



# **The Global Response to Abortion – with Special Focus on India’s Medical Termination of Pregnancy Bill**

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## **Authors’ contributions**

*This work was carried out in collaboration among all authors. All authors read and approved the final manuscript.*

## **Article Information**

DOI: 10.9734/JPRI/2021/v33i36A31923

### Editor(s):

(1) Dr. Takashi Ikeno, National Center of Neurology and Psychiatry, Japan.

### Reviewers:

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(3) Carausan Mihaela Victorita, National University of Political Studies and Public Administration, Romania.

Complete Peer review History: <http://www.sdiarticle4.com/review-history/69534>

**Original Research Article**

**Received 02 May 2021**

**Accepted 07 July 2021**

**Published 08 July 2021**

## **ABSTRACT**

The 2020 Amendment Act, of Medical Termination of Pregnancy has reinvigorated the discussion with regards to bodily autonomy and reproductive rights in India. This comes at a juncture of time, where the discussion regarding reproductive rights is an important part of the global socio-political narrative. The aim of this paper is to study the developmental trajectory of reproductive rights by gauging how the right to abortion has fared in various countries across the world by analysing specific legislations, judicial precedents and statistical data. We examine how one may secure the reproductive health rights of a woman better by analysing the two functional methods adopted thus far - either through liberal legislations that guarantee full autonomy to the woman or more restrictive laws that permit abortions only in certain circumstances - a major. The second half of this paper focuses on India, a country whose culture is traditionally perceived to be deeply rooted in orthodoxy and conservatives. The Medical Termination of Pregnancy Act was enacted in 1971, and the 2020 Amendment has garnered acclaim for its more progressive outlook and direction. Even though the amendment has addressed some of the major concerns voiced out by reproductive rights’ activists, there are still a few systemic and practical dogmas that are still pervasive in the reproductive rights

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domain. The paper discusses these prevalent lacunae at play at length and emphasizes on the need for comprehensive and quick solutions. These will contribute to the prevention of unwanted pregnancies while simultaneously reducing the physical and psychological harm that is caused to vulnerable women across the country.

*Keywords: Abortion; bodily autonomy; reproductive rights; fetal rights; amendment; psychological harm.*

## 1. INTRODUCTION

The termination of pregnancy called the abortion is a procedure which has been at the forefront of constant debates for decades. It has been discussed greatly and at length by gender justice advocates, religious institutions, policymakers, politicians and the global medical community. Its use has been documented for centuries, and incidents of women using opium, crocodile dung, pennyroyal tea, sharp tools and many such crude methods to induce abortion have been recorded throughout the world [1]. Studies have revealed that 8% of maternal deaths worldwide currently are due to high-risk abortions which are easily and almost completely avoidable if done through legal and most importantly, safe means [2].

The public opinion about these has, however, differed throughout the years and influenced by the impact of various cultures and social phenomena. In Ancient Rome, abortions were largely permitted without question except in cases where the father wished to keep the baby [3]. Many interpretations of the Bible seem to allude to the fact that the loss of an unborn baby is seen as loss of property, and as long as it is aborted before any movement is noticed, it is acceptable. In most of colonial America, since unmarried sexual activity was frowned upon, an abortion was taboo and due to many reasons including religious pressure and ethical concerns, was outlawed with exceptions of cases in danger.

Although the subject of abortion has gained a place in a multitude of forums in current times, it is still often met with the same regressive mindsets or apathy, and has resulted in stark polarizing opinions. The two sides arguing for and against abortion are the Pro-life, and the Pro-choice, to be discussed below.

### 1.1 Pro -Life and Pro-Choice of Abortion

The pro-life and pro-choice arguments are primarily based on the issue of the right to abortion – involving ethics, religious sentiments,

bodily autonomy and scientific interpretations of unborn life [4]. The pro-life movement has its roots in religious beliefs of a ‘sanctity of life’ which is a concept extending to the unborn foetus. It also cites ethical and moral implications of having an abortion by ending an innocent life before it even begins. They reject arguments in favour of sexual freedom and bodily autonomy as they believe a responsibility arises when individuals engage in sexual activity and if a child is conceived, they are liable for the result of their actions [5].

