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## ABOUT US

“Journal of Unique Laws and Students” (JULS) which shall provide law students, young lawyers and legal professionals to deliberate and express their critical thinking on impressionistic realms of Law. The JULS aims to provide cost free, open access academic deliberations among law students and young lawyers. The ISSUE IV of Volume I focuses on three themes i.e. (i) Environmental Law (ii) Company Law, (iii) Labour Law, (iv) Constitution Law and the themes from our previous issues.

The journal strives to contribute to the community with quality papers on a vast number of legal issues and topics written by authors from various groups that have been reassessed and revised by our editorial team to reach the highest possible standard.

UNIQUE LAW is a law related Ed-tech premier start up in India that excels in imparting legal education. The research papers which are published undergo 3 stages of review. Firstly, pre-screening is executed in which the paper that does not satisfy the technical criteria for example, the paper which is plagiarized is ruled out. Second stage checks the grammatical consistency of the content. Lastly, the depth of the research is reviewed and it is checked whether the research is imparting the relevant knowledge to the readers or not. At every stage, the authors are given reviews and a chance to make the required changes. This grants an opportunity to the authors for publishing the paper in the suitable and appropriate manner.

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## PREFACE

Legal research is the “hands on” subject you will take in the course of your legal education. Although numerous books discuss research methods and techniques, there is no substitute for actually performing the task of legal research. Our journal`s Issue IV of Volume I has worked on crucial themes such as Environmental Law, Company Law Law, Labour Law, Constitution Law. We would like to express our deep appreciation of the cooperation of the contributors, who so willingly devoted their time and energies.

We have tried to cover these wide topics with the relevant research and landmark judgments in the form of Research Paper, Case Analysis, Short Notes and Case Commentaries. We have used a standard of words for the explanation, evenly attempted to clear the concepts and presented captivating writing to the readers. The work also contains some suggestions in respective fields.

The views expressed in the articles are purely and solely of the authors and the entire team of the Journal has no association with the same. Although all attempts have been made to ensure the correctness of the information published in the articles, the Editorial team shall not be held responsible for any errors that might have been caused due to oversight or otherwise. It is up to the rest of us to help make the journal a success story in the next several years.

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## EDITOR'S NOTE

### **Volume 1 Issue IV of Journal of Unique Laws and Students (JULS)**

This journal has become a successful climb in reaching to our goal of gaining visibility in the academic front and becoming a great platform in education community.

The journal aims to present merit papers on the numerous legal issues and these topics are authored by various groups of individuals that have been reappraise and emended by our team of editors to attend the highest possible excellence. These research papers, case analysis and shortnotes are the result and we feel privileged to have been able to act as editors.

We thank to all our authors for their obedient submission to the third issue of the journal and also for their productive cooperation with the editorial team to garnish their work with perfection. We would also like to express our gratitude to our diligent editorial board, whose restless support and commitment made this Journal's Issue IV a success.

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## ABORTION LAWS IN INDIA – A RIGHT OR A PRIVILEGE

Author: Shivangi Prakash\* & Co-author: Ansh Yadav\*\*

### ABSTRACT

*The concept of abortion has become a horrific crime, or rather a social norm, in India, a country of atheism and spirituality, but the wave of modernization and the post-colonial ideological conflict will cause people to move between cultures. And the culture of dealing with current difficulties, including medical abortion, was a sign of reassurance for everyone. This article describes the Medical Abortion Act of 1971, the amendments made in 2002 and 2003, and the rules and improvements made. This article addresses not only initiatives to improve women's reproductive rights and the availability of safe abortion, but also needs, issues and some issues that are often overlooked.*

**Keywords:-** *The Medical Termination of Pregnancy Act 1971, Unwanted Pregnancies, Fetal anomalies, 20 weeks of pregnancy, 24 weeks termination.*

### INTRODUCTION

Female sexuality, childbirth, and reproductive health are rarely considered as essential as publicly debated. Due to the overwhelming patriarchal framework of society, such issues are often ignored. The same can be seen in the kind of law enacted on women's issues.

