

# EXPANDING CIRCUMFERENCE OF ABORTION LAWS AND THE CONUNDRUM OF AUTONOMY

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## Abstract

*The expansion of abortion laws has been a topic of much debate and discussion in recent times. The conundrum of autonomy lies at the heart of this issue, as individuals and societies grapple with the balance between personal freedom and societal norms. In India, the Medical Termination of Pregnancy (Amendment) Act 2021 caters to safe and legal abortion services on therapeutic, eugenic, humanitarian, and social grounds to ensure universal access to comprehensive care. This move has been hailed as a win for women's autonomy and reproductive rights. A recent landmark case in India that touches upon this issue is X v. The Principal Secretary, Health and Family Welfare Department, Govt of NCT of Delhi. In this case, the Supreme Court of India ruled that every pregnant woman has the intrinsic right to choose to undergo or not undergo an abortion. This article critically examines this case, question of real autonomy and critical loop holes and probable acceptable alternatives. However, the debate continues as different countries have different laws and cultural attitude towards abortion. The right to accessible, high-quality abortion care is considered a human right by many organizations, but restrictive laws and policies continue to undermine women's autonomy and reproductive rights, in effect. The judgement in question, as well as its impact and the true scope of the autonomy that women have in this matter, are all critically examined in the paper. The research project examines the implemented improvements and pinpoints any discrepancies that need criticism along with potential solutions.*

**Keywords:** Abortion, Medical Termination of Pregnancy (Amendment) Act, 2021, Reproductive Rights, Supreme Court, X v. The Principal Secretary, Health and Family Welfare Department, Govt of NCT of Delhi

*(Supreme Court recently in X vs. Govt. of NCT of Delhi expanded the meaning of the terms in abortion laws and inclined towards a purposive construction, in the application of the MTP*

*Act. As India walks ahead, we will walk down the growth and milestones to see where we started and what we have moved to).*

A woman frequently gets caught in entangled ideas of caste, religion, society, and family. Particularly when it comes to decisions about reproduction, such external societal variables have an impact on how a woman exercises freedom and authority over her body. Legal restrictions that limit a woman's access to abortion frequently bolster societal factors. Only the woman can decide independently, free from outside pressure or influence, whether to have an abortion or not given her complex life circumstances. Every pregnant woman must have the absolute right to choose whether or not to undergo an abortion, without the approval or consent of a third party, to practise reproductive autonomy

The Medical Termination of Pregnancy Act<sup>1</sup> was originally a creation in 1971. Better to say it rather belonged to a different era, where women's rights were unidentified or breathed a narrow existence. Back then, women were treated as responsibilities & chattel, with no property rights and lived absolutely by the socially assigned specific gender roles. Time has flown at its own pace and clapped a few wings that have brought drastic changes in women's positions, roles assigned, and social and familial constructions.

On November 17, 1969, the Medical Termination of Pregnancy Bill was drafted and presented to the Rajya Sabha. On August 2, 1971, the MTP bill was introduced in the Lok Sabha in order to "liberalise some of the restrictions under section 312 of the IPC." The MTP Act was passed by Parliament as a "health" measure, a "humanitarian" measure, and a "eugenic" measure.

Married women were a major focus of the 1971 MTP legislation as it stood at the time, which stated that most of the women seeking abortions were married, and thus "under no particular necessity to conceal their pregnancy." Despite the passage of the MTP Act in 1971, unsafe abortions remain the third greatest cause of maternal death, with close to eight women dying in India every day from causes associated with unsafe abortions. Another study published in the BMJ Global Health points out the grim statistics of unsafe abortions in India: between the years 2007 and 2011, an estimated 67% of abortions carried out were classified as unsafe.

