

## ABORTION LAWS : A PARADIGM SHIFT TOWARDS THE APPROACH FROM PRO-LIFE TO PRO-CHOICE WITH RESPECT TO MEDICAL TERMINATION (AMENDMENT) BILL 2020

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### ABSTRACT

*The much needed Medical termination of Pregnancy (Amendment) Bill, 2020 has been passed in the Lok Sabha and awaiting a nod from Rajya Sabha. The Amendment is the change which was called for with respect to the reproductive rights of a female. The Medical Termination of Pregnancy Act, 1971 regulates the conditions under which a pregnancy can be terminated. The introduced Amendment Bill makes some alterations in the conditions under which a pregnancy can be terminated, increasing the period within which the termination procedure can be carried out and changes alike. Getting an abortion in India is not just about finding the right doctor who can perform the procedure in a safe manner and through legal methods it's also about dealing with the stigma and navigating the laws around it. Though we may be living in 2020, if an Indian woman seeks termination of pregnancy even today, she cannot do so openly without judgment and people trying to change her mind.*

*This paper tries to examine and assess the new Amendment Bill taking into consideration the reforms this Bill aims to bring in the ideology and approach of society towards the reproductive rights of a woman and her choice and autonomy over her body. Amid all the rights a human has the supreme right is the right to life and personal liberty which should never be compromised at any cost and this right to life vary for every person and keep changing with the evolution of the society as a whole as its violation can shake the very foundation of the basic structure of the Constitution of India.*

**Keywords:** Abortion, Reproductive Choice, Indian Courts, Right to life, Constitution of India

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*“Of all the religion in the world, perhaps the religion of liberty is the only faith capable of purity”*

– *Tiffany Madison*

## INTRODUCTION

The right to abortion services forms a crucial part of the reproductive rights framework, with countless campaigns by the women's movement across the world and in India advocating for the right of women to access safe and effective abortion services. Because this right has been shaped by concerns about sexuality and morality, it is a hotly contested issue. Giving birth to a child is a journey, a woman goes through which is altogether a very different & difficult task too. For a woman to become a mother requires her to be physically as well as mentally & psychology prepared for giving birth to a child. Additionally, the choice has to be evaluated in the light of the right to life of the unborn child, leading us to the 'pro-choice' and the pro-life debate. In this debate, one opinion is that terminating a pregnancy is the choice of the pregnant woman, and a part of her reproductive rights and the other one opines that the state has an obligation to protect life, and hence should provide for the protection of the foetus. Across the world, countries set varying conditions and time limits for allowing abortions, based on foetal health, and risk to the pregnant woman. A reproductive rights framework lays emphasis on the right of a woman to be able to exercise her agency in being able to decide the number and spacing of her children.<sup>1</sup> Reproductive right is a relatively new concept, and it gained traction after the International Conference on Population and Development (ICPD). The outcome document of the ICPD, held in 1994 in Cairo, helps to highlight the arguments that were made around the abortion debate. The Cairo Programme of Action says that reproductive rights are to be enjoyed by all couples and individuals. They must be able to decide the number, spacing and timing of their children, so that they may attain the highest standard of sexual and reproductive health. Decisions regarding reproduction must be made free of 'discrimination, coercion and violence'. In this context, the Cairo Programme of Action regarded the woman as the decision-maker.<sup>2</sup> The Platform for Action that was adopted at the Beijing Women's Conference is a reaffirmation of the Cairo Programme's ideas on

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<sup>1</sup> Malavika Parthasarthy "Integrating Mental Health Perspectives into the Legal Discourse on Reproductive Justice in India (Journal of National Law University Delhi)

<sup>2</sup> International Conference on Population and Development, *Programme of Action*, Cairo (Sept. 5–13, 1994) Available at: [https://www.unfpa.org/sites/default/files/pub-pdf/programme\\_of\\_action\\_Web%20ENGLISH.pdf](https://www.unfpa.org/sites/default/files/pub-pdf/programme_of_action_Web%20ENGLISH.pdf) (Accessed on: 01.02.2021)

reproductive health. It laid stress on equal relationships between men and women in the matter of reproduction, including the right to integrity, consent and shared responsibility for sexual behavior and its consequences. The Platform also condemns forced pregnancy, which includes forced initiation and continuation of pregnancy.<sup>3</sup>