The pro – choice stand, however, is seen as more individual centric as it advocates for situations where the pregnancy has to be terminated due to a multitude of reasons. This movement values personal autonomy over the unborn life, and since the woman carries the baby, she has the choice to terminate the pregnancy if she so chooses. Women’s activists also vehemently reject the government’s interference into her decisions vis-à-vis her body, which is said to be a slippery slope into greater and possibly oppressive governmental control [6]. The commonly used modern argument is that abortions are never entirely preventable, or cannot be done away by moral or societal pressure, so making them as affordable and safe as possible is the best way out [7].

The principal contention which drives these moral debates is actually based on science – that is at what point can the right to life be accorded to a foetus; or *when does life began?* Historically, this was dependent on a term called ‘quickening’, which meant the time when a mother started feeling the baby’s kicks in her womb [8]. However, with many centuries of medical advancements, we can reasonably confirm that this is not true, as the ‘quickening’ happens at around 16 to 20 weeks, and the baby’s heartbeat can be heard much earlier than this time. The scientific question is the viability of the foetus, i.e., when exactly the foetus can begin to be able to survive outside the womb - has divided opinions among the scientific community [9]. There are many stages when ‘life’ has been

claimed to have begun, ranging from conception to fertilization to the quickening to viability -but as scientists themselves cannot arrive at a conclusion, and the debate has been left to mostly moral or theological grounds. As Pro-lifers claim that is the path towards murder of a life [10]; whereas pro-choice activists claim that a clump of cells without the ability to think or feel pain does not constitute a 'life' therefore negating the claims of murder or taking away right to life [11].

## **1.2 Rights of Foetus v. Mother's Rights**

In the case of foetal rights v. mother's rights, both sides have a strong moral standing, and that has greatly affected the inconclusive nature of the argument. Historically, foetal rights have not been given any special attention in legal discourse, and it is only recently that they have started gaining traction due to strong polarizing views on abortion and a robust societal discourse on the same [12]. Although the argument for providing rights to the foetus is based on real concerns, the pursuit of this can result in far – reaching and harmful complications for the mother, and a dismissive stand regarding her personal beliefs.

## **2. LITERATURE SURVEYS**

In recent years, courts around the world have failed to reach a consensus on this novel issue, and the judicial narratives have often gone in opposite directions.

It has argued that if the extension of legal personhood or fundamental rights is accorded to a foetus, it would result in strict scrutiny of the mother during pregnancy, where any false judgment or error might result in a criminal action suit by the government. This would pave the way for further policing of the body of the pregnant women, infringing on her right to privacy and instilling fear in the mind of any woman considering pregnancy. Cases where home births lead to stillborn births or miscarriages might also result in the mother/midwife being charged with negligence or reckless behaviour. Widely publicized cases in the United States have morphed this hypothetical into reality, where women have been charged for manslaughter in cases where they have suffered car accidents [13] or have simply fallen down the stairs [14] resulting in the death of the foetus.

A deeper analysis shows that legislation which looks into providing rights to the foetus need not

necessarily be in direct conflict with women's rights – but in order to do so, it must be drafted carefully and the letter of the law must reflect that it intends to prosecute only third parties who cause harm to the foetus, and exclude women performing self-abortions or terminating pregnancies through legal means. These must also exclude health care workers and medical professionals performing abortions with the consent of the woman or in medical emergencies where consent might be impossible to acquire [15]. Laws which allow for the inclusion of foetus as the potential victims in cases of homicide by a third party, injury or assault, wrongful death etc. should adhere to the abovementioned guidelines and uphold the basic constitutional rights of pregnant women simultaneously [16].

## **2.1 The Global Response to Abortion**

Even though the moral debate surrounding abortion is still alive and well, the illegal or backend abortions by relaxing their laws to allow late terminations of pregnancy. This has resulted in a rise in maternal survival, which is affected due to a drop-in high-risk abortions and tendency towards safe pregnancy termination procedures [17]. Numerous studies have revealed that even though the percentage of abortions in countries with restrictive laws and liberal laws is nearly the same (34% and 37%, respectively), countries with more liberal laws show a 90% rate of safe and complication-free abortions. This number is disastrously low at 25% in countries which have placed a complete ban on abortions [18].

