

**Right to Abortion as a Right to Privacy:  
A Human Rights Perspective**

A Thesis Submitted

To

**Sikkim University**



In Partial Fulfilment of the Requirement for the  
**Degree of Doctor of Philosophy**

By

**Pallav Ram Bhujel**

Department of Law  
School of Social Sciences  
Sikkim University

Under the Supervision of  
**Prof. Imtiaz Gulam Ahmed**

Department of Law  
Sikkim University

November 2022

## DECLARATION

I, **Pallav Ram Bhujel**, hereby declare that the research work embodied in the thesis titled "**Right to Abortion as a Right to Privacy: A Human Rights Perspective**" is the record of the work done by me, that the contents of the thesis did not form the basis of award of any previous degree to me, or to the best of my knowledge. The thesis has not been submitted earlier for any other degree to this University or any other University/Institution. This thesis has been submitted in partial fulfillment of the degree of **Doctor of Philosophy in Law**, School of Social Sciences, Sikkim University, Gangtok, India.

*Pallav Ram Bhujel*  
Signature of Scholar

**Pallav Ram Bhujel**

Roll Number: 18PDLW03

Registration Number: 18/PhD/LAW/02

6 माइल, सामदुर, तादोंग - 737102  
गंगटोक, सिक्किम, भारत  
फोन-03592-251212, 251415, 251656  
टेलीफैक्स - 251067  
वेबसाइट - [www.cus.ac.in](http://www.cus.ac.in)



6th Mile, Samdur, Tadong-737102  
Gangtok, Sikkim, India  
Ph. 03592-251212, 251415, 251656  
Telefax : 251067  
Website : [www.cus.ac.in](http://www.cus.ac.in)

## सिक्किम विश्वविद्यालय SIKKIM UNIVERSITY

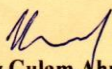
(भारत के संसद के अधिनियम द्वारा वर्ष 2007 में स्थापित और नैक (एनएएसी) द्वारा वर्ष 2015 में प्रत्यायित केंद्रीय विश्वविद्यालय)  
(A central university established by an Act of Parliament of India in 2007 and accredited by NAAC in 2015)

Date:

### CERTIFICATE

This is to certify that the thesis entitled “**RIGHT TO ABORTION AS A RIGHT TO PRIVACY: A HUMAN RIGHTS PERSPECTIVE**” submitted to Sikkim University in partial fulfilment of the degree of **Doctor of Philosophy in Law**, embodies the result of *bonafide* research carried out by **Pallav Ram Bhujel** under my guidance and supervision. No part of this thesis has been submitted for any other Degree, Diploma or Fellowship. All the assistance and help received during the course of investigation have been acknowledged by him.


We recommend this thesis to be placed before the examiners for evaluation.

  
Prof. Imtiaz Gulam Ahmed

(Supervisor)

Department of Law

Research Supervisor  
Department of Law  
Sikkim University

  
Dr. Denkila Bhutia  
(Head of the Department of law)

अध्यक्ष/प्रभारी  
विश्वविद्यालय  
Department of Law  
सिक्किम विश्वविद्यालय  
Sikkim University



6 माइल, सामदुर, तादोंग - 737102  
गंगटोक, सिक्किम, भारत  
फोन-03592-251212, 251415, 251656  
टेलीफैक्स - 251067  
वेबसाइट - [www.cus.ac.in](http://www.cus.ac.in)



6th Mile, Samdur, Tadong-737102  
Gangtok, Sikkim, India  
Ph. 03592-251212, 251415, 251656  
Telefax : 251067  
Website : [www.cus.ac.in](http://www.cus.ac.in)

## सिक्किम विश्वविद्यालय SIKKIM UNIVERSITY

(भारत के संसद के अधिनियम द्वारा वर्ष 2007 में स्थापित और नैक (एनएएसी) द्वारा वर्ष 2015 में प्रत्यापित केंद्रीय विश्वविद्यालय)  
(A central university established by an Act of Parliament of India in 2007 and accredited by NAAC in 2015)

Date: 22.11.2022

### PLAGIARISM CHECK CERTIFICATE

This is to certify that plagiarism check has been carried out for the following Ph.D. Thesis with the help of **URKUND SOFTWARE** and the result is 7%, which is within the permissible limit (below 10% tolerance rate) as per the norm of Sikkim University.

**“Right to Abortion as a Right to Privacy: A Human Rights Perspective”**

Submitted by **Mr. Pallav Ram Bhujel** under the supervision of **Prof. Imtiaz Gulam Ahmed**, Department of Law, School of Social Sciences, Sikkim University.

*Pallav Ram Bhujel*

Signature of the Scholar

(Pallav Ram Bhujel)

Countersigned by Supervisor

*[Signature]*  
Research Supervisor  
Department of Law  
Sikkim University

*[Signature]*  
22/11/2022

Vetted by Librarian  
मुस्तकालियोग्यत  
Librarian

कन्द्रीय पुस्तकालय Central Library  
सिक्किम विश्वविद्यालय  
Sikkim University

## **ACKNOWLEDGEMENT**

It is a pleasure to express my gratitude to everyone, who has helped me complete this thesis with their effort and time. Firstly, I am indebted to my respected supervisor Professor Imtiaz Gulam Ahmed for his guidance throughout the Ph.D. Program. He has always been there for me in every step, guiding my research and supporting me when in need. His valuable suggestions and meticulous checking of all work made work very enjoyable.

I am grateful to Professor Praveen Mishra, Dr. Sonam Yangchen Bhutia, Dr. Denkila Bhutia, Dr. Nidhi Saxena, Dr. Veer Mayank for believing in me and encouraging me to start this journey of research. I would like to thank Mahendra Khas, Alisha Pradhan, Minu Thapa, Sonam Lepcha, Rana Roy, Bendangyanger, Kuldeep Datta, Naman Chandal, Subhajit Debnath, Sonam Tshering, Karma Tshering for showing their concern in my research.

My special thanks to my dearest friends and senior scholars of Sikkim University Dr. Tikendra Nepal, Yankeela Bhutia, Palsang Theeng, Sebastian Ratney, Uddhav Bhattarai, Amiras Luitel, Binod Chettri, Devandra Limbu, Kalyan Rai, Badal Sirwal, Keshav Pradhan, Manohar Sharma for their help, unconditional affection, support and concern.

I would like to express my heartiest appreciation to my wonderful parents, Special thanks to my mother, father and sister for providing me with space and time to write, more importantly for their faith in my abilities and for being a constant source of inspiration and for providing moral support in the course of my research.

- **Pallav Ram Bhujel**

# CONTENTS

Page No.

A. Certificate	
B. Declaration	
C. Plagiarism Check Certificate	
D. Acknowledgement	
E. List of Abbreviation	i-ii
F. Table of Cases	iii-vi
<b>CHAPTER 1: INTRODUCTION</b>	<b>1-18</b>
1.1 Introduction	1-5
1.2 Statement of Problem	5-7
1.3 Review of Literature	8-14
1.4 Hypothesis	14
1.5 Research Objective	14
1.6 Research Questions	15
1.7 Rational and Scope of the Study	15
1.8 Research Methodology	15-16
1.9 Chapterisation	17-18
<b>CHAPTER 2: RIGHT TO ABORTION AS A RIGHT TO PRIVACY: ISSUES AND CHALLENGES IN SOCIETY</b>	<b>19-58</b>
2.1 Introduction	19-20
2.2 Abortion: Development, History and Meaning	20-26
2.3 Types of Abortion	26
2.3.1 Spontaneous Abortion	27

2.3.2	Isolated Abortion	27
2.3.3	Recurrent Abortion	27
2.3.4	Threatened Abortion	27
2.3.5	Inevitable Abortion	27
2.3.6	Complete Abortion	28
2.3.7	Incomplete Abortion	28
2.3.8	Missed Abortion	28
2.3.9	Septic Abortion	28
2.3.10	Induced Abortion	29
2.3.11	Legal Induced Abortion	29
2.3.12	Illegal or Criminal Induced Abortion	29
2.3.13	Therapeutic Abortion	30
2.3.14	Non-therapeutic	30
2.4	Methods of Abortion	30
2.4.1	Medical Abortion	30-31
2.4.2	Medical Abortion during the second trimester	31
2.4.3	Vacuum Curettage (Suction Aspiration)	31
2.4.4	Dilation and Surgical Curettage (D&C)	32
2.4.5	Partial Birth Abortion	32
2.4.6	Methotrexate Injection	32
2.4.7	Prostaglandins Injection	33
2.4.8	Salt Poisoning (Saline Injection)	33
2.4.9	Salina Amniocentesis (Salt Poisoning)	33
2.4.10	Urea Injection	33
2.4.11	Hysterectomy	34

2.4.12 Dilation and Evacuation (D&E) (Aspirotomy)	34
2.4.13 Menstrual Extraction/ Menstrual Regulation	34
2.5 Reasons for abortion among women in India	35-36
2.5.1 Socio-Cultural Factors	37
2.5.1.a Married women	37
2.5.1.b Widow	38
2.5.1.c Separated, Divorced and never Married Women	38
2.5.1.d Unmarried women	38
2.5.2 Limiting Family size and birth timing	39
2.5.3 Inadequate use and insufficient use of contraceptives	39
2.5.4 Rape and Incest	40
2.5.5 Economic reasons	40
2.5.6 Fetal defect	40-41
2.6 Right to Privacy as a Right to abortion: History and meaning	41-42
2.7 Unsafe Abortion	43-45
2.8 Religion and Abortion.	45
2.8.1 Hindu view on Abortion	45-50
2.8.2 Buddhist view on Abortion	50-52
2.8.3 Christian view on Abortion	53-54
2.8.4 Islam View on Abortion	54-57
2.9 Conclusion	57-58



