

Reproductive Freedom: Study of MTP Act and Access to Abortion

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Abstract

Reproductive rights are essential for women to enjoy their human rights. These rights are centered on women's ability to make the best choices for their lives, including around the number of children they have, if any, and the spacing between their children's births. Reproductive rights include prenatal services, safe childbirth, and access to contraception. They also include access to legal and safe abortion. Abortion bans violate the rights to be free from violence, to privacy, to family, to health, and even the right to life. And bans are most devastating for people of color, young people, and marginalized communities, who already have trouble accessing health care and other needed services. Governments should trust women to know what is best for their bodies, their physical and mental health, and their lives.

Key words: Women, Reproduction, Privacy, Right, Abortion, Act, Judiciary, Decisions.

1. Introduction

The quest for individual autonomy over reproductive choices has gathered increasing global attention, solidifying the right to determine parenthood freely and responsibly as a fundamental human right. The concept of "reproductive rights" is firmly rooted in international human rights declarations and firmly connects with women's aspirations in India.

For many decades, access to safe and legal abortion and contraception has been a contentious subject, acting as proof of the ongoing fight for women's autonomy over their bodies and responsibility over reproductive decisions. Despite persistent religious and cultural opposition, a series of international conferences and agreements, ranging from ICCPR and the Vienna Declaration and Programme of Action to the International Conference on Population and Development (ICPD) have established a solid groundwork to recognize and protect these rights¹.

Acknowledging the significant influence reproductive rights have on women's health, empowerment, and general well-being, India has created a legal landscape, including both constitutional provisions and specific legislations such as the Medical Termination of Pregnancy (MTP) Act, while also taking public health considerations into account. The quest for universal and unrestricted access to reproductive healthcare, on the other hand, remains a continuous endeavor. This article aims to provide an overview of the legal framework for legal abortion and the reproductive rights of women in India.

2. Legal Framework for Reproductive Rights

The notion that women have the right to make their own reproductive health decisions is reflected not only in individual wants but also in India's legal system. Legislation such as the Medical Termination of Pregnancy (MTP) Act of 1971, together with constitutionally guaranteed rights and freedoms, form a dynamic and ever-changing environment that protects reproductive health and well-being.

¹ <https://ksandk.com/litigation/legal-abortion-and-reproductive-rights-of-women-in-india/>

The Medical Termination of Pregnancy (MTP) Act, 1971, was a significant milestone in the fight for women's reproductive rights in India². The Act, as amended in 2021, expands authorization for safe and legal abortion services on a variety of grounds.

Key provisions include:

- **Termination due to contraceptive failure:** Both married and unmarried women can now terminate a pregnancy up to 20 weeks.
- **Gestational limits:** Termination requires the opinion of one Registered Medical Practitioner (RMP) up to 20 weeks; two RMPs are necessary for 20-24 weeks; and a state medical board is consulted for serious foetal abnormalities beyond 24 weeks (in exceptional categories).
- **Special category accessibility enhancements:** Abortion is legal up to 24 weeks of pregnancy for survivors of rape, incest, and other vulnerable women (including minors and people with disabilities).
- **Confidentiality:** Confidentiality is maintained for the benefit of women, whose information is only disclosed in compliance with applicable legal provisions.

The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 is also relevant in this regard. To prevent sex-selective abortions, this legislation prohibits prenatal sex determination. The Protection of Children from Sexual Offences Act, 2012 authorizes a minor's right to terminate a pregnancy resulting from sexual assault, ensuring access to safe abortions notwithstanding the sensitivity of the circumstance. Finally, the Indian Penal Code defines the penalties for illegal abortions conducted outside the context of the MTP Act. This emphasizes the importance of adhering to legislative regulations that protect both women and healthcare providers.

3. The Constitutional Framework and International Obligations

The fundamental rights guaranteed by the Constitution provide women agency over their reproductive choices. Articles 14 and 15 guarantee non-discrimination and equality in healthcare, including reproductive healthcare. Further, Article 21 interpreted through judicial pronouncements, encompasses the right to health, dignity, privacy, and freedom from torture and ill-treatment, furthering bodily autonomy and reproductive freedom.