There are only 26 countries around the world which have effectuated a complete ban on abortions. Singapore, with the most liberal laws on abortion has put into place legislations where as long as a certified medical practitioner performs the abortion in a government approved clinic, the woman has the complete right to choose if she wants to terminate her pregnancy. The only limitations placed are after the gestational period goes beyond 24 weeks (Sec. 4 of the Termination of Pregnancy Act of Singapore), when abortions have to be performed only if the mother's life or health is in grievous danger [19].

Canada, a country which has a long history of judicial back – and – forth regarding abortion passed a judgment in 1988 which stated that denying abortion rights to women is unconstitutional and violates the rights. It is now a member of the small group of countries which

does not have a law restricting abortion, which is treated as any other medical procedure and governed by regulations. An important figure in its struggle for reproductive rights is Dr. Henry Morgentaler, who flouted its anti-abortion laws by opening an abortion clinic and fighting for his right to the same for almost 30 years – the fight which resulted in the Supreme Court relaxing the restrictive laws [20].

Since 2013, abortions in Ireland were only allowed to be conducted if the life of the mother was at risk due to medical complications, or there existed a credible threat of suicide. Any transgression of this law, and the maximum penalty could put the perpetrator behind bars for 14 years. In 2016, the Irish Department of Health released a report saying that the number of unsafe abortions conducted in the country were only a meager 25 [21], but since a 1992 amendment allows the women wishing to access abortion services to travel to other countries for the same, the number of Irish women who actually got an abortion irrespective of location was obviously not reflected in the report. A huge step for a change in these laws came in the form of a referendum in 2017 – where the Irish people were asked to vote on a bill, the ban on abortion – which resulted in a 64.51% majority in the favor of ending the ban. This decision has allowed the government to introduce legislation allowing termination of pregnancy in the first 12 weeks of pregnancy, and between 12 and 24 weeks as exceptional circumstances [22].

A very well-known case concerning reproductive rights a turning point in America's history of women's health. An extension is fundamental right in its Constitution's Fourteenth Amendment. It was decided that the state's interest in the woman's or her foetus' health would only come into question after the fetus was capable of 'meaningful life outside the womb' – held to be after the first trimester. This has allowed the state to put restrictions on abortions conducted after the first trimester, and women the right to undergo safe procedures to terminate their pregnancies before the same period. In developing countries such as Bangladesh, a watertight legislation on abortion rights is the need of the hour. A country where sex work, sexual assaults, marital rape and child marriages affect a large portion of the population, laws permitting termination of unwanted pregnancies are absolutely imperative. However, the country has yet to put in place a decisive legislation providing the same. Abortions are only permitted

in Bangladesh if the abortion is performed by the mother herself in case of danger in mother's life; she is subject to penalties listed under Section 312 of the Penal Code.

## **2.2 Abortion in India**

India, being a country with strong religious and moral influence over social behavior and practices, has always considered induced abortion to be a sin and a social taboo. Ideas of virginal purity before marriage, condemnation of sexual deviancy and traditional gender roles are held as the cultural standard, and women who seek out abortion for any reason sometimes including medical, are shunned and even disowned.

Because of its large population, India has a higher number of at-risk demographics which can be affected by lack of proper reproductive health legislation became a fairly progressive abortion measure and a part of the Indian Penal Code.

The judicial precedents in India with respect to abortion cases have largely been women-centric, and have valued the choice of the women in consenting for an abortion over the State, spouse [8] or relatives. Many cases with women who are incarcerated [9], mentally ill, of legal age have been ruled in favor of the woman, with her choice being taken into high consideration. They have maintained that a preventable maternal death is a violation of Act 21 and a failure of the State to protect its citizens and provide them with safe access to medical help. The courts have also paid great attention to the prevalence of sex-selective abortions in India, ordering a better implementation of the Pre-conception Pre-Natal Diagnostic Techniques Act.

