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HISTORICAL CONTEXT, EVOLUTION AND DEVELOPMENT OF ABORTION LAWS IN INDIA

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ABSTRACT

The present abstract offers a synopsis of the legislative framework, recent modifications, and ongoing concerns concerning abortion laws in India. It emphasizes the necessity of ongoing reforms to bring Indian abortion laws into compliance with global human rights norms and to cater to the varied needs of women. The Medical Termination of Pregnancy Act of 1971, its legislative background, and its numerous modifications to address changing societal and medical concerns are all covered in this page. At first, the Act only allowed abortion in certain circumstances, such as when the mother's life was in danger, when there were foetal abnormalities, or when there had been rape or incest. The most recent revision, which took effect in 2021, widened the conditions and extended the time frame for abortions. Notwithstanding these developments, there are still issues to be resolved, including stigma, regional differences in access, and the requirement for more extensive reproductive health services.

Evolution and development of abortion laws in India

India spent the most of its history as a colony, and as such, the colonial powers had a significant influence on the abortion laws that remain in place today. Abortion laws in colonial India were not put into effect until the 19th century, according to historical records.¹ Though the Vedas permitted

¹ Lu, Mathew. "Aristotle on abortion and infanticide." *International Philosophical Quarterly* 53.1 (2013): 47-62.

abortion up to five months prior to the fetus's viability, this was understandable given that the main population of India was Hindu. Alternatively, Kautaliya's Arthashastra levies a 1000 panas fine for miscarriages caused by physical assault, 500 panas for miscarriages caused by taking drugs for an abortion, and 250 panas for miscarriages caused by hard labor. The same belief on abortion is also highlighted in the Upanishads and Puranas where it is considered to be a moral and social transgression². The Hindu religion, which is followed by the majority of the people in India, has never accepted abortion but it is still practiced among the population. Abortion is prevalent in the country because of the cultural preference to have a son, leading to abortion that prevents the birth of a girl child. Nonetheless, in ancient India, abortion was only acceptable when it was to save the life of the mother. This particular belief in the Hindu religion was replaced by the "Indian Penal Code 1962" and "Code of Criminal Procedure 1898" in British India. These legislations in British India were not taken from the Hindu texts or literature but originated from the "Offences against the Person Act 1861" that made abortion punishable in England³. Hence, abortion was made a punishable offense in British India unless it was to save the life of a woman.

Passing of Medical Termination of Pregnancy Act 1971

Sections 312 to 316 of the "Indian Penal Code," which outlawed abortion, were carried over from British law to independent India upon its independence in 1947.⁴ However, liberalization began in Europe and America in the 1960s and 1970s and persisted throughout the 1980s in many other regions of the world. Parallel to global liberalization, India started liberalizing in 1964 against a backdrop of high rates of maternal deaths from unsafe abortions. Doctors saw women who were dying or extremely sick rather frequently as a result of their decision to have an unsafe abortion performed by untrained personnel.⁵ But it was also noted that the majority of the women who had abortions were married, did not feel pressured by society or culture to conceal their pregnancies, and obtained abortions in a risky way because they were against the law. This gave rise to the idea that decriminalizing the entire procedure would enable women to have safe, legal abortions,

² Karim, Fatimah. "Abortion in Religious Perspectives: Islam, Hinduism, and Buddhism." *Al-Risalah: Journal of Islamic Revealed Knowledge and Human Sciences (ARJIHS)* 6.2 (2022): 348-370.

³ Hirve, Siddhivinayak S. "Abortion law, policy and services in India: a critical review." *Reproductive health matters* 12.sup24 (2004): 114-121.

⁴ Berer, Marge. "Making abortions safe: a matter of good public health policy and practice." *Bulletin of the World Health Organization* 78 (2000): 580-592.