<b>CHAPTER 3: ABORTION LAW AND POLICY IN INDIA: AN OVERVIEW</b>	<b>59-110</b>
3.1 Introduction	59
3.2 Indian Penal Code, 1860	59-63
3.3 Medical Termination of Pregnancy Act, 1971	64
3.3.1 Termination of Pregnancy	64-66
3.3.2 Registered Medical Practitioner	67
3.3.3 Places Authorized for termination of Pregnancy	67-69
3.3.4 Miscellaneous	69-70
3.4 Abortion law reform after 2000: Legislative View	70
3.4.1 Medical Termination of Pregnancy (Amendment) Act, 2002	70-71
3.4.2 Medical Termination of Pregnancy (Amendment) Act, 2021	71-73
3.5 Abortion law reform after 2000: Judicial View	74-77
3.5.1 Medical Termination of Pregnancy Act 1971: Judicial View	77
3.5.2 Judicial authorization for termination of pregnancy	77-79
3.5.3 Termination beyond the prescribed period of time	79-80
3.5.4 Risk from continuing the pregnancy	80
3.5.5 Risk to the Pregnant Women	80-81
3.5.6 Fetal Impairment	81-84
3.5.7 Pregnancy from Rape	84-85
3.5.8 Rape of a Minor	85-86
3.5.9 Consent of the Minor	86
3.5.10 Consent of a Mentally Disabled Woman	86

3.5.11	Consent of Spouse for termination of pregnancy	87
3.5.12	Prosecution in case of contravention of the MTP Act	87-90
3.6	Reproductive rights in India: Judicial View	90-95
3.7	Human Rights Standards and Jurisprudence for access to Abortion	95-96
3.7.1	Convention on the Elimination of All Forms of Discrimination against Women, 1979	96-97
3.7.2	International Covenant on Economic, Social and Cultural Rights, 1966	97
3.7.3	International Covenant on Civil and Political Rights, 1966	97-98
3.7.4	Convention on Rights of the Child, 1989	98-99
3.7.5	Convention on the Rights of Persons with Disability, 2006	99-101
3.8	Human Rights Standards and Jurisprudence for Right of Unborn Child.	101
3.8.1	The Universal Declaration of Human Rights, 1948	101-102
3.8.2	The International Covenant on Civil and Political Rights, 1966	102
3.8.3	Declaration on the Rights of the Child, 1959	102-103
3.8.4	The Hindu Succession Act, 1956	103-104
3.8.5	Indian Succession Act, 1925	104
3.8.6	The Transfer of Property Act, 1882	104-105
3.8.7	Indian Penal Code, 1860	105
3.8.8	The code of Criminal Procedure, 1973	105
3.8.9	The Limitation Act, 1963	105
3.8.10	Medical Termination of Pregnancy Act, 1971	106
3.8.11	Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994	106-107
3.9	Conclusion.	107-110

<b>CHAPTER 4: RIGHT TO ABORTION AS A RIGHT TO PRIVACY: COMPARATIVE STUDY BETWEEN USA AND INDIA</b>	<b>111-157</b>
4.1 Introduction	111-112
4.2 Social movement regarding abortion in India and United States of America	112-116
4.2.1 Anti-Abortion movement (Pro-Life movement)	116-119
4.3 Abortion law in India and United States of America	119-124
4.4. Judicial view in India and United States of America	125-130
4.5 Social acceptability and stigma in India and United States of America	130-134
4.5.1 Psychological effect of abortion on women.	135-140
4.5.2 Accessibility to Abortion in India and United States of America	140-144
4.6 Reproductive Rights in India and United States of America	144-149
4.7 Comparing Abortion laws in different countries.	149-153
4.8 Constitutional protection to Abortion in India and United States of America	153-155
4.9 Conclusion	155-157

<b>CHAPTER 5: HUMAN RIGHT PERSPECTIVE ON RIGHT TO ABORTION IN INDIA</b>	<b>158-188</b>
5.1 Introduction	158
5.2 Right to Privacy: Extended	159-160
5.3 Right to life of an unborn Child	160-161
5.4 The Moral and legal Status of an Unborn Child	161
5.4.1 Conception	161-162
5.4.2 Brain Activities	162
5.4.3 Sentience	162-163
5.4.4 Quickening	163
5.4.5 Viability	163
5.4.6 Birth	163-164
5.4.7 Religious and Abortion	164-165
5.5 Legal Status of an Unborn Child	165-168
5.6 Access to Safe and Legal Abortion as a Human Right.	168-169
5.6.1 Right to Life	169-170
5.6.2 Woman's Right to Health	171-172
5.6.3 Woman's right to Equality and Non-Discrimination	172
5.6.4 Woman's right to Self Determination	172-173
5.6.5 Woman's Right to be free from Cruel, Inhumane, or Degrading Treatment	173-174
5.6.6 Woman's Right to Benefit from Scientific progress	174
5.7 Role of the state in regulating Abortion: Compelling State Interest	175
5.7.1 Compelling state interest	175-178
5.8 Pro-life and Pro-choice Argument: An Analysis.	178

5.8.1	A Woman's Right over her Body	178-180
5.8.2	Incase abortion is made illegal, women will seek back-alley abortions	180
5.8.3	The Pro-choice position	180-182
5.8.4	The problem of unwanted pregnancies	182-184
5.9	Conclusion	185-188
<b>CHAPTER 6: CONCLUSION AND SUGGESTION</b>		<b>189-198</b>
<b>BIBLIOGRAPHY</b>		<b>199-211</b>
<b>ANNEXURE</b>		<b>212-228</b>

## LIST OF ABBREVIATIONS

AIR	All Indian Reporter
ALL	Allahabad
BOM	Bombay
BOM LR	Bombay Law Reporter
CAL	Calcutta
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRPD	Convention on the Rights of Persons with Disability
CriLJ	Criminal Law Journal
CTC	Current Tamil Nadu Cases
CWP	Civil Writ Petition
FLQ	Family Law Quarterly
GLH	Gujarat Law Herald
GLT	Gujarat Law Times
GUJ	Gujarat
HC	High Court
HP	Himachal Pradesh
IBR	Indian Bar Review
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural rights
ILI	Indian Law Institute
ILR	Indian Law Report



IPC	Indian Penal Code
KAR	Karnataka
Kar LJ	Karnataka Law Journal
KEL	Kerala
KLT	Kerala Law Times
MAD	Madras
MTP	Medical Termination of Pregnancy
MP	Madhya Pradesh
NARAL	National Abortions Rights Action League
NOW	National Organization of Women
P&H	Punjab and Haryana
POCSO	Protection of Children Against Sexual Offences
RLR	Rajasthan Law Reporter
SC	Supreme Court
SCC	Supreme Court Cases
UNCRC	United Nation Convention on the Rights of the Children
UDHR	Universal Declaration of Human Rights
ICPD	International Conference on Population and Development
USA	United States of America
WHO	World Health Organization
WP	Writ Petition

## TABLE OF CASES

- Akil Kumar vs. State of Madhya Pradesh, 1992 Cri L.J. 2029(MP).
- Alakh Alok Srivastava vs. Union of India, 19 Writ Petition (C) no76 of 2018.
- Amita Kujur vs. State of Chhattisgarh and Ors, Writ Petition(C) no 976 of 2016.
- Anil Malhotra vs. Ajay Pasricha, Civil Appeal No.4704 of 2013.
- Ashaben vs. State of Gujarat, 2015 AIR 3387.
- Bashir Khan vs. State of Punjab, 9 AIR 2014 P&H 150.
- Bhavikaben vs. State of Gujarat, 20163 RLR (Cri) 362.
- Binod Bihari Naik vs. State of Orissa, 2013SCC OnLine Del2068.
- Bux Soo Meah Choudry vs. The King, (1938)39 Cri. L.J. 985.
- Chanchala Kumari vs. Union of India, W.P. (C) 871/ 2017.
- Chandrakant Jayantilal Suthar vs. State of Gujarat, (2016) 2 GLH 662.
- Devika Biswas vs. Union of India & Ors, (2016)10 SCC 726.
- Dobbs vs. Jackson Women’s Health Organization, 2022 U.S.LEXIS 305.
- Dr. Mangla Dogra vs. Anil Kumar Malhotra, 60 ILR (2012) 2 P&H 446.
- Dr.Nikhil Dattarand & Ors vs. Union of India, (2008) 110 BOM LR 3293.
- Dr.Saraswati vs. State of Maharashtra, 2013 SCC OnLine Bom 1014.
- Geeta Devi vs. State of Himachal Pradesh, Writ Petition No.11940 of 2017 (Bombay High Court).
- Griswold vs. .Connecticut, 381 U.S. 479 (1985).
- Hallo Bi vs. State of Madhya Pradesh, 11 2013 CriL.J. 2868 (M.P.).
- Hasi Mohan Barman vs. State of Assam, 2007 (2) GLT 98.