## **2.3 Laws in Favour of Woman**

The change of law in favor of women will take up years to be framed as per the legal protocols. When the need arises the requirement of legal laws comes into light where the lawyers were given prominent role for the need for framing of constitution. Parliamentarians, health professionals, legal experts, women's groups and organizations, human rights groups, family planning supporters—and above all, women themselves are the main persons who acts as a key to successful law reform in spite of a strong opposition. Those unable to contemplate no law at all must confront the fact that each legal

ground for abortion may be interpreted liberally or narrowly, and thereby implemented differently in different settings, or may not be implemented at all. The challenge is to define which abortions should remain criminal and what the punishment should be. Even if only some grounds would be considered acceptable, the question of who decides and on what basis remains when reforming existing law.

### **3. METHODOLOGIES**

#### **3.1 The Medical Termination of Pregnancy Bill, 1971 and the 2020 Amendment**

By 1969, the need for a comprehensive law on abortion was felt nationwide. Due to doctors refusing to perform abortions because of social stigma or fear of the law, and the number of unsafe abortions being performed by quacks across the country [10], the demand for such legislation was finally realized. The Medical Termination of Pregnancy Act of 1971 was passed, with provisions considered to be fairly progressive for the time.

It allowed with the approval of one Act detail that pregnancies caused allegedly due to rape, or as a result of failure of any contraceptive device or method will constitute a 'grave injury to the mental health of the pregnant woman'. However, it is important to note that these provisions were subject to relaxations in certain cases, where the Medical Board approved the abortion beyond 20 weeks citing fetal abnormalities [11], the age of the victim or any such factors which might cause great harm to the mother or the child [12].

This Act, however impressive, still lacked a proper approach to reproductive health legislation and failed to completely protect the women's bodily autonomy or agency as it aimed to. The text of the Act focuses mostly on protection of medical practitioners from criminal action, placing great emphasis on the logistics of performing abortions which will not hold them guilty of any offence, sidelining their own body is the right to woman and her life choices. This is also evidenced by the fact that the Act basically places the decision on whether to go ahead with the abortion with the medical practitioner, and not on demand by the pregnant woman.

The ultimate decision, therefore, rests on a party other than the concerned woman – with the discretion of ignoring her choice on the basis of

prima facie medical grounds. Additionally, the clause allowing failure of contraceptive device to be a valid cause for abortion only applied to a 'married woman and her husband', and ignored non-marital [13] relationships.

#### **3.2 The MTP Bill – 2020 Amendment**

A 2017 study by Reuters revealed that 25% of rape victims in India were between the ages of 12 to 18, out of the 33,000 reported cases; and 50% between the ages of 18 and 30 [14]. These statistics indicate that the need for safe and legal abortions in India is absolutely necessary and must be effectively supported and safeguarded by the State. The low conviction rate of rapists or sexual offenders also indicates that rape victims are at great danger after recourse to the court from their perpetrators; and measures taken by them to alleviate any more mental harm are completely justifiable.

The 2020 Amendment addresses a lot of concerns that came up throughout the years after the Act came into being. It increases the gestational limit to 20 weeks for a pregnancy which can be terminated by the approval of one medical practitioner, which was formerly 12 weeks. Furthermore, it also increases the next slot period to 24 weeks – formerly 20 weeks – within which an abortion is necessary to be performed by the opinion of two medical practitioners. However, this latter provision is restricted only for the use of women who fall into the vulnerable category – which includes mentally unfit, differently abled, minors, etc. Another provision details the removal of the upper gestational limit altogether for cases where the foetus might suffer from any abnormalities, for which the approval has to be granted by a Medical Board, to be constituted according to prescribed Rules.

The Amendment also aims to benefit women in regards to reproductive legislation on 'eugenic, social, humanitarian and therapeutic grounds', by making the process of getting an abortion safer, easier and legal. It guarantees confidentiality for the woman to honour her privacy for the medical procedure, and her personal information cannot be revealed unless authorized by the law. Furthermore, in pursuit of inclusivity, it also modifies the clause of contraceptive failure which allows for the same to be cited as a reason for termination of pregnancy by 'a married woman and her husband' to 'a woman and her partner'. This is a step towards changing the country's

laws to respect and acknowledge a woman's sexual agency as her own prerogative, not to be regulated by the government.

