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Navigating India's Abortion Rights: From Legal Evolution to Social Challenges.

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ABSTRACT:

This article explores India's dynamic landscape of abortion rights. Since the 1971 enactment of the Medical Termination of Pregnancy (MTP) Act, the legal framework has evolved significantly. We delve into its historical context, from a time when abortion lacked specific legislation to the present MTP Act. Crucially, we highlight recent amendments, including the 2021 change that extended abortion rights to unmarried women and increased the permissible gestational period to 24 weeks for specific cases. Underpinning these legal changes are constitutional principles, particularly Articles 21¹ and 14², affirming women's reproductive autonomy and right to equality. Notable court cases, like *Meera Santosh Pal v. the Union of India*,³ emphasize these rights, irrespective of marital status.

Yet, challenges persist. The MTP Act primarily considers physical health, leaving mental well-being less addressed, causing discrepancies between law and practice. Additionally, societal stigma hinders women from accessing safe abortion services.

This analysis concludes by advocating for bridging the gap between legal provisions and societal attitudes. Education and awareness campaigns are crucial for informing women about their rights and accessible healthcare options. Ongoing reforms should aim to align Indian abortion laws with the holistic well-being of pregnant individuals, fostering a society where every woman can exercise her reproductive rights without fear of stigma or legal barriers.⁴

INTRODUCTION:

In the diverse landscape of Indian society, the right to abortion stands as a critical and contentious issue. While legalized in 1971 under the Medical Termination of Pregnancy (MTP) Act, the debate surrounding abortion rights in India is far from settled. The core question revolves around whether this legal framework adequately addresses the nuanced needs of women and if the knowledge of these rights has permeated every corner of the country. Despite the legal protection afforded to women, a formidable societal challenge looms large, often hindering their ability to exercise this fundamental human right. In this exploration of India's abortion laws and their impact, we delve into the historical context, recent amendments, legal underpinnings, and the intricate interplay between legislation and societal perceptions.

¹ INDIA CONST. art. 21.

² INDIA CONST. art. 14.

³ *Meera Santosh Pal v. the Union of India*

⁴ Pai, Satvik N, and Krithi S Chandra. "Medical Termination of Pregnancy Act of India: Treading the Path between Practical and Ethical Reproductive Justice." *Indian journal of community medicine : official publication of Indian Association of Preventive & Social Medicine* vol. 48,4 (2023): 510-513.

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Abortion Law Before 1971:

Before the MTP Act was enacted, there existed no particular law to address the issue of abortion properly. However, the Indian Penal Code, 1860 criminalized the act of voluntary miscarriage under section 312.⁵ Anyone who performed an abortion on the mother, and the mother herself was liable for 3 years imprisonment and/or fine under the section. In the 1960s abortion was already legal in 15 countries. It wasn't until 1964 that Shantilal Shah Committee was established by the Government to address the rising demand for abortion law in India. The committee in 1966 recommended legalizing abortion and finally in 1970 Medical Termination of Pregnancy Bill was introduced in Parliament.⁶

Medical Termination of Pregnancy Act, 1971⁷:

This Act was passed by Parliament in August 1971 and came into force on the 1st of April 1972. Initially, the Act allowed abortion within 12 weeks of pregnancy and also between 12 weeks and 20 weeks for which the opinion of two doctors was required. The abortion was granted- **i.** if continuation of such pregnancy could injure the mother physically or mentally; or, **ii.** If the child was born, it would suffer from serious mental or health conditions. However, a recent amendment of 2021 of the Act recognizes abortion of unmarried women so that they can avail of safe abortion. Moreover, the amendment also increased the gestation period from 20 weeks to 24 weeks, for special categories of women such as survivors of sexual abuse or rape, minors, disabled woman, and victim of incest.⁸ The New Act also states that medical boards must be established in all the states constituting a gynecologist, radiologist/oncologist, pediatrician, and other members to decide if the abortion would be safe after 24 weeks of pregnancy.⁹ A confidentiality clause was also added to the new law.

Abortion Law as a Fundamental Right:

After the historical judgment of **Roe v. Wade**¹⁰ by the U.S. Supreme Court, many states started to recognize Abortion Law as a fundamental right.¹¹ In India Abortion rights in general fuelled by two distinct fundamental rights of the Constitution, first, the right to choose under Article 21, and second, the right to equality under Article 14. The Supreme Court on the matter of women's right to abortion has stated that an unmarried woman stands on the same footing as a married woman when there is a question related to her rights of reproductive autonomy, dignity, and privacy. She will enjoy the same right of choice as a married woman does. In the case of **Meera Santosh Pal v. the Union of India (2017)**,¹² a petitioner of 22 years old applied for termination of her 24 weeks of pregnancy, after learning the fact that the fetus suffers from

⁵ Indian Penal Code, 1860, Sec. 312, No. 45, Acts of Parliament, 1860 (India).