### **The Amendment of 2021**

In order to guarantee women's access to safe and legal abortions without sacrificing the safety and quality of care, the MTP Act was amended in 2021. This ensured that women who choose

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<sup>1</sup> Medical Termination of Pregnancy Act, 1971, Act No.34 of 1971 (INDIA)

to abort would be accorded dignity, autonomy, confidentiality, and justice. Reproductive rights, bodily autonomy and ancillary decisions branch from the fundamental rights in terms of the right to dignity, personal liberty, privacy and health under Article 21 of the Constitution of India. India traces it back to constitutional rights. So, this encompasses wider aspects in its ambit including maternity health and safety along with just the right to terminate.

In *K S Puttaswamy v. Union of India*,<sup>2</sup> a nine-judge bench of this Court recognized the right to privacy -as a constitutionally protected right under Article 21 of the Constitution. This Court determined in Puttaswamy (above) that the right to privacy allows people to maintain and exercise control over their bodies and minds. "The ability to make decisions on vital matters of concern to life" is the definition of autonomy given to an individual. "Woman's freedom of choice whether to bear a child or abort her pregnancy are areas which fall in the realm of privacy.", according to Chelameshwar, J.

In the case of *Suchita Srivastava v. Chandigarh Administration*,<sup>3</sup> the court rightly recognised that the right of women to make reproductive choices is a dimension of personal liberty under Article 21. It was decided that a woman had the right to have an abortion, carry her pregnancy to term, give birth, and raise her children. More crucially, it acknowledged that the option not to have children was also part of the right to reproductive choice. By doing this, it positioned women's reproductive rights as fundamental constitutional rights.

### **Judicial Evolution of The Terms and The Law**

After the amendments in 2021, the Supreme Court recently went on to expand the terms and meaning of some rules and provisions of the act that were in dispute in a case and weaved it in harmony with the need of the changing time.

**In the latest case of *X vs. Govt. of NCT of Delhi***,<sup>4</sup> Supreme Court expanded the interpretation of the disputed terms and rules, to rule out arbitrary inequality and secure access to safe abortions. Court took up various aspects at hand-

One of them is extra-legal conditions imposed by the Registered Medical Practitioners (RMPs) authorised to conduct abortions and also the chilling effect cast by the Indian Penal Code, 1860 in the interpretation of provisions of the MTP act - A woman may terminate a pregnancy under

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<sup>2</sup> Justice K.S.Puttaswamy (Retd) vs Union Of India (2018)

<sup>3</sup> Suchita Srivastava & Anr vs Chandigarh Administration (2009)

<sup>4</sup> X vs The Principal Secretary Health Health and Family Welfare Department, Govt. of NCT of Delhi & Anr. (2022)

the MTP Act based on the opinion formed by RMP(s), either under Section 3 or Section 5. The MTP Act is a provider-centric law, as a result- women are forced to approach the courts or seek abortions in an unsanitary environment because their right to access abortion is contingent on an RMP's approval. As a rampant scenario to discourage abortions and owing to the attached criminal liability, RMPs take up the role of moral policing and insist on extra-legal conditions like family consent, documentary proofs, and legal authorisations, to an extent that they explicitly or consequently deny services in case of non-compliance. These requirements are more of a moral mandate and are backed by social prejudices rather than any law. Court expressly raised concern at such practices and clarified that the woman falling within the ambit of legal abortion is not bound by the requirement of consent of her family. Guardian's consent is a mandate only in cases of minors or mentally ill women. By having a deterrent effect on RMP behaviour, the fear of prosecution under this complex web of laws—including the connection between the MTP Act and the IPC—acts as a significant impediment to safe abortion access. The chilling effect, which has historically been associated with Article 19 protection of free speech and expression, impacts the choices made by medical professionals working under the MTP Act.

This Court has also acknowledged the disastrous results of unnecessary delays and a lack of promptness on the part of the authorities when it comes to pregnancy termination. In *Z v. State of Bihar*,<sup>5</sup> this Court found that the state authorities, including Patna Medical College and Hospital, had erred in failing to terminate the pregnancy before the passage of twenty weeks, despite the woman validly seeking an abortion on the ground that she was a victim of rape. The court rebuked the authorities for “negligence and carelessness” in this concern. It noted that the proceedings in the High Court were unduly delayed, leading to a situation where the pregnancy could not be terminated without endangering the life of the woman in question.