Complementing these constitutional safeguards are India's numerous international treaty obligations, which the government is obligated to respect, as per Article 51 of the Constitution. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) expressly recognizes the inviolability of women's reproductive rights and empowers them to exercise informed autonomy over their reproductive well-being. Similarly, the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) strengthen the legal basis for reproductive rights by recognizing the right to health, free from discrimination. The Convention on the Rights of the Child (CRC) underlines the importance of protecting the health and well-being of young women.

² <https://ksandk.com/litigation/legal-abortion-and-reproductive-rights-of-women-in-india/>

4. Judicial Activism

The Supreme Court of India's judgment on 29th September, 2022, held that unmarried women have the same right to abortion as married women. In *X v. the Principal Secretary Health and Family Welfare Department & Another*³ decided by a three-judge bench of the Supreme Court, the anonymous Petitioner learned that she was pregnant in June 2022. On 5 July 2022, an ultrasound revealed an intrauterine pregnancy of 22 weeks. She moved a petition before the High Court of Delhi with a request to terminate her pregnancy through registered medical practitioners (RMPs) at a private or government centre or hospital before 15 July 2022, during the statutory limit of 24 weeks. One of her prayers to the Court was to include unmarried women within the scope of Section 3(2)(b) which governs the termination of pregnancies between 20 to 24 weeks of gestation. The High Court held that since the Petitioner is an unmarried woman whose pregnancy arose out of a consensual relationship, her case is "clearly not covered" by clauses of Rule 3B of the MTP Rules⁴. As a consequence, her termination request was denied. A Special Leave Petition was then filed before the Supreme Court, which found that the principle of statutory interpretation is that the words of a statute must be read in their entire context.

The Supreme Court while delivering a landmark judgment emphasised that in a gender-equal society, it is imperative that interpretation of the MTP Act and Rules consider current social realities. Speaking for the bench, Justice Chandrachud noted, "*A changed social context demands a readjustment of our laws. Law must not remain static and its interpretation should keep in mind the changing social context and advance the cause of social justice*". This judgement and the recent Amendment Act together significantly expanded the scope of abortion rights in India. The most important changes to the law are explained below:

First, the Court held that every pregnant person in India has a right to reproductive decisional autonomy, including transgender and gender-variant persons. Everyone is entitled to reproductive health, including access to safe, effective, and affordable methods of family planning, access to contraception, and sex education. Further, the Court acknowledged that the MTP Act is a provider-centric law that does not focus on the rights of pregnant persons. Since the right to access abortion depends on approval from a RMP, denial of services compels women to approach courts or seek abortion in unsafe conditions. RMPs are reluctant to provide abortion services due to fear of prosecution under the IPC, which has a chilling effect on the behaviour of healthcare service providers. Therefore, the Court held that the decision to terminate a pregnancy vests solely with the pregnant person.

Second, the Court expanded the scope of access to abortion services from 20 to 24 weeks, taking note of the factors and circumstances changing the material realities of women and how individuals' unique circumstances cannot be exhaustively accounted for by the law. The Court held,

"the decision to give birth to and raise a child is formed by one's material circumstances, which includes the situational, social and financial circumstances of a woman and her family and each of these is relevant to her decision to carry the pregnancy to term".

The Court noted that individual circumstances should be considered on a case-to-case basis because it is not possible for the "*legislature or the Court to enlist each of the potential events which would qualify as a*

³ Civil Appeal No. 502 of 2022 (Arising out of SLP (C) No. 12612 of 2022).

⁴ Government of India . Medical Termination of Pregnancy Rules, 2021. New Delhi Gazette of India, 2021

change of material circumstances". The Court held that it is ultimately the prerogative of pregnant persons to make decisions, keeping in mind their material circumstances.

Third, the Court clarified that rape as grounds for abortion includes marital rape. The Court noted, "*It is not inconceivable that married women become pregnant as a result of their husbands having 'raped' them.*" It is important to clarify that the Court noted that rape should include marital rape for the purpose of the MTP Act, and that reading the provisions of the MTP Act in a manner that excludes married women who may be pregnant as a result of forced or abusive sexual conduct of their husbands would compel them to have children with abusive partners.

Fourth, the Court empathetically noted that the MTP is a beneficial legislation meant to enable access to abortion services for all pregnant persons. Therefore, the RMPs should offer abortion services without any extra-legal conditions like spousal or family consent, documentation requirement or judicial authorisation.