In India, abortions are regulated by the Medical Termination of Pregnancy Act, 1971 which was passed on the recommendation of the Shantilal Shah Committee in pursuance of the objective of legalizing abortion to address the growing number of unsafe abortions in India.<sup>4</sup> The debate of legalizing abortion started with the movement called “Pro-Choice” or the United States Abortion rights movement which was a socio-political movement in the United States supporting the view that a woman should have the legal right to an elective abortion, meaning the right to terminate her pregnancy, and is part of a broader global abortion-right movement. In 4<sup>th</sup> century AD, abortion was allowed only till the first three months of pregnancy. In the Middle Ages and until the 1900s, abortions were not allowed legally in many countries. For instance, England in 1869 came up with a legislation called ‘Offences Against the Persons Act’, that outlawed abortions for any reason. In the modern era, the first country to allow termination of pregnancies on a slew of legal grounds was the former Union of Soviet Socialist Republics (USSR) in 1920. Nazi Germany, practised selective abortions, as seen in the 1933 legislation called “Law for the Prevention of Progeny with Hereditary Diseases”, that was used to terminate differently abled children. They were closely followed by Japan in 1948 and several European countries in the 1950s. Interestingly, Britain reversed its stand in 1967 and started allowing abortions. USA has a fractured history of abortion rights. In the 1950s, the medical community in America started discussing ‘planned parenthood’ - a subtle synonym to describe abortions. This laid the ground for the American legal institute to plead for abortions to be legally allowed in cases other than rape in 1959. In the 1960s, Mississippi, California and Colorado became the first states to allow abortions. However, by the 1970s, only 16 of the 50 states supported the abortion rights movement. Later due to the US Supreme Court’s decision in *Roe V Wade*, in 1973, allowed abortions nationally. This, however, caused a political and legal friction between “pro-life” groups and abortion lobby in America.<sup>5</sup>

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<sup>3</sup> Johanna B. Fine ‘*The Role of International Human Rights Norms in the Liberalization of Abortion Laws Globally*’ Health and Human Rights, 19 Health. Hum. Rts. J. 69, 69 (2017).

<sup>4</sup> K.D. Gaur, *Abortion and the Law in India*, Journal of the Indian Law Institute, Vol 28, No.3 , pp. 348-363

<sup>5</sup> Saurabh Kumar, *A Critical Analysis on the Abortion Laws in India*, Available at:

## LEGAL PROVISIONS DEALING WITH MEDICAL TERMINATION OF PREGNANCY IN INDIA

Owing to its colonial legacy and Great Britain's act of outlawing abortions during 1869-1967, Section 312 of the IPC disallowed as an induced act of miscarriage. However, post-independence things changed significantly. In 1952, India introduced family planning programme to check its expanding population. In 1964, the Central Planning Commission formed a committee- under the leadership of the Health Minister of the state of Maharashtra, Shri Shantilal Shah, to look into the need to bring in changes to the IPC and introduce other needed legislation to deal with termination of pregnancies purposefully. The committee submitted its report in 1966, which called for deletion of Section 312 of IPC which was not accepted and the provisions are there in IPC and the need to bring in a special law to deal with termination of pregnancies. They cited the changes in Great Britain's abortion laws to support the need for India's abortion laws to be changed. As a result, an exclusive abortion-related legislation- the Medical Termination of Pregnancy (MTP) Act, 1971, came into being. Apart from MTP Act there are certain provisions given under Section 312-316 of IPC which deals with offences related to miscarriage. According to Prof. K. D. Gaur, under section 312 of IPC<sup>6</sup>, the framers of the Code have carefully avoided use of the word 'abortion' in Section 312, which relates to an unlawful termination of pregnancy. This was perhaps done with a view to avoiding injury to sentiments of the tradition bound Indian community. The section speaks of 'miscarriage' only, which term has nowhere been defined in the Code. The MTP Act (No.34 of 1971)<sup>7</sup> confers protection to a registered allopathic medical practitioner against any legal or criminal proceedings for any injury caused to a woman seeking abortion, provided that the abortion was done in good faith under the terms of the Act. The Act allows an unwanted pregnancy to be terminated upto 20 weeks of pregnancy, and requires a second doctor's approval if the pregnancy is beyond 12 weeks.

