**LEGALIZATION OF ABORTION: LEGAL AND MORAL ASPECTS**

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# Abstract

The debate and discrepancies around the social and legal aspect of abortion has been in standing practice since time immemorial. Not only the Indian society but also on global parameters, different countries following different; traditions, customs and practices have to put up a great fight to curb it against the existing moral and ethical aspect. Tackling the subject matter of abortion not only calls for legal but also social advancements from the society shedding the orthodoxic mindset. The present paper transudes in discussing how the laws governing abortion, particularly the Medical Termination of Pregnancy Act, 1971, being a legislation ahead of its time crippled to dire needs of amendment in present era. It further elaborates on matters of how historically, the moral stigmas regarding abortion continues to prevail in a developing society and how the laws governing abortion need an active feminist vocabulary. The article ends on the note of drawing analytical insights on the proposed amendment bill and how it acts as a knight in shining armour. The article draws certain loopholes that continue to exist regardless of the acknowledged and proposed advancements, which conclusively ends on the note of dual advancement of socio-legal aspect in regards to abortion by actually professing to achieve the intended objective.

**KEYWORDS: -** Abortion, MTP Act, Social Offense, Moral Wrong, Feminist Vocabulary

# Brief About the Author

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# Introduction to Nuances of Abortion

Despite the legislative’s efforts in progressing towards recognition of abortion laws in India, the women till date face shame, disgust, guilt and unprofessional personnel’sengagement whilst undergoing the process of abortion. Aborting a foetus is often considered to be brining a questionable character assassination upon a woman overlooking the medical and health concerns of the former.

Women and their right to determine their sexuality, fertility and reproduction are considerations that have seldom, if ever, been taken into account in the formation of policies related to abortion.[[1]](#footnote-2)Although, abortion as a course is a matter of choice and right,which the women possess, it is seldom that this right gets called as a sin for the transgression of mortality and needs judicial intervention for rightfully claiming what already prevails.The fulcrum of abortion not only exists as a medicinal matter but transgresses into the ethical, legal and also moral aspects of which seldom the women get restricted from availing such services. Generally, if we look at traditional arguments for and against abortion, we find legal and religious arguments guiding each respectively.[[2]](#footnote-3)

# Historical Prevalence of Abortion Laws

After nearly 50 years of prevalence of the Medical Termination of Pregnancies (MTP) Act, 1971[[3]](#footnote-4), a little practical change has been so induced to carry out abortions using the right tools, providing the right facilities and being undertaken by professional medical practitioners.

The Act, allows a woman to legally carry out abortion in case when the undergoing pregnancy conveys risk of posing bodily disfigurement, contraception of certain failure of organs endangering both physical and mental health of the mother and her foetus. Although the present legislation is made applicable to termination of pregnancies by married women, there still prevails an ambiguity for the process being undertaken by unmarried women, to which the rape victims form a more likely exception.

Historically, the act of abortion was considered to be an offense under Indian Penal Code (IPC), 1860 and Code of Civil Procedure 1898, having their respective origins in lieu with the British Offences against the Person Act, 1861[[4]](#footnote-5). As under section 312 of the IPC, both the person inducing the pregnant women to undergo miscarriage or the women herself wanting to terminate the pregnancy, are liable to criminal prosecution and facing imprisonment for every such act done with an ill intention of miscarrying a foetus.[[5]](#footnote-6)

However, it was only in the year 1964, that the Ministry of Health and Family Planning via their Central Family Planning Board had recommended the Ministry to constitute a committee for the legalization of abortion in India, keeping the global standards and statutes in consideration. Subsequently, the committed was formed with the appointment of Shantilal Shah chairing committee members from various Indian public and private agencies. Herein, the committees first task was to determine and convince the legislators on whether there was a need for abortion laws to exist, as an exception to the already established laws on miscarriage.

To this, the committee carried out a review of socio-cultural, medical and legal facets which formed potential subject matters on recommended legislation, along with a lengthy analysis of vast statistical data predominant at that time, subsequent to which the committee published its report on 30th of December 1966[[6]](#footnote-7) and soon upon receiving an affirmative response, introduced the Medical Termination of Pregnancies Act was passed in 1971 and the Medical Termination of Pregnancies Rules and Regulations framed in 1975.

