal of choices about reproduction, thus minimizing the individual's right to self-determination. Abortion laws come under the purview of welfare laws by the state. Even though they are imposed with a wider aim of achieving welfare, they continue to remain confined to the socio-economic and political interests of a state.

In states with pro-life stances, a woman who chooses to end a problem pregnancy with an abortion may face greater social disapproval than would a counterpart in another state. She may have to pay more, travel farther, or wait longer to obtain an abortion [11]. In pro-choice states, she faces fewer barriers to accessing an abortion than do women in pro-life states [12].

For example, an Indian woman will face fewer hurdles in procuring abortion as compared to an Irish woman and at the same time her hurdles will be greater than those of a British woman. The situation can be well understood by an example of Saudi Arabia. In the year 1990, 47 women who terminated their pregnancies were detained by the police in Saudi Arabia and dismissed from their jobs. Their travel papers were denied their names were broadcasted on loudspeakers with the demand that they be beheaded. Only 39.3% of the world's population lives in countries where abortion is permitted without restriction as to reason. A detailed analysis of abortion laws of various pro-life and pro-choice countries is given below -

### Position of Abortion Law in India

Abortion in India is legal only up to twenty weeks of pregnancy under specific conditions and situations, which are broadly defined as:

- The continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury of physical or mental health, or
- There is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Recently, the Supreme Court permitted a rape survivor to terminate her pregnancy at 24 weeks, which is beyond the permissible 20 weeks limit prescribed under the Medical Termination of Pregnancy Act, 1971.

An adult woman requires no other person's consent except her own in many parts of India, daughters are not preferred and hence sex-selective abortion is commonly practiced, resulting in an unnatural male to female population sex ratio due to millions of developing girls selectively being targeted for termination before birth. Gender hierarchies, cultural norms, values and image of women in society are very important factors in Indian culture and the topic of abortion is considered very personal. In India, the matter of termination

of pregnancy is often not based on the perceptions of the woman herself, rather cultural, religious, socioeconomic and societal pressures play a significant role in influencing her decision.

Abortion laws in India were introduced in order to curb the issue of overpopulation. Unlike most of the western countries, they weren't a result of a feminist struggle. Abortion became an issue for feminists in early 1980s due to an alarming rise in abortion of female fetuses. India is one of the few countries where abortion related legislative reforms were brought about without any opposition and without any influence from pro-life, pro-choice groups. Chandrasekhar argues that though Hindu texts condemn abortion, the state did not experience the same religious struggle, as seen in the U.S., because the pressing issue of over-population outweighed religious arguments. Despite of the existence of major religions which explicitly oppose abortion, the reforms did not experience any kind of public outcry <sup>[12]</sup>.

In pursuance of the recommendations of a UN mission in 1965, India appointed Shantilal Shah Committee on 29<sup>th</sup> September, 1964 to study and make recommendation on the issue of abortion. In light of growing illegal and unsafe abortions, the committee recommended legalization of abortion. The committee felt that if reforms are made only with the aim of family planning, it may fail to achieve the desired results <sup>[13]</sup>. They were in complete denial of family planning as a goal behind the reforms. The committee played smart and focused on women's health and access to safe abortion. In accordance with the recommendations of the committee,

The Medical Termination of Pregnancy (MTP) Act, which was enacted by the Indian Parliament in the year 1971 with the intention of reducing the incidence of illegal abortion and consequent maternal mortality and morbidity. The MTP Act came into effect from 1 April 1972 and was amended in the years 1975 and 2002.

Pregnancies not exceeding 12 weeks may be terminated based on a single opinion formed in good faith. In case of pregnancies exceeding 12 weeks but less than 20 weeks, termination needs opinion of two doctors. And the object of this act are -

1. To help unfortunate women who are victims of forcible sexual acts
2. To help women who become pregnant as a result of failed contraception.
3. To reduce the risk of crippled children (eugenic) <sup>[14]</sup>.
4. To help Women whose physical and/or mental health were endangered by the pregnancy
5. Women facing the birth of a potentially handicapped or malformed child <sup>[4]</sup>.
6. To manage Pregnancies in "lunatics" with the consent of a guardian <sup>[4]</sup>.
7. To mitigate Pregnancies that are a result of failure in sterilization

Commenting on the hidden goal of population control, Savitri Shyam stated that failure of contraception as a ground for abortion can be justified only in context of population control <sup>[15]</sup>. Pro-choice advocates in the Parliament like Nand Kishore Singh <sup>[16]</sup> and Vikram Chand mahajan <sup>[17]</sup> felt that the Parliament should make abortion available to every woman

who wishes to exercise the right irrespective of the reason. Even though the bill did not permit abortion on social reasons, Lakshitantamma supported the bill on the ground that it is the only remedy available with a pregnant unmarried woman to avoid social stigma. Apart from two MPs who opposed the bill on the ground that it amounts to murder, the pro life debate did not even once crop up once. The MTP act was passed smoothly without any opposition or public outcry.

