

# JURISPRUDENTIAL TRANSITION OF CRIMINALIZATION OF ABORTION TO LIBERALISATION IN INDIA: A PROGRESSIVE APPROACH

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*"Where women get respect and given good position,  
that nation will be in prosperous and in great position"*

**- Swami Vivekananda**

## **ABSTRACT**

*Reproductive rights of women are as old as human civilization but its recognition as an intrinsic human right is of recent development. On the other hand, abortion is also as old as recorded history. Though in recent years there have been many instances of social movements and positive legislation aimed at bringing drastic changes towards the role and status of women in the modern society. The present paper aims to represent the societal changes towards reproductive rights of women as a basic human right. However, the abortion related controversies have never played a significant role in mainstream political parties unlike the West. In -this article we will see how abortion laws has been liberalized. In 1960, India criminalized abortion, imposing penalties of imprisonment or fines for women who underwent the procedure. However, the Shantilal Shah Committee was formed in the mid-1960s to evaluate the need for a new law on abortion. As a result, the Medical Termination of Pregnancy (MTP) Act was passed in 1971. The main objective of the MTP Act 1971 was to legalize abortion to ensure safe access to the procedure while protecting women's health and preventing unauthorized abortions. Section 3(2) of the act permits abortion only under specific circumstances and with certain restrictions. In 2021, the Medical Termination of Pregnancy (Amendment) Act was enacted to enhance access to safe and legal abortion services for therapeutic, eugenic, humanitarian, and social reasons.*

*Though women's constitutional right to make reproductive choices under Article 21 of the Indian Constitution has been recognized by the courts, the authority to make abortion decisions still lies with doctors. The amendment aims to provide universal access to comprehensive care for women seeking abortions and uphold their dignity, autonomy, bodily integrity, and privacy.*

*The Justice K.S Puttaswamy case has brought clarity and nuance to previous rulings on women's reproductive rights in India. The amendment's purpose is to improve access to safe abortion in India and protect women's rights. Abortion-related controversies in India have not significantly influenced mainstream political debate due to the moral and religious beliefs of the Indian public. Despite high judicial activism, abortion in India has evolved through Acts*

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*of Parliament and landmark legal decisions in response to changing social and cultural trends in India. In today's time, where questions are raised on women's rights in Western countries, where the Supreme Court itself bans violation of women's right to abortion, then the role of the judiciary becomes important here. Abortion law in India has undergone significant changes in the last few years due to the changing social system and medical advancement in recent times. This paper highlights the judicial role and challenges in the ongoing process of liberalization.*

**Keywords - Abortion, Reproductive Rights, Right to Privacy, Termination of Pregnancy, Indian Penal Code, Judicial Activism, Liberalization**

## **INTRODUCTION**

Today, personal freedom is widely acknowledged as crucial for women's bodily autonomy. This includes the right to make decisions about their reproductive choices, such as carrying or terminating pregnancies and selecting suitable contraception methods. This freedom allows women to make informed choices about their lives, including when and how to have children. It is important for their overall reproductive rights, which also include access to safe delivery practices, legal abortion, contraception, and prenatal care. However, these rights are frequently violated by laws that prohibit abortion, disproportionately affecting young people and disadvantaged populations. Governments should have faith in women's ability to make responsible decisions about their bodies, health, and lives.

The Centre for Reproductive Rights is working to protect and expand abortion rights by overturning restrictive laws, repealing procedural barriers, and defending women imprisoned under such laws. With over 60 countries liberalizing their laws, the organization has won ground-breaking abortion cases in national courts and international human rights bodies. The issue of abortion revolves around the question of when life begins. People who believe in the right to life argue that life begins at conception, while those who support reproductive choice argue that it begins when the fetus can survive on its own. This conflict between a woman's ability to make decisions about her body and the rights of the fetus is widespread.<sup>1</sup>