⁵ Hirve, Siddhivinayak S. "Abortion law, policy and services in India: a critical review." *Reproductive health matters* 12.sup24 (2004): 114-121.

therefore lowering the nation's death rates. Therefore, the Indian government established the "Shah Committee" to investigate the matter and offer a thorough understanding of the social, cultural, legal, and medical elements associated with abortion after realizing the necessity of safe abortion as well as population management. The committee carried out the investigation and submitted the findings in 1966 with the suggestion that abortion be made legal in order to ensure that no lives of women are lost or wasted and their health is proper⁶. However, this recommendation was perceived by many states in the country as a strategy for reducing population but the committee entirely denied that it was not the purpose. The recommendation also received resistance from various groups based on social and religious grounds⁷. The term "Medical Termination of Pregnancy (MTP)" was created as a result of all of this to address the opposition to the committee's recommendations from all groups. As a result, the MTP Act, which legalized abortion throughout all of India save Jammu and Kashmir (J&K), was passed by the Parliament in response to a 1971 proposal.⁸.

The Act was formulated in 1975 and implemented in all states with the exception of J&K in 1972. In addition to requiring the approval of a second physician to abort a pregnancy before 12 weeks, the act allowed for the termination of an unwanted pregnancy up to 20 weeks on the recommendation of a single licensed medical expert.⁹ The legal basis for terminating a pregnancy was that there had to be a substantial risk to the woman's physical and mental health in the current or anticipated environment, such as when the pregnancy occurred despite the use of contraception or for humanitarian reasons.¹⁰ Another reason to end a pregnancy is if it resulted from a sexual offense like rape, or if the mother is mentally ill, or if there's a chance the unborn child will be born sick or malformed.¹¹ Given that the procedure was carried out in good faith, the statute shields any doctor performing an abortion from civil or criminal action if the woman suffers harm during the process. Additionally, it permits government hospitals to carry out the required

⁶ Government of India. *Report of the Shah Committee to study the question of legalization of abortion*. New Delhi: Ministry of Health and Family Planning, (1966).

⁷ Hirve, Siddhivinayak S. "Abortion law, policy and services in India: a critical review." *Reproductive health matters* 12.sup24 (2004): 114-121.

⁸ Government of India. *The Medical Termination of Pregnancy Act [Act No. 34, 1971]*. New Delhi; Ministry of Health and Family Planning, 1971.

⁹ Kelkar, R. V. "Impact of the Medical Termination of Pregnancy Act, 1971: A Case Study." *Journal of the Indian Law Institute* 16.4 (1974): 593-625.

¹⁰ Chattopadhyay, Savithri. "Medical Termination of Pregnancy Act, 1971: A Study of the Legislative Process." *Journal of the Indian Law Institute* 16.4 (1974): 549-569.

¹¹ Chattopadhyay, Savithri. "Medical Termination of Pregnancy Act, 1971: A Study of the Legislative Process." *Journal of the Indian Law Institute* 16.4 (1974): 549-569.

abortions with authorization and approvals from any private sector organization. There is one exemption, nevertheless, in which the doctor can execute the abortion without a second opinion or certification if it saves the woman's life. However, the "MTP Rules and Regulations 1975" regarding permission, records, and respecting secrecy outline the requirements and approval for abortion.¹² It further states that if a pregnancy termination is carried out in a hospital or facility without the government's previous consent, it is against the law and the facility must obtain such approval. Because of this, the act was regarded as a major step toward solving the problem of unsafe abortion and lowering death rates.

Liberalisation of Abortion

Despite the act coming into force, the initial years (1972-86) of the legalization of abortion saw a marginal rise of 8-10% in the number of abortion facilities and reported abortion¹³. . In contrast, the number of abortions reported in the clinics in the authorized facilities during the 1980s and 90s decreased. When it comes to access to these certified facilities, it was observed that by 1997, two-thirds of the nation's facilities were located in urban areas. This finding was indicative of a significant disparity in access between urban and rural areas. India is mostly a rural nation, and since these facilities were inaccessible to the populace, abortions were performed there without any documentation. By the mid-1990s, just 10 percent of all abortions in the nation were thought to have been recorded to the authorities.¹⁴ Even with access, the data could not be regarded as accurate because it was extremely uncommon to obtain information about abortions occurring outside of designated clinics. Although the numbers from 1990 to 2000 are somewhat conjectural, they suggest that 2–11 illegal abortions were performed in exchange for relatively legal ones.¹⁵ It was generally due to the fact that the access to approved facilities were quite low in the rural parts of the country even after three decades of the “MTP Act 1972” coming into force. It was found that only 20% of the health centers were providing the abortion services in most of the states¹⁶. Similar to this, a study by Guttmacher Institute on six most populated states in India found that

¹² Hirve, Siddhivinayak S. "Abortion law, policy and services in India: a critical review." *Reproductive health matters* 12.sup24 (2004): 114-121.

