



## The medical termination of pregnancy (Amendment) ACT, 2021 with special reference to reproductive rights in India

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### Abstract

Earth is the best example of reproduction. In India, we consider the earth as our mother. Earth's greatest virtue is tolerance. In our country, we compare the earth with a woman and when we compare, we expect women to be as tolerant as the earth. And the habit of tolerance becomes an obstacle in establishing women's rights. Both men and women have reproductive rights. We cannot say that women have a monopoly in this. But if we look at the statistics, we will find that half of the world's population is women. Women's reproductive rights are outwitted in the world, be it by partners, family members, or the state. The right to life is the principal right of humans and human rights are those which are accessible to all human beings without any unfairness. The fundamental right of women is the reproductive choice which directly falls under the right to life and privacy, as recognized under Article 21 of, the Constitution of India. Reproductive and sexual rights directly deal with freedom. When we talk about the law on reproductive rights, a main law comes out, which is the MEDICAL TERMINATION OF PREGNANCY ACT, of 1971. Although many other rights are associated with reproductive rights, but mainly associated with the right to "Abort" and the right to "Conceive" Reproductive rights include many human rights recognized by international laws, national laws, and human rights documents. Such as couples and humans have full freedom to determine the time of birth and number of children with responsibility. Along with these, they make decisions regarding their reproduction without any coercion, discrimination, and violence. In this paper MEDICAL TERMINATION PREGNANCY ACT, 1971, and the amended Act 2021 are being analyzed. The changes that the amended act has brought, and how it is positively and negatively affecting the human rights and constitutional rights in India. If we talk about human rights, then it is for all sections of society. So is the concern act able to reconcile with all the sections of society because it seems that this law has been made keeping in mind a particular gender and when we study it, it seems that its provisions are not even completely in favour of women. The purpose of presenting this paper is to discuss whether this act helps bring gender justice and whether it is running in parallel with other laws or overlapping or contradicting them.

**Keywords:** Abortion, reproductive, foetus, pregnancy

### Introduction

"When you deprive people of their right to live in dignity, to hope for a better future, to have control over their lives, when you deprive them of that choice, then you expect them to fight for these rights"-Queen Rania Al Abdullah.

Reproductive rights are very basic and notable rights of human life and their significance is enhanced further when it comes to the reproductive rights of women. Because history is witness to the fact that women have never had complete control over their lives and bodies. The question comes, what are these rights after all? Most people understand from reproductive rights that it is related to conceiving and the termination of pregnancy only. There is a legislation in our country called the Medical Termination of Pregnancy Act, 1971 which is considered as the main law on reproductive rights. This law talks about when, how, and why the pregnancy will be terminated, and what will be its terms and conditions, but these rights that is reproductive rights are not limited to this only. When these rights are combined with other laws and their provisions, or if we look at the cause of bringing Medical Termination of Pregnancy Act, 1971, and the history of reproductive rights then we find that the scope of these rights is very large. If we talk about laws, then first the supreme law of our country "The Constitution of India" mentions that our right to life includes the right to live freely and with full dignity. Article 21 of the constitution talks about "personal liberty" and it has a very wide scope it includes the right to privacy, dignity, and bodily integrity so

there is no confusion that women's reproductive rights fall under the ambit of personal liberty which is mentioned under Article 21. If a woman is not able to use her reproductive rights as per her wish then it is a violation of Article 21 and proof of this statement is under "Justice K.S Puttaswamy Versus Union of India" the landmark judgment of Supreme Court in which bench held that privacy generally covers personal autonomy relating to mind, body and to choice or making decisions. The word personal autonomy here mainly the reproductive rights, means safe abortion and to make decisions related to pregnancy free from coercion and discrimination. Indian society has been lagging in understanding and providing reproductive rights and health for a long time. And even at present, it has not been able to truly understand its importance and meaning. The main reason for this is the stereotypes and many misconceptions behind the word "reproductive" and another reason is that the word "sexual" and "reproductive" are considered the same, hence prescription is associated with the word "sexual" in our society and because of this reproductive right and health is also denied. If we go towards the history of reproductive rights and look into religious scriptures like Manu Smriti, we will find that fathers are advised to get their daughters married at an early age and the aim or meaning of the marriage is procreation. Manu Smriti restricts women's purpose in life when it states women are formed for conceiving and having children, not a wish or right but an obligation for women. Even the judge