Further, a significant part of the judgment is the observations on adolescent access to abortion. The Protection of Child from Sexual Offences (POCSO) Act, 2012 was enacted to address issues of child sexual abuse, sexual harassment and child pornography. It criminalises all sexual conduct involving a "child", who is defined as a person not having attained 18 years of age. The Act also has provisions on mandatory reporting of any sexual activity involving a "child" under Section 19, meaning that when an adolescent seeks abortion services, the RMP is obligated to report an offence of statutory rape under the Act. Taking note of how mandatory reporting requirements impede access to abortions for adolescents, the Court harmoniously read the MTP with POCSO and held that medical practitioners do not need to disclose the identity and personal details of an adolescent seeking an abortion, when filing their report under Section 19 of the POCSO Act. It emphasised that "it could not possibly be the legislature's intent to deprive minors of safe abortions".

Major judicial decisions have had a significant impact on India's evolving legal landscape in terms of reproductive rights. In *Sandesh Bansal v. Union of India*,⁵ the Madhya Pradesh High Court established the government's responsibility to protect the lives of all pregnant women and rejected the use of financial limitations as a justification for violating reproductive rights. In *Devika Biswas v. Union of India*⁶, the Supreme Court supported gender equality and women's autonomy in relation to constitutionally protected reproductive rights. It also condemned government practices that aided in the misuse of sterilization.

In *Meera Santosh Pal v. Union of India*⁷, the legality of abortions conducted at 24 weeks gestation in cases of anencephaly was established, giving precedence to a woman's reproductive autonomy and bodily integrity. In another case, *Ms. Z v. State of Bihar*⁸, a rape survivor petitioned the Patna High Court to grant her permission to terminate her pregnancy after exceeding the 20-week gestational limit owing to bureaucratic delays. Because of the Patna High Court's negligence, the Supreme Court ordered that the State of Bihar pay the petitioner Rs. 10 lakhs in compensation, provide financial support for her irreversible condition, and assume responsibility for the child's welfare.

Further, in *Laxmi Mandal v. Deen Dayal Harinagar Hospital & Ors.*,⁹ the Delhi High Court recognized maternal health as a fundamental right, emphasizing the importance of ensuring that pregnant women have

⁵ Sandesh Bansal v. Union of India, W.P. (C) 9061/2008

⁶ Devika Biswas v. Union of India, (2016) 10 SCC 726.

⁷ Meera Santosh Pal v. Union of India, (2017) AIR SC 787.

⁸ Ms. Z v. State of Bihar, (2018) 11 SCC 572

⁹ Laxmi Mandal v. Deen Dayal Harinagar Hospital & Others, W.P. (C) No. 8853/2008

access to treatment and care that meets the minimum standard. Together, these cases reflect a jurisprudential evolution, safeguarding reproductive rights and maternal health in India.

5. Analyzing the concept of Bodily Autonomy and Choice

The Indian judiciary has made significant contributions to the expansion of reproductive choice and the concept of bodily autonomy. The constitutional freedom of women to make reproductive decisions was firmly established in the landmark case *Justice K.S. Puttaswamy (Retd.) v. Union of India*¹⁰, which emphasized the importance of personal liberty and privacy as protected by Article 21. Following this, the importance of recognizing women's autonomy was highlighted in the case of *High Court on its Own Motion v. State of Maharashtra*¹¹. This was specifically concerning improving the capacity of female inmates to procure abortions and safeguarding the fundamental right to live with dignity.

A significant stride towards gender equality and reproductive rights was marked in the case of *X v. Principal Secretary, Health and Family Welfare Department, Govt of NCT Of Delhi*¹². The Supreme Court held that every woman has an inherent right to get legal and secure abortions, thereby ruling out any sort of discrimination based on marital status. Notably, the Court deemed it unconstitutional to draw distinctions between married and unmarried women seeking abortions within the 20 to 24 weeks gestation period arising from consensual relationships.

These recent developments collectively reinforce the concept of bodily autonomy and underscore the imperative of recognizing and safeguarding women's reproductive choices¹³.

The decision of the Supreme Court is a landmark ruling on issues of access to abortion and the right to reproductive and decisional autonomy. The Court relied on earlier decisions to articulate a right to reproductive autonomy as a manifestation of the right to decisional autonomy extending to one's sexual and reproductive health, which are integral parts of right to privacy, self-determination and right to dignity under articles 14 and 21 of the Constitution of India.