¹³ Hirve, Siddhivinayak S. "Abortion law, policy and services in India: a critical review." *Reproductive health matters* 12.sup24 (2004): 114-121.

¹⁴ Chhabra, Rami. "Abortion in India: an overview." *Demography India* 25 (1996): 83-92.

¹⁵ Indian Council of Medical Research. *Illegal Abortion in Rural Areas: A Task Force Study*. New Delhi: ICMR, 1989.

¹⁶ Indian Council of Medical Research. *Evaluation of the quality of family welfare services at the primary health centre level: an ICMR task force study*. New Delhi: ICMR, 1991.

less than 10% of the public health care facilities provided abortion, with 8% in Assam, 4% in UP, 3% in Tamil Nadu, 14% in Madhya Pradesh, 9% in Gujarat and 5% in Bihar.¹⁷ However, women would still seek abortions in the private sector, despite public health clinics offering the services, which would result in underutilization of the resources. During that time, there was a dearth of knowledge on the legality of abortion and various legal fallacies regarding women and their providers.¹⁸

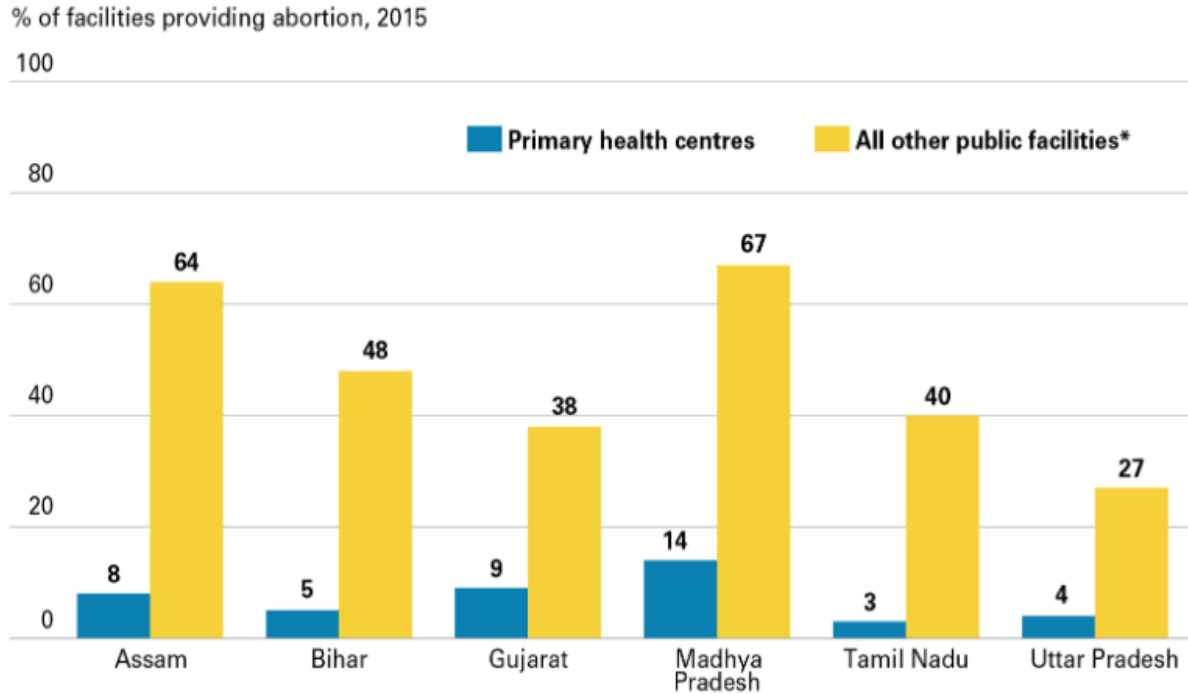


Figure 1: Provision of abortion in public health facilities¹⁹

Following the MTP Act's implementation thirty years ago, a consultation was held with all government and non-government agencies to address the abortion-related issues that persisted in the nation. This was done because of India's commitment to protecting women and their

¹⁷ Singh Susheela et al. (2018), *Abortion and Unintended Pregnancy in Six Indian States: Findings and Implications for Policies and Programs*, Guttmacher Institute, <https://www.guttmacher.org/report/abortion-unintended-pregnancy-six-states-india>

¹⁸ Hirve, Siddhivinayak S. "Abortion law, policy and services in India: a critical review." *Reproductive health matters* 12.sup24 (2004): 114-121.