## **LIBERALIZATION OF ABORTION LAWS IN INDIA**

The MTP Act 1971 was a significant step towards liberalizing the laws surrounding abortion in India. Prior to this act, abortion was considered illegal and punishable by imprisonment, except in cases where it was performed in good faith to save the life of the woman. However, the strictness of the law led to a rise in illegal abortions, which had severe consequences for the health and mortality rates of pregnant women. The MTP Act 1971 recognized the importance of decriminalizing abortion and providing women with the right to choose when to have a child. It acknowledged that illegal abortions were being performed by unqualified individuals under unhygienic conditions, leading to numerous complications and even deaths. It was estimated that millions of induced abortions were being carried out in India each year, with a large majority being illegal, yet prosecution and convictions were extremely rare.

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<sup>1</sup> <https://reproductiverights.org/our-issues/abortion/safe-and-legal-abortion-is-a-womans-human-rights>

Various knowledgeable individuals and organizations advocated for the liberalization of abortion laws in India, highlighting the mental health issues faced by women and the increasing number of maternal deaths resulting from illegal abortions. The MTP Act 1971 addressed these concerns and was a significant step towards ensuring safe and legal abortions for women. It was influenced by global trends towards liberalizing abortion laws, and the Central Family Planning Board recognized the need for such a change in India. To address the rising number of unsafe abortions and protect the lives of pregnant women, the Central government appointed a committee chaired by Dr. Shantilal Shah and consisting of medical professionals and members from the fields of law, health, and judiciary. This committee thoroughly examined the issue, reviewed evidence, and studied the laws on induced abortions in other countries. They submitted their report on December 31, 1966, recommending the liberalization of abortion laws in India. The passing of the MTP Act 1971 was a result of the recommendations made by the Shah committee. It aimed to provide women with the freedom to decide when to have a child and to combat criminal abortions. This act played a crucial role in addressing the complex issue of induced abortions in India and has had a significant impact on women's reproductive rights and maternal health.<sup>2</sup>

The new abortion law in India is one of the most progressive in the world and considers the failure of contraceptives as a valid reason for abortion, which is unique compared to other legislations. Implemented in 1971, the M.T.P. Act focuses on combating illegal abortions and upholds women's right to privacy and control over their bodies. It aims to control population growth by allowing the termination of unwanted pregnancies caused by contraceptive failure.<sup>3</sup> The Act permits abortion in certain situations, including when it endangers the woman's life or health, in cases of rape, or if the child is likely to have severe physical or mental disabilities. While it signifies a step forward in challenging societal biases against abortion and addressing a social problem, the Act is also cautious in ensuring that its provisions are strictly employed to safeguard women's health and not exploited for promoting a permissive society. Thus, the Act strikes a balance between progressive reforms and necessary precautions.

The M.T.P. Act of 1971 in India is a progressive legislation that aims to address the issue of illegal abortions and grant women the right to privacy and control over their own bodies. It allows for the termination of unwanted pregnancies resulting from contraceptive failure and certain other circumstances, such as a risk to the woman's life or health, rape, or potential disabilities in the child.<sup>3</sup> While the Act represents progress in challenging societal prejudices against abortion and addressing a social problem, it also includes safeguards to ensure that the provisions are used responsibly to protect women's health. The Act strikes a balance between progressive reforms and cautious measures. The purpose of the MTP Act is to reduce population growth by allowing safe and legal termination of unwanted pregnancies. It recognizes the failure of contraceptives as a valid ground for abortion, which is a unique

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<sup>2</sup> Madhava Menan, N.R. "Population policy, Law Enforcement on the Liberation of Abortion: A sociolegal Inquiry\ into the Implementation of the Abortion Law in India". 16 JILT (1974) P. 626 at 632-33.

<sup>3</sup> (Gour K.D. "A Text Book of The Indian Penal Code",3<sup>rd</sup> ed. 2004, Universal Law Publishing Conip.Pvt Itd Delhi. PP.503-4.

provision compared to other countries.<sup>4</sup> The Act also aims to protect the woman and unborn child by specifying that only registered medical practitioners with experience and training in gynaecology and obstetrics can perform abortions for specified grounds.