of Gujrat high court, quoting Manu Smriti, said in the abortion plea of a minor rape victim that in olden times, marriage used to take place at the age of 14-15 and children were born before 17 and told the counsellor that you must have heard this and if not, then must read Manu smriti once<sup>[1]</sup>. In many religious scriptures, women have been given the status of goddess, but even in today's times, there seems to be a contradiction between laws and religious scriptures. It seems that respect and rights are being given from one side and snatched away from the other side, today's laws have adopted a dual character. This paper reviews the history of the Medical Termination Pregnancy Act, 1971 and abortion laws so that all the facts are clear to the readers and listeners as to why and how this legislation came and the question also came to their mind whether this law is fully capable of providing women with their reproductive rights. Have the amendments made in it been able to remove the shortcomings of the old law and the researcher has tried to solve all these questions with suggestions? There is no special law on reproductive rights in our country and if we talk about abortion laws, 1971 until the Medical Termination of Pregnancy Act, of 1971 came, abortion was governed only by the provision under the Indian Penal Code. Sections 312 to 315 contained in chapter sixteen of this code deal with miscarriage. These provisions were not included in the code keeping in mind the reproductive rights of women, rather abortion has been declared a crime, and provisions for its punishment have been made in different sections. The word miscarriage has been used in place of abortion in the code. As times changed with modernity, abortion started being seen as a right, and seeing its widespread nature a need felt to make a special law on it, so the government formed a committee. In 1964 Government of India formed a committee under the chairmanship of Shanti Lal Shah to study the question of advancing the actual law of abortion and recommend some steps to rectify the provision of the code.

The committee submitted an exhaustive report suggesting various situations and giving reasons for the termination of pregnancy under the law. It was of the view that this should be allowed not protect the life of the pregnant woman, but also to avoid severe damage to her physical or mental health. The Government of India accepted the recommendations of the committee and brought forth in 1970 in Parliament the Medical Termination of Pregnancy Bill a comprehensive bill) introduce various situations under which pregnancy might be lawfully terminated. The bill was finally passed in August 1971 as the Medical Termination of Pregnancy Act 1971 which came into force on 1 April 1972. After some time, the government used the power given in section 6 of the 1971, Act and framed the Medical Termination of Pregnancy Rules, 2003. If we look at the international level, India has been an active participant and signatory in many conventions, conferences, and protocols and has taken the responsibility of providing women their rights. India has accepted all the Human rights schemes that are necessary for the security and welfare of women. In modern times, as people started becoming aware of their rights, the scope of this Act started appearing limited to them. People started understanding it as a population control law, and then the judiciary brought out the intention behind this law in the judgments of many cases, such as safe abortion is one of the objectives of this law because when this Act of 1971, came health facilities and technology were not fully developed.

Change is the law of nature as development in health facilities and the educational and mental level of people increased the Petitions demanding these rights started increasing in the judiciary. The right which was limited only to "safe abortion" now started being demanded by the petitioners through their petitions in the form of reproductive rights and personal liberty in the form of "bodily autonomy". Looking at all these petitions, the Judiciary found that this Act of 1971, is not completely capable of keeping up with today's times. Therefore, after seeing the increase in several petitions and many pending cases related to pregnancy termination, the shortcomings of this law came to light, hence after a long period of 50 years, it was thought to make changes in the old Act of 1971. The Medical Termination of Pregnancy (Amendment) Bill, 2020 got its introduction in the Lok Sabha on March 2, 2020, got the acceptance by the Parliament on March 17, 2020, and ultimately got the assent of the president of India on March 25, 2021, thereby convert into a complete law balancing the provisions of abortion in India. After the amendment of this law, the way the judiciary is making its decisions is acting as a weapon for the protection of reproductive rights. This amendment has emerged as an excellent law in an intellectual and progressive society. Violation of rights has stopped due to this law, but even at present when we study this amended act or use its provisions, many shortcomings are seen in it. We can say that along with the merits, it also has demerits which have been analyzed in this paper. Whether women are completely free to make decisions regarding their family rights without any pressure, or this law is still in the hands of the government and the administration is running it as per its convenience. Is this law proving effective in bringing gender equality or has this amendment been made to meet the needs of the times?