As per the official statements, the Act had been envisaged with the following three objectives:

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<https://blog.ipleaders.in/critiquing-indias-abortion-laws/> (Accessed on: 07.02.2021)

<sup>6</sup> Indian Penal Code , Section 312 - Causing miscarriage - Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both and if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation — A woman who causes herself to miscarry, is within the meaning of this section.

<sup>7</sup> Government of India. The Medical Termination of Pregnancy Act [Act No. 34, 1971]. New Delhi: Ministry of Health and Family Planning, 1971.

- (i) Health measures, when there is danger to the life or risk to physical or mental health of the woman,
- (ii) Humanitarian grounds, such as when pregnancy is caused as a result of a sex crime or intercourse with a lunatic woman etc, and
- (iii) Eugenic grounds, when there is a substantial risk that the child, if born, would suffer from deformities and disease.

The Act consists of only 8 sections & is a landmark in the history of social legislation in India. According to Prof. K. D. Gaur the Act was enacted with the motive that *“it will go a long way towards encouraging women to play a role outside home, in achieving the goal of economic independence and in emancipating them from the age old economic exploitation by men folk. Autonomy and independence of a woman is directly as well as closely related to her ability to decide for herself whether she wishes to bear and rear the child or not. The inability to decide freely and responsibly on the spacing of children has, in turn, deprived many women of the advantages of health, education and employment and their roles in family, public and cultural lives on equal footing with men”*. This right and opportunity to fully participate is an element of human dignity and respect recognised in a number of inter-national human rights agreements and covenants.<sup>8</sup>

Another object of passing the Act, besides the elimination of the high incidence of illegal abortions, was perhaps to confer on the woman the right to privacy,<sup>9</sup> which includes the right to space and limit pregnancies, and the right to decide about her own body.<sup>10</sup> Another important feature of the Act was to encourage a reduction in the rate of population growth by permitting termination of an unwanted pregnancy of a married woman on the ground that a contraceptive device failed.<sup>11</sup> But if we observe through various data available & various case laws, it can be observed that these objects have not been fulfilled completely in the socio-legal aspect. This was the provision of the MTP Act, 1971. Besides these provisions as the

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<sup>8</sup> Mc Dougal Lasswell and Cuen, *Human Rights for Woman and World Public Order: The Outline of Sex Based Discrimination*, 69 Am. J. Int. L. 497 at p. 504 (1975). The Declaration on Social Progress and Development and the Proclamations of Teheran provide that parents have a basic human right to determine freely and responsibly the number and the spacing of their children.

<sup>9</sup> The U.S. Supreme Court in two landmark decisions, *Roe v. Wade* 41 U.S.L.W. 4213 (1973); 410 U.S. 113 (1973) and *Daw v. Bolton* 41 U.S.L.W. 4233 (1973), has upheld the right of a woman to an abortion for the first three months of pregnancy as being an element in the right of privacy given by the Fourteenth Amendment of the U.S. Constitution.

<sup>10</sup> *H. L. v. Matheson*, 1980, 450 U.S., 398

<sup>11</sup> Gazette of India, 17 Nov. 1969, s. 2 p. 880, for statement of objects and reasons of the M.T.P. Bill 1969

society is dynamic and laws need to be dynamic with the societal requirements there are some amendments have been made in the MTP Act of 1971 by The Medical Termination of Pregnancy (Amendment) Bill, 2020. The recent Amendment Bill amends the Act to increase the upper limit for termination from 20 to 24 weeks for certain categories of women, removes this limit in the case of substantial foetal abnormalities, and constitutes Medical Boards at the state-level. The Statement of Objects and Reasons of the Bill states that several cases have been filed before the Supreme Court and various High Courts seeking permission for aborting pregnancies at stages beyond the 20-weeks limit under the Act, on the grounds of foetal abnormalities or pregnancies due to rape faced by women.<sup>12</sup> It also states that with the advancement of medical technology, there is a scope to increase the upper limit for terminating pregnancies especially for vulnerable women, and in cases of severe foetal abnormality.<sup>13</sup>