Most significantly, the court recognised several structural barriers that adversely impact access to abortion services including lack of access to health services, caste discrimination, bureaucracy, and poverty, among others. Therefore, the Court issued directions to the Government to ensure that all pregnant persons are able to access abortion and contraception services, information regarding reproduction and safe sexual practices, and those medical facilities and RMPs must be available in every district to provide services to all pregnant persons including marginalised persons with sensitivity and care. The Court noted that unless these recommendations are implemented the right to reproductive and bodily autonomy cannot be achieved.

The abortion law, while being touted as a legal framework that protects pregnant persons' rights, was not a rights-based legislation. The right to access safe abortions *at will* remain as an aspiration for the majority of

¹⁰ Justice K.S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors., AIR 2017 SC 4161

¹¹High Court on its own Motion v. The State of Maharashtra, W.P. (CRL) No. 1/2016.

¹² X v. Principal Secretary, Health and Family Welfare Department, Govt of NCT Of Delhi, Civil Appeal No. 502 of 2022 (Arising out of SLP (C) No. 12612 of 2022).

¹³<https://www.hrw.org/topic/womens-rights/reproductive-rights-and-abortion>

pregnant persons in India. This landmark, historic decision paves way for abortion on demand creating a pregnant person's right in India¹⁴.

Further, criminalisation of abortion is acknowledged by Justice Chandrachud to impede access. As we move forward, decriminalising abortion will reverse the "chilling effect" on RMPs, making it more likely that they will grant abortions, rather than involving courts. And most importantly, the decision to terminate an unwanted pregnancy now vests only with the pregnant person in India, making it a rights-based legal framework. The MTP Act must therefore be read and implemented accordingly. However, in order for the impact of this verdict to translate on the ground, the legislative framework must be amended to remove the ambiguities and other barriers taken note of by the Court.

6. Two contradictory decisions

In September 2022, the Supreme Court granted a petitioner permission to terminate her 22-week pregnancy. In a decision¹⁵ that was celebrated among reproductive rights advocates, the Court found that any distinction made between the rights enjoyed by a person based solely on marital status is unconstitutional. Additionally, it recognised the unmet needs of marital rape survivors in situations of unwanted pregnancies.

The judgment held that the decision to carry a pregnancy to term or terminate it is firmly rooted in a woman's right to her bodily autonomy and her ability to choose her path in life. It also recognised that an unwanted pregnancy can have serious negative effects on a woman's life, such as disrupting her education, career, and mental well-being.

But in 2023, the positive developments of 2021 and 2022 appear to have been overshadowed by anti-reproductive rights sentiments. A year after the judgment in *X v Principal Secretary*, this pro-rights agenda received a major setback and revealed how much more there is to be done for India to transition into a truly liberal and right-based jurisdiction for medical termination of pregnancies.

In *X v Union of India*¹⁶, a 27-year-old married woman, a mother of two, approached the Supreme Court to seek permission for abortion as per the Medical Termination of Pregnancy Act, 1971. The petitioner discovered her pregnancy at around 24 weeks due to a condition known as lactational amenorrhea, which leads to breastfeeding women not menstruating.

After facing initial denial at the health facility, the petitioner promptly went to the apex court to seek access to essential healthcare. In a rather dramatic turnaround of events in the Supreme Court, the arguments for foetal viability and concerns about the rights of the unborn child were heard and given precedence over the reproductive autonomy of the petitioner.

Despite fulfilling the legal requirements of mental health concerns, her reproductive rights were measured against a checklist for eligibility for termination beyond 24 weeks, and were found wanting. The Court noted that she did not attract Section 3(2B) protections which covered sexual assault survivors, minors, widowed or divorced persons, disabled persons, mentally ill persons, foetal abnormality or pregnancy during humanitarian crises. She also did not attract Section 5 protections which allow termination of pregnancy in cases where it is necessary to save the life of the woman.