However, even after the introduction of the enactment, the Act does not supersede the penal provision so existing in the IPC and continues to exist in harmony with the prevalence of miscarriage of a foetus as a punishable offence.

## Need of Inducing Abortion Laws

The MTP Act, when introduced by the committee was considered much ahead of its time by the drafters and the critics however, it was the need of the dawn when a greater number of abortions were undertaken by medications done outside the health facilities with inadequate; experience, understanding and equipment’s than those performed by trained personnel’s.

The committee considered this stratum and determined how there were two broad classifications of abortion which were the- (i) Medicinal Abortion and (ii) Surgical Abortion. The former is when a pregnancy is ended by consumption of abortion pills and medicinal drugs which might or might not be consumed upon a practitioner’s prescription, whereas the latter suggests a procedure of terminating the pregnancy by surgical operation that in all cases has to be undertaken by a trained medical practitioner.

Considering this, the MTP Act potentially focusses on situations where a pregnancy may be aborted on condition of foetal abnormalities and to delay unanticipated and unwanted pregnancies which also include the rape victims.

As per the estimates of Registrar General of India in 1976, for every 1,00,000 live births, 407 mothers died every year due to pregnancy related causes[[7]](#footnote-8) of which one of the major concerned reason was that of unsafe abortions inducing high maternal mortality rates. Additionally, the Ministry of Health and Family Welfare, in 1996- ‘97 recorded about 4.6 lakh MTPs which were performed in India, against which, an estimated 16.7 million abortions per year are performed in other than registered and government recognised institutions, often by untrained persons in unhygienic conditions.[[8]](#footnote-9)

With the introduction of the legislation in 1971, in the earlier 1980s era, the recorded number of abortions projected only a marginal statistical record of 8-10% in the number of approved abortion facilities.[[9]](#footnote-10)Compared to this, in the year 2015-2016, a statistical figure of an estimated 15.6 million abortions had being undertaken, with a rate of 47 abortions being performed on every 1000 women in the age category of 15-49 years of age.[[10]](#footnote-11)

As per the study of abortions undertaken by Lancet Globe Health, published in the year 2018,[[11]](#footnote-12)22% of these abortions were carried out righteously with the consultation of trained medical practitioners in safe conditions whilst observing due quality of care and precaution, whereas a large chunk of 73% reported abortions were medicinal in nature, meaning they had been terminated with the ingestion of contraceptive pills being part of medicinal drugs and a small yet significantly upsetting 5% of reported estimated abortions although being carried out by medical practitioners were so observed with inadequate health facilities and required amount of expertise precision ultimately constituting part of unsafe surgical abortions.

# Legal and Moral Aspect: A matter of Perspective

The debate around legal and moral aspects of abortion has been around since years, from the medieval era, when in India the act was prominently in practice with the coexistence of torture being borne upon the pregnant mothers on pretext of dowry in form of domestic abuse, provided at those times the act was induced by an independent person and not the mother herself in most cases; the act was also in existence when before the wave of liberalization of economies it was considered to be a criminal wrong to terminate a life of a newly germinating human species within the embryo of the mother, induced either by an independent person or by the mother herself, and today also the act stands to be of debatable nature when after 50 years of decriminalizing abortion, the country still faces significantly problems because of meagre issues and resources.

Going by a simple definition to understand abortion as per the liberal’s perspective, it suggests that the process of abortion is when a woman exercises her right of determining whether she chooses to reproduction and birth a life or not. Differing to this thought is the definition of conservative section of the society which believe that abortion is an act of committing homicide.[[12]](#footnote-13)

Herein, the main focal argument slips from the hands of both the intemperate as the former couldn’t justify if it is morally right to abort a foetus which shall gradually blossom to be recognised as a human offspring and the latter couldn’t justify if termination of pregnancy at its earliest stage which exists in form of a unicellular zygote in a mother’s womb has life enough to be refereed to as a human person.

With changing societies and evolution of human being in all aspects of existence, there are prominent changes in the shift of perspective in regards to abortion that in some circumstances stands to favour the moral aspect of the notion and in other circumstances stands to favour the legal facet of the same.

