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**Editor In chief – Assistant professor Dr. Taru Mishra**

**Publisher & Founder – Vaibhav Sangam Mishra**

**Frequency – Quarterly ( 4 Issue Per year )**

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**A Fresh Approach to Indian Abortion Laws**

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**ABSTRACT :**

The US Supreme Court overturned the landmark judgement which serves as bedrock for abortion rights of citizens on 24<sup>th</sup> June 2022. The Roe v. Wade judgement used to give a constitutional right to abortion back in 1973, during the first 2 trimesters of pregnancy. But sadly in a 9-judge bench, this was overturned by a 6:3 majority in the case of Dobbs v. Jackson Women's Health Organization. This was done on the grounds that "the substantive right to abortion was not deeply rooted in Nation's history or tradition, nor considered a right when the due process clause was ratified in 1868".<sup>1</sup>

With this in mind, a question arises that a country which could be seen as the forerunner of modernization had such a dissenting view on the reproductive rights of women then what is India's take on abortion? How does India manage women's autonomy and what regulations govern this decision-making?

This article will look at various regulations which have been enforced by the central government for the safe termination of pregnancy- irrespective of them being in rural or urban areas. Finally, it will raise specific questions in relation to inadequacies of the legislation as well as its implementation. This article is meant to create awareness about the available abortion laws made by the GOI in response to unsafe abortions which have seen a steep rise during the pandemic.

**[Keywords:** Indian Penal Code, Medical Termination of Pregnancy Act, Registered Medical Practitioner, Gestation period]

**INTRODUCTION :**

All women are granted reproductive rights? No one can say no to that. That answer is pitch-perfect. But are all women entitled to 'safe' and 'legal' abortion? 'Abortion' refers to a pregnancy that has been terminated intentionally. This question has haunted the legal systems of the world till date. No country's parliament is safe from it. No religion can give an answer

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<sup>1</sup> [https://en.m.wikiquote.org/wiki/Roe\\_v.\\_Wade](https://en.m.wikiquote.org/wiki/Roe_v._Wade)

which is inclusive to everyone. But there have been clashes. Debates, riots, and internal politics just form the tip of the iceberg. Out of this back and forth, 2 contrasting opinions have churned out. These opinions are what lay the groundwork for abortion laws across the planet. These are

- Terminating a pregnancy is the choice of the pregnant woman, and it is a part of her reproductive rights. So a woman can terminate her pregnancy anytime she wants to.
- The state has an obligation to protect life, and hence it is the responsibility of the state to take care of its future citizens. This can be done by regulating abortions, even going as far as making it difficult for the woman to obtain an abortion legally which would be prescribed to them by the state.

The US which is also known as the forerunner of modernization used to follow the first school of thought. However, by its recent judgement, it has jumped schools. The American citizens cast serious doubt on their legal system over the recent judgement of *Dobbs v. Jackson Women's Health Organization*<sup>2</sup>. One may say this case is seen as a classical example of a bad precedent. Although good or bad only time can tell. The decades-old judgement of *Roe v. Wade* was overturned in this landmark case. *Roe v. Wade*<sup>3</sup> held a special place in the eyes of the American Judiciary. This landmark judgement provided that the "Due process clause of the 14<sup>th</sup> amendment to the US constitution provides a fundamental right to privacy, which protects a pregnant woman's right to an abortion"<sup>4</sup>. But on June 24, 2022, the US Supreme Court officially reversed this decision.

The SC said that "Roe must be overruled because they were "egregiously wrong", the arguments being "Exceptionally weak" and so "damaging" that they amounted to "an abuse of judicial authority". the arguments were labeled to be "unrealistic" because the arguments refused to face the facts". In layman's terms, its translation is that "Now all states in the US are completely free to ban abortion for any reason".

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<sup>2</sup> No. 19-1392, 597 U.S.\_(2022)

<sup>3</sup> 410 U.S. 113 (1973)

<sup>4</sup> <https://www.npr.org/2022/06/24/1102305878/supreme-court-abortion-roe-v-wade-decision-overturn/>

Google came as a knight in shining armor to millions of people at that time. From the technology giant said that its employees are free to relocate to states with abortion rights<sup>5</sup> to google deleting abortion data along with the location details of the woman who is traveling for the purpose of abortion<sup>6</sup>. Google has also said that it will label medical facilities in the US that provide abortions in its search results and in google maps to avoid discrepancies<sup>7</sup>. This move if made in India would have brought forward many imposing sanctions on Google.