While the Act has expanded the circumstances where abortions are not considered criminal, there are still concerns about illegal abortionists operating and posing risks to women. The moral status of the unborn and abortion itself are not widely discussed in India, but it is important to continue addressing the issue to prevent exploitation. In summary, the MTP Act of 1971 in India is a progressive and cautious legislation that aims to protect women's rights and address the issue of illegal abortions while ensuring responsible use of its provisions.

The recent abortion law of India, while it came into effect later than expected, is one of the most lenient regulations of its kind in the world. It is the only legislation that recognizes the failure of contraceptives as a valid reason for abortion. The M.T.P. Act of 1971 was introduced to tackle illegal abortions and uphold women's right to privacy and control over their own bodies. It aims to curb population growth by allowing the termination of unintended pregnancies resulting from contraceptive failure. The Act permits abortion in specific circumstances such as to protect the woman's life or health, in cases of rape, or when the child is likely to have severe physical or mental disabilities. It is a step forward in countering societal biases against abortion and addressing a social issue, while also including safeguards to prevent its misuse. The Act strikes a balance between progressive reforms and cautious measures.

There is another progressive step in abortion laws while amending MTPA, 1971 which encompasses legal shortcomings. The recent amendment of the Medical Termination of Pregnancy Act (MTPA) in 2021 is seen as a progressive step in protecting the reproductive rights of women in India. The MTPA was enacted in 1971 to regulate the circumstances under which abortions could be performed but had several shortcomings that needed to be addressed.<sup>5</sup> The 2021 amendment<sup>6</sup> expands the scope of women who can access abortion services by allowing unmarried women, among others, to avail themselves of safe and legal abortions. Previously, only married women were allowed to seek abortions under certain conditions. This change recognizes the rights of unmarried women to make choices regarding their reproductive health. Another significant improvement is the extension of the upper limit for abortion from 20 weeks to 24 weeks. This change acknowledges the fact that some fetal abnormalities can only be detected at a later stage and ensures that women are not forced to continue pregnancies when there may be severe health risks or when the fetus has developmental issues. The amendment also empowers women by allowing them to make independent decisions about their bodies and health. It removes the requirement for the opinion of multiple medical professionals for abortions up to 20 weeks, reducing the unnecessary burden and delays that woman previously faced. The amendment allows for the establishment of state-level Medical Boards that can provide support and guidance to medical professionals and individuals seeking

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<sup>4</sup> Seth D D and Maitra S K and Sinha RN. "Abortion and Termination of Pregnancy in India", 1973 ed. Pub. by Delhi Law House, Allahabad, p 95.

<sup>5</sup><https://www.who.int/india/news/detail/13-04-2021-india-s-amended-law-makes-abortion-safer-and-more-accessible>

<sup>6</sup> <https://pib.gov.in/PressReleasePage.aspx?PRID=1705381>

abortions. This provision is crucial to ensure the availability and accessibility of safe abortion services across the country. By addressing the shortcomings of the MTPA by amending it in 2021, India has taken significant steps toward safeguarding the reproductive rights of women. These changes not only empower women to make informed decisions about their bodies and health but also ensure that they have access to safe and legal abortion services when needed.

## ISSUES AND CHALLENGES IN ACCESSING SAFE AND LEGAL ABORTION

Below are several issues that have been identified:

**Different Perspectives on Pregnancy Termination:** There are differing opinions on the termination of pregnancy, with some arguing for reproductive rights and the woman's decision-making authority, while others emphasize the state's responsibility to protect the fetus.

**Limited Time Frame for Certain Cases:** In situations where a woman has surpassed the 24-week gestation limit and desires an abortion because of rape, her only recourse is to submit a Writ Petition. The Act only allows abortions beyond this timeframe for cases involving substantial fetal abnormalities, as assessed by the Medical Board.

**There is a shortage of qualified doctors:** Specifically gynaecologists and Obstetricians, which is required by the Act to perform abortions. This shortage is particularly pronounced in rural areas where community health centers face a significant deficit of 75%. This shortage creates a barrier for pregnant women seeking safe abortion services.