¹⁹ Singh Susheela et al. (2018), *Abortion and Unintended Pregnancy in Six Indian States: Findings and Implications for Policies and Programs*, Guttmacher Institute, <https://www.guttmacher.org/report/abortion-unintended-pregnancy-six-states-india>

reproductive rights, as stated in numerous international forums. All of this resulted in the government enacting the "MTP (Amendment) Act 2002" with revised rules & regulations 2003, which was the first update to the act and standards & regulations.

The "MTP 2002 Act" was implemented to decentralize the entire system and lessen the red tape associated with facility approvals, hence facilitating the establishment of abortion facilities around the nation.²⁰ In addition, it proposed a sentence of two to seven years in prison for facility owners and suppliers who maintained their operations without the government's consent. By establishing a deadline for the district committee to register and mandate the abortion clinic, the rule and regulations in the modified act attempted to resolve potential administrative delays.

Within two months of receiving an application, the District Committee is required to visit the facility, inspect it, and process the permission within the next two months if there are no defects or within the next two months if flaws are detected and corrected.²¹ Nevertheless, the modified statute did not specify what steps were to be followed in the event that the required approval process was not finished within the allotted period. However, the amendment also altered the physical requirements for a clinic performing first-trimester abortions, leaving the physical requirements for second-trimester abortions unchanged. The modified act required facilities to have trained workers who could identify major complications and either offer care or refer patients to other facilities that could provide emergency care, rather than requiring them to have an on-site capability for addressing any serious complications.²² The legislation also recognized the use of abortion techniques in the medical setting, allowing family doctors or doctors to administer "mifepristone + misoprostol" to end a pregnancy up to seven weeks, given that they have access to a facility that can perform the procedure in the event that a medical abortion fails or presents complications.²³ The fact that the modified statute made it easier for women to use medical abortions—abortions performed with pills—to end pregnancies in the nation was one of its main features. But the act has also come under fire for being medically discriminatory due to its "physician only" stance, which disregards mid-level and alternative medicine practitioners.

²⁰ Yadav, Mukesh, and Alok Kumar. "Medical termination of pregnancy (Amendment) act, 2002 An answer to mother's health & 'Female foeticide'." *Journal of Indian Academy of Forensic Medicine* 27.1 (2005): 46-52.

²¹ Hirve, Siddhivinayak S. "Abortion law, policy and services in India: a critical review." *Reproductive health matters* 12.sup24 (2004): 114-121.

²² Government of India. Medical Termination of Pregnancy (Amendment) Act [No.64 of 2002]. New Delhi: Ministry of Health and Family Welfare, 2002.

²³ Government of India. Medical Termination of Pregnancy (Amendment) Act [No.64 of 2002]. New Delhi: Ministry of Health and Family Welfare, 2002.

The Medical Termination of Pregnancy Amendment Act 2021

In addition, the MTP Act was revised in 2021 to reflect a number of adjustments made to better fit the circumstances and environment of the time. The upper gestation limit for vulnerable mothers, rape survivors, and incest victims was raised from 20 weeks to 24 weeks by the "MTP Amended Act 2021." Additionally, it modified the view that stipulates that for 20 weeks, a single medical professional's approval is sufficient, and for 24 weeks, two.²⁴.