***Termination due to failure of contraceptive method or device:*** Under the Act a pregnancy may be terminated up to 20 weeks by a married woman in the case of failure of contraceptive method or device. The Bill allows unmarried women to also terminate pregnancy for this reason.<sup>14</sup>

***Medical Boards:*** All state and union territory governments will constitute a Medical Board. The Board will decide if a pregnancy may be terminated after 24 weeks due to substantial foetal abnormalities. Each Board will have a gynaecologist, paediatrician, radiologist/sonologist, and other members notified by the state government.<sup>15</sup>

***Privacy:*** A registered medical practitioner may only reveal the details of a woman whose pregnancy has been terminated to a person authorised by law. Violation is punishable with imprisonment up to a year, a fine, or both.<sup>16</sup>

## WHY NOT 'ABORTION' BUT 'MEDICAL TERMINATION' OF PREGNANCY IN INDIAN LAWS?

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<sup>12</sup> Statement of Objects and Reasons, Medication Termination of Pregnancy (Amendment) Bill, 2020

<sup>13</sup> Ministry, Health & Family Affairs, *Medical Termination of Pregnancy (Amendment) Bill 2020*, Available at: <https://www.prsindia.org/billtrack/medical-termination-pregnancy-amendment-bill-2020> (Accessed 07.02.2021)

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

Some attribute the curious choice of words ‘medical termination of pregnancy’ in the 1971 Act to the colonial hangover of using technical jargon. But that’s not the case. The intended reason behind the using of the term “Medical Termination of Pregnancy” instead of the commonly used term “Abortion” is aimed at ensuring that abortion laws in the country aren’t framed as granting women a choice or a right to undergo safe abortions, but as procedures to protect doctors against prosecution for conducting abortions. To understand that lets understand the History of the Medical Termination of Pregnancy Law (hereinafter called ‘MTP’). The discussion on the need for abortion laws in India started since 1960s. Around then the government set up the Shantilal Shah Committee to evaluate whether an abortion law was needed in the country. At that time, abortions were strictly illegal under Section 312 of the Indian Penal Code, 1860, and ‘causing miscarriage’ of a woman was a crime punishable with imprisonment up to three years and/or a fine. The Committee carried out a review of the legal, medical and socio-cultural aspects of abortion and recommended legalised abortion and a law on comprehensive abortion care. The Committee’s recommendations eventually led to the passing of the MTP Act, 1971, which allows for only medical termination of pregnancies. Moreover the sections of MTP Act begin with “*Notwithstanding anything contained in the Indian Penal Code*” clearly signifying that this was more of a protection for doctors conducting ‘medical terminations’ than a comprehensive abortion care for women, as the Committee had originally advertised. This particular choice of words in the law is aimed at not keeping penal provision intact to protect doctors from criminal prosecutions. Further, framing of Section 3 of the MTP Act, which rests the decision of undergoing a medical termination solely on the doctor’s opinion, also points to lack of autonomy for women. However, even when the MTP Act was introduced, the penal provisions weren’t nullified. The law on causing miscarriages continues as is and the punishments remain the same, i.e., imprisonment and/or fine.<sup>17</sup> In a famous case of United Kingdom of *Rex v. Bourne*<sup>18</sup>, where a girl under the age of fifteen, was raped and got pregnant as a result of rape. An eminent obstetrics surgeon and gynaecologists, who terminated the pregnancy was charged under Section 58 of the Offences Against the Person Act 1861<sup>19</sup>, for causing abortion against the

<sup>17</sup> Shonottra Kumar, *Why India’s law on abortion does not use the word ‘abortion’*, Available at: <https://theprint.in/opinion/india-law-abortion-medical-termination-pregnancy-act/423380/> (Accessed on: 01.02.2021)

<sup>18</sup> [1938] 3 All E.R. 615 at p. 621; See D. S. Devies, *The Law of Abortion and Necessity* 1938 L.R. 126.