Another concern at hand, was the exclusion of unmarried women, single women & women without a partner from the ambit of availing abortion as per rules in cases of pregnancies falling within 20 to 24 weeks. Court held this classification to be arbitrary, unconstitutional and discriminatory in nature as under Rule 3B of the act. The court went on to include unmarried women to be legally entitled to seek an abortion. Pregnancy is an aspect of bodily autonomy and personal liberty, not drawn by marital status. Sexual activities weren't limited to married women. The social taboos looming over pre-marital sex prevent access to contraceptives and

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<sup>5</sup> Ms. Z Vs. State of Bihar and Others (2017)

safe abortions. The reproductive autonomy looked after by the MTP Act lies with the biological functioning and not the social net of distinctions. Now that courts are recognising live-in-relationships, LGBTQ rights and structural variations, other laws have to change and have to be construed in harmony. The law must remain cognizant of the fact that changes in society have ushered in significant changes in family structures. In *S. Khusboo v. Kanniammala*,<sup>6</sup> the three-judge Bench of this Court acknowledged that live-in relationships and pre-marital sex should not be associated with the lens of criminality.

Change in the marital status- dealt with in rules as one of the circumstances that allow abortion in cases of pregnancy between 20 to 24 weeks – actually deals with a shift in the responsibility of the child from partners to the mother solely in every aspect. Hence it was interpreted to cover unmarried women in consensual relationships, as the impact of the break-down of the partnership remains the same and motherhood stands independent of the marital status. Even the parent act after the amendment in 2021 substituted the word ‘husband’ with ‘partner’ and hence the act lies with the change.

Another contentious aspect that was dealt with by the Supreme Court, in this case, was cases of marital rape, which stands as an exception to the offence of Rape under IPC and hence lends immunity to the husband from the criminal liability for a sexual offence with his wife without consent. The exception is advocated and critiqued on varied volatile grounds but cannot be ruled out as the grim reality of tainted four walls of many. Marital status doesn’t affect social prejudices and violent realities. Court went on to include the cases of marital rape within the term ‘Rape’ to seek legal abortions in cases of pregnancies resulting from rape. Logically such a pregnancy is constituted out of the elements of being ‘unwanted’ and forcing the continuation of such a pregnancy would be a critical stab to the dignity of the woman and would sabotage the mental and physical health of the mother. So, these cases will now be covered under ‘survivors of sexual assault/rape/incest’ under Section 3B (a).<sup>7</sup> Incidentally, it was clarified that to seek abortion in such cases there is no pre-requisite for women to go via formal legal proceedings, FIR or to prove the offence of rape before the court.

Along with this was the expansion of the expression ‘women’ in the MTP Act. The court flexibly increased the ambit of the term ‘women’, to be all-inclusive of gender identities that require access to safe abortions. Court by this judgment chose to give the term a purposive

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<sup>6</sup> S. Khusboo vs Kanniammal & Anr, (2010)

<sup>7</sup> Medical Termination of Pregnancy Act, 1971, §3B, Act No.34 of 1971 (India)

meaning as per the act i.e., providing safe and lawful abortion to those having a reproductive system of the female sex, notwithstanding with which gender they choose to identify.