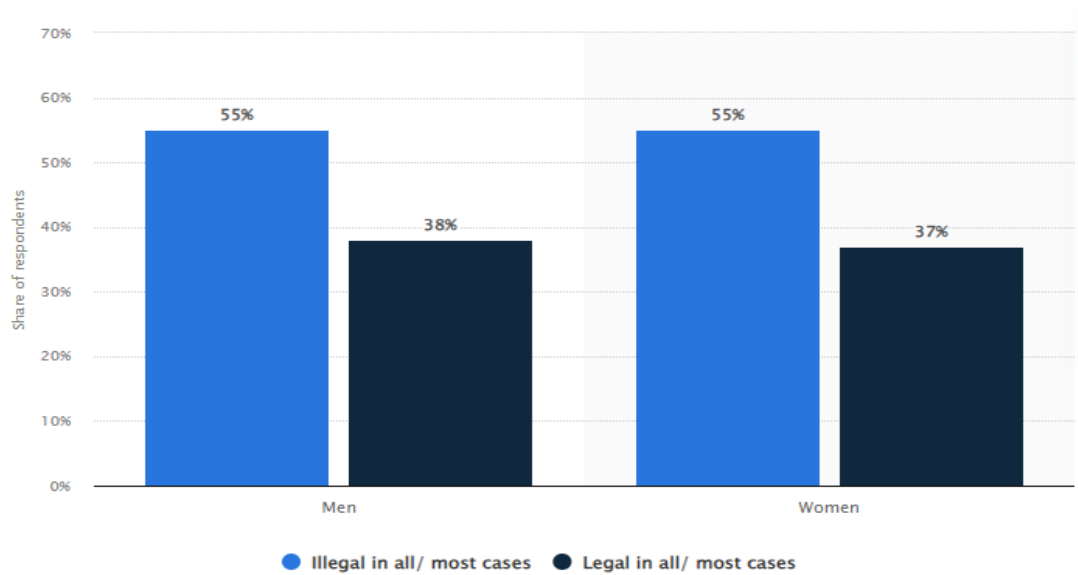


Figure 1: Public opinion on abortion laws in India, 2020²⁵

The amended act also extended the provision to unmarried women by removing the condition of marital status in case of abortion due to contraceptive failures. It also focused on the privacy of the women by prohibiting the disclosure of the identity of the person procuring abortion unless warranted by the law²⁶. The amendment also stipulated that each State and Union Territory would establish a Medical Board to make decisions on anomalies in babies. It is clear from the discussion in this section that India's abortion regulations have changed considerably over time. However, there are still issues with implementation, accessibility, and social stigma in this context—particularly in the nation's rural areas. However, the public's opinion is still very divided in spite

²⁴ Arora, Veronica, and Ishwar C. Verma. "The Medical Termination of Pregnancy (Amendment) Act, 2021: A step towards liberation." *Indian J Med Ethics* 7.1 (2022): 1-7.

²⁵ Rathore, Manya, Public opinion on abortion laws in 2020 in India, by gender, Statista, (2023), <https://www.statista.com/statistics/1302396/india-public-opinion-on-abortion-laws/>

²⁶ Agrawal, Khushi. "The Medical Termination of Pregnancy (Amendment) Act, 2021: Nominally Progressive or Profoundly Liberal?." *Jus Corpus LJ* 1 (2020): 67.

of all the legal advancements around abortion in India. According to a 2020 Pew Research Center study conducted in India, 38% of men and 37% of women thought that abortion should be permitted there, while 55% of both male and female saying that it should be made illegal **Error! Bookmark not defined.**

Conclusion-The discussion into the historical context, evolution and development of abortion laws in India has provided a significant understanding of the way in which the country have approached this sensitive issue. The early history of abortion was illegal in India under the colonial rule of the British and the same practice was adopted even after the independence of the country. However, there were mid-century reforms in the 1900s in the abortion laws in India which recognized the dangers involved with unsafe practices. A similar thing was witnessed in the UK and USA where there were reforms made to the existing abortion laws in the country. The “Rex v. Bourne” case of 1938 in the UK was the landmark case that set the tone for reforms in the abortion law in the country while “Roe v. Wade” case played a significant role in the USA. The reforms in India can be attributed to the recommendations made by the Shah Committee which led to the enforcement of the MTP Act 1971. India have reformed and legalized abortion by the end of the 20th century and this was due to various landmark cases and judgements especially in the case of the USA. The evolution and development of abortion laws in UK and India have led to abortion being legal up to 24 weeks in the current landscape. In a general context, abortion is well-accepted in the UK with proper systems in place but when it comes to India, the access to safe abortion still remains a challenge despite the legal provisions. Hence, the discussion in this chapter has helped in understanding the way in which the history, evolution and development of abortion laws in each of the countries has been shaped by its unique legal, social and cultural aspects. Moving forward, this research will engage in more comprehensive discussion into the abortion laws in each of the countries from the legal perspective while also taking a judicial approach to provide a better understanding of this sensitive subject.

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