Abortion, in particular, is always associated with ethical issues as it involves the killing of humans. Those who support liberal abortion have a legal debate, claiming that it is a matter of pure choice for women.<sup>1</sup> Those who oppose it often use moral or religious arguments to contradict the former.

Despite progressive legislation, women struggle to acquire basic rights and now lack access to safe abortion treatments as well as reproductive choices. But the debate of necessity is summarized

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<sup>1</sup> Joyita Ghosh, Women's Right to Abortion in India: A Critical Analysis, JOURNAL FOR LAW STUDENTS AND RESEARCHERS (Sep. 09, 2020), <https://www.jlsrjournal.in/womens-rights-to-abortion-in-india-critical-analysis-by-joyita-ghosh/>.

in all fundamental rights to equality and freedom in all areas, regardless of caste, beliefs, gender or sexual orientation, the life and individual of all with full dignity. It is a vow to respect and accept the freedom of.

We have come a long way from completely criminalizing abortion to legalizing it under certain conditions and to a more liberal approach to abortion law. Despite the abortion law, morality has remained a major issue in women's lives, not only due to lack of information, but also due to various urban and political issues. India today has a set of roles and obligations available to all genders, but the situation was not the same. This also applies to abortion and pregnancy regulations. Today, India is one of 14 countries where abortions are taking place for a variety of socio-economic reasons, not on demand.

### **WHAT IS ABORTION?**

Abortion is the end of an accidental or induced pregnancy before the foetation is fully developed to survive on its own. It refers to the act of aborting with a non-viable fetal or non-living child. Every year, about 205 million pregnancies occur worldwide. Most abortions are caused by unwanted pregnancies.

Abortion is the medical termination of pregnancy using external intervention. It is also known as targeted abortion. Abortion is a safe practice when done properly, but unsafe abortion is a major cause of maternal death, especially in developing countries. With sufficient knowledge of family planning and contraception, abortion rates have declined significantly over time.

### **HISTORY OF ABORTION LAWS IN INDIA**

Under the Indian Criminal Code of 1860 and the Criminal Procedure Code of 1898, British India called abortion a "criminal act." It was a criminal offense for both the woman under the colonial government and others who wished to do so, with or without her consent.

Prior to 1971, abortion was considered illegally punished under Articles 312-316 of the Indian Penal Code of 1860, which was defined as causing miscarriage unless done to save the life of a

woman. A voluntary abortion can result in a sentence of up to 3 years in prison or a fine, and a voluntary miscarriage can result in a sentence of up to 7 years in prison or a fine.<sup>2</sup>

By the turn of the century, abortion was illegal in almost every country in the world. *Roe v. Wade*<sup>3</sup>, the historic US Supreme Court ruling on abortion has changed the way other countries see abortion law.

This decision lifted the strict abortion law and ratified the Fourteenth Amendment to the US Constitution. The Fourteenth Amendment to the United States Constitution guarantees that citizens have the right to vote. Right to privacy is protected by the Constitution, which also guarantees the choice of women for or against abortion. European countries moved to legalize abortion shortly after this ruling.

In the 1960s, the Government of India established the Shah Commission, led by Chantilal Shah, in response to the excessive maternal mortality and morbidity caused by abortion failures. The Commission was established to investigate the problem of maternal mortality due to bacterial miscarriage. The Commission conducted a thorough investigation into the social and medical aspects of abortion and recommended that abortion be legalized for compassionate medical reasons. Abortion (MTP). Law 1971 was enacted as a result of their recommendations.

### **THE MEDICAL TERMINATION OF PREGNANCY (MTP) ACT 1971**

All countries, including India, have their own strict abortion legislation to prevent induced abortion and reduce maternal mortality from unsafe abortions. However, the criminal law was not changed by the enforcement of the MTP law. The rules and penalties for miscarriage have not changed.