### Meaning and definition of reproductive rights

In common phrase, Reproductive Rights are the rights of humans to determine whether to reproduce and have reproductive health. This may comprise the individual right to plan a family, terminate the pregnancy, utilize contraceptives, acquire sex education, and obtain ingress into reproductive health services. Such rights are grounded in other human rights, including the right to health, the right to be free from discrimination, the right to privacy, the right not to be subjected to torture or ill-treatment, the right to determine the number and spacing of children and right to free from sexual violence.

### Dictionary Meaning and Definition of Reproductive Rights

According to Merriam-Webster Dictionary, "a woman's right to choose whether or not she will have a baby"

The International Conference on Population and Development Programme recognizes Reproductive Rights and states that couples have the right to determine whether and when to have children as well as the number of children, and the right to obtain the highest level of sexual and reproductive health"

**Article 16(1) (e):** also grants reproductive rights in the form of "deciding freely and responsibly on the number and spacing of children and to have access to the information education and means to enable them to exercise these rights"<sup>[2]</sup>

**Article 12:** According to this article Parties shall take all proper steps to eliminate discrimination against women in the field of health care to ensure, based on equality of men and women, access to health care services, including those attributed to family planning.

2. Parties shall ensure to women relevant services in connection with pregnancy, confinement, and the post-natal period, granting free services where necessary, as well as requisite nutrition during pregnancy and lactation. According to the Supreme Court of India, "Reproductive rights and choice is the constitutional right of women and a major element of personal liberty under Article 21 of the Indian constitution.

### **Reproductive rights are component of human rights**

Although understanding the concept of reproductive rights it becomes necessary to be aware of the reality that reproductive rights contain in them certain fundamental rights which are part of human rights as well. The reproductive health of women can stay protected if there remains impartiality in every domain between men and women.

Especially, intending to protect the reproductive rights of women it is indispensable that their human rights are also protected. Human rights always focus concentration on protecting the life and liberty of human beings and permitting them to lead a glorified life that is not reduced to bare animal existence. Reproductive rights can be claimed and exercised healthy manner of life and the liberty of females is also protected completely. In another way, it signifies the duty on the part of the state to demonstrate such social order where the law is capable of keeping safe the women so that they can make use of their reproductive rights safely and efficiently

To acknowledge how reproductive rights are part of basic human rights. Such subcomponent that establishes the association between reproductive rights and human rights and is identified under the international instruments are defined here below:-

1. Right to Health, Reproductive health, and family planning.
2. Right to decide the number and spacing of children.
3. Right to get married and establish a family.
4. Right to remain free from gender discrimination.
5. Right to stay protected against sexual assault and exploitation.
6. Right not to become a victim of torture or other cruel, inhuman, or degrading treatment.
7. Right to life, liberty, and security.
8. Right to privacy.
9. Right to change customs that discriminate against women.
10. Right to enjoy scientific progress and to consent to experimentation.

### **Abortion and provision under Indian laws**

The term, "abortion" originated from the Latin word "abortion" which means 'to get separated from the proper site. Abortion is said to take place when the life of the fetus or embryo is demolished in the woman's womb or the pregnant uterus evacuates before the usual time<sup>[3]</sup>. In other words, Abortion is the termination of a pregnancy by the removal or exclusion from the uterus of a fetus or embryo ensuing or causing its death.

Medically, there exist three distinctive terms, like abortion, miscarriage, and premature labour that signify the expulsion of a foetus based on the distinct phases of gestation at which expulsion or termination of pregnancy is performed. The term abortion is used when the termination of the pregnancy is carried out before the placenta is formed, which means within the first three months of pregnancy. In contrast, miscarriage signifies the expulsion of the foetus within the first fourth to the seventh month of gestation before it is viable or grows. The third term that is "premature labour" means delivery of a premature baby capable of sustaining life.