In India, abortion as a topic is usually frowned upon. There are many issues surrounding the medical termination of pregnancy. Some of these include :

1. Religious belief- India has the majority of followers of Hinduism<sup>8</sup>. The religion condemns the taking of the life of another human being. The conception of a foetus is also seen as a form of life. So how can one kill an unborn child?
2. Ethical/Moral values- This looks upon your upbringing in society. When you are nurtured to be a part of society, no one teaches someone to be a killer or murderer.
3. Medical ethics- The “Hippocrates oath” taken by every doctor strongly says that a doctor must do everything in his power to preserve life. So how is someone who took an oath to preserve life, going on to destroy it?
4. Social and Cultural values.
5. Rights of mother V. Right of an unborn child- Generally this is contested before a court of law and Indian acts take cognizance of this.
6. Rights of mother V. right of father-
7. An unmarried woman being pregnant- This was generally thought of when live-in relationships were frowned upon. But now the court recognizes live-in relationships and has subsequently brought in amendments to the previous acts.
8. Legal issues (law)- Earlier it was difficult to approach the judiciary in regard to this issue. With longer decision-making time, unsafe abortions were generally preferred. But this has now changed with newer amendments.

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<sup>5</sup> <https://www.cbsnews.com/amp/news/abortion-google-workers-can-move-to-states-where-abortion-is-legal-roe-v-wade/>

<sup>6</sup> <https://www.outlookIndia.com/international/google-to-delete-abortion-data-of-woman-to-protect-health-privacy-in-us-news-2016215/amp>

<sup>7</sup> <https://www.reuters.com/technology/google-clearly-label-us-medical-facilities-that-provide-abortion-2022-08-25/>

<sup>8</sup> According To 2011 census. 2021 census could not be undertook due to pandemic.

Law on abortion is primarily governed by the Indian Penal Code,1860, Indian Constitution & Medical termination of pregnancy act and rules, 1971 more commonly referred to as IPC,1860, and MTP act and rules, 1971

### **Protection By Indian Penal Code :**

The IPC( Indian Penal Code) was made in 1860 by Sir Thomas Macaulay. With the goal of giving the nation a comprehensive penal law, it lists crimes along with their punishments in 511 sections spread across 23 chapters. It has undergone many amendments and is supplemented by additional acts. With the exception of Jammu and Kashmir, it has jurisdiction over the entirety of India.

The provisions dealing with abortion are governed under S. 312 to S.316.

- S. 312 says “Whoever voluntarily causes a woman with a child to miscarry, shall, if such miscarriage is not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment up to 3 years”. This basically meant that whoever voluntarily causes a woman with a child to miscarry[ except to save the life of the mother] is penalized with 3 years imprisonment. This includes a woman who causes by her own actions to miscarry.
- S. 313 says “Whoever commits the offence defined in S.312 without the consent of the woman is punishable with life imprisonment or a term extending to 10 years.” This generally meant that the woman’s consent is required during an abortion.
- S. 314 says “Whoever with intent to cause the miscarriage of woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend upto 10 years and shall be liable to fine”. It would be seen here that whoever causes the death of a woman with the intent to cause miscarriage- could be done intentionally or in good faith will be punishable.
- S. 315 says “Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such an act prevent that child from being born alive, or cause it to die after its birth, shall, if a such act is not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment upto 10 years or fine or both”. This basically

refers to the act done with the intent to prevent a child from being born alive or to cause it to die after birth is penalized.<sup>9</sup>

- S.316 says “Whoever does any act under such circumstances, that if he thereby caused death he would be guilty of culpable homicide, and does by such act cause the death of an unborn child, shall be punished with imprisonment of 10 years and/or fine”. It generally talks of causing the death of an unborn child by an act amounting to culpable homicide is penalized.

### **Protection Under The Indian Constitution :**

The Indian constitution is the father and mother of all laws in India. The constitution serves as the supreme law-making authority. No one is above the constitution. The constitution is responsible for providing powers to the legislature, executive as well as judiciary. The Indian constitution is divided into 25 parts and 12 schedules.

Part 3 of the Indian constitution is Fundamental rights. These rights are justiciable in any court of law and they can be only brought up against the state. Art 32 of the Indian constitution is validating the right of the individual to bring a fundamental right matter to the Supreme Court of India if they have been infringed. Art.21 of the Indian constitution which is a fundamental right of the Indian constitution says the following.

“Every person has a right to life and personal liberty, except due to procedure established by law”.

This article also includes the right to bodily autonomy and bodily autonomy. Bodily autonomy also includes reproductive autonomy. The rights given before are mostly for the woman. In a leading precedent<sup>10</sup>, the court recognized the constitutional right of a woman to make reproductive choices. Reproductive autonomy includes the right to choose a contraceptive method, the right to choose the number of children, and whether to abort a foetus or not.