Firstly, the understanding of the Court of mental illness as a ground for termination was unclear. Despite X's multiple submissions regarding her mental health, postpartum depression and psychosis, suicidal tendencies and tendency to cause harm to herself and her children, the Court refused to permit termination based on

¹⁴ Jain D, Sengupta S. Reproductive rights and disability rights through an intersectional analysis. *Jindal Global L Rev.* 2021;12(2):337. doi: 10.1007/s41020-021-00153-6 [CrossRef] [Google Scholar]

¹⁵ *X v. Principal Secretary*

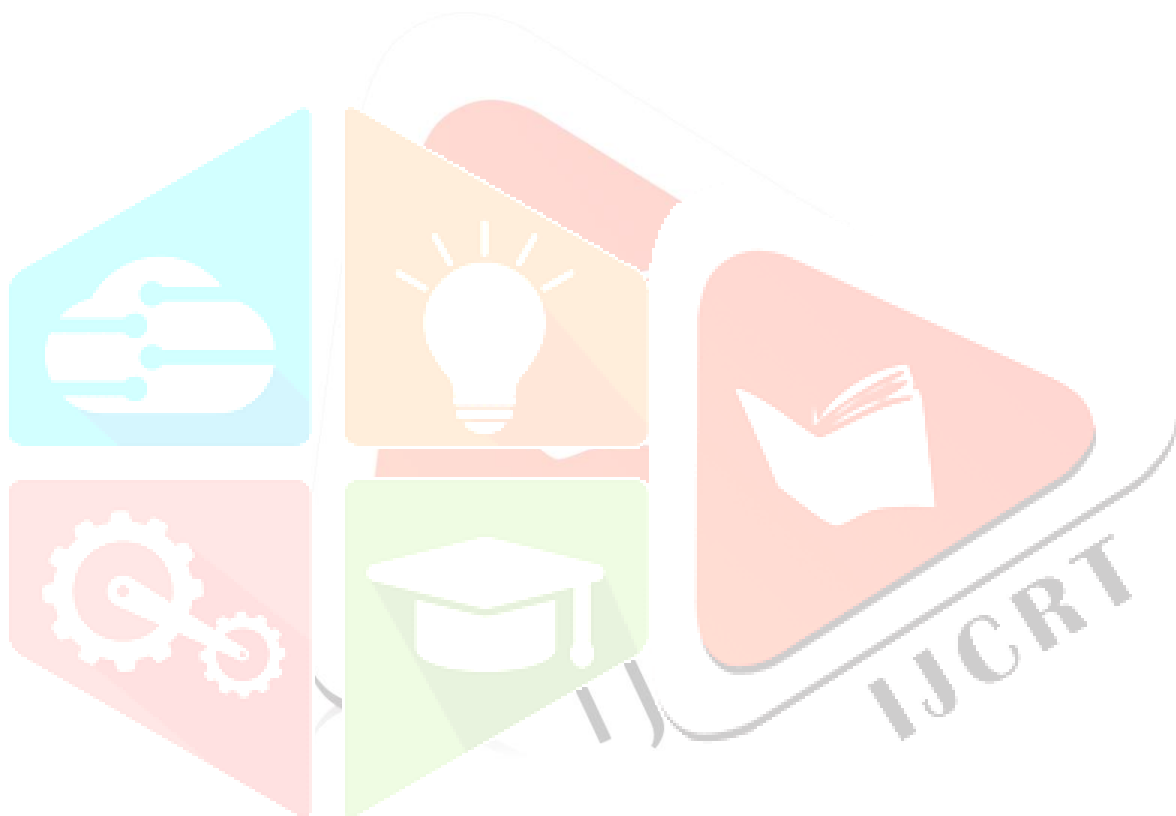
¹⁶ https://www.scobserver.in/wp-content/uploads/2023/10/x-v-union-of-india-medical-termination-of-pregnancy-Judgement_16-Oct-2023.pdf

these grounds. Secondly, with the petitioner's concerns of suicide considered and rejected, the judgment begs the question—what constitutes a threat to a woman's life?

The judgment suggests that for a full exercise of reproductive autonomy, the woman has to prove the dangers of her circumstance and her absolute *need* for an abortion. With this, the Court effectively went back on its decision in *X v Principal Secretary*, which had recognised a woman's position as the “ultimate decision-maker” on matters of her reproductive choices¹⁷.

Conclusion

India has made significant progress in the domain of reproductive rights and legal abortion, which is indicated by the backing of constitutional provisions, legislative frameworks, and judicial activism. The current emphasis on reproductive autonomy and the elimination of discrimination in the availability of legal abortion are notable accomplishments. Long-term efforts to ensure universal access to reproductive healthcare, address societal stigmas, and advocate for comprehensive sex education will be crucial in the future for the progress of reproductive rights of women in India and women's autonomy over their bodies.



¹⁷ <https://privacylibrary.ccgmlud.org/case/the-puttaswamy-effect-exploring-the-right-to-abortion-in-india>