- High Court on its Own Motion vs. State of Maharashtra, 2017 Cri L.J. 218.
- Jacob George vs. State of Kerala, 1994 CrL.J. 3851.
- Jaitun vs. Maternity home, MCD, Jungpura and Ors, Writ Petition (C)10700/2009.
- Jamana Suthar vs. State of Rajasthan, 2009 SCC OnLine Raj 3468.
- K.S.Puttaswamy vs. Union of India, (2017)10SCC 1.
- Kamala Devi vs. State of Haryana, 10CWP No 2007 of 2015.
- Kavita vs. State of Haryana, 2015 SCC OnLine P&H 7425.
- Laxmi Mandal vs. Deen Dayal Harinagar Hospital & Ors, Writ Petition (C) 8853/2008.
- Leela Wati vs. State of Punjab, 1982 Cri L.J. 27.
- M.S. Subbukrishna vs. Parvathi, 2008 (1) KarLJ 438.
- Madhuben Arvindbhai Nimavat vs. State of Gujarat, 2016SCCOnLine Guj 662.
- Maharashtra vs. Flora Satuno Kutino, 2007 Cr L.J. 2233 (Bom).
- Marimuthu vs. Inspector of Police, (2016)6CTC90.
- Meera Santosh Pal vs. Union of India, (2017)3SCC 462.
- Mrs. X and Ors vs. Union of India, Writ Petition (C) no 81 of 2017.
- Ms. X vs. State of Kerala, (2016) 4KLT 745.
- Ms. X vs. Union of India &Ors, 2016 14SCC 382.
- Murugan vs. State of Tamil Nadu, 1991CriL.J.1680.
- Nanda Kishore vs. Union of India, AIR 2006 Raj.166.
- Nirav Anupambhal Tarkas vs. State of Gujarat, 61 2011SCC OnLine Guj 5577.
- Planned Parenthood vs. Case, 505 U.S. 833(1992).
- Pujaben Subedar Yadav vs. State of Gujarat, 2017 Cri L.J. (NOC719) 225.
- Queen Empress vs. Ademma, III.D. Madras (N.S.) 653,(1886) ILR9 369.

- R vs. Morgentaler, (1988) 1 SCR 30.
- Ramakant Rai vs. Union of India, (2009) 16 SCC 565.
- Roe vs. Wade, 410 U.S. 113 (1973).
- Samar Ghosh vs. Jaya Ghosh, (2007)4 SCC 511.
- Sandesh Bansal vs. Union of India, Writ Petition No.9061/2008.
- Sarmistha Chakraborty and Ors vs. Union of Indian Secretary and Ors, SCC OnLine SC 897.
- Sastri Yagnapurushadji and Ors vs. Muldas Bhudardas Vaishya and Anr, AIR 1966 SC 1119.
- Satya vs. Sri Ram, AIR 1983 P&H 252.
- Savita Sachin Patil vs. Union of India, (2017)13SCC436.
- Shaikh Ayesha Khatoon vs. Union of India, 2018 SCC OnLine Bom 11.
- Sheetal Shankar Salvi vs. Union of India, (2018) 11 SCC 606.
- Shushil Kumar Varma vs. Smt.Usha, AIR1983 P&H 252.
- Sonali Sandeep Jadhav vs. Union of India, Writ Petition(Civil) No.551of 2017.
- State of Maharashtra vs. Rajendra Ramkishan Jaiswal, 2010 Cr L.J. 3603 (Bom).
- Suchita Srivastava vs. Chandhigarh Administration, (2009) 9 SCC 1.
- Suman Kapur vs. Sudhir Kapur, 2009 1 SCC 422.
- Sundralal vs. State of Madhya Pradesh, AIR 2018 (NOC 589) 205.
- Surendra Chauhan vs. State of Madhya Pradesh, AIR 2000 SC 1436.
- Sushil Kumar vs. Govt. of NCT of Delhi, AIR 2000 SC 1436.
- Sweezy vs. New Hampshire, 354 U.S. 234(1957).

- Tapasya Umesh Pisal vs. Union of India, 2017 SCC OnLine HP 1574.
- V. Krishnan vs. G. Rajan & others, HCHP1450/93.
- Vishaka vs. State of Rajasthan, AIR 1997 SC 3011.
- X vs. Govt. of NCT of Delhi, 8 2013SCC OnLine Del 6473.
- X vs. Union of India, 2017 SCC OnLine Bom 9334.

## CHAPTER 1: INTRODUCTION

### 1.1 Introduction

The term abortion has been derived from a Latin term 'abortus' which means an object which had been removed from its proper place. Abortion is the termination of pregnancy at any stage before confinement.<sup>1</sup> Abortion is a medical process by which the embryo or fetus is removed from the uterus, before the fetus or embryo is able to sustain independent life. It can also be referred as miscarriage, spontaneous abortion or induced medical termination of pregnancy. Legally, abortion means feticide, the internal destruction of the fetus in the womb, or any untimely delivery brought about with intent to cause the death of the fetus.<sup>2</sup> Abortion can occur due to natural causes as well as spontaneous or accidental and artificial. Natural abortion occurs due to complication in the health of the woman or the fetus. Accidental or Spontaneous abortion arises due to accident and pathological reasons. Artificial abortion is when the fetus is destroyed intentionally.<sup>3</sup> When abortion is done artificially and intentionally then it is punished under the law.

Until the mid-twentieth century, approximately three-fourth of the world's population was governed by the laws which prohibited abortion. Owing to the moral and ethical principles prevailing in our society, the right to abortion did not exist. It was only during the 1960s and 1970s, that a number of circumstances gave rise to a movement for reform. Women's organizations also started to see abortion reform as a pivotal step towards the goal of equality between the sexes. They argued that the women must be

---

<sup>1</sup> K. Mathiharan and Amrit K. Patnaik, *Modi's Medical Jurisprudence & Toxicology* 1013 (Lexis Nexis Butterworth, New Delhi, 23<sup>rd</sup>edn, 2008).

<sup>2</sup> Glanville Williams, *Textbook of criminallaw* 114 (Sweet and Maxwell, 3<sup>rd</sup>edn, 2012).

<sup>3</sup> K. D. Gaur, "Abortion and the law in countries of Indian subcontinent, Asian region, United Kingdom, Ireland and United States of America", 37 *ILI* 293 (1995).



able to control their reproductive rights in order to secure equal status.

Termination of pregnancy is unlawful and punishable under the law in Indonesia and Philippines. In England, prior to the Abortion Act 1967, abortion was largely prohibited. The woman whose pregnancy has been an aftermath of sexual violence like rape, incest or those deserted by their husbands and over-burdened mothers living in poverty were denied abortion under sections 58 and 59 of the Offences Against Person Act, 1861. In view of these difficulties, a robust attitude among the people developed. Accordingly, the Abortion Act 1967 was passed, which substantially liberalized the law on abortion. The Human Fertilization of Embryology Act 1990 amended the shortcomings of the Abortion Act of 1967 and places a much more importance on the requirements of the pregnant woman in making a choice regarding the termination of pregnancy. The abortion law of England is considered to be the most liberal law. The health of the mother or children may successfully be pleaded in such circumstances in invoking the termination of pregnancy. The landmark case which established the basic law governing abortion in the United States was *Roe vs. Wade*<sup>4</sup>. The Court held that State may not absolutely prohibit abortion by making their performance a crime. The State may not make abortion unreasonably hard to acquire by setting complicated procedural rules. Personal privacy embraced a woman's decision whether to carry a pregnancy to term. The right to abortion is not directly related but mutually intertwined with right to privacy. The right accordingly has been assumed to include the right to terminate a pregnancy by aborting the unborn fetus. Privacy is a basic need of human beings. Respecting a person's privacy is to acknowledge such a person's right to freedom and to recognize that individual as an autonomous human being. Therefore, right to privacy is important because it is a

---

<sup>4</sup>*Roe vs. Wade*, 410 US 113(1973).

necessary condition for other rights such as freedom and personal autonomy. The concept of privacy is closely tied to the ideals of autonomy, personal worth and independence. Privacy is often seen as a necessary condition for keeping personal and public life separate<sup>5</sup>.

In *Roe vs. Wade*, the United States Supreme Court recognized that a women's right to decide whether to continue her pregnancy was protected under the constitutional provisions of individual autonomy and privacy. For the first time, *Roe* positioned women's reproductive choice together with other fundamental rights, such as freedom of speech and freedom of religion, by conferring the highest degree of constitutional protection, strict scrutiny to choice. The Court required the state to justify any interference with the abortion decision by showing that it had a "compelling interest" in doing so and that restrictions on abortions performed before fetal viability were limited to those that narrowly and precisely promoted real maternal health concerns. After the point of viability, the state was free to ban abortion or take other steps to promote its interest in protecting fetal life. Even after that point, however, the state's interest in the viable fetus must yield to the women's right to have an abortion to protect her life and health. Although a landmark ruling, the *Roe* decision was consistent with earlier Supreme Court rulings recognizing a right of privacy that protects intimate and personal decisions including those affecting child rearing, marriage, procreation, and the use of contraception from governmental interference. In the decade preceding *Roe*, women's activists organized movements to reverse century old criminal abortion laws that had resulted in the death or injury of scores of women who had undergone unsafe illegal or self- induced abortions. During the

---

<sup>5</sup>James Waldo, Herbert S. Lin, and Lynette I. Millett (Eds.), "Engaging Privacy and Information Technology in a Digital Age", (Feb 14, 2019) Available at [www.nap.edu/open\\_book](http://www.nap.edu/open_book) (Visited on 10 December 2018).

1960s and 1970s, a movement of medical, public health, legal, religious, and women's organizations successfully urged one-third of state legislatures to liberalize their abortion statutes. By guaranteeing women's right to make childbearing decisions, Roe became a foundation for achieving the promise of women's equality in educational, economic, and political spheres. The Court further held that since right of personal privacy is a fundamental right, only a "compelling State interests" could justify its limitation by a State. Thus while it recognized the legitimacy of the State interest in protecting maternal health and preservation of fetus potential life, and the existence of a rational connection between these two interests and the State's anti-abortion law, the court held these interests insufficient to justify an absolute ban on abortions, and concluded that until the end of the first trimester, an abortion is no more dangerous to maternal health than child birth, itself.