**Exclusion of Transgender:** Despite the recognition of transgender individuals as a separate gender under India's Transgender Persons Act, the Act does not explicitly address their inclusion. It is unclear whether the Act provides protection for transgender individuals, as it primarily focuses on the termination of pregnancies for women.

In addition to these issues, Rule 3B of the MTP (Amendment) Rules 2021 further defines the categories of women eligible for termination of pregnancy between 20 and 24 weeks. These categories include survivors of sexual assault, minors, individuals whose marital status changes during the pregnancy, women with physical disabilities, mentally ill women, and women with pregnancies in humanitarian or emergency situations as declared by the government.<sup>7</sup>

Difficulties in accessing safe and legal abortions arise due to various reasons. One major obstacle is the lack of a rights-based approach in abortion laws, which leads to the criminalization of abortion in many countries. This criminalization creates fear of prosecution and legal consequences for both women seeking abortions and medical professionals providing them. In addition to legal barriers, there are also practical challenges that hinder access to safe abortions. These include insufficient infrastructural facilities, such as a lack of properly equipped clinics or hospitals that can provide safe abortion services. This forces some women to resort to clandestine and unsafe methods of terminating pregnancies, putting their health and lives at risk. A lack of awareness about the availability and legality of safe abortion services is

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<sup>7</sup> The Gazette of India: The Medical Termination of Pregnancy (Amendment) Act, 2021.

another barrier. Women may not know where to go or who to ask for help, especially if they come from marginalized backgrounds or face social stigma related to abortion. The stigma surrounding abortion also contributes to a culture of silence and secrecy, making it difficult for women to openly seek the care they need.

Furthermore, gender stereotypes about women's sexual autonomy outside of marriage can create specific barriers for unmarried women seeking abortions. These stereotypes perpetuate the idea that unmarried women have less right to control their reproductive choices, leading to discrimination and denial of services. The fear of prosecution under criminal laws adds to the difficulties in accessing safe abortions. Medical professionals may be hesitant to provide abortion services due to the possibility of legal repercussions, including linking the abortion law (such as the MTP Act) with criminal laws. This fear limits the number of providers and impedes women's access to safe and legal abortion services.

Overall, the combination of legal, practical, social, and cultural barriers creates significant difficulties for individuals seeking safe and legal abortions. These obstacles not only violate women's reproductive autonomy but also endanger their health and lives by forcing them to turn to unsafe and clandestine methods of abortion.

### **THE MEDICAL TERMINATION OF PREGNANCY (AMENDMENT) ACT, 2022**

The Medical Termination of Pregnancy (Amendment) Act, 2022 has undoubtedly brought about a significant liberalization of abortion laws in India. This amendment has been long-awaited and is seen as a progressive step towards women's reproductive rights and empowerment. One of the most significant changes brought about by the amendment is the extension of the gestation period for seeking an abortion. Earlier, a woman could only seek an abortion up to 20 weeks of pregnancy in cases where the pregnancy posed a risk to the woman's life or physical or mental health, or in cases of fetal abnormalities. However, the amendment has increased this gestation period to 24 weeks, allowing more women to access safe and legal abortion services. This extension of the gestation period is particularly crucial as it acknowledges the fact that fetal abnormalities may not always be detectable within the initial 20 weeks. It gives women more time to make informed decisions about their pregnancies and provides them with options in case unforeseen complications arise.

Additionally, the amendment also aims to improve access to abortion services by expanding the number of qualified healthcare professionals authorized to perform abortions. Previously, only registered medical practitioners were allowed to carry out abortions, but now, mid-level healthcare providers, such as nurses and auxiliary nurse midwives, can also perform the procedure. This change is significant as it helps address the shortage of doctors in many parts of the country and ensures that women have access to safe and timely abortion care.