The legal facet of the debate always undergoes answering one point which is, under what circumstances should the state intervene in an individual’s freedom,[[13]](#footnote-14) which in normal pretext is so done when the state has a duty to abide the statute to serve a common good of the society. Elaboratively, the other answering so demanded is, until what limits can a state go on to serve a common good of saving a life to be born compared to the fundamental rights of privacy and choice pre-exiting with the pregnant mother.

The ethical feature of the discussion experiences no such standard as it simply requests its similarity with the ideal great of either the mother or that of the germinating human soul. Rather, the advocates on moralities of abortion claims the foetus deserves the same standing right as that given to any other human being.[[14]](#footnote-15) In such scenarios the value of foetus’s life, is then considered to outweigh easily any respect for the choice of the bearer and the same exultantly gets compared to the act of committing a murder.

The legalization of abortion laws, specifically the, Medical Termination of Pregnancies Act, 1971 can reasonably be justified on the ground that the existence of abortion and termination of pregnancy will prevail as an act regardless of it being or not being regulated by the law. This, puts a pressure on the State to rightfully regulate it in order to curb the difficulties being faced by the mother on pretence of self-abolition which is subject to the illegality of existing laws, the medical practitioners or independent persons on facing abetment to murder for facilitating in aborting a child although when the foetus suffers abnormalities or when there prevail unwanted pregnancies.

## Abortion Yet A Moral Wrong in Progressive Society

The concept of ‘personhood’ is pivotal to determining the moral standing of the foetus.[[15]](#footnote-16) The way in which this idea is characterized impacts the manner by which the contention between the privileges of the mother and of the foetus are found with regards to termination of pregnancies.

The liberal strata of society consider personhood as a social category instead of it being recognised in an isolated state. To be a morally significant category, personhood must involve personality as well as biological integrity.[[16]](#footnote-17)Abortion causes enthusiastic strife for some women and their families, particularly when convoyed with suppression by the state. In any case, it can't be viewed as anything short of an unalienable ideal for pregnant mothers as they have a right not only over their bodies but also on its reproduction which can't be objectified, as they continue to do, either by their families or by the State. This is more relevant in this country where childbearing is modified by social mores; and women’s right to decide when and if they want to bear children remains a theoretical rather than a practical right.[[17]](#footnote-18)

### A Feministic Vocabulary

Injustice does not flow directly from recognizing differences rather injustice results when those differences are transformed into social and economic deprivation.[[18]](#footnote-19) Even in a country like India when constant steps by the judiciary and the legislators are being taken in profusely understanding the problems faced by women, the society fails to acknowledge little good in implementing and taking a stride towards developmental goals.

Those who oppose abortion claim to have religion, tradition and law on their side, however, if abortion is a key to women's reproductive health, it is necessary to talk about the ethics of abortion from a women-centred perspective.[[19]](#footnote-20)

The decision of women aborting a foetus is personal and sacred to the understanding and consideration of diversified subject matter. Today’s era has to come in terms in understanding the difference between a wanted and an unwanted pregnancy, an anticipated and an unanticipated pregnancy. It is not only about the black and white thumb rules of facing financial or the emotional pressure due to which such decisions are being taken, however, all the greys within these extremes needs to be so embraced and acknowledged, whilst respecting a women’s decision.

Unanticipated motherhood is never ethical in nature, even though it is often accepted to be called so under the garb of sacrifice from the women’s end in accepting her fate as they are still looked down with the belief that motherhood should be welcomed and never denied. A larger stratum of society often considers the giving of life through pregnancy a blessing which should be retained regardless of any contraception’s being consumed.

Still, people anticipating to undergo the process of abortion are disgraced, for the societies concern still lies in the protection of foetus than that of a pregnant woman, regardless of her being in this situation against her wish and will. More frequently than ever, they make the idea of delivering a child so holy, that they downgrade the one who conveys it, regarding her as a simple vessel or container.[[20]](#footnote-21)

### Social Offences and Stigmas Yet a Prevalence

The MTP Act, when introduced although was considered ahead of its time, however, with the changing societies and evolving mind-sets of the people, the legislation couldn’t pace up with the developments affirmatively. Regardless of this facet, the legislation since its introduction although has facilitated in reducing a large share of social, moral and ethical stigmas that relate to the subject of abortion, such as that of son preference, the society spots little difference in the same matter when compared with the early pre-independence era.