Sections 312, 313 and 314 of I.P.C deal with the law on abortion and miscarriage. Section 312 lays down that if any person causes a miscarriage of woman, he shall be penalized with the imprisonment up to three years and fine or with both, and if the woman be quick with child, he shall be punished with imprisonment up to seven years and fine also. Under this section a woman who causes her miscarriage or gives consent to miscarry is also liable for punishment, although this section makes an exception for causing miscarriage in good faith for saving the life of woman. Section 313 provides the punishment for life or ten years and fine, who causes the miscarriage of a woman without her consent. Section 314 makes a provision for imprisonment up to ten years and fine also, who intends to cause miscarriage of a woman by doing any act. With the model of the Abortion Act, 1967 of England, in 1971, the Indian

parliament passed the Medical Termination of Pregnancy Act<sup>6</sup>.

The Act is among the most liberal legislation of its kinds in the sense that it is the only legislation where the failure of contraceptive device has been legally accepted as valid grounds for abortion. The Act, however, does not meet all challenges of right to abortion. The Act has not provided the right to abortion where the pregnancy is the result of felonious intercourse.

The Indian judiciary has played an important role in giving right of privacy a constitutional status within Article 21. When right to life under Article 21 of the Indian Constitution is analysed in the context of abortion, it raises certain thought provoking questions such as whether fetus is a 'person' and is the right to life under Article 21 extended to an unborn person also? Has an unborn person's right to life been protected under Article 21 and whether it has a right to be born? Does a woman have a right over her reproductive organs and to choose whether or not to give birth to a child in the name of her right to privacy under Article 21 of the Constitution? The legitimacy of the abortion laws has been examined on the ground of constitutionality of right to life of an unborn vis-a-vis right of the mother to bear or not to bear a child.

## **1.2 Statement of Problem**

The paramount human right is the right to life and liberty which is an inalienable right. Nonetheless there are some contentious issues associated with this

---

<sup>6</sup> The Act provides for the termination of pregnancy by registered medical practitioners where its continuance would involve a risk to life of the pregnant woman or grave injury to her physical or mental health or where there is a substantial risk that if the child were born, it would suffer from physical or mental abnormalities. The measure was designed to create certain exceptions to the strict provisions of the IPC which declare that all abortions or "miscarriages" are criminal unless undertaken to save the life of the pregnant woman. After the enactment of the abortions were made legal when they are performed for one of the several specified reasons within a limited period after conception by a specially designated specialist and under prescribed conditions

paramount right. One such issue is the right to abortion. The expansion of personal liberty has seen right to privacy being accepted within its realms through judicial decisions. Human rights are very closely linked with control over reproduction. Human rights direct as to how human beings are to be treated. In a similar way it is said that every mother has a right to abortion and should have the freedom to make decisions about her reproductive rights against the belief that the unborn child has a right to life. It is an issue that is divided by an invisible line that separates religion from science, conservative from liberal and to some good from evil.

Biologically women are structured to bear child and carry forward the human generation but this ability of women has been the instrument of suppression to them where their choice of bearing a child has been subject to control by the state. Since the Fundamental Rights in the Indian Constitution has given everyone right to life and liberty which also includes right over their body, it seems absolutely unjust that one's body is being controlled by the other. Right to abortion gives not only a right over their body to a women, it also empowers them to make choices of their own. However, the current legal framework in India restricts women's reproductive rights. A woman can become pregnant with or without her consent but the right to give birth to that child should be the choice of the pregnant woman. Abortion doesn't happen in isolation. People do not casually or out of the blue decide to get abortion. There are many factors that determine the choice to get abortion. The cause of abortion may be due to financial problems, disability, work pressure, and other responsibility. Each person has their own reasons and circumstance when abortion becomes a necessity.

The abortion debate has two sides. Firstly, pro-choice advocates who accept that woman should have complete control over their reproduction. Secondly, pro-life

activists accept that a child has a right to life. There is no way to give the rights of personhood to embryo or fetus without infringing the rights of the women. A women's right to bodily autonomy and legal personhood is directly affected by it. Giving right to life to the fetus would subtract rights from women and vice versa.

In India where sex is still considered a taboo, the choice of abortion is like the "Pandora's box" with many social and legal problems. Abortion laws were first introduced to check maternal mortality, but have rather led to the increase of illegal and unsafe abortions which pose greater risk to her life and health. Further, in case of any accident to the health and life of the women no legal actions can be taken against the concerned hospital as this act of abortion is illegal ab-initio and likewise burden of proof does not fall with the concerned aborting authority. Moreover, two other legislations have led to restrictions on abortion access within the trimester period: the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, which forbids ultrasound for purposes of sex determination and has led to restrictions on all second-trimester abortion provision, and the Protection of Children from Sexual Offences Act, which requires reporting of underage sex, so that minors who become pregnant cannot feel safe if they seek an abortion.

This research is to examine reproductive rights issues i.e. right to abortion as a right to privacy from a human right perspective. An analysis of the basis of abortion from the point of view of human right framework becomes necessary because recent legal developments reveal that legal measures resorted to penalize, avert and restrain abortion fall short of espousing comprehensive Constitutional and Human right approach.



### **1.3 Literature Review**

S.N. Parikh, “Right to life and unborn person” 11(3) IBR, 282 (1984): In this article, right to life is considered to be one of the most important human rights. Furthermore, when Right to Life is taken away from one human being then all other human rights are spontaneously robbed from that human being. All human beings have right to life” but the question is whether the human embryos and fetuses can also hold this right. Abortion disputes can be argued from two sides. One side focuses on women’s liberty, choice and privacy.

K. D. Gaur, “Abortion and the law in countries of Indian subcontinent, Asian region, United Kingdom, Ireland and United States of America”, 37 ILI, 293(1995): In this article it has been pointed out that when the life of the fetus or embryo is ended in the women’s womb then it is said to be an abortion. Abortion can occur naturally, accidentally, spontaneously or artificially. The author further discusses the hurdles in implementing Medical Termination of Pregnancy Act 1971, he points out that abortion is not allowed if the pregnancy is instigated as an outcome of an illicit sexual relationship other than rape.

Glanville Williams, “Textbook of criminal law” 3<sup>rd</sup> Edition, Sweet and Maxwell: In chapter 15 of this book which is titled as “The Fetus and the New-Born Child” the author states that for legal purposes, abortion means feticide, the internal destruction of the fetus in the womb, or any untimely delivery brought about with intent to cause the death of the fetus. He also states that the philosophical debate is whether there is a difference in moral status between the fetus and the born child. It points out that a fetus is not a legal person. It states that most people agree that at some point of development a fetus has or should have rights, but not the full rights of a born child.

Glanville Williams, “Text book of criminal Law” 2<sup>nd</sup> edition, Universal Law Publishing Co., In chapter 13 of this book which is titled as “The fetus and the new-born child” the author points out that under the Act 1929, the offence of child destruction is committed by an act done with intent to cause and actually causing the death of a fetus/child when it is capable of being born alive and before it has an existence independent of its mother. There is a presumption of the former after the 28<sup>th</sup> week of pregnancy. The offence is not committed if the act was done in good faith for the purpose of only preserving the life of the mother. The offence of abortion protects the fetus up to the time when birth starts, and therefore overlaps child destruction.

Ratanlal and Dhirajlal, “The Indian Penal Code”, 32<sup>nd</sup> Edition, Lexis Nexis: In chapter 16 of this book which is titled as “Of offences affecting the human body” the Medical Termination of Pregnancy Act 1971 has been discussed. It provides for the termination of pregnancy by registered medical practitioners where its continuance would involve a risk to life of the pregnant woman or grave injury to her physical or mental health or where there is a substantial risk that if the child were born, it would suffer from physical or mental abnormalities. When the pregnancy is alleged to have been caused by rape or as a result of failure of a contraceptive use by a married woman.

Abhinav Chandrachud, “The Substantive right to privacy: tracing the doctrinal shadow of the Indian constitution” 3SCC, 3(2006): the author has focused on Privacy is in its incipient stages in India. This article seeks to knock on the doors of substantive thought by delineating the concept of privacy in the Indian arena. It proposes to identify momentous decisions of the Indian Supreme Court in essaying to

define this elusive right in the context of the Indian Constitution. The developments of this right with reference to the law of torts has not been dealt with, as this article is an exposition solely of constitutional law. It also seeks to redefine the essential attributes of privacy in the Indian context, with the use of abstract principles and concrete case law. The objective is to mold the right to privacy into the structure of the Constitution.

Asween Kaur, “Mother and the Fetus: A Socio-Legal Conflict”, BLR, 294(2016). In this article the author has discussed the Indian perspective on abortion. How the India society has suppressed their women and often ignored their rights. The author has stated that a women’s right to self- determination with regard to her body have been restricted by societal pressure and state laws in India. The author has explained how the Medical termination of Pregnancy Act, 1971 has recognized right to termination of pregnancy and at the same time how it has limited a women’s right to self-determination with regard to her body by setting up a time limit and certain conditions to be fulfilled before abortion is permitted. The author has also recognized the active role of judiciary and judicial activism while dealing with the cases of abortion. The author has argued that Indian being a democratic state should give full freedom to its people and not make laws restricting and withdrawing the freedom of its people. It is stated that the people are the real sovereign, under the garb of welfare state. Lastly the author has stated that a child born is entitled to equal rights as that of his/her mother.

Krishna Kumar, “Law of Abortion: Critical study from the perspective of Women’s Right to Privacy”, 10 IJAR, 111(2017). In this article the author talks about abortion and a women’s right to privacy as a fundamental right under the constitution of India. The author has discussed that the Medical Termination of Pregnancy Act which

recognizes women's right, as the medical practitioner has to consider only the issues of women. The matter is thus purely between the doctor and the woman, and the consent of family and husband becomes immaterial. However, the author also states that even though the women have an unrestricted right under the statute, various decisions in *Satya vs. Sri Ram* and *Shushil Kumar Varma vs. Usha* have held that aborting fetus without the consent of husband would amount to cruelty under section 13 (1) (a) of Hindu Marriage Act. Therefore, the author maintains that there is a need for guidelines for to protect the privacy and dignity of women. Lastly, the author has stated that if abortion is not allowed on demand, the only alternative available to women is to either carry it or look for illegal abortion.