## 4. RESULTS AND DISCUSSION

### 4.1 Lacunae in the Act

The amendment has addressed all the initial and basic concerns that rose up after the 1971 Act, such as the inclusion of unmarried women, extension of gestational limit, etc. However, as a country, if we claim to fully secure and safeguard the rights of our citizens, we must always aim towards the best possible welfare laws. A quick study of the criticisms that still sustain after the 2020 Amendment proves there is much more progress still to be made. The lacuna in the bill that still exists is as follows:

The recourse to Medical Boards is a double-edged sword. On one hand, it allows the court to make a safe and reliable consultation with a group of experienced medical professionals in order to make a fully informed and medically sound decision. However, a Medical Board is restricted to its knowledge of medicine and science while making a judgment, and cannot be expected to take other social and personal considerations in mind. In the *Niketa Mehta* case [15], the foetus was in serious danger of being born with a congenital heart defect and the mother had requested for permission to abort the foetus at 26 weeks. The decision of the court to refuse permission for abortion was on the basis of recommendation by a Medical Board on the grounds that abortion might cause pain to the foetus and pose a risk to the mother's life. This decision was clearly given on medical grounds, and the court chose to rule against the mother's choice of not wanting to give birth to a severely disabled child due to social and financial considerations. The mother suffered a miscarriage after the court case.

The Bill says that the upper limit for termination of pregnancy is increased from 20 weeks up to 24 weeks. However, from S. 2(b), this provision will only be extended to certain categories of women; limited to victims of incest, differently abled, minors and rape survivors. This will not include cases where termination is necessary due to potential foetal abnormalities, which can be detected even after the 20-week limit. A Bill passed in 2020 with supposed consideration of modern technology cannot ignore such a fact, and is therefore unreasonable. This also

completely ignores cases where a woman would require an on-demand abortion, where neither a medical need nor mental health is concerned. This only reinforces the patriarchal ignorance that our courts and lawmakers have held, refusing to acknowledge that women can simply not choose to go forward with a pregnancy for personal reasons [15].

Clause 5A (1) of the Act is a welcome step for securing the privacy of woman seeking abortions, but leaves too much for interpretation and potentially, exploitation. The clause states that the details and particulars of women receiving abortion treatment are not to be disclosed by the medical professionals providing the same, except to officials authorized by law. This clause is vague and ambiguous, especially in the context of the POCSO Act – which has provisions making it compulsory for any person who has knowledge of an occurrence of sexual assault to report the same. Mandatory reporting in this sense clearly clashes with the privacy provision, and cases where a minor woman who has been raped approaches a doctor for an abortion would compel the latter to report the sexual crime to the authorities – which she may not wish to do.

The act has also failed to address many concerns regarding the exploitation of women, often unmarried and young, by the medical professionals performing such abortions. Since the most commonly used method of abortion in the country is MMA (Medical Methods of Abortion), which is generally administered in the first few months of pregnancy, and is the relatively cheaper and easier option. Many news reports [16] have indicated towards a rampant misuse of medical discretion committed by the doctors who are approached for an abortion, which enables them to overcharge the women for the two pills – which are to be inserted orally and vaginally. The consultation with the doctors and the provision of the medicines - *Misoprostol* and *Mifepristone* [17] [Ceiling price: Rs. 10.03 and Ceiling Price: Rs. 379.70 respectively (NPPA, Department of Pharmaceuticals)] - can cost the woman anywhere from Rs. 1000 to Rs. 10,000 [17]; with the cost often times going without question due to fear of non-service or helplessness on the part of the woman. It is very easy for the doctors in these situations to claim that the costs are for the consultation for the abortion, not solely for the provision of the pills.

After pre-natal diagnosis became a widely accessible and common medical procedure, sex

selective abortions intending to avoid the birth of a girl child became a widespread issue in India. To combat the spread of this practice, the Act of 1994 in the Pre-conception and Pre-natal were enacted. A practical issue resulting from the confusion regarding these two Acts is the refusal of doctors to perform an abortion on patients after the completion of 4 weeks of pregnancy, (as this is the ceiling after which sex selective abortions commonly take place) fearing prosecution due to the provisions of PCPNDT Act. The smart phones using android application with new technologies used to monitor the patient's health conditions made possibly easy to handle and reduce the work of doctors in spite of visiting the hospital [20].