Furthermore, the amendment also focuses on improving the confidentiality of women seeking abortion services. It prohibits the disclosure of a woman's identity without her consent, ensuring that her privacy is protected. This provision helps reduce the stigma associated with abortion and makes it easier for women to access the care they need without fear of judgment

or discrimination. Overall, the Medical Termination of Pregnancy (Amendment) Act, 2022 is a commendable step towards advancing women's reproductive rights in India. It recognizes the importance of providing women with safe and legal abortion services, extends the gestation period for seeking an abortion, expands the pool of qualified healthcare professionals, and protects women's confidentiality. However, it is essential to ensure that these changes are implemented effectively across the country and that women are aware of their rights and the available services.

## **ROLE OF JUDICIARY**

The Indian judiciary has played an active role in liberalizing abortion laws in recent years. The role of the judiciary in India in protecting and expanding women's reproductive rights has been crucial. The judiciary has interpreted and expanded the scope of Article 21 of the Indian Constitution, which guarantees the right to life and personal liberty, to include reproductive rights.

Here are a few key developments:

**Right to terminate unwanted pregnancies:** In the *Suchita Srivastava v. Chandigarh Administration* case in 2009, the Supreme Court held that the right to make reproductive choices is an integral part of the right to personal liberty. The court ruled that women have the right to terminate unwanted pregnancies, especially in cases where the pregnancy poses a threat to their physical or mental health.

**Women's access to contraception and family planning services :** The judiciary has also played a crucial role in addressing issues concerning women's access to contraception and family planning services. In the *State of Himachal Pradesh v. Nikku Ram* case, the Supreme Court held that the government has a constitutional obligation to provide family planning services to women as part of their reproductive rights.

**Reproductive rights of all women irrespective of their socio-economic status:** The judiciary has recognized the reproductive rights of marginalized and vulnerable women. In the *Laxmi Mandal v. Deen Dayal Harinagar Hospital* case, the Delhi High Court ruled that economically weaker sections of society have the right to access free maternal healthcare services, highlighting the state's responsibility to protect the reproductive rights of all women, regardless of their socio-economic status.

**Right to Privacy:** In 2017, the Indian Supreme Court passed a landmark judgment in the case of *Justice K.S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors.* This judgment recognized the right to privacy as a fundamental right under the Indian Constitution. This decision laid down the foundation for subsequent judgments that liberalized abortion laws.

**Expansion of Women's Rights:** In 2019, the Supreme Court recognized the right of reproductive autonomy as an integral part of a woman's right to privacy and personal liberty. The court held in the case of *Meera Santosh Pal & Anr. v. Union of India & Ors.* that women

have the right to make choices regarding their reproductive lives, including decisions related to abortion.

**Decriminalization of Abortion:** In 2020, the Indian Parliament passed the Medical Termination of Pregnancy (Amendment) Act, which aimed to decriminalize abortion and provide greater access to safe and legal abortion services. This amendment increased the gestational limit for abortion from 20 to 24 weeks for specific categories of women, and beyond 24 weeks in cases of substantial fetal abnormalities.

**Accessibility of Abortion:** The judiciary has also emphasized the importance of increasing accessibility to safe abortion services. In the case of Anita Ravindra Pawar v. Union of India & Ors., the Bombay High Court directed the government to expand safe abortion services to ensure accessibility for women in rural areas.

**No distinction between married and unmarried women:** In the X vs The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi Welfare Department, Govt of Delhi and Anr (2022) case, the Supreme Court made significant observations while interpreting the Medical Termination of Pregnancy Act. The court held that women, regardless of their marital status, have the right to choose safe and legal abortions. It emphasized that reproductive autonomy, dignity, and privacy fall within the purview of the right to choose. This ruling eliminated the distinction between married and unmarried women, granting equal rights to all women in making decisions about their reproductive health.<sup>8</sup>

**"Women" is not limited to just cis-women:** The recent ruling by the Supreme Court also recognized that /individuals who identify as women. This further solidified woman's right to reproductive and decisional autonomy, regardless of their marital status.