Pyali Chatterjee, "Medical Abortion Act: A Boon or a Bane for a Woman in India - A Critical Analysis", *IJSR*, 236(2015). The author in this article has critically analyzed the Medical Termination of Pregnancy Act, 1971. The author has stated Nikita Mehta case to showcase the deplorable condition of women in India. It is stated that the women in India have right to abortion however with limitations and these limitations have caused serious social, legal and health issues for women while seeking safe abortion. The author has talked about the bias nature of the act which remains silent on the unmarried, widow and divorcee women. Even in cases where the women had shown or proved that there was a failure of contraceptives there is no relaxation. The author has argued that in such cases the right to privacy is completely absent. Lastly the author has stated that the Indian society and the Government do not allow reproductive freedom to its women under a male dominated society.

Siddhivinayak S Hirve, "Abortion Law, Policy and Services in India: A Critical Review", *12 IJSRHR*, 114(2004). The author in this article has critically reviewed the

history of abortion law, service and policy in India since the 1960s. He has stated that the liberalization of abortion law in India began in 1964 due to high maternal mortality due to unsafe abortion. However, even after 30 years of liberal abortion laws in India the situation remains similar. It has been argued that it is so because of failure to implement the laws properly. Further, the laws which empower states to regulate abortion service differ in their interpretation and implementation. It has been suggested that there exists a misconception among the service providers and policy makers which needs to be cleared along with need to enhance awareness about the contraception and abortion service. Lastly, it has been suggested that the laws and policies to be implemented effectively, there is a need of political will and commitment with regard to adequate resource allocation, training and infrastructure support, accompanied by social inputs based on present needs of the women.

Sybil Shainwald, "Reproductive Injustice in the New Millennium", 20 WMJRGs, 123(2013). In this article the author has reviewed history of abortion law in the United States. The author has provided a synopsis of the early Anglo-American view of abortion in common law, anti-abortion statutes and abortion during the 20<sup>th</sup> century. It is stated that in history, abortion was not illegal in England or America before the nineteenth century and that even when abortion was banned in the 1800s, the purpose was to protect the life of the mother. The doctrine of quickening i.e. fetus did not have a soul until the point of quickening, which was originally developed by St. Thomas Aquinas in the twelfth century, was used to differentiate between pregnancy stages and legal standard for differentiating between legal and illegal abortions by the common law courts and it was only after the passing of the Lord Ellenborough's Act, 1803 that abortions at all stages of pregnancy were criminalized in common law, limiting abortions to the single purpose of saving the life of the mother. The author

has also discussed the liberalization of abortion laws since the 1960's, as well as the ways in which the law pertaining to a women's right to choose as a constitutional right has evolved since *Roe vs. Wade* (1973). Lastly, the author has talked about the new states restriction placed for abortion access in United States of America and analyzed the constitutionality of the restrictions which violate the principles laid down in *Roe vs. Wade*.

Christyne L Neff, "Woman, Womb, and Bodily Integrity", 3 YJLF, 328(1990). In this article the author has analyzed abortion laws in the light of the right to privacy. It has been argued that the right to privacy is meaningless to a woman if it allows the state to control women's reproductive rights. It has been stated that without physical integrity, a women cannot peruse her rights and privileges enshrined in the Constitution. Lastly, the author has suggested the principles of physical liberty or bodily integrity as a more effective shield for protecting the rights of a women against state interference.

K.G. Santhya and Shalini Verma, "Induced Abortion: The Current Scenario in India" 2(8) RHF 13(2004). The authors in this paper have explored some of the factors why women continue to seek abortion services from unqualified providers. It is highlighted author has stressed the need of new technologies and legislation and effective implementation of these measures make safe abortion services more accessible.

R. H. Nicholson, "Old World News: Abortion Remains a Live Issue" 21(5) HCR, 5(1991). The author in this article has presented a brief sketch of abortion in Europe. The author has stated that the Western Europe is slowly becoming more liberal toward abortion, while the former communist countries are becoming less liberal.



Whereas twenty years ago one might have supposed that the balance in a particular country between permitting and preventing abortion might be determined by the prevailing religious view that seems no longer to be the case. Recently attempts have been made within the European Community to harmonize views on euthanasia; some similar attempt may be made for abortion.

It is clear from the aforementioned literature review that none of the research work has accurately covered the problem which needs to be recognized. There is a research gap. Therefore, a research is important in the matter and the researcher proposes to undertake it.

#### **1.4 Hypothesis**

The mother's right should prevail over the right of the unborn and therefore, abortion should be the mother's choice. The Medical Termination of Pregnancy Act of 1971, violates right to life and personal liberty of the mother guaranteed under the Constitution of India.

#### **1.5 Research Objectives**

- To examine the various social issues regarding right to abortion.
- To analyze and understand the basic legal principles and judicial decisions regarding right to abortion and right to privacy.
- To recognize the numerous human right violation when right to abortion is made illegal.

## **1.6 Research Questions**

- What are the various issues regarding right to abortion as a right to privacy in India?
- Whether the existing laws are adequate to protect the issues of right to abortion?
- What is the significance of right to abortion as a right to privacy from a human rights perspective?
- Whether the law of abortion should be pro-life or pro-choice?

## **1.7 Rationale and Scope of the Study**

Women in the society have always been suppressed throughout history. Their rights are often ignored. They don't even have the right of self-determination in regard to their body and hence abstain from aborting the child out of societal pressures and state's compulsive laws. Right to abortion of mother is in conflict with right to life of the fetus who is a potential being and is capable of possessing rights as his or her mother. The rationale and scope of the study is to find an answer to the question as to whether abortion legislation should be pro-life or pro-choice. The scope of the study will be limited to India. Also a brief comparison will be made with the relevant laws of United States of America.

## **1.8 Research Methodology**

The present work will be primarily doctrinal in nature. In order to achieve the object of the research and to assist the researcher, methods such as historical method, evaluation method, analytical method and comparative method will also be used. Historical method will be used to trace the origin and development of abortion laws

and right to privacy. Analytical method will be adopted to analyze the laws, regulations and procedure as well as International conventions, treaties, judicial decision, scholars' articles, etc. Evaluation method would be adopted to elicit whether the standards laid down in above mentioned instruments have been effectively implemented in the legislation in India. Comparative method will be used to compare the legislative provisions, rules, regulation with International instruments and also the laws of the United States of America.

Since the research approach will be confined to the analysis of International Instruments, statutes, judicial decisions, identification of material sources is necessary. Concerning legal materials or sources, two types of sources will be used. Firstly, the primary sources will include law made by the law-making bodies such as parliament, courts and other statutory authorities. Secondly, secondary sources will include publications, which refer and relate to the law on the subject. In general, Secondary sources will include legal commentaries, legal textbooks, journal articles, case citation, case digests and law dictionary.

## **1.9 Chapterization**

### **CHAPTER1: INTRODUCTION**

The first chapter will be an introduction to the proposed thesis which includes the statement of problem, literature review, research objectives, research questions, hypothesis and the research methodology.

### **CHAPTER2: RIGHT TO ABORTION AS A RIGHT TO PRIVACY: ISSUES AND CHALLENGES IN SOCIETY**

This chapter will give a general idea about right to abortion as a right to privacy, its definition and historical back ground will be discussed. It will also outline the issues that have made right to abortion a raging debate as well as the key challenges faced by the right to abortion in society.

### **CHAPTER 3: ABORTION LAW AND POLICY IN INDIA: AN ANALYSIS**

This Chapter will try to identify and analyze the legislations and policies aimed at protection, prosecution, prevention or any other aspect related to abortion in India.

### **CHAPTER 4: A COMPARATIVE ANALYSIS OF RIGHT TO ABORTION AS A RIGHT TO PRIVACY IN INDIA AND THE UNITED STATES OF AMERICA**

Chapter four will explore the response of legal systems around the world with special reference to the American legal system. A detailed enquiry into the American legal system will be carried out in this chapter to understand abortion law in comparative perspective.

## **CHAPTER 5: HUMAN RIGHT PERSPECTIVE ON RIGHT TO ABORTION IN INDIA**

This Chapter will identify and analyze right to abortion as a right to privacy from a human rights perspective. It will also try to understand the numerous human rights violations which take place when right to abortion is made illegal.

## **CHAPTER 6: CONCLUSION AND SUGGESTIONS**

This Chapter will conclude the study with suggestions on the basis of the findings of the study.