The MTP Act 1971 consists of eight parts that address issues such as when, where, and under what conditions a pregnancy ends. Abortion is legal by law if the pregnancy is terminated by a qualified doctor and the foetation is less than 20 weeks in any of the following situations:

A prolonged pregnancy might shorten a pregnant woman's life expectancy or cause serious bodily or psychological harm. If the baby is born, there is a risk that he or she will be impaired due to

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<sup>2</sup> Indian Penal Code, 1860, § 312, No. 45, Acts of Parliament, 1860 (India).

<sup>3</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

physical or psychological problems.<sup>4</sup> Two qualified practitioners must be consulted if the pregnancy is more than 12 weeks but less than 20 weeks.

Rape that leads to pregnancy. It can cause psychological distress to pregnant mothers. Pregnancy caused by the inability of a married woman or her husband to use her contraception. This can affect a woman's mental health.

### **WHO CAN TERMINATE PREGNANCY?**

The MTP method only allows the termination of pregnancy by a doctor, such as:

- A registered physician with medical qualifications recognized under the Indian Medical Council Act
- Its name is in the state medical registry
- Meets the requirements of the OB / GYNMTP law. 4,444 doctors who meet these requirements are eligible for an automatic abortion. Moreover, the doctor cannot refuse an abortion because of his religious beliefs.

The following types of consent are required before a qualified physician aborts a pregnancy:

If the female is single, written consent is sufficient. Single women under the age of 18 require written permission from her parents or guardians. If you have a mental illness, you will need written permission from your legal guardian.

### **PROBLEMS IN THE ACT**

The law stipulates that if a pregnancy is less than 12 weeks, the opinion of one doctor is required to legally end the pregnancy. If the pregnancy is 12 to 20 weeks, the woman needs the advice of two doctors before proceeding with the abortion. The law was enacted primarily to curb population growth and completely ignored women's rights. This includes the ability to make decisions that affect a woman's body. In comparison to our population, India lacks a significant quantity of skilled

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<sup>4</sup> Meenaz Kakalia, *Abortion in India-Still Not a Right but a Privilege*, THE LEAFLET (May 03, 2021), <https://www.theleaflet.in/abortion-in-india-still-not-a-right-but-a-privilege/>.

medical workers. Due to a lack of medical practitioners and services, many women are forced to use risky methods to abort their babies, which push them to do so.<sup>5</sup>

A woman suffers both mental and physical harm as a result of the MTP act. For example, medical incompetence and prolonged court hearings can harm the mental health of a rape survivor who is also carrying the rapist's child. The act also ignores the socio-economic implications of unwanted pregnancies and their impact on women. Medical research has advanced to the point where late-term abortion procedures can now be streamlined. Doctors can now discover problems in the foetus as late as the twentieth week of pregnancy. This rule, however, permitted abortion up to the twentieth week, resulting in a clumsy implementation and a closed-minded attitude.

The act enables only allopathic doctors to terminate a pregnancy but with the rise in technology, medications, talents, the MTP act needs to bring into account the developments of ayurveda, homoeopathic doctors as well. There are a few problems which can only be diagnosed after 20 weeks of pregnancy, which to convert an intended pregnancy into an unwanted one.

While *section 3*<sup>6</sup> permits single, divorced, or widowed women to have an abortion, but the term "married woman or her husband's permission" can send the wrong message. Activists are trying to replace it with the phrase "all women", but nothing has changed yet. Prior to the introduction of the 2021 MTP Act, many petitions were made due to the shortcomings of the 1971 Act. The court also acted against the rules. As a result, there is a collection of misleading decisions and orders that take different approaches to enforcing the 1971 MTP Act..

## **STANCE OF INDIAN JUDICIARY**

### **Nikhil D. Dattar v. Union of India**<sup>7</sup>

*Sections 3 and 5*<sup>8</sup> of the Act were challenged in this instance because they did not include any events that were outside of the Act's scope. In this case, the foetation was confirmed to have a complete heart block at 26 weeks gestation. The mother then applied for an abortion.

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<sup>5</sup> Rujuta Joshi, *Social, Legal and Ethical Analysis: How Do We View Abortion in India*, ACADEMIKE (June 1, 2021), <https://www.lawctopus.com/academike/india-abortion-laws/>.