Art. 14 is also involved as it says “equality before the law”. The doctrine of reasonable classification which says that the centre is allowed to make a classification in a class of people provided that it would not amount to discrimination and this will be used for recognizing any particular class of people. It is often used to differentiate between married and unmarried women. But this has been identified as a “constitutionally unsustainable

<sup>9</sup> <http://www.legalservicesindia.com/articles/pregact.htm>

<sup>10</sup> Justice K.S Puttaswamy V. Union of India and Others (2017).

stereotype” in today’s day and age. SC said that “it is a misnomer that only married women engage in sexual intercourse”. Since the court has already acknowledged live-in relationships, this step is seen as a welcoming platform towards the same.

### **Protection Under Medical Termination of Pregnancy Act, 1971 :**

Medical termination of pregnancy act was brought in as an exception to S.312 to S.316 of the IPC. The main reason behind the act was to save the life of the mother if the pregnancy was fatal for the mother’s life & legalize the abortion practice in India. IPC did not allow that. MTP act expands the option of safe and legal abortion services on social and humanitarian grounds to ensure universal access and comprehensive care to all women.

Between 2007 to 2011, a cottage industry spurred which provided unsafe abortion services to all in India. The medical community had requested an extension on the time limit as it would ease the process and would help the legal system to allow women to access quality healthcare. A report by a British medical journal said 67% of abortions taking place in the country currently are unsafe.<sup>11</sup> In light of this report, the Supreme Court said that we as the Supreme Court cannot promote this. Hence the wheels started churning for the MTP bill. MTP in India comprises of MTP acts as well as MTP rules. Both have to be read together. MTP act has 8 sections-

- Section 1 deals with short title, extent, and commencement- Section 1 says that the act will be known as the Medical Termination of Pregnancy act, 1971. it will extend to the whole of India except the state of Jammu and Kashmir & it would come into force on such date as the central government decides to with a notification in the official gazette.
- Section 2 deals with definitions of terminologies used in the act- the important one includes the following

“Registered medical practitioner means a medical practitioner who possesses any recognized medical qualification as defined in Cl.(h) of Sec. 2 of the Indian Medical Council Act, 1956 (102 of 1956), whose name has been entered in a State Medical Register and who has such experience or training in gynecology and obstetrics as may be prescribed by rules made under this Act.”

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<sup>11</sup> <https://indianexpress.com/article/india/india-unintended-pregnancy-abortion-7845655/>

- Section 3 deals with when pregnancies can be terminated.
- Section 4 deals with places where MTP can be done.
- Section 5 deals with when S.3 & S.4 cannot be applied.
- Section 6 deals with the power to make rules.
- Section 7 deals with the power to make regulations.
- Section 8 deals with the protection of action took in good faith.

There are 2 indications of MTP given in the MTP act, of 1971. These were “medical termination of pregnancy is to occur when the life of the pregnant woman is in grave danger & substantial risk that the child born will have physical or mental abnormality”. These include not only physical abnormality (hole in the heart)[can be detected by a 2D echo] but also mental abnormality (down syndrome[can be detected at foetal stage]).

There are 2 stages given at which a pregnancy is to be terminated- before 20 weeks and between 20-24 weeks. No termination of pregnancy is to take place without the consent of the mother. Till 20 weeks, the option is given to everyone- earlier this option was available at 12 week gestation period and was available only to married women but thanks to the latest amendment, it has increased and now it encompasses unmarried women within its grasp too. The term “sexual partner” has been used. They have to terminate after the consultation of 1 RMP (Registered Medical Practitioner)The pregnancy usually occurs when there is a failure of contraceptives and this is to be counted as a mental injury.

But what happens when pregnancy crosses 20 weeks time period? This mostly happens in the case of rape survivors. They are too traumatized mentally to even speak before someone and even if she does, she speaks out too late. Well then there is a way in the eyes of the law. S.3b says that there remain special categories who are exclusively allowed by the law to terminate their pregnancy. They have to terminate after the consultation with 2 RMP (Registered Medical Practitioner). These are

1. Someone whose pregnancy is caused by rape or incest and wants to abort.
2. Termination of pregnancy of a minor is to be done with the consent of the guardian.
3. Termination of pregnancy of a differently able (physical disability) and/or a lunatic (mental disability), is to be done with the consent of the guardian.

4. There has been a change in the marital status of the wife during pregnancy [widowed or divorced].
5. There has been a foetus malformation in the pregnancy.
6. Women with pregnancy in humanitarian settings or emergencies. (this is seen mostly during wars).

People have often said that while the stories of metropolitan cities are different wherein 2 RMP (Registered Medical Practitioners) are easily found, what about the villages? There, finding a single gynaecologist is a miracle in itself. So the question arises as to how 2 RMPs can be found in rural areas?