<sup>19</sup> Section 58 makes an attempt to procure abortion by administering drugs or using instruments to procure abortion and Section 59 for procuring drugs, etc., to cause abortion punishable with imprisonment for life and up to five years respectively. Indian law of abortion has been modelled on Sections 58 and 59 of the Offences



law. Justice Macnaghten observed that “*if the operation was done bona fide to save the life of the mother, the defendant was entitled to an acquittal, that the bona fide object of avoiding the practically certain physical or mental breakdown of the mother would afford an excuse, that if a doctor in good faith thought it necessary for the purpose of preserving the life of the mother, not only was he entitled to perform the operation, but it was his duty to do so, and that the burden of proving that the procurement of abortion was not lawful was upon the Crown*”. The court directed the jury that if the Crown had satisfied them beyond reasonable doubt that the defendant did not do the act in good faith for the purpose of preserving the life of the girl, he was guilty, but that if it had failed to do so, he was entitled to a verdict of acquittal. The jury gave a verdict of acquittal since the Crown failed to comply with the obligation of proving that the operation was not procured for the purpose of preserving the life of the woman. So this one such landmark decision was there which was considered in India in protecting the interest of doctors performing medical termination in good faith and the law makers cautiously used the term ‘medical termination of pregnancy’ instead of ‘abortion’.

### COVID-19 PANDEMIC AND ITS EFFECTS ON ABORTIONS IN INDIA

The world’s biggest Pandemic of the century broke out in 2019 i.e. COVID-19 which is highly communicable. To curb the transmission of this virus biggest lockdown was imposed in almost all the countries in the world and India was no new in this. In India to curb the COVID-19 biggest lockdown in the country was imposed in the month of March 2020. This lockdown caused an unintended consequence by breaking the Family Planning services in India. India’s lockdown to flatten the COVID-19 curve has been followed by reports of increasing domestic violence, mirroring the global trend, and which UN Women has called a ‘shadow pandemic’. This places women at an increased risk of unwanted pregnancies with fewer means to assert their bodily autonomy. There is a pre-existing issue with contraception access, especially in rural areas, which could become aggravated as public health workers responsible for distributing contraceptives are engaged with COVID-19 issues. Further, disruptions in pharmaceutical supply chains are likely to impact the availability of contraceptive methods and medical abortion drugs.<sup>20</sup> A public health crisis of this scale renders invisible the rights of those already at the margins. Reports have

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against the persons Act 1861, with certain modifications.

<sup>20</sup> Rupavardhini B.R. & Vrinda Agarwal ‘*The Pandemic Can’t Be an Excuse to Overlook Women’s Reproductive Rights*’ Available at: <https://thewire.in/health/covid-19-pandemic-women-reproductive-rights-abortion-access> (Accessed 1 February 2021)



begun to emerge of women struggling to access abortion services during the lockdown even though the health ministry has classified abortion as an essential service. Even otherwise, India has a poor record in sexual and reproductive health services. In 2017, the Comptroller and Auditor General of India's performance audit report on reproductive and child health under the National Rural Health Mission flagged several issues with physical infrastructure, equipment and medicines, human resources, and provision of safe abortion services. Despite the medical termination of pregnancy laws, women face barriers in abortion access. The recent amendments to the Medical Termination of Pregnancy Act 1971 are meant to remedy some longstanding lacunae in the law, but the pandemic threatens to undo all progress on this front. Abortion and maternal care are time-sensitive interventions. Recognising this, a PIL was filed in the Delhi High Court for directions to the Centre to ensure access to medical services for pregnant women. As a relief measure, the high court directed the Delhi government to ensure a helpline service is made available for pregnant women and is publicised through newspapers and the social media. Even though the lockdown restrictions have been uplifted but still return of normalacy will take time hence ensuring sexual and reproductive health must be an integral part of the government's immediate response strategy otherwise it could cause immeasurable damage to the progress that India has made in meeting the sustainable development goal of gender equality. Reproductive rights are inalienable and have legitimate demands on public resources especially during a crisis.