<sup>6</sup> Medical Termination of Pregnancy Act, 1971, § 3, No. 34, Acts of Parliament, 1971 (India).

<sup>7</sup> Nikhil D. Dattar v. Union of India, SLP (C) 5334 of 2009.

<sup>8</sup> Medical Termination of Pregnancy Act, 1971, § 3, 5, No. 34, Acts of Parliament, 1971 (India).

The petitioner submitted that *Section 5(1)*<sup>9</sup> should be construed down to include Section 3's scenarios. As a result, respondents should be instructed to allow an abortion. However, the court may grant Section 5 tax exemption only if it does not have the authority to enact a law and can show that the life of the mother is at risk if the pregnancy does not end.

### **Samar Ghosh v. Jaya Ghosh**<sup>10</sup>

The Supreme Court has determined whether it is psychologically cruel for a woman to have an abortion without her husband's consent. In this case, the court said, "If a wife undergoes a vasectomy or abortion for no medical reason, such conduct may constitute psychological abuse without the consent or consent of her husband.

### **Dr.Mangla Dogra & Others v. Anil Kumar Malhotra**<sup>11</sup>

In this case, the Punjab and Haryana High Court said, "The MTP Act requires the consent of only one person, a woman who has an abortion. A husband cannot force his wife to have a period of pregnancy. "

### **Suchita Srivastava and v. Krishnanan, 2009**<sup>12</sup>

Rights of ladies to select within the context of persevering with a being pregnant were affirmed through the Supreme Court and the High Court of Madras, respectively. The Supreme Court evidently stated in *Suchita Srivastava* that the nation has a dedication to guard a woman's reproductive rights as a part of her Article 21 rights to non-public liberty, dignity, and privacy.

### **Anand Manharlal Brahmhatt v. The State of Gujarat**<sup>13</sup>

The question in the lawsuit was whether the state could approve to the abortion of a mentally challenged woman that was unable to look for herself. It was held that yes, the state may consent to termination if a medical expert determines that a woman is unable to make decisions for herself or recognise that she is pregnant.

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<sup>9</sup> Medical Termination of Pregnancy Act, 1971, § 5(1), No. 34, Acts of Parliament, 1971 (India).

<sup>10</sup> *Samar Ghosh v. Jaya Ghosh*, (2007) 4 SCC 511.

<sup>11</sup> *Dr.Mangla Dogra & Others v. Anil Kumar Malhotra*, (2012) 3 PLR 267.

<sup>12</sup> *Suchita Srivastava and v. Krishnanan*, (2009) 14 SCR 989.

<sup>13</sup> *Anand Manharlal Brahmhatt v. The State of Gujarat*, 2015 LawSuit(Guj) 2786.

**Ms. X v. Union of India & Others<sup>14</sup>**

In this case, after 20 weeks, the woman discovered that her baby had structural flaws and abnormalities. The woman may have her pregnancy terminated under *Section 5* of the MTP Act if the medical board determines that continuing the pregnancy would represent a grave threat to the woman's mental and physical health.

**Halo Bi v. State of Madhya Pradesh & Ors. 2013<sup>15</sup>**

The question in this case was whether a jailed woman needs jail officials' permission to obtain a medical abortion. It was decided that a pregnant woman who is detained does not need to obtain permission from jail officials to terminate her pregnancy.

**MEDICAL TERMINATION OF PREGNANCY AMENDMENT BILL, 2020**

Some of the above cases and judgments that resulted in damages and conflicts of interest, as well as the law, urged the government to pass an approved MTP amendment bill 2020.<sup>16</sup> The Minister of Health and the Ministry of Family Welfare Dr. Harsh Vardhan introduced this law on March 2, 2020. In March 2021, both Lok Sabha and Rajya Sabha passed the law.<sup>17</sup> This is a popular step towards women's rights, as it is the first time in 49 years that our elected officials have had time to tackle issues such as abortion. The bill aims to renew outdated, ineffective and inadequate legislation by changing some provisions and stating that pregnancy can be terminated within 20 weeks with the consent of a certified physician. It is said that. For abortions between the 20th and 24th weeks of pregnancy, only the consent of two qualified doctors is required. Pregnancy up to 24 weeks ends only for certain groups of women defined by the government.