Both above phrases are many times considered synonymous with each other. Taylor, in his Principle and Practice of Medical Jurisprudence (13<sup>th</sup> edition) states that the phrases 'miscarriage' and 'abortion' are legally synonymous since the foetus is considered as human life from the moment of fertilisation. The Supreme Court while hearing the one significant case held that 'miscarriage' symbolizes 'spontaneous abortion' on the other hand 'abortion' is said to be a miscarriage performed by unlawful means.

### **Indian penal code**

The provisions concerning abortion in the Indian Penal Code were constituted more than a hundred years ago and were following English law. The Indian Penal Code uses the word "causing miscarriage" to signify abortion. Miscarriage technically refers to spontaneous abortion, whereas "voluntarily causing miscarriage" (induced abortion) which forms the offence under the Indian Penal Code, 1860<sup>^</sup> stands for criminal abortion. The law of the country has always held human life to be hallowed and the security that the law gives to human life extends also to the unborn child in the mother's womb. The unborn child must not be torn down unless it is for the aim of safeguarding the yet more valuable life of the mother. The mother's life is more valuable than that of the unborn child because she is the inventor of the foetus and her life is well entrenched. The mother has obligation and liability and permitting the mother to die would also cause the death of the foetus in most cases. Bearing in mind this view the code has designated causing miscarriage (induced abortion) a serious offence and made both causing miscarriage "with the consent" or "without the consent" of the women punishable under sections 312 and 313 of the Indian Penal Code 1860, respectively.

However, to entice the provisions of section 312 of the The Indian Penal Code has two important requirements that must be fulfilled,

1. Miscarriage should have been caused voluntarily; and
2. Miscarriage should not have been caused in good faith for the aim of saving the life of the woman

Section 312 of the Indian Penal Code, divides the crime into two

The category that is causing miscarriage:

1. When a woman is with child, and
2. When she is quick with child

### **The medical termination of pregnancy Act, 1971**

Indian society has been inspecting reproductive rights infringement since remote ages. The social cohesion of our community is such that suppressing antiquated and harmful practices and eliminating several dotages of superstition



fastened with the act of abortion is a difficult task. Tracing the historical aspect of the existence of penal laws in India, it is found that The Indian Penal Code, of 1860 declares abortion to be a crime that is punishable in a strict way. However, for the aim of drafting a completely developed special law concerning the application of abortion in India, The Government of India, in the year of 1964, tried to constitute a special committee to expedite such a purpose. It was headed by Shantilal Shah hence it came to be known as Shantilal Committee. Bear in mind the various suggestions of citizens of India regarding the right to abortion, the committee achieved victory in reaching the last submission of drafting an independent and special law for abortion. Various commendations which were made by the committee from time to time were given ears to in 1970 in an inclusive manner. Thereafter, the approved recommendations were passed to the parliament and were introduced there in the guise of a bill known as the Medical Termination of Pregnancy Bill. After inspecting the provisions of the Bill, it was passed in the year 1971 in the form of an Act named the Medical Termination of Pregnancy Act, 1971. The Medical Termination of Pregnancy (MTP) Act, of 1971 makes provision for the introduction of legally assembled rules and regulations for proclaiming abortions valid in India. The MTP Act is concerned with distinct phases of abortion such as who can legally terminate pregnancy at what site and following what sort of method.

As per official statements, the MTPA had been with the following three objectives.

- a. Health measures, when there is a threat to the life or danger to the physical or mental health of the women; or
- b. Generous necessity, such as when pregnancy is caused as a result of a sex crime or intercourse with a lunatic woman, etc.; or
- c. Abiogenic grounds, when there is a considerable risk that the child if born, would suffer from abnormality and illness.

The Medical Termination of Pregnancy Act, of 1971 contains eight sections. Its aim is besides the removal of the high occurrence of illegal abortions, possibly to confer on women the right to privacy, which includes the right to

1. Distance and limit pregnancies (i.e., whether to bear children); and
2. Choose her own body.

The MTPA modified the provisions of the Indian Penal Code relating to abortion by permitting previously illegal abortions under certain specified and limited conditions i.e., Section 3 of MTPA, which is the operative Section has modified the strict provision of the law of abortion as contained under section 312 of the Indian Penal Code by permitting termination of pregnancy in several situations.