India suffers from many social and systemic structures that prevent even the most welfare – oriented laws from making a mark; due to misinformation, lack of legal knowledge, reduced access to services due to logistical and location restrictions, and social stigmas to name a few. For example, even though the Supreme Court in 2017 upheld the Punjab and Haryana High Court's 2011 ruling that a husband's consent is not required for a woman to terminate her pregnancy [18], the incidences of doctors refusing to perform abortions without the family's or spouse's permission are far too common. Similarly, the provision of medical boards to assess the legitimacy of the abortion request is good on paper, but will result in many pregnant women residing in rural areas having to travel far distances to the state boards in order to get a decision, or even going forward with the pregnancies despite their needs due to financial or time constraints. The high concentration of the abortion centres only in urban or semi urban areas is also a major issue, resulting in disproportionate access to women in rural villages and towns [19]. The oft encountered bias within the Medical Boards or medical community in general also proves to be a hurdle in a country like India, where the mental health of the woman is disregarded in favour of medical opinion or prejudice. The medical professionals in these cases are also often not trained to correctly discern the patient's mental state, and the clause which permits them to determine whether the woman will face significant mental trauma on the non – provision of an abortion leaves a wide gap – for exploitation, ambiguity and disappointment.

Policy recommendations made by the IPAS Development Foundation in 2017 highlight a potentially damaging obstacle within the system

of abortion healthcare in India. A report developed by a panel of experts facilitated by the Foundation has suggested that the qualifiers required to lawfully enable MBBS Doctors to conduct abortions are out-dated, over stringent and impossible to fulfil in the current scenario (for e.g., 'House-jobs'). It is leading to a reduced number of healthcare professions being able to safely conduct abortions. The addressed of this issue, which has cropped up in the last decade [21] will lead to a wider base of medical professionals being able to perform abortion services, leading to a broader percentage of women getting access to the same across the country. A recent case in Colombia saw a continuation of the status quo as the national court refused to relax its strict conditional permissions on abortion. Even in the United States, where the historic *Roe v. Wade* has staunch and widespread support, there are still conservative states trying to place restrictions on abortion. The majority cases which can mean disastrous consequences for the nation's future in reproductive rights legislation is about to be worried.

However, there have been steps taken in certain countries towards the relaxation of their restrictive laws as well, such as New Zealand which has decriminalised abortion in early 2020. Argentina, which also has strict abortion laws, has found support for the pro – abortion movement from the president Alberto Fernandez, which might lead to a change in the same.

## **5. CONCLUSION**

The right to abortion is still a hotly debated topic across the socio-political sphere, and there is still a lot of progress to be done in the pursuit of safe and accessible reproductive rights for women in the world. Broadly progressive laws being implemented still don't guarantee a robust and functional system – due to medical misuse, corruption, social stigma and various other factors affecting women from actually accessing the services provided. Even after the MTP Act has significantly eased the path towards safe and accessible abortion services in India, as of 2015 there were still 78% of abortions which were conducted outside a health/medical facility and did not qualify as completely lawful [22].

However, many policy recommendations have been made, addressing the Act's obsolete provisions in the face of novel medical technologies, practical accessibility of abortions

and general betterment of the law – showing that further progress is just around the corner, and that the country's populace is willing to fight for comprehensive laws for the improvement of women's lives.

Furthermore, across the world conservative and pro – life activists are still attempting to roll back the judicial and legislative decisions which have accorded comprehensive reproductive rights over the years. Countries are still grappling with state, county and national level tug of wars on abortion rights which are limiting and relaxing these laws.

### CONSENT

It is not applicable.

### ETHICAL APPROVAL

It is not applicable.

### ACKNOWLEDGMENT

The author wants to acknowledge Symbiosis Law School for its support.

### COMPETING INTERESTS

Authors have declared that no competing interests exist.

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