Pregnancy due to the inability of a married woman or husband to limit the number of children who can become pregnant using contraception under the original law can pose a significant threat to the psychological well-being of pregnant women. The new bill replaces the phrase "married woman or her husband" with "female or her partner." As a result, there is a more liberal move.

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<sup>14</sup> Mrs. X v. Union of India & Others, 2017 SCC OnLine SC 124.

<sup>15</sup> Halo Bi v. State of Madhya Pradesh & Ors., WP(C) 7032/2012.

<sup>16</sup> Medical Termination of Pregnancy (Amendment) Bill, 2020.

<sup>17</sup> Akanksha, *Abortion in India- Right or Restriction*, IPLEADERS (Aug. 6, 2020), [https://blog.ipleaders.in/abortion-law-indiaright-restriction/#Medical\\_Termination\\_of\\_Pregnancy\\_Amendment\\_Bill\\_2020](https://blog.ipleaders.in/abortion-law-indiaright-restriction/#Medical_Termination_of_Pregnancy_Amendment_Bill_2020)

The bill proposes the establishment of a medical committee consisting of:

- Obstetrician and gynecologist
- Pediatrician
- Radiologist or scholar
- A number of other members determined by the state government. It makes recommendations in critical and unusual situations and approves abortions.

On the other hand, the bill focuses on privacy issues, stating that certified practitioners do not have the authority to identify the woman in question unless otherwise provided by applicable law.

### **THE EXPECTED BENEFITS OF THE EXTENSION**

Twenty weeks later, many fetal abnormalities are discovered that turn an intended pregnancy into an unwanted one. Prenatal abnormal scans are usually done between the 20th and 21st weeks of gestation. If this scan is delayed and a fatal defect is found in the foetation, the 20-week deadline is the limit.<sup>18</sup>

With this change, if a fetal abnormality is detected after 20 weeks, the pregnancy can be terminated. Empowering unmarried women with the ability to medically end their pregnancy, and providing provisions to protect the privacy of those seeking abortion, will give them reproductive rights. The law helps rape victims and allows sick and young women to legally end unwanted pregnancies. Importantly, the law also applies to unmarried women, abolishing one of the 1971 law's retreat clauses that prohibited single women from citing contraceptive failures as a reason for abortion.

### **CONCLUSION**

Until the women`s rights movement, almost every country disapproved of this practice. It required several historic decisions to finally stir up the rest of the globe from its slumber.

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<sup>18</sup> Drishti IAS, *Medical Termination of Pregnancy (Amendment) Bill, 2020*, DRISHTIIAS, (Feb. 03,2020), <https://www.drishtiias.com/dailyupdates/daily-news-editorials/medical-termination-of-pregnancy-amendment-bill-2020>.

Abortion is rarely a simple choice. It's not fair to hold a woman responsible for choosing abortion when she doesn't want or can't care for a child. It should be entirely up to the woman, and it should be made available to all women, regardless of their circumstances. The term "abortion" has a negative connotation in a conservative society. Abortion of an unmarried woman is considered completely unacceptable. Several times, such primitive attitudes have subjected young single/unmarried women to emotional and physical anguish, resulting in the deaths of numerous women.

The 2021 MTP Amendment Act is meaningful and more flexible in its application, but the arbitrary classification reflects a regressive attitude towards women's rights in general. After reviewing all the clauses and clauses, the bill seems to be moving in the right direction, but if you take a closer look at Section 2 (b) of the bill, the amendment is the most vulnerable individuals such as rape victims and incest. You can see that it only applies to. Victims, minors, women with disabilities, and the bill rarely improve the shortcomings of India's abortion law. In addition, the law defines abortion as an extension of criminal liability under Indian criminal law, not as an extension of women's physical autonomy. But there is no reason why abortion should not be recognized as a fundamental right of women's free choice. Therefore, the state should empower women by allowing them to make decisions about their reproductive health, rather than depriving them of their autonomy.