## **PARADIGM SHIFT TOWRDS A NEW APPROACH**

The Indian state's approach to reproductive rights historically has focused on population control rather than enhancing individual autonomy and removing structural barriers to reproductive health services, which is reflected in the barriers to provision of services. As a consequence of the early adoption of family planning and population control measures in the 1950s, India was one of the first countries to legislate on abortion and legalise conditional abortion. While contraception was also made available, the focus was on meeting targets for sterilisation rather than temporary spacing methods. This has shifted focus away from universal provision of abortion and contraception to meeting top-down targets for population control. The legality of the abortion is contingent on the mental and physical health of the pregnant woman and the likelihood of the unborn child having a physical or mental abnormality. The mental health of the person is likely to be negatively impacted if the

pregnancy is without consent (i.e. rape, or the failure of a contraceptive method used by a married couple). The supreme law of the land which gives and protects the fundamental rights to a person recognizes reproductive rights as one of them as these rights are essential to the realization of all human rights and violation of the same is critical to ensure gender justice and equality of women in the society. The Constitution of India recognizes many of these same rights as fundamental rights that the government has an obligation to uphold, including the right to equality and non-discrimination (Articles 14 and 15) and the right to life (Article 21) which is understood through jurisprudence to include the rights to health, dignity, freedom from torture and ill treatment, and privacy.<sup>21</sup> Although India was among the first countries in the world to develop legal and policy frameworks guaranteeing access to abortion and contraception, women and girls continue to experience significant barriers to full enjoyment of their reproductive rights, and denials of women's and girls' decision-making authority. Historically, reproductive health-related laws and policies in India have failed to take a women's rights based approach, instead focusing on demographic targets, such as population control, while also implicitly or explicitly undermining women's reproductive autonomy through discriminatory provisions such as spousal consent requirements for access to reproductive health services. Although abortion is legal on multiple grounds until 20 weeks of gestation and throughout pregnancy where necessary to save the life of the pregnant woman under the Medical Termination of Pregnancy Act (MTP Act), 56% of the 6.4 million abortions estimated to occur in India annually are unsafe and result in 9% of all maternal deaths.<sup>22</sup> With this new Medical Termination of Pregnancy (Amendment) Bill, 2020 the legislature has taken a step forward in breaking the 'Pro-life' approach which was followed with respect to abortions and reproductive choices a women had in the country, many a times ignoring the female liberty and autonomy over her body like the "Statement of Objects and Reasons" of the Bill states that several cases have been filed before the Supreme Court and various High Courts seeking permission for aborting pregnancies at stages beyond the 20-weeks limit under the Act, on the grounds of foetal abnormalities or pregnancies due to rape faced by women.<sup>23</sup> It also states that with the advancement of medical technology, there is a scope to increase the upper limit for terminating pregnancies especially for vulnerable

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<sup>21</sup> *Parmanad katara v. Union of India* AIR 1989 SC 2039

<sup>22</sup> 7 Frost, Jennifer *Abortion in India: A Literature Review*, Guttmacher Institute (2014) referencing the Report on Medical Certification of Cause of Death, 2010, New Delhi

<sup>23</sup> Supra note 12

women, and in cases of severe foetal abnormality.<sup>24</sup> Currently, the medical termination for pregnancy requires the opinion of one doctor, if, it is done within 12 weeks of conception and two doctors if, it is done between 12 and 20 weeks.<sup>25</sup> The Bill allows abortion to be done on the advice of one doctor up to 20 weeks, and two doctors in the case of certain categories of women between 20 and 24 weeks.<sup>26</sup> This adaptation and recognition of Pro-Reproductive Rights has been long journey and is still a long journey ahead. In this journey the Courts have played a very important role in shifting towards such approach.