A woman would have the right to be relieved of carrying the foetus, however, she would not have the right to the death of the foetus.[[21]](#footnote-22)

Progression of any society and its economy depends on its population which consist of not only male, but also female population and people identifying as the LGBTQIA community. However, ever after 73 years of Independence, the people preferring a male child over a female foetus outnumbers the one’s advocating for the support of the latter.

The sole reason behind sex selection appears that of the male child having deep-rooted favouring customs in practice, such as that of inheritance rights that favoured the male child way more than that of rightly considering the rights of the female child, or the practice of last rites of a person being performed by a male member over the female family members.

There are no human societies in which the women dominate men, instead, societies in which men dominate women are so common that male dominance has been considered a human universal.[[22]](#footnote-23)Not only the social aspect but also from the focal view of economic aspect, the male dominance and prevalence is rightly so found.

Males, are more valued because of their long-standing dominance in economic, political and social dimensions.Because of this long standing orthodoxic mindset, the needs of married, single, widowed or separated women are often overlooked and neglected.[[23]](#footnote-24)

Evidence suggests that female foeticide not only was the result of son preference[[24]](#footnote-25), before the enactment of MTP but also this practice continues to be in existence till date.Even while the practice of discrimination in sexual preferences of the foetus has been curbed in India since the introduction of the legislation, The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, the practice of female foeticide continues as a heinous act against the mother and the germinating human soul.

The Act provides for prohibition of sex-selection, not only before the conception but also after the conception of the foetus, and it further transudes in regulation of prenatal diagnostic techniques limited to a scope of detecting genetic abnormalities, metabolic disorders, chromosomal abnormalities and congenital malformations, prohibiting the sex determination of foetus.[[25]](#footnote-26)Post the introduction of Legislation, the amendments were so inculcated in the year 2003 yet the traces of the heinous act continues in witness.

# Legalities of the Medical Termination of Pregnancies Act, 1971

The Medical Termination of Pregnancies Act, a legislation, considered ahead of its time, today stands in dire need of amendment. Since, voluntary abortion continues to be a criminal practice, the MTP Act forms an exception for termination of pregnancy by medical and health practitioners.[[26]](#footnote-27)

As per the Medical Termination of Pregnancy Rules introduced in 2003, a pregnancy can be terminated only by a registered medical practitioner who either has adequate experience or training as a gynaecologist or as an obstetrics.[[27]](#footnote-28)Such termination of pregnancies shall be done under the consultation of single medical practitioner’s opinion formed in good faith of its termination in cases when the act is to be performed within twelve weeks of time frame,[[28]](#footnote-29) whereas in cases extending the time frame of 12 weeks but within 20 weeks shall be performed in consultation with two medical practitioner’s opinion formed in good faith.[[29]](#footnote-30)

Here, the opinion of registered medical practitioners is found to be in good faith only-

1. When the continuance of pregnancy might involve a threat posed to the life of the pregnant woman by way of suffering a physical or mental agony by herself,[[30]](#footnote-31) or
2. When there is a substantial risk involved for the child to suffer any physical or metal abnormalities such as (s)he cripples to be seriously handicapped.[[31]](#footnote-32)

This legislation focuses on pregnant married woman and also on woman whose pregnancies are caused by forceful sexual intercourse or rape, the anguish caused by such pregnancy is also presumed to constitute a grave injury to the mental health of the pregnant woman within the first explanation of the reasons for good faith of medical termination.

Yet, even after the legislation, the courts faced huge number of petitions to consider termination of pregnancies beyond the regulated period of twenty weeks, as in many circumstances the pleading arguments proved that the abnormalities may get formed after twenty weeks of pregnancy which shall leave a bodily disfigurement or mental imbalance on the foetus.