But what is to happen when the foetus has substantial abnormalities but it can be only found in +24 weeks? Well, then a medical board constituted by the state government will decide whether it's safe enough to abort the child or not. This medical board shall consist of

- A gynaecologist.
- A paediatrician.
- A radiologist or sonologist.
- Any other number of members as may be notified in the official gazette by the state government.

But what if it's the +24 weeks but the reason differs. Maybe due to a delay in proceedings, the pregnant woman is unable to do MTP? Then the only recourse available to her is to go to HC [High Court] or SC [Supreme Court] under the writ jurisdiction of Art. 226 or Art.32.

The power of the state medical board has been prescribed under rule 3A of the MTP rules. It states

1. To allow or deny MTP beyond 24 weeks. this is done by checking whether MTP is safe at a gestational stage and whether there is a substantial risk of being incompatible with the life of foetus or it being handicapped.
2. Co-opt other specialists in the board.

One of the most famous quotes in a spider-man movie is "With great power comes great responsibility". The same is true for the state medical board. It's functions include

- To examine the woman and her reports.
- To provide the opinion of the medical board.

- To ensure MTP occurs after disclosing- safety precautions, counselling and within 5 days of the request.

Section 4 declares where MTP is supposed to occur? it is supposed to occur in

- (a) a hospital established or aided by Government, or
- (b) a place for the time being approved for the purpose of this Act by the Government.

S.5 declares that “ No registered medical practitioner shall reveal the name and other particulars of a woman whose pregnancy has been terminated under this Act except to a person authorized by any law for the time being in force”. Not following this can lead to a punishment of imprisonment for upto 1year and/or a fine.

Section 6 deals with the power to make rules in relation to this act- it is the Central government or GOI who has the power to make rules. Section 7 deals with the power to make regulations- this power is vested in the state government. Section 8 deals with actions took in good faith. It says “No suit for other legal proceedings shall lie against any registered medical practitioner for any damage caused likely to be caused by anything which is in good faith done or intended to be done under this act.”<sup>12</sup>

Some major amendments brought forth by the 2021 amendment have been highlighted in the table given below.

Sr.no	Basis	MTP act, 1971	MTP amendment,2021
1	Contraceptive failure	Only applies to married woman.	Unmarried woman are also allowed.
2	Age limit	20 weeks for all indication.	24 weeks for 6 categories and beyond 24 weeks, consent of the medical board for fetal abnormalities.
3	No. of medical practitioner opinions	1 RMP for 12 weeks MTP. 2 RMP for 12-20 weeks MTP.	1 RMP for 20 weeks 2 RMP for 20-24

<sup>12</sup> <https://www.reproductiverights.org/sites/default/files/documents/MTP-Act-1971.pdf>

	required		weeks.
4	Breach of confidentiality	Fine upto Rs. 1000.	Fine and/or Imprisonment upto 1 year.

One cannot say that this act has achieved the purpose of reproductive autonomy that it wishes to fulfill. However, like every act, there are pros and cons to the act.

**Pros/ progressive features of the act :**

- Abortion beyond 20 weeks is allowed with the latest amendment.
- The burden on the court has been severely decreased due to the constitution of a medical board.
- It “enhances the upper gestation limit preventing the “socioeconomic and psychological” impact of unwanted pregnancies.
- The new amendment maintains confidentiality.
- The new amendment increases the de-stigmatization of relations outside marriage.

**Cons/ Serious concerns of the act :**

- There is still no right to abortion at any time.
- There is no recourse seen for rape victims above 24 weeks. They have to knock at court doors via writ petition.
- This act does not consider institutional lacunae- it is rare to find 2 RMPs in a rural area.
- Transgender and unmarried pregnancies have been kept within the ambit of 20 weeks.
- There is a need for more medical practitioners in the country.
- The act does not give a woman freedom to decide since she will need an approval from a state medical board in case of pregnancy. This could be observed as a need-based approach and not a rights-based approach.
- There is a shortage of doctors in rural areas. So it is difficult to access safe and legal abortions in the area.

Somewhere along the lines, MTP is a huge step toward women’s empowerment. It is seen as nothing sort of commendable and it balances the diverse cultures, and various schools of

thoughts that our country maintains. The act helped in the recognition of marital rape. The Supreme Court has said that “Married women may also form a part of a class of survivors of sexual assault and rape as it is quite possible that a woman may become pregnant on account of a non-consensual act by the husband”. A short review of the MTP amendment 2021 sees it as medical-centric as still RMPs permission is required to have an abortion. This can be seen as a gross violation of the reproductive rights that women have. MTP has to be read with acts like Protection Of Children against Sexual Offenses (POCSO).

But the act has till date left women with various conditions which may act as hindrances in safe abortions. One can only hope that amendments are brought in regularly to help the woman as they constitute the other 50% of the population.