A 2004 Supreme Court ruling undermined women's reproductive autonomy by holding that a woman's decision to undergo abortion or sterilization without her husband's consent could constitute mental cruelty,<sup>27</sup> subsequent judicial decisions have moved toward greater constitutional protection of this right. In 2009, the Supreme Court recognized women's reproductive autonomy as a fundamental right, stating, "*There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21.*"<sup>28</sup> In 2011, the High Court of Punjab and Haryana reiterated women's rights to reproductive autonomy by dismissing a suit filed by a husband against a doctor who had performed an abortion without the husband's consent saying that "*it is a personal right of a woman to give birth to a child...No body [sic] can interfere in the personal decision of the wife to carry on or about her pregnancy...unwanted pregnancy would naturally affect the mental health of the pregnant women [sic].*"<sup>29</sup> Further, in the 2013 case of *Hallo Bi v. State of Madhya Pradesh and Others*, the High Court of Madhya Pradesh affirmed the importance of providing victims of rape access to abortion without requiring judicial authorization, stating "*we cannot force a victim of violent rape/forced sex to give birth to a child of a rapist. The anguish and the humiliation which the petitioner is suffering daily, will certainly cause a grave injury to her mental health.*"<sup>30</sup> In the 2016 case of *High Court on its Own Motion v. State of Maharashtra*, the Bombay High Court ruled to improve women prisoners' access to abortion and strongly affirmed women's rights to abortion as an aspect of the fundamental right to live with dignity under Article 21. The judgment recognizes that unwanted

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<sup>24</sup> Supra note 13

<sup>25</sup> Medical Termination of Pregnancy Act, 1971

<sup>26</sup> Medical Termination of Pregnancy (Amendment) Bill, 2020

<sup>27</sup> *Samar Ghosh v. Jaya Ghosh* (2007) 2004 SC 151. 19

<sup>28</sup> *Suchita Srivastava & Anr v. Chandigarh Administration*, (2009) 11 SCC 409.

<sup>29</sup> *Dr. Mangla Dogra & Others v. Anil Kumar Malhotra & Others*, C.R. 6337/2011

<sup>30</sup> Human Rights Law Network (HRLN), The High Court of Madhya Pradesh allowed a pregnant female prisoner to exercise her reproductive rights under the Medical Termination of Pregnancy Act (2013).

pregnancies disproportionately burden women and states that forcing a woman to continue a pregnancy “represents a violation of the woman’s bodily integrity and aggravates her mental trauma which would be deleterious to her mental health.” The decision boldly recognizes that *‘an unborn foetus is not an entity with human rights. The pregnancy takes place within the body of a woman and has profound effects on her health, mental well-being and life. Thus, how she wants to deal with this pregnancy must be a decision she and she alone can make. The right to control their own body and fertility and motherhood choices should be left to the women alone. Let us not lose sight of the basic right of women: the right to autonomy and to decide what to do with their own bodies, including whether or not to get pregnant and stay pregnant’*.<sup>31</sup> The cases above illustrate the significant and evolving role the judiciary can play in India to address the legal and practical barriers which operate to deny women and girls their reproductive rights. While litigation has its challenges, including long time frames and difficulty in implementation of decisions, the robust recognition of reproductive rights as fundamental rights emerging from Indian courts has created a mandate for the government to shift away from population control approaches, confront discriminatory stereotypes that limit women’s authority, and instead center women’s rights to dignity, autonomy, and bodily integrity in reproductive health related laws and policies.<sup>32</sup>

This transition of approach from Pro-life to Pro-choice has not been easy as there was and still a debate continue over the issue that ‘at what point does the life of foetus becomes worthy of protection and after how many months a woman’s right of termination should be restricted under the MTP Act? Abortion laws rely essentially on deciding when the life begins and societies will always debate over it. Therefore a society need laws to regulate it as where there is a mismatch of opinions and values in the society and presence of uncertainty then laws provide a frame within which people can navigate knowing with certainty that what is right and wrong.