Supreme Court recognised and dealt with another impediment in access to safe abortions, in cases of minors. The court acknowledged that the mandatory reporting of acts of sexual offences against minors to SPJUs or local police desists the parents or guardians from opting for a legal and proper course of abortions. Supreme Court exempted the Registered Medical Practitioners, from the mandatory reporting under section 19 of the POCSO Act<sup>8</sup> - to the extent that they need not disclose the identity of the minor child involved or such details that would reveal the identity, for conducting abortion under the MTP Act. POCSO Act in itself doesn't identify the concept of consent by minors and seeks to prevent sexual offences against minors. However, as refracts from the real picture- this act cannot prevent consensual sexual relations among minors, which do exist in the world. Minors consensually engage in sexual activities owing to influences, lack of awareness, sexual health education and other facts and circumstances. Even in cases of sexual abuse and offences, these are discovered later, and mandatory reporting would act as a threat owing to hesitancy, taboos or fear and trauma. By this exemption, the court has sought to give a harmonious construction and working of the object of both the acts – as this would promote safe abortions and would prevent the revealing of the identity of the child which is often sought to be prevented at all costs and level by the guardians to maintain confidentiality and prevent the child's involvement in the legal ruckus.

The Court also interpreted 'grave injury to mental health—a condition for abortion within the Medical Termination of Pregnancy Act 1971 (MTPA)—broadly, going beyond mental illnesses - to highlight the unavoidable- severe harm to mental health, from being compelled to carry to term any unwanted pregnancy. In Section 3(2), the phrase "grave injury to her physical or mental health" is used in a broad, all-inclusive sense. The conditions, under which the suffering brought on by pregnancy may be presumed to constitute a grave injury to a woman's mental health is laid out in the two explanations appended to Section 3(2). The term "mental health" broadly encompasses much more than the absence of a mental illness or impairment. The Court construed the concept of mental health as a positive vocab, for the MTP Act, as it went on to clarify that allowing abortion in cases that caused 'grave injury to mental health- is to be seen as the presence of mental well-being and not scaled along absence of mental illness, in prospects of a normal human being. The World Health Organization defines mental health

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<sup>8</sup> Protection of Children from Sexual Offences Act, §19, (2012)

as a state of “mental well-being that enables people to cope with the stresses of life, realize their abilities, learn well and work well, and contribute to their community. The MTP Act explicitly recognizes the need to consider the woman's environment when determining whether or not she has suffered harm to her health. According to Section 3(3), the pregnant woman's actual or reasonably foreseeable environment may be taken into account when determining what constitutes "grave injury to her physical or mental health." It is vital to take into account a woman's "actual or reasonably foreseeable environment," particularly when assessing the risk of harm to a woman's mental health. *In High Court on its own Motion v. the State of Maharashtra*,<sup>9</sup> the High Court of Bombay correctly held that compelling a woman to continue an unwanted pregnancy violates a woman’s bodily integrity aggravates her mental trauma and has a deleterious effect on her mental health because of the immediate social, financial and other consequences flowing from the pregnancy. In *Mamta Verma v. Union of India*,<sup>10</sup> *Meera Santosh Pal v. Union of India*,<sup>11</sup> and *Sarmishtha Chakraborty v. Union of India*,<sup>12</sup> this Court permitted the termination of post-twenty-week pregnancy after taking into account the risk of grave injury to the mental health of a pregnant woman by carrying the pregnancy to term.

Recently, the USA went on to strike down abortion rights as a constitutional right and hence left it to the absolute discretion of the states, to the extent that they may declare it illegal. Articles and news pieces in India corroborated India’s progress on this account. The judgment given by the SC of India -went far as to discuss the issues at hand and give rules a purposive line, in sync with the object of the Act and as needed by time but did not completely deal with the aspect of access to reproductive health rights in general.

As we celebrated our progress over the critique of the USA’s regress by Roe vs. Wade, the question of real autonomy remains! The cases up to weeks of pregnancy consent of a pregnant woman with that of one RMP as per the Act is needed and in cases of pregnancies between 20 to 24 weeks – the consent of women along with 2 RMPs is needed. By broadly construing Section 5, which allowed RMPs to terminate pregnancies beyond the twenty-week limit when doing so was necessary to save the woman's life, courts across the nation have allowed women to end their pregnancies when the length of the pregnancy exceeded twenty weeks (the maximum period during which a pregnancy may be terminated under the unamended MTP Act). So, as far as bodily autonomy in true terms finds its expression, MTP veils it blurs!