⁶ Wikipedia, https://en.wikipedia.org/wiki/Abortion_in_India, (last visited Sep. 6, 2023).

⁷ Medical Termination of Pregnancy Act, 1971, No. 34, Acts of Parliament, 1971(India).

⁸ Wikipedia, Supra Note 6, at 853.

⁹ Wikipedia, Supra Note 6, at, 853.

¹⁰ Roe v. Wade

¹¹ reproductiverights, <https://reproductiverights.org/maps/abortion-laws-by-state/>, (last visited Sep. 6, 2023).

¹² Meera Santosh Pal v. the Union of India (2017),

anencephaly, a condition that results in no formation of skull bones and is not treatable. This would have ultimately caused the child to die after birth and also is very dangerous for the mother's health.¹³ The Supreme Court decided that under Article 21 the mother has the right to make her reproductive decision and hence has the right to safeguard her life through abortion. Article 14¹⁴ ensures that every individual is treated with a similar attitude before the law-keeping that vision in sight, the new MTP Act has added the same gestation period of 20-24 weeks for both married and unmarried women. Furthermore, the Supreme Court stated that a woman's reproductive rights don't only encircle her right to have or not have children but also cover her right to access information about contraception and sexual health, right to sex education, right to choose safe and legal abortion and right to reproductive health care.

Punishments for Illegal Abortion:

Abortion must be committed with the ultimate faith to save the mother's mental and physical health. All cases of abortion unconditionally require the mother's permission. However, if these conditions are breached and the aforementioned gestation period is violated then consequences may be severe-

- **Abortion Within 4-5 Months of Pregnancy-** unless done in good faith to save the mother's life, both the mother and the doctor will be regarded as they have committed a crime and shall be liable for imprisonment up to 3 years and/or fine.
- **Abortion When a Mother Is Quick with Child-** when the fetus starts to move in the mother's womb, it is called the "quickening" of the fetus. Any abortion done in this period, unless done for the mother's health, shall be considered a criminal act, and under section 312 of IPC, the mother shall be liable for 7-year imprisonment and/or fine.
- **Abortion Without Mother's Consent-** if a person coerces a mother to have an abortion without her will to do so, that person shall be liable for 10-year imprisonment and a fine.
- **The abortion that Results in Death-** if the mother died in the process of abortion and the abortion was done by an inexperienced doctor, then he will be liable for 10 years of imprisonment and a fine. But if the mother was compelled to have the abortion then the doctor shall be punished with life imprisonment.¹⁵

Abortion Law for Unmarried Mothers in India:

A survey was performed in the state of Bihar in 2007-2008, according to which around 549 women aged 15-24 years had abortions.¹⁶ Another report states that every year approx. 15.6

¹³ Meera Santosh Pal vs. Union of India (2017) 3 SCC 462

¹⁴ INDIA CONST. art. 14.

¹⁵ vikaspedia, <https://vikaspedia.in/social-welfare/women-and-child-development/women-development-1/policies-and-acts-1/law-on-abortion>, (last visited Aug. 21, 2023).

¹⁶ Kalyanwala S, Zavier AJ, Jejeebhoy S, Kumar R. Abortion experiences of unmarried young women in India: evidence from a facility-based study in Bihar and Jharkhand, *International Perspectives on Sexual and Reproductive Health*, vol. 36, no. 2, p. 64, 62-71, 2010 Jun,

<https://www.guttmacher.org/sites/default/files/pdfs/pubs/journals/3606210.pdf>

million abortions are performed in India. Hopefully, after the 2021 amendment unmarried women have the same opportunity for safe abortion as married women. MTP Act of 1971 required a doctor's opinion in case of 12 weeks of pregnancy and two doctors' opinions in case of 12-20 weeks of pregnancy. However, keeping in view the larger societal aspect and change in lifestyle the provisions fell short in addressing the abortion issues unmarried women often faced at that time. Hence, the Act extended the time limit for surgical abortion, and after the 2021 amendment one doctor's opinion is needed for 20 weeks of pregnancy and two doctors' opinion is needed for 20-24 weeks of pregnancy.¹⁷

Unmarried women are entitled to have medical abortions irrespective of their age. If the woman is above 18 years the doctor will simply require written consent before performing the abortion, and if the woman is below 18, then her guardian's written consent is needed. She can avail the abortion if, **i.** the pregnancy was a result of sexual violence or rape; **ii.** The pregnancy will be a hindrance to the mother's or the baby's (if born) mental well-being; **iii.** The infant after birth has the chance to develop any physical defect; **iv.** The pregnancy is the result of a failed contraception.