Under the MTP Act, the right to abortion was made available at the discretion of medical practitioners. Permission is granted if the pregnant woman succeeds in satisfying him that the conditions for abortion given in the act are met <sup>[18]</sup>. Termination during the first 12 weeks requires a certificate by one registered gynaecologist or obstetrician. From 12 to 20 weeks, termination is permitted only if there is risk to the life of the pregnant woman or if it would cause grave injury to her physical and mental health, or alternatively, that there is a substantial risk that a seriously handicapped child would be born. Termination during this period required certification from two registered gynaecologists or obstetricians. Immediate necessity to save the life of the pregnant woman permits termination after 20 weeks with the certification of two registered gynaecologists or obstetricians. Contraceptive failure in case of a married woman and rape are covered within the ambit of injury to mental health as per the explanations under the act. Sex-selective abortion Pre-natal diagnostic techniques like Medical Ultrasonography are capable of determining the sex of the fetus. In many parts of India, daughters are not preferred and hence sex-selective abortion is commonly practiced, a form of Gendercide, resulting in an unnatural male to female population sex ratio due to millions of developing girls being terminated before birth.

It can be seen that wide discretionary powers are given to the medical practitioners thus making the act susceptible to misuse. The decision to abort ultimately rests with medical professionals instead of the pregnant woman. On the issue of liberal interpretation, Jesani and Iyer point out that the act is prone to liberal interpretation which may lead to imposition of extraneous restrictions in the future. <sup>[19]</sup> Legalization of abortion has resulted in imposition of regulations which have proved to be detrimental to the free exercise of freedom of choice. Pro-choice groups are of the opinion that advocating the need for new laws may turn to be counterproductive. New laws would further categories, concretize and regulate behaviour <sup>[20]</sup>. Clearly, the larger plan of the state in implementation of the MTP Act was to achieve population control. Family planning, protection and emancipation of women were mere instruments used to avoid hurdles in the implementation of this act <sup>[21]</sup>.

The feminist struggle for free choice started in 1980s as a result of an alarming rise in the instances of sex selective abortion. They feared that demand for a legislation on sex-selective abortion might impose further restrictions on the exercise of right to abortion in India. This fear is depicted by Nivedita Menon in her book 'Recovering Subversion' - "First, the assumptions underlying the feminist demand for curbs on Sex Determination tests overlap those behind justification of restrictions on abortion itself. In other words, arguments deployed to support a ban on sex determination

tests can also be used to support a ban on abortion. This can give rise to very serious political contradictions.

Second, there is a profound philosophical incoherence involved in arguing for abortion in terms of the right of women to control their bodies and at the same time, demanding that women be restricted by law from choosing specifically to abort female fetuses. It is essential that feminists avoid being forced to counterpoise the rights of (future) women to be born against the rights of (present) women to control over their bodies."

The introduction of the Pre Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act in 1994 (hereinafter PNDT), resolved the contradictions which the feminists groups faced.

Even though abortion reforms were introduced in this country without any obstruction, religious and cultural norms continue to act as a barrier in their effective implementation. Strong son preference and other structural facts of patriarchy limit women's "freedom" to exercise choice even when it appears that they are doing so. A Delhi High Court judgement in 1983 held that abortion without the consent of the husband constitutes "cruelty" within the meaning of the Hindu Marriage Act. The husband was therefore granted divorce as, in the words of the judgement, the wife had refused to "satisfy a husband's natural and legitimate craving to have a child." The judgement goes on, "This is more so... where the parties to the litigation are Hindus. In this sort of case the court has to attach due weight to the general principle underlying the Hindu law of marriage and son ship and the principle of spiritual benefit of having a son<sup>[22]</sup>."

Therefore the pro-life effect of religious groups is inherent in the implementation of the act, the need of the hour is to sensitize the judiciary. When every petty decision of a woman's life is subjected to the consent of her husband, family and society, it is very difficult for her to exercise control over her womb.

Although in ancient and primitive times there were widespread practices of abortion and infanticide among savage, semi-civilized and even sophisticated races, the later period provided a better status to the unborn children. This is evident from the punishment and compensation provided in Old Testament for hurting a pregnant woman. The unborn was treated as equal to human being at least for the purposes of its protection. But as times have brought about revolutionary changes, each person has a right to bodily sovereignty and Human rights instruments protect such rights internationally. Thus it becomes important to secure the right to abortion to every woman.

### **The failure of the law**

In its current form, the MTP Act permits abortion after consultation with one doctor upto 12 weeks. Between 12 to 20 weeks, a woman seeking abortion needs the medical opinion of at least two doctors. Exceptions are made to the 20-week ceiling if continuing the pregnancy poses a threat to either the mother or the baby's life, but only after approval from courts. It is admirable that India was one of the first countries in the world to legalise abortion to encourage family planning and population control. Ostensibly, the reason for the relatively low time frame was to safeguard the girl child by preventing

sex-selective abortions. While that is a noble intent, women who discover abnormalities in the foetus or develop complications later in their pregnancies, and rape victims, particularly underage ones, end up bearing the brunt of it.