## **CHAPTER 2: RIGHT TO ABORTION AS A RIGHT TO PRIVACY: ISSUES AND CHALLENGES IN SOCIETY**

### **2.1 Introduction**

Two decades into the 21<sup>st</sup> Century, we still find ourselves in a transforming world in the context of Women empowerment and advancement of their right. Women population constitutes a major section of the world population, yet they are often placed at a disadvantageous position due to gender differences that have existed in our society since time immemorial. Though in recent years there have been many instances of Social movements and positive legislation aimed at bringing drastic changes toward the role and attitude of women in the modern society. Till date, women still find it very difficult to depart from their recognized traditional role as only reproducers, mothers and wives. The differences still continue to exist and likewise women continue to fight to ascertain their rights in many socio-legal spheres. One such gender related issue is abortion. Abortion is a gender related issue because only women can have abortion. It has been a subject of constant debate in the social, political and academic field. The abortion debate can be divided into Pro-Life Advocates i.e., people who advocate for the right to life of the unborn fetus and embryo and Pro-Choice i.e., people who advocate for a women's right to choose to have an abortion or continue with the pregnancy. The general question around which the discourse revolves is of ethics, morality, religion, unsafe-abortion, women's right, life of fetus and state's authoritative role in regulating the women's reproductive right in society<sup>7</sup>. There have been many varied political turns of events throughout history that have done nothing to ameliorate it much less, to resolve it. Similarly, law has

---

<sup>7</sup>Krishna Kumar, "Law of Abortion: Critical study from the perspective Of Women's Right to Privacy", 3 IJAR 111(2017).

made abortion legal in most of the countries around the world but under certain conditions that attract a large amount of controversy. The Judiciary has adjudicated that the right to Abortion as a right to privacy. However, it is not made absolutely clear and lacks legislative enforcement. Even today the debate continues. These considerations focus exclusively on the fetus and the women, but are equally relevant if not less on how both the women and the fetus are related to the wider social and cultural contexts.

## **2.2 Abortion: Development, History and Meaning**

Before going into the common definition of abortion and its types it is important that we first discuss the reproduction process and the various terms associated with it. Human beings are mainly divided into two genders i.e. man and woman. Thought in the recent years law and society have given recognition to other genders also but for the purpose of this research only two genders are considered. They both play an important part in the reproduction process. It is the interaction between the female and male reproductive systems which results in a women getting pregnant and out of which a child is born. The Reproductive process normally begins with copulation<sup>8</sup>, followed by nine months of pregnancy bore by the women before childbirth.

Pregnancy is the period of time during which the embryo and fetus develops inside a women. After a period of time it takes the form of a human child. It is basically the women who have to carry the unborn child inside her womb for a period of nine months approximately. During this time, the fetus receives all of its nutrition and oxygenated blood from the female via the umbilical cord. This drain of nutrients is

---

<sup>8</sup> It includes a sexual behavior where male sperm is introduced to the female uterus.

quite exacting on the female, who will be required to take higher levels of nutrients. In addition, vitamins and other essential nutrients are required in greater quantities than normally required by the body. While in the uterus, the baby first endures a very brief zygote stage, then the embryonic stage, which is marked by the development of major organs and lasts for approximately eight weeks, then the fetal stage, which revolves around the development of bone cells while the fetus continues to grow in size<sup>9</sup>. Once the fetus is sufficiently developed, the process of birth begins naturally with the fetus being pushed out of the birthing canal or by Cesarean surgery (C-section). The newborn child, which is called an infant, should typically begin respiration on its own shortly after birth. After birth it takes years of parental care after which a human child becomes independent and capable of surviving on its own.

The World Health Organization(WHO) has defined “abortion as a termination of pregnancy before the fetus is capable of extra uterine life”<sup>10</sup>.

Mapping the history of abortion, literature suggests that the concept of abortion has been in existence in human society since time immemorial. Records have shown that the Romans relied on the extracts of the silphium plant to induce abortions; similarly Greeks employed the herb pennyroyal for the same purpose<sup>11</sup>. The Sacred Hindu texts like Manusmriti among many other similar religious texts also talk about the act of abortion<sup>12</sup>. However, due to lack of literature it is unclear how often or to what extent the ethics of abortion was discussed during that time. We know that the main opposition of Abortion at the early period of time was mainly considered to be

---

<sup>9</sup>Kendra Cherry, Stages of Prenatal Development Available at <https://www.verywellmind.com/stages-of-prenatal-development-2795073>. (Visited on January 23, 2021)

<sup>10</sup>WHO, Complications of abortion: Technical and managerial Available at <https://apps.who.int/iris/handle/10665/40349> (Visited on January 23, 2021)

<sup>11</sup> Kathryn G. Milman, “Abortion Reform: History, Status, and Prognosis”, 21 CWRLR 540 (1970).

<sup>12</sup>Moira Stephens, Christopher F C Jorden et al, *Religious Perspectives on Abortion and a Secular Response*, 7 JRH 527(2010).



religious institutions and their heads. Widespread regulation on abortion did not begin until the eighteenth century. The Common law history indicates that abortion was not illegal in either England or America before the nineteenth century and that even when abortion was banned in the 1800s it was done to save the life of the mother<sup>13</sup>. The early common law did not prohibit abortion in the early stages. It was only after quickening that abortion had restrictions. The doctrine of quickening i.e. fetus did not have a soul until the point of quickening<sup>14</sup>. The Doctrine was originally developed by St. Thomas Aquinas in the 12<sup>th</sup> century; it was used to differentiate between pregnancy stages and legal standard for differentiating between legal and illegal abortions by the common law courts<sup>15</sup>.

It was only after the passing of the Lord Ellenborough's Act, 1803 that abortions at all stages of pregnancy were criminalized in common law, limiting abortions to the single purpose of saving the life of the mother<sup>16</sup>. It was done with a view that considered abortion a sin and a form of transgression of morality, and the laws were intended to punish and act as a deterrent and also to protect the fetal life<sup>17</sup>. Violations of these abortion laws carried serious repercussions for all parties. The anti-abortion laws continued to dominate till the first half of the 20<sup>th</sup> Century. The second half of the 20<sup>th</sup> Century saw liberalization of abortion laws all over the world. The 20<sup>th</sup> Century saw Women's liberation movement that imbibed liberal individual goals of equality as same as that of men, rights as self-preference, and of free choice as a negative freedom interference by others<sup>18</sup>. The history of the abortion rights

---

<sup>13</sup> Sybil Shainwald, *Reproductive Injustice in the New Millennium*, 20 WMJRGSC (2013).

<sup>14</sup>*Id* at 126.

<sup>15</sup>*Id* at 128-129.

<sup>16</sup>*Id* at 130,131.

<sup>17</sup>*Id* at 134.

<sup>18</sup>Elisabeth Porter, *Abortion Ethics: Rights and Responsibilities*, 9 Wiley on behalf of Hypatia, Inc, 77 (1994).

movement has used the slogan "a women's right to choose" which expresses real needs of women who had no choice with regard to their reproductive rights without the interference of the state<sup>19</sup>. This has led us to an impasse between those who believe the women had an exclusive right to choose whether or not to terminate a pregnancy and those who believe the fetus has a right to life on the basis of human status, and hence whose destruction should be prohibited by law<sup>20</sup>. The issue continues to be a hot topic for debate with advocates on both sides of the argument. Those in favor of abortion argued that such laws were made to protect the health of the mother. Medical procedures at the time were hardly advanced. It is also believe that the true reason these laws were enacted was to protect the women from a procedure that could very well result in infection, permanent damage or even death<sup>21</sup>. Feminists have argued that these early laws were an effort to control women<sup>22</sup>.

The major change in opinion and the onset of modern day debate regarding abortion rights and statutes started in America when the United States Supreme Court for the first time interpreted the right to make choices under right to privacy in the case of *Griswold vs. Connecticut*<sup>23</sup>. The Supreme Court invalidated a law that prohibited the use of contraceptives for married women on the ground that constitution protects right to privacy were infringed. Further, more importantly in 1973 the Supreme Court of America interpreted constitutional right to privacy to include a women's right to terminate a pregnancy in the case of *Roe vs. Wade*<sup>24</sup>. This case is now understood as

---

<sup>19</sup>Lynn M. Lindholm, *Judicial Supremacy, Right-to-Life and the Abortion Decision*, 2 NAPP 3 (1988).

<sup>20</sup>*Id* at 7.

<sup>21</sup>Dallas. a. Blanchard, *The Anti-Abortion Movement and the Rise of the Religious Right: From Polite to Fiery Protest*, 7 Twayne Publishers 1452(1994).

<sup>22</sup>James Andrew Moretto, *The Walk of Life: The History of the Anti-Abortion Movement and the Quest to Overturn Roe vs. Wade*, Law School Student Scholarship 539 (2013).

<sup>23</sup>*Griswold vs. Connecticut* 381 U.S. 479 (1985).

<sup>24</sup> Leo H. Kahane, Political, *Ideological and Economic Determinants of Abortion Position: An Empirical: Analysis of State Legislatures and Governors*, 53 AJES, Inc. 350(1994).

establishing a constitutional right to abortion<sup>25</sup>. The case recognized abortion as a fundamental right and further stated that only “compelling interest” could justify the state laws that limit the right. However, the court also accepted that the state has “important and legitimate interest in preserving and protecting the health of the women” and “the potentiality of human life” inside her. The United States Supreme Court in *Roe v. Wade* used the "right to privacy" as its rationale to invalidate anti-abortion laws on the ground that such laws violated a women's right to reproductive choice<sup>26</sup>. The Judgment in *Roe vs. Wade* concluded that in case of first trimester when the abortion was safe the state could have no regulation which banned abortion. In the second trimester when the abortions became more dangerous state could have regulations that was directed to protect the mother’s health and safety. In the third trimester the state can ban abortion services.

In India, the Indian Penal Code 1860 and the Code of Criminal Procedure 1973, with their origins under the British rule in India, made abortion a crime punishable for both the woman and the abortionist except to save the life of the women<sup>27</sup>. The liberalization of abortion law in India began in 1964 in the context of high maternal mortality due to unsafe abortion<sup>28</sup>. The Shantilal Shah Committee, appointed by the Government of India, carried out a comprehensive review of socio-cultural, legal and medical aspects of abortion and recommended The Medical Termination of Pregnancy Act, 1971<sup>29</sup>. The MTP Act provides a legal framework for abortion law in India. It deals with the restrictions imposed by the law not only on when the fetus can be aborted, but also who can get the abortion done and under what circumstances.