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<sup>9</sup> High Court on Its Own Motion vs The State Of Maharashtra, (2016)

<sup>10</sup> Mamta Verma vs Union of India (2017)

<sup>11</sup> Meera Santosh Pal and Ors vs Union Of India And Ors (2017)

<sup>12</sup> Sarmishtha Chakraborty vs Union Of India Secretary (2017)

Restrictions on abortion within the MTPA affect women as a group wholly, or pregnant women as a group disproportionately. They restrict women's ability to make reproductive decisions by only allowing access to abortions under specific circumstances and within predetermined time frames. Doctors determine whether these requirements have been met (not women). The MTPA was created as an exception to the IPC's criminal ban on abortion. Because of the risk of criminal sanctions, doctors interpret the MTPA's criteria strictly, which is a factor the Court mentioned in its ruling. The acclaimed autonomy, guarded by constitutional rights – is rather operated by the medical board and the strangers are armed with the actual decisive power with the court having the final veto, in the cases where the aggrieved manages to concur time and reach its doors. Abortion as a decision and in terms of the procedure is over-regulated and densely restricted with layered complexities, which is not driven by the idea of healthy pregnancies or the health of the woman in question. Childbirth, rearing and caring are not equally distributed social and physical responsibilities between men and women-

Being denied an abortion frequently compels women to raise children in patriarchal systems where they are solely responsible for childcare, which is undervalued both inside and outside the house. Women's participation outside of the home is shaped by the fact that they are either compelled to work the "double day" or are excluded from the public realm (for example, from employment). This worsens their economic disadvantage by causing them to be economically ostracized. Furthermore, the MTPA's rejection of reproductive decision-making is premised on stereotypes about women as incompetent decision-makers and unfit mothers. These complexities even seep in as bias among experts and doctors along with a lack of information, sensitisation, infrastructure and myths looming over even the medical aspects of it.

The court expressed its concerns over access to safe abortion, but the case did not explore the room. Unsafe abortions wither into maternal mortality, morbidity, health and reproductive issues. Women placed in comparative underprivileged positions in the social chart in terms of caste, religious minorities, literacy, finances and status swing at a higher risk in this concern, as the complexities get aggravated with these circumstances. A petition asking the Supreme Court to declare the MTPA unconstitutional for violating the right to life of the foetus has already been submitted. If so, then the state is choosing the easier route of "promoting the welfare of the unborn only when it can use women's bodies and lives to realise the potential of unborn life" by insisting on restricting abortion as a means of protecting foetuses the sexual discrimination prism is obviously in violation of the constitutional commitment made under the "equality code."



In real-time effect, subjectivity and third-party involvement still limit the expansive meaning. Also, owing to the attached criminality with illegal abortions RMPs act in a very stringent manner and expansive meanings cannot be drawn individually, in the absence of specific rules or guidelines and this may lead to an increase in litigation in this arena- to interpret the change in circumstances, which runs as a common element in all the cases where abortion is allowed between 20-24 weeks.

As was **repeatedly recognised** in the Constituent Assembly, ‘the average woman in this country has suffered now for centuries from *inequalities heaped upon her by laws, customs and practices of people*. If so, a law like the law on abortion, which perpetuates centuries of inequalities experienced by women, would fall foul of the equality guaranteed under the Constitution

Mandatory timelines can be brought in for disposal of such applications and petitions before the medical board and courts, to rule out delays- as the entire process revolves around the delicate time scales. Fast-track procedures for such cases should be considered.

There is a need to look through and degenerate the structural, social and patriarchal barriers, spreading awareness, engaging in public discussions, sensitising the authorities and doctors involved at various levels, increasing access at the ground level, and conducting seminars and relevant workshops at institutional levels. India has walked a long way and paved its way through changes, but the scope of progress and honest application is wide and remains. So, what now lies in the question of reasonable and unbiased application?