The court was forced to note that due to advancements in medical technology, pre-natal defects could be revealed even after 20 weeks. And because the MTP Act is outdated and doesn't consider these eventualities, women are forced to move court. Consequently, judgements that are doled out vary drastically due to individual interpretations of law.

In July 2107, a Kolkata woman was allowed to terminate her 26-week pregnancy by the Supreme Court because the foetus suffered from cardiac ailments. In January, it allowed a Mumbai woman to terminate her 24-week pregnancy because the foetus was suffering from anencephaly (a condition in which it can survive only inside the uterus). But in February, the same Supreme Court refused a woman's plea to abort a 26-week-old foetus that would be born with Down syndrome, as they admitted that the child may suffer from severe abnormalities.

Similarly, in 2008, when a couple petitioned the Bombay High Court to abort at 26 weeks when the foetus was diagnosed with a heart defect, they were turned down. This was among the first cases in which the court was forced to note that due to advancements in medical technology, pre-natal defects could be revealed even after 20 weeks, and that perhaps it was time to re-evaluate MTP. It is worth mentioning that the girl's family lost a precious 8 weeks in the long-drawn-out legal proceedings.

Another thing that the law fails to take into account is that often, especially in the case of underage rape victims, pregnancies are discovered very late. Due to the stigma attached to rape and the silence of the victims, underage pregnancies are often only discovered when the child develops health issues and medical intervention is finally sought. In many cases, by the time they come to light, the child is either teetering very close to the 20-week mark or has already crossed it. As a result, there are a slew of cases with young girls and women pleading before courts to allow them to terminate unwanted or unviable pregnancies that are over 20 weeks.

In the case of the 14-year-old girl from UP, 'advanced pregnancy' (32 to 33 weeks) was the court's reason for denying permission to abort. However, it is worth mentioning that the girl's family lost a precious 8 weeks in the long-drawn-out legal proceedings. Today, her extenuating financial circumstances that have made it impossible for her family to support her and the baby, coupled with their ostracisation from society, have forced her to marry her rapist. All of this could have been avoided, had the law worked in favour of the victim, instead of against her.

All these incidents make it evident that unless alternate provisions are made, courts will continue to be forced to evaluate and rule on individual cases. This might work as a stop-gap arrangement, but is obviously not a feasible solution to the problem in the long term.

Slow legal machinery is another loop hole in the female foeticide fighting mechanism in india Despite these significant oversights in the law, they are just one part of the problem. The issue is further complicated when our grindingly slow

legal machinery makes it medically dangerous to safely terminate the pregnancy, rendering the whole process of seeking legal intervention an exercise in futility.

In January, a 35-year-old HIV+ woman from Bihar was forced to have a baby because her paperwork got stuck at a government hospital for 4 weeks and she crossed the 20-week mark. A long legal battle ensued, which ended with both Bihar's high court and the Supreme Court rejecting her abortion plea in May. The reason: she was already 26 weeks pregnant by then and abortion was a risky proposition.

### Conclusion

Since the state is responsible for the realisation of the right to abortion through institutional and medical support, it also has the right to regulate it by imposing restrictions. Therefore, it is an accepted reality that neither complete *laissez faire* nor complete state regulation is beneficial to the society. The need of the hour to ensure that abortion is made available to women who want it, while selective abortion of female foetuses must be stopped. The current abortion debate is more than just pro-life and pro-choice.

Clearly, the law is currently at cross-purposes with the need of the hour. While its original objective was to prevent sex-selective abortion, that line of reasoning no longer holds true since medical advancements.

While opinions range from right from the time of conception (pro-lifers) to the time when the foetus becomes viable (able to survive outside the time of birth) to the time of birth, there is no one benchmark that is globally used to frame their laws.

By making abortion a qualified right, the law does not recognise women as individuals with autonomy over their own bodies, a glaring mistake by all accounts.

India, despite its liberal abortion law, does not compute 'choice' as a factor for abortion. A lesser-known fact about the MTP Act is that a woman cannot simply choose not to be a mother; abortions are conditional and predicated on reasons like the physical or mental health of the mother, a potentially handicapped or malformed child, rape, underage pregnancies, pregnancies in women of reduced mental capability and failure of contraception. By making abortion a qualified right, the law does not recognise women as individuals with autonomy over their own bodies, a glaring mistake by all accounts. Even so, it is commendable that India's abortion law from 46 years ago is more liberal than the laws of many countries even today. More admirably, it is a secular law; it does not pander to any religion's beliefs about when life starts and the foetus' right to life. At the time of enactment, it was practical, and it truly served the best interests of the mother. Which is why, in keeping with the spirit of the thought behind the original law, it now needs to be amended.

"It is an old law, that needs to be reviewed and strengthened," says Dr Rishma Dhillon Pai, president of the Federation of Obstetric and Gynaecological Societies of India (FOGSI), a body representing 34,000 gynaecologists in the country. "There is greater focus on the time frame than what needs to be done in the best interest of the mother and the baby. You can't say that abortion is safe at 19-and-a-half weeks, but unsafe at 20-and-a-half weeks."

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