---

<sup>25</sup> Mary Ann Glendon, *A World without Roe: How Different Would It Be?* 19 THCR, 30 (1989).

<sup>26</sup> Marilyn B. Cane, *Whose Right to Life? Implications of Roe vs. Wade*, 7 ABA 422 (1973).

<sup>27</sup> Siddhivinayak S Hirve, *Abortion Law, Policy and Services in India: A Critical Review*, 12 IJSRGR 114 (2004).

<sup>28</sup> *Id* at 123.

<sup>29</sup> *Id* at 124.

India did not have any sort of mass social movement seeking the right to abortion it was mainly a result of criminal law reforms that was taking place in and around the world at that point of time.

The Preamble of the Act states, “An Act to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto”<sup>30</sup>. It is a short Act with only 8 sections. It deals with the various aspects like the time, place and circumstances in which a pregnancy may be terminated by a registered medical practitioner. If the woman has been pregnant for less than 20 weeks, the permission of one medical practitioner is required, and if the pregnancy is between 20 and 24 weeks, the authorization of two medical practitioners is mandatory<sup>31</sup>. Beyond 24 weeks, the Act permits abortion only in situations where the medical practitioner believes that abortion is immediately necessary to save the women’s life<sup>32</sup>.

Abortion has been a controversial issue on, moral, ethical, legal and political point. Women in India have right to abortion with certain limitations and these limitations have caused social, legal and reproductive health issues in women especially about their right to safe abortion<sup>33</sup>. Women’s sovereignty over her body is affected by the MPT Act. It is thought that the right to take decision over her body seems to have been lost into wilderness, a pregnant woman doesn’t have right to privacy<sup>34</sup>. MTP Act, which was introduced to check maternal mortality, has rather lead to the increase in the same because of women being forced by law, having no other options than to

---

<sup>30</sup>Medical Termination of Pregnancy Act, 1971 (Act No.34 of 1971), Preamble.

<sup>31</sup>Medical Termination of Pregnancy Act, 1971 (Act No.34 of 1971), Sec 3.

<sup>32</sup>Medical Termination of Pregnancy Act, 1971 (Act No.34 of 1971), Sec 5.

<sup>33</sup>Piyal Chatterjee, Right to Abortion is a basic Human Right: Special reference to India (2015) (Unpublished Conference: 2<sup>nd</sup> International Women’s Rights Assembly, New Delhi).

<sup>34</sup>*Supra* note 8 at 113.

go for back- street unsafe abortions which pose greater risk to her health<sup>35</sup>. It has been argued that India being a democratic state should give full freedom to the individuals rather than dictating its people, who are the real sovereign, under the garb of welfare state<sup>36</sup>. Women in India do not have the right of self-determination in regards to their body and hence are abstained from aborting the child out of societal pressures and state's compulsive laws<sup>37</sup>. Right to abortion of mother is in conflict with right to life of the fetus who is a potential being and is capable of possessing rights as his or her mother. In the absence of a justified law the Judiciary has often come to the rescue and has played a positive role by allowing abortion even beyond the restricted time period<sup>38</sup>.

Moreover, two other laws have led to restrictions on abortion access: the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, which forbids ultrasound for purposes of sex determination and has led to restrictions on all second-trimester abortion provision, and the Protection of Children from Sexual Offences Act, which requires reporting of underage sex, so that minors who become pregnant cannot feel safe if they seek an abortion<sup>39</sup>.

### **2.3 Types of abortion**

Abortion are of various types which can be sub divided under (a) Spontaneous or naturally occurring Abortion and (b) Induced Abortion.

---

<sup>35</sup>Asween Kaur, *Mother and the fetus: A Socio-legal Conflict*, BLR, 288 (2016).

<sup>36</sup>*Id* at 293.

<sup>37</sup>*Id* at 294.

<sup>38</sup>Bhavish Gupta and Meenu Gupta, *The socio-cultural aspect of abortion in India: law, ethics and practice*, Winter Issue ILILR,143(2016).

<sup>39</sup> Marge Berer, *Abortion Law and Policy Around the World: In Search of Decriminalization*, 19 HHRJ 18 (2017).

### **2.3.1 Spontaneous Abortion**

Spontaneous abortions can also be called miscarriage. This refers to naturally occurring termination of pregnancy without medical or other intervention. This type of abortion sometimes happens “even before a woman realizes that she is pregnant, and she even may not realize that she has had an abortion.”<sup>40</sup> Natural Spontaneous Abortion is the miscarriage that occurs owing to natural reasons like ill-health, disease or disease of the generative organs, accident etc. of the mother.

Types of Spontaneous Abortion

### **2.3.2 Isolated Abortion**

As the name indicates is a spontaneous abortion that occurs at a single phase.

### **2.3.3 Recurrent Abortion**

It is defined as a sequence of three or more consecutive spontaneous abortion.

### **2.3.4 Threatened Abortion**

It is a clinical entity where the process of abortion has started but has not progressed to a state from which recovery is impossible.

### **2.3.5 Inevitable Abortion**

It is the clinical type of abortion where the changes have progressed to a state from where continuation of pregnancy is impossible.

---

<sup>40</sup>*Supra* note 11 at 11.

### **2.3.6 Complete Abortion**

When the products of conception are expelled *en masse*, or all the products of conception have been expelled from the uterus, it is called complete abortion.

### **2.3.7 Incomplete Abortion**

When the entire products of conception are not expelled, instead a part of it left inside the uterine cavity, it is called incomplete abortion.

### **2.3.8 Missed Abortion**

When the fetus is dead and retained inside the uterus for a few days, it is called missed abortion.

### **2.3.9 Septic Abortion**

Any abortion associated with clinical evidences of infection of the uterus and its contents, is called septic abortion<sup>41</sup>. “Fever, chills, foul-smelling vaginal discharge, persistent vaginal bleeding, abdominal cramping, and pelvic pain or discomforts are common findings that cause septic abortion.

The above mentioned types of abortion are not considered in morality and ethics, because these types of abortions do not depend on human choice and decision. Further, these types of abortion are not considered illegal nor have any criminal sanction associated with it.

---

<sup>41</sup>Spencer A. Rathus, Jeffrey S. Nevidet et al (ed.) *Human Sexuality in a World of Diversity*, 376(Pearson, London, 1993).

### **2.3.10 Induced Abortion**

An induced abortion is the purposeful termination of a pregnancy before the embryo or fetus is capable of sustaining independent life. In contrast to spontaneous abortion, an induced or an elective abortion involves a decision to terminate a pregnancy by medical procedures.<sup>42</sup> Induced abortion is means the deliberate destruction of the product of conception while it is in the womb.<sup>43</sup>

Types of Induced Abortion.

### **2.3.11 Legal Induced Abortion**

It includes any induced abortion performed in accordance with the provisions of Law of a concerned country is called legal induced abortion. For example in India, any Abortion done according to the procedures provided by the Medical Termination of Pregnancy Act of 1971 would be considered a legal induced abortion.

### **2.3.12 Illegal or Criminal Induced Abortion**

Any induced abortion performed in violation of the provisions of the Law of a concerned country is called illegal or criminal induced abortion. For example, In India, any abortion done in violation of the Medical Termination of Pregnancy Act of 1971 will be considered illegal and criminal induced abortion.

Further, Induced Abortion can be divided into:

---

<sup>42</sup>Robert L. Crooks and Karla Baur, *Our Sexuality*, 361 (Cengage, Boston, 1993).

<sup>43</sup>*Id* at 367.



### **2.3.13 Therapeutic Abortion**

It is a procedure to end pregnancy when the life of the mother is at risk or if the unborn child has major abnormalities and is not expected to survive after birth. It is considered legal under the MTP Act of 1971.

### **2.3.14 Non-therapeutic**

It includes ending pregnancy for reasons other than to save the life of the mother and for reasons of major abnormalities of the unborn child that would inevitably lead to death or serious handicap of the child after birth.

Morality and Ethics is very much concerned with this type of abortion, because this type of abortions depends solely on human choice and decision. Illegal or Criminal induced abortion is punishable by Law. In India the culprit is punished for violation of the MTP Act of 1971. Though it may not be supported from moral point of view but there is as such no contradiction here, because not all illegal acts are necessarily unjustified ethically.

## **2.4 Methods of Abortion**

Various methods are used under different circumstances depending upon the stage and development of the embryo or fetus, various methods include:

### **2.4.1 Medical Abortion**

Medical abortion is a multistep process involving two medications (mifepristone and misoprostol) and/or multiple doses of one medication (misoprostol alone). Mifepristone (RU486) with misoprostol is more effective than misoprostol used

alone, and is associated with fewer side-effects.<sup>44</sup> Allowing home use of misoprostol following provision of mifepristone at a health care facility can improve the privacy, convenience and acceptability of services, without compromising on safety. Facility-based abortion care should be reserved for the management of medical abortion for pregnancies over nine weeks (63 days) and management of severe abortion complications.<sup>45</sup> Women must be able to access advice and emergency care in the event of complications, if necessary. Misoprostol might have teratogenic effects (malformation) if the abortion fails or the women decide to continue the pregnancy. However, because of potential risk, follow-up of a continued pregnancy is important in this situation.

#### **2.4.2 Medical Abortion during the second trimester**

Oxytocids is a pharmacological agents used to induce contraction of the uterus to cause abortion<sup>46</sup>.

The side effects in all medical abortion cases are considerable pain, heavy bleeding, diarrhea, nausea, vomiting, severe cramping and infection.

Surgical and other methods.

#### **2.4.3 Vacuum Curettage (Suction Aspiration)**

The most common first trimester abortion is suction aspiration<sup>47</sup>. The Cervix is dilated and a powerful vacuum tube is inserted. The suction is used to pull out the baby along with blood, amniotic fluids, tissues and body parts<sup>48</sup>.