## CONCLUSION

Over the last decade, Indian courts have issued several notable decisions recognizing women’s reproductive rights as part of the inalienable survival rights implicitly protected

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<sup>31</sup> *High Court on its Own Motion v. The State of Maharashtra* 19 September 2016

<sup>32</sup> Reproductive rights in Indian Courts, Available at: <https://reproductiverights.org/sites/default/files/documents/Reproductive-Rights-In-Indian-Courts.pdf> (Accessed on: 02.02.2021)

under the fundamental right to life. In certain ground-breaking judgments, the courts have even for the first time recognized reproductive rights as essential for women's equality and have called for respect for women's rights to autonomy and decision-making concerning pregnancy as getting an abortion in India is not just about finding the right doctor who can perform the procedure in a safe manner and through legal methods, it's also about dealing with the stigma and navigating the laws around it. Though we may be living in 2020, if an Indian woman seeks termination of pregnancy even today, she cannot do so openly without judgment and people trying to change her mind. In cases spanning maternal health, contraception, abortion, and child marriage, Indian courts have adopted robust definitions of "reproductive rights" that reflect human rights standards.<sup>33</sup> While court decisions are not uniform, several trailblazing rulings have boldly affirmed women's rights to remedies for violations of reproductive rights-including the first case globally to recognize maternal health as a right-and laid the foundation for Indian courts to continue to play a strong role in preventing and addressing ongoing violations of these rights. In the landmark case of *Devika Biswas v. Union of India*<sup>34</sup> the Supreme Court in its decision unequivocally held that Article 21 includes the "reproductive rights of a person." The Supreme Court recognized reproductive rights as both part of the right to health as well as an aspect of personal liberty under Article 21. Recent jurisprudence concerning abortion in India also reflects progressive evolution in the judiciary's articulation of reproductive rights. The recent amendment in the Medical Termination of Pregnancy Act 1971 through Medical Termination of Pregnancy (Amendment) Bill 2020 has placed a step towards those women who wishes to make individual choices from their perspective and predicament by liberalizing some of the provisions in the prevailing Act of 1971. The amendment has raised the Upper limit of Medical termination of Pregnancy from 20 weeks given to 24 weeks in the cases where women are rape survivors, victims of incest, Differently-abled women and minors. Failures of contraception has also been acknowledged as well as it is made available to "any women or her partner" which replaces the earlier provision saying that it was only available for "only married woman other husband" which is also a step towards giving a women the choice over her body and autonomy. The amendment is forward looking and will place the Country among nations with a highly progressive law allowing legal abortions on a much broader range of therapeutic , humanitarian and social grounds which will help in empowering

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<sup>33</sup> AIR 2016 SC 4405

<sup>34</sup> *Ibid.*

especially those who are socially , economically vulnerable in the society. The amendment also provides that there is no limit for gestational age in case of fetal abnormalities addressing maternal mortality and morbidity arising from unsafe abortions which will spare them from stress and agony of seeking permissions from courts. The amendment also clarifies the role of medical practitioners who hesitate to perform the procedure. The critics of the amendment says that the amendment does not go far enough as it does not deals with the question of when life starts in the womb of a pregnant women and rights of that unborn foetus. The question is more of the social and moral approach inclined towards rights of the one who is not even born ignoring the rights of the one who is responsible to bring that life into existence. The amendment is a huge jump in the abortion laws, there is still the problem of it being only a conditional right – i.e., one can get an abortion only based on a doctor's opinion. Anubha Rastogi, a lawyer and member of Pratigya Campaign Advisory Group said that *“First trimester abortions should be allowed as per request/decision of the pregnant person and it should become a legal right. Moreover, constituting medical boards at all levels would be an operational nightmare. Medical boards will further add to delays and complicate access to abortion, apart from putting an unnecessary burden on an already weak healthcare system. The number of specialist doctors to constitute such boards is limited in many districts and smaller towns,”* Law is a dynamic process where it should keep changing for the development and betterment of the society at large and bringing certainty in situations where there is difference of opinions and uncertainty over some issue in the society. As Bentham says “it is the greatest happiness of the greatest number that is the measure of right and wrong”. So this amendment law is a step towards creating a bridge between those who supports reproductive rights of women and those who supports rights of unborn even if there may be some issues in it also but still it is a step taken forward. This amendment makes the point that some of its provisions can be arbitrary for some member of the society but it is necessary. Now its high time that we start giving recognition of woman's right to freely exercise their reproductive and sexual rights including right to terminate her pregnancy. The Medical Termination of Pregnancy (Amendment) Bill, 2020 is a progressive law which should be welcomed and should be enforced at the earliest.