## Medical Termination of Pregnancy over Abortion: The Play of Words

Interestingly, the enactment of MTP although exists to ensure safe abortion and eliminates voluntary abortion, the legislation doesnot refer to the terminology of ‘*abortion’*, instead the jargon used is ‘*medical termination of pregnancies*’. This is so done to safeguard the medical practitioners from being prosecuted for the pregnancies so terminated as the legislation has an underlying key objective of making the process of abortion legally available to the woman not as a matter of choice but as a matter of granting safe abortions in case of foetal abnormalities and mental or physical suffered either by the mothers or their off-springs.

## Medical Termination of Pregnancies (Amendment) Act, 2020: A Ray of Hope

The Union Cabinet, chaired by Prime Minister Shri Narendra Modi approved an Amendment Act in the MTP Laws on 29th of January, 2020.[[32]](#footnote-33) With this, the Medical Termination of Pregnancy (Amendment) Bill, 2020 was introduced in the Lok Sabha on 2nd March 2020 and was subsequently passed on 17th of March, 2020. Currently, the bill requires further approval from the Parliament in order to come into being.

Termination of pregnancies are subject which are time sensitive in its nature of being and a profuse postponement of the same often leads to complications subject to the suffering of the pregnant women and in most cases the suffering being passed on to the foetus as well.

The Bill with its introduction proposes to increase the time period for termination of pregnancies from twelve weeks of existing time frame to twenty weeks of elated time frame upon the good belief of sole registered medical practitioner. This would not only be benefitted by the married woman but also would target and benefit unmarried women, whose abortion rights remain upon unsettled decision of the court.

Not only this but also, the termination of pregnancies in special cases would no longer remain berated to a time frame of twenty weeks, but would be increased to a time frame of twenty-four weeks upon the good belief of two registered medical practitioners or the Medical Board. Although, the bill proposes this benefit, it has left the interpretation of such special cases upon the rules, yet to be notified, by the Central Government. The Bill also, advocates on introducing a Medical Board, to be constituted in every State and Union Territory whose decision and expertise should be sought upon prolonged termination of pregnancy until twenty-four weeks.

Considering the proposal of the amendment bill, the objective of achieving safe abortionby eliminating some of the existing loopholes, the drafter of the legislation considered the advancement of medical technology for safe abortion and determined how the scope for increasing upper gestational limit for terminating pregnancies especially for vulnerable women and for pregnancies with substantial foetal anomalies detected late in pregnancycan be so tackled by a legal framework.[[33]](#footnote-34)

### Addressing the Cry of Privacy

The Bill, progressively tackles the most crucial loophole which is that of protection of privacy of the woman, wherein no medical practitioner shall reveal the particulars of a woman undergoing termination of pregnancy, unless to a person authorised by law.

### Prospective Loopholes

Although, the ambiguity around the provision in MTP Act for un-married women is settled in the new amendment bill, it fails to identify the right of abortion for transgenders who identify as woman and can bear a foetus. Moreover, the act also fails to acknowledge the suffering of the rape victims as for them the process of abortion still needs to be undergoing by way of filing writ petitions in the court of law.

Moreover, the benefit of consulting two registered medical practitioners for the termination of pregnancy in second trimester is rural areas, particularly stands as a challenge as not adequate and safe practices[[34]](#footnote-35) are made available yet in many parts of the country which resort them to undergo unsafe abortion in inadequate medical facilities or by quacks.

# Conclusion

The object of the Medical Termination of Pregnancy Act, to ensure safe abortion practices in India has achieved many terminations of pregnancies, either with the judicial intervention or without its introspection. The saga of legal aspect of abortion has been progressively proposed to being tackled by the Amendment Bill. The proposed Bill is viewed as a step towards safety and well-being of women which will enlarge the ambit and access of women to safe and legal abortion without compromising on safety and quality of care. The proposal will also ensure dignity, autonomy, confidentiality and justice for women who need to terminate pregnancy.

However, the social aspect of the abortion, the stigma, shame and suffering that a woman is made to go through calls for change of mindset in the society. The advances of both the legal and moral aspect of the abortion comes down to the boiling point of not only actively professing change of laws but also ensuring the said object is achieved the way it is intended to.

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