---

<sup>44</sup>WHO, Clinical practice handbook for safe abortion - world health organization *Available at* [https://www.who.int/reproductivehealth/publications/unsafe\\_abortion/clinical-practice-safe-abortion/en/](https://www.who.int/reproductivehealth/publications/unsafe_abortion/clinical-practice-safe-abortion/en/) (Visited on February 29, 2021).

<sup>45</sup>*Id* at 24.

<sup>46</sup>*Supra* Note 11 at 16.

#### **2.4.4 Dilation and Surgical Curettage (D&C)**

Dilation refers to the forceful opening of the cervix by the use of series of instruments and curettage refers to a mechanical instrument used to remove tissues from within the uterus<sup>49</sup>. In Dilation Surgical Curettage, firstly the cervix is diluted and then the pregnancy tissue contents from the inside of the uterus are evacuated by a mechanical instrument called curettage.

#### **2.4.5 Partial Birth Abortion**

After ultrasound, forceps are used by the doctor to grab the baby's legs<sup>50</sup>. The baby's legs are pulled out into the birth canal. The doctor pulls out the entire body of the baby except the head<sup>51</sup>. Then the doctor jams scissors into the head of the baby to enlarge the skull and a suction catheter is inserted<sup>52</sup>. The baby's brain is sucked out, causing the skull to collapse. The dead baby is then removed.

#### **2.4.6 Methotrexate Injection**

Methotrexate is an injection that attacks the cells surrounding the embryo<sup>53</sup>. The embryo is deprived of food and oxygen which will eventually lead to the death of the baby. It is performed during the early trimester.

---

<sup>47</sup>*Id* at 18.

<sup>48</sup>*Ibid.*

<sup>49</sup>*Id* at 21.

<sup>50</sup>*Id* at 19.

<sup>51</sup>*Id* at 20.

<sup>52</sup>*Ibid.*

<sup>53</sup>*Ibid.*

#### **2.4.7 Prostaglandins Injection**

In this process Prostaglandins, naturally occurring birthing hormones are injected to induce premature labor<sup>54</sup>. This technique is used in the second trimester.

#### **2.4.8 Salt Poisoning (Saline Injection)**

A needle containing concentrated salt solution is inserted through the mother's abdomen into the amniotic sac of the baby<sup>55</sup>. The baby gets poisoned by the solution and start dying. Within, twenty four hours labor is induced and the mother gives birth to a dead child<sup>56</sup>. Used to sixteen weeks when enough fluid has accumulated<sup>57</sup>.

#### **2.4.9 Salina Amniocentesis (Salt Poisoning)**

This process includes 50-250 ml of amniotic liquid is removed from the abdomen of the pregnant mother<sup>58</sup>. This is replaced by a concentrated salt solution kills the baby<sup>59</sup>. This technique is used in the second trimester.

#### **2.4.10 Urea Injection**

This method is similar to saline injection. Instead of concentrated saline solution urea is used<sup>60</sup>. It is injected into the abdomen of the pregnant mother which would kill the baby. This technique is used in the second and early third trimester.

---

<sup>54</sup>*Id* at 21.

<sup>55</sup>*Id* at 22.

<sup>56</sup>*Ibid.*

<sup>57</sup>*Ibid.*

<sup>58</sup>*Id* at 23.

<sup>59</sup>*Ibid.*

<sup>60</sup>*Id* at 23.

#### **2.4.11 Hysterectomy**

In this process incision is made in the abdomen, to remove the baby, placenta and amniotic sac<sup>61</sup>. The technique is similar to the caesarean delivery, except that the umbilical cord is cut while the baby is still in the womb<sup>62</sup>. This leads to suffocation of the baby. It is normally performed during the third trimester, this is usually performed if other forms of abortion are unsuccessful<sup>63</sup>.

#### **2.4.12 Dilation and Evacuation (D&E) (Aspirotomy)**

It is similar to D&C method of abortion. However, the instruments used are different. In this process a forceps are used to take out the developing baby inside the womb<sup>64</sup>. It is generally performed in the second trimester.

#### **2.4.13 Menstrual Extraction/ Menstrual Regulation**

In the early stages of development of the embryo, suction abortions are performed with tubes, requiring small amount of dilation of the Cervix. The method is used in the first eight weeks. However, in case all the remains are not removed, severe infection may result<sup>65</sup>.

Abortion is one of the most commonly performed procedures in gynecological departments worldwide. The latest estimated worldwide rate for abortion in 2019 is 39 induced abortion per 1000 women aged 15 to 49 years old<sup>66</sup>. World-wide, an

---

<sup>61</sup>*Ibid.*

<sup>62</sup>*Ibid.*

<sup>63</sup>*Ibid.*

<sup>64</sup>*Id* at 22.

<sup>65</sup>*Id* at 18.

<sup>66</sup>WHO, Abortion Key Facts, *available at* <https://www.who.int/news-room/fact-sheets/detail/abortion> (Visited on June 21, 2021).

estimate of 73.3 million induced abortions takes place every year<sup>67</sup>. Medical and surgical methods are available for both first and second trimester abortions. These multiple processes are studied in the medical science as the methods of abortion. However, the methods of abortion vary upon concerned clinic as well as the choice of the operators.

The vast majority of abortions are performed within the first trimester. For early first-trimester abortions, two methods are available, medical abortion and surgical abortion with manual vacuum aspiration. For late first-trimester abortions or second-trimester abortions, electric vacuum aspiration and labor induction are available. However, because of legal restrictions, limited provider and clinic availability and patient costs, access is more limited for second-trimester abortion services than for first-trimester services.<sup>68</sup> After the second trimester Abortion is made illegal by law.

## **2.5 Reasons for abortion among women in India**

Abortion is evident in every society. A considerable amount of pregnancies are resolved by abortion worldwide. However, there is very limited information on abortion. This is mainly due to scarcity of data on abortion. Legal, moral and ethical issues seriously affect the quality of information with regard to abortion. Further, collecting information on the issue of abortion is very difficult because it requires asking women to articulate the often complex and sensitive process that leads to that decision<sup>69</sup>. One might say that the reason for seeking abortion is that the mother does

---

<sup>67</sup>Jonathan Bearak, Anna Popinchalk et al, “*Unintended pregnancy and abortion by income, region, and the legal status of abortion: estimates from a comprehensive model for 1990–2019*”, 8 LGH, 1157 (2020).

<sup>68</sup>Rachel K Jones, Mia R Zolna, et al, “*Abortion in the United States: Incidence and access to services, 2005*”, 40 PSRH 9 (2008).

<sup>69</sup>Akinrinola Bankole, Susheela Singh et el, *Reasons why women have induced abortion: evidence from 27 countries*, 24 IJSRH 120 (1998).

not want to continue with the pregnancy. While on one level it might be very true, there can be many steps between an unplanned abortion and having an abortion<sup>70</sup>. Moreover, many women who may have an unintended pregnancy may simply continue with pregnancy. In the same way, due to unknown and unforeseeable condition an intended pregnancy may be become undesired later on after conception. Evidence abounds that high proportion of women have unintended pregnancies and is one of the major reasons for abortion<sup>71</sup>. However, there can many underlying factors which are essential for a woman to decide whether or not to continue a pregnancy. Further, not all women who seek abortion may be able to succeed in getting the same. They may face personal and social pressure such as their husband's objection or community value that does not agree with abortion<sup>72</sup>. Legal restriction on abortion also obstructs abortion, lack of safe abortion facilities and high cost of private doctors cause problems for poor pregnant women to access abortion. In such cases women are often left with no option but to seek backdoor, unsafe abortion risking their health and life.

In addition, desire for small family, spacing in Child birth, failure of contraceptives, family planning, economic issues, non-marital sexual activities, pre-marital sexual activities and pregnancy due to rape and incest maybe other causes of abortion. Further, today women are no more recognized as only mothers and reproducers. They play an important role as any man would do in any field in the modern world. Therefore, recognition of women's reproductive freedom is considered essential for empowerment of women and their equality with the opposite gender.

There can be various reasons for seeking abortion in India including:

---

<sup>70</sup>*Id* at 151.

<sup>71</sup>*Id* at 152.

<sup>72</sup>*Id* at 155.

### **2.5.1 Socio-Cultural Factors**

There are various Socio-Cultural reasons which play an important part in the women's decision to abort or continue with the pregnancy. To name a few the socio-cultural environments, gender-power relation, education, availability and accessibility of information and use of fertility regulation methods, religion and personal belief of the women all play an important role in the decision she takes regarding unintended pregnancies<sup>73</sup>. Socio-Cultural reasons for abortion can be studied under different women groups.

#### **2.5.1.a Married women**

In a country like India, since childhood marriage and childbirth are considered the sole duty of women. It is installed in their mind that they are to obey the husband and his family. Such notions have long term effect on the minds of the girl and are not in a position to refuse sex or demand the use of contraceptives<sup>74</sup>. In India, girls are often married at a young age and are mostly are unaware about the use of contraceptives. Marriage and child bearing at a young age seriously disrupts the education of the women and makes her incapable of acquiring important knowledge regarding reproduction, family planning etc. Women are also discouraged to use contraceptives due to the superstitious belief that it affects their capacity to work and causes infertility<sup>75</sup>.

---

<sup>73</sup>Sonali Regmi, Unsafe Abortion: violation of women's right to reproduction and sexual health, study with reference to Nepal (2001) (Unpublished LLM Dissertation, Toronto University, Canada).

<sup>74</sup>*Id* at 13.

<sup>75</sup> RUWSEC Study in Tamil Nadu has shown that