We can say that the Indian judiciary has been proactive in interpreting constitutional rights and passing judgments that recognize women's reproductive autonomy, expanding the scope of legal abortion, and ensuring greater accessibility to safe abortion services. These developments have played a significant role in liberalizing abortion laws and empowering women to make choices about their reproductive health. No doubt, the judiciary's role in protecting and expanding women's reproductive rights in India has been instrumental in upholding their fundamental rights and promoting gender equality.<sup>9</sup>

The ruling further discussed the issue of teenage pregnancies and the importance of safeguarding the privacy and anonymity of minors seeking abortions. According to the court, healthcare providers are not required to reveal personal information about minors in certain situations. In general, the ruling acknowledges women's reproductive rights and stresses the principle of individual self-governance. It supports the right to reproductive autonomy, a

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<sup>8</sup> *The Gazette of India: The Medical Termination of Pregnancy (Amendment) Act, 2021.*

[https://www.livelaw.in/pdf\\_upload/621-x-v-principal-secretary-health-family-welfare-department-21-july-2022-426996.pdf](https://www.livelaw.in/pdf_upload/621-x-v-principal-secretary-health-family-welfare-department-21-july-2022-426996.pdf)

<sup>9</sup><https://thewire.in/women/six-themes-supreme-court-touched-verdict-right-legal-abortion>

<https://www.livelaw.in/top-stories/teenage-pregnancies-doctor-need-not-disclose-identity-of-minor-girl-seeking-abortion-in-information-given-to-police-supreme-court-210587>



dignified life, equality, and privacy, as outlined in the Medical Termination of Pregnancy Act. Regardless of marital status, the court confirms that every woman has the right to make decisions concerning her own body. Thus, the Supreme Court's observations in these cases reaffirm the significance of women's reproductive rights and emphasize the necessity of a rights-based approach to ensure access to safe and legal abortion services. The ruling also highlights the judiciary's role in protecting and upholding women's rights to reproductive health and autonomy.

## CONCLUSION

As we see in this article which highlights the crucial role of reproductive rights in ensuring the autonomy, dignity, and safety of pregnant persons. It emphasizes that these rights are protected by national laws, international treaties, and consensus documents and guarantee comprehensive physical, mental, and social well-being. The legal situation surrounding abortion in India has undergone changes over the years, starting with the implementation of the Medical Termination of Pregnancy (MTP) Act in 1971, which made abortion lawful under certain circumstances. The judicial system has also played a crucial role in shaping the legal framework by interpreting existing laws. The recent approval of the Medical Termination of Pregnancy (Amendment) Bill, 2021 further enhances the availability of secure and legal abortion services in particular situations. However, challenges such as socio-cultural factors, lack of awareness, healthcare infrastructure, and stigmatization still hinder access to these services. Efforts are being made to address these barriers and promote wider access to safe and legal abortion. The conclusion concludes by emphasizing the importance of adopting a pragmatic approach that balances women's reproductive rights with ethical considerations, shifting from criminalization to liberalization of abortion to ensure a more inclusive and equitable reproductive healthcare system. Undoubtedly, in recent times, the Indian court has been instrumental in safeguarding and advancing the reproductive rights of women. The judiciary has highlighted women's reproductive choice, safety, and access to healthcare services through historic rulings and progressive interpretations of the Constitution. However, challenges remain in ensuring the effective implementation of these rights, and ongoing efforts are necessary to address gender-based discrimination and ensure equal access to reproductive healthcare for all women in India. By adopting a pragmatic approach that balances women's reproductive rights with ethical considerations, it is possible to shift from the criminalization to the liberalization of abortion. This approach recognizes the autonomy and agency of women while addressing societal concerns, ultimately working towards a more inclusive and equitable reproductive healthcare system. The judiciary has played an instrumental role in recognizing reproductive choices of women in India but time will tell how this liberalization of the abortion laws will be affected in the society because as the society changes faster than the law and here the legitimate interest of the unborn child is also to be considered before deciding or reforming any kind of abortion laws.