In the case of **X v. State of Maharashtra (2022)**, a rape victim was permitted by the Nagpur Bench of the Bombay High Court to terminate her 25 weeks pregnancy, which was a result of the rape. Keeping in view the mental well-being of the woman, and the fact that if the child is born, it will not be properly taken care of, the Court took such a drastic decision and allowed abortion even though the pregnancy was clearly over the gestation period of 24 weeks as required by the MTP Act.¹⁸ In another case of **Alakh Alok Srivastava v. Union of India (2020)**,¹⁹ a 10-year-old rape victim was denied an abortion, as the pregnancy was already over 31 weeks.²⁰ The victim's father filed for a safe abortion, but there was a huge risk factor of life loss of the victim.

Inconsistencies of The MTP Act:

The Act regards all the abortions of pregnancies over 20 weeks mainly as "immediately essential to preserve the pregnant woman's life". It does not take into account the mental health of the mother. However, there were instances when the Courts emphasized the mental satisfaction of the woman even when the pregnancy period was over 24 weeks but the Act itself has a long way to go before it includes all the aspects of Abortion. After 1971,²¹ a lot of amendments have been made such as the Amendment of 2002 decentralized the process of approval of a private place to offer abortion services to the district level, and so that all women

¹⁷ Jain, Dipika. "Supreme Court of India judgement on abortion as a fundamental right: breaking new ground." *Sexual and reproductive health matters* vol. 31,1 (2023): 2225264.

doi:10.1080/26410397.2023.2225264

¹⁸ Ms. X Vs. State of Maharashtra and Anr.[Criminal Appeals No. 822-823 of 2023 arising out of Petitions for Special Leave to appeal (Crl.) No. 11104-11105 of 2022]

¹⁹ Alakh Alok Srivastava v. Union of India (2020)

²⁰ Alakh Alok Srivastava vs Union Of India on 31 March, 2020

²¹ Civil Appeal No 5802 of 2022 (Arising out of SLP (C) No 12612 of 2022) X ... versus The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr.

can facilitate the CAC (Comprehensive Abortion Care) services.²² 2003 amendment was made to provide specific guidelines related to the place of abortion etc. However, the amendments speak through the implementation of the provisions and the societal approval of the public, as abortion is still a stigmatized issue in India.

CONCLUSION:

In conclusion, the evolution of abortion law in India has been a journey marked by significant milestones and amendments. Since the enactment of the Medical Termination of Pregnancy (MTP) Act in 1971, there has been a gradual recognition of abortion rights as a fundamental aspect of women's reproductive autonomy, privacy, and dignity. The Act has undergone several amendments, with the most recent one in 2021, which expanded access to safe abortion for unmarried women and increased the gestation period from 20 to 24 weeks for special categories of women.

These legal changes have been driven by the recognition of women's constitutional rights, particularly under Article 21²³ (right to life and personal liberty) and Article 14²⁴ (right to equality). The Indian judiciary, through landmark cases like *Meera Santosh Pal v. the Union of India*, has affirmed that women, whether married or unmarried, have the right to make decisions regarding their reproductive health and access safe and legal abortion when necessary. However, challenges and inconsistencies remain within the MTP Act. It primarily focuses on physical health considerations while neglecting the mental well-being of pregnant individuals, leading to discrepancies between the law and court rulings.²⁵ Additionally, the social stigma surrounding abortion in India continues to be a barrier for many women seeking safe and confidential reproductive healthcare. As we move forward, it is crucial to bridge the gap between legal provisions and societal attitudes. Education and awareness campaigns are essential to inform women of their rights and the availability of safe abortion services. Further reforms and amendments that consider the holistic well-being of pregnant individuals, including their mental health, should be explored.

In conclusion, India's abortion laws have come a long way, but there is still work to be done to ensure that every woman can exercise her right to make informed choices about her reproductive health without fear of stigma or legal barriers.

²² Wikipedia, *Supra* note 3, at 856.

²³ INDIA CONST. art. 21.

²⁴ INDIA CONST. art. 14.

²⁵ [reproductiverights, https://reproductiverights.org/wp-content/uploads/2020/12/SecuringReproductiveJusticeIndia-Chpt05.pdf](https://reproductiverights.org/wp-content/uploads/2020/12/SecuringReproductiveJusticeIndia-Chpt05.pdf), (last visited Aug. 21, 2023)