In section 3(1) of MTPA, it is provided that the termination of a pregnancy by a registered medical practitioner is no longer to be an offence under the Indian Penal Code, where there is a medical opinion.

1. That the carrying on pregnancy will involve a risk to the life of the pregnant woman or a risk of heavy injury to her physical or mental health, or
2. That there exists a considerable risk that if the child were born, it would endure such physical or mental deformity to be gravely handicapped.

The Medical Termination of Pregnancy (MTP) Act 1971 as amended in the year 2002, primarily dealt with the women working in the private health area. The amendments that were introduced in the Act rationalized the following provisions and objectives:

1. To allow the private places to act as MTP service providers were to be decided by a committee which was to act at the district level basically;
2. To deal with the mental disorder that did not amount to mental retardation was dealt with under the purview of amending the term 'lunatic' with 'mentally ill person';
3. The nature and quality viz. time and place of carrying out the MTP service had to be strictly complied with the provisions of the Act, or else there had been introduced stricter penalties for the same.

After the amendments being introduced by way of the MTP Amendment Act, of 2002 there still arose a need to upgrade the situation of the private hospitals which provide abortion services. Hence to standardize the working of private hospitals The Medical Termination of Pregnancy Rules, 2003 were introduced.

### **The medical termination of pregnancy (Amendment) ACT, 2021**

MTP (Amendment) Act, 2021 is one of the few honours in the domain of women's empowerment that the Indian legislature has received. In addition to extending the time frame in which an abortion can be lawfully performed, the modification has expanded the scope of the Act by changing section 3. The new amendment replaces the terms "married woman and her husband" The terms "woman and her partner". As a result, an unmarried woman can also terminate pregnancies within the time limit prescribed under the Act. Besides this, with the zeal for protecting the privacy and confidentiality of women, the latest law under section 5A of the Act intends to penalize medical practitioners who fail to protect the privacy and confidentiality of women who wish to terminate their pregnancy.

Despite these progressive amendments in asserting women's reproductive rights in the country, the amendments to the MTP Act, of 1971 do not go far enough.

The MTP (Amendment) Act, 2021 was enforced as a legal remedy for the backlog of matters that had been filed in the form of Writ petitions before the Hon'ble Supreme Court and various High Courts, seeking permission to terminate pregnancies beyond twenty weeks in cases of fetal abnormalities or pregnancies caused by rape. Respectively, enlarging the duration for the termination of pregnancy beyond twenty-four weeks only for the cases where a Medical Board diagnosis substantial fetal abnormality. In this regard, it is worth mentioning that the ramification of such legislation is that there is no change in the process for terminating pregnancies caused by rape that have progressed beyond the 24-week threshold: the only option is to obtain assent by Writ Petition.

Termination of pregnancies is a touchy subject matter. The amended Act does not specify the time limit within which the medical board must make its decision. Delays in decision-making by the board may result in further complexity for pregnant women. It is a conclusive fact that the Act permits the termination of pregnancies of "pregnant women" under certain conditions. However, with the advancement of medical sciences, it has come to the

knowledge that several medical studies have shown that there may be cases where persons have been identified as an additional gender, transgender (and not women) can become pregnant even after taking hormone therapy to change from female to male, and may require termination services. Since the amended Act exclusively allows for the termination of pregnancies in the case of women, it is not clear if transgenders will be incorporated under the amended Act or not.

### Conclusion

Legal recognition of the same is essential as it goes a long way in the emancipation of women from the age-old fear of abortion being considered sinful and criminal. Even after making the laws progressive with the changing times, it triggers a thought that the woman who has to bear the child does not have complete control of her body. Her choice of whether to keep the baby or not is regulated by the law or society and allows unbridled intervention by courts in a matter that should strictly fall within the medical purview. It will significantly impact empowering women and instilling a belief that they can make decisions independently without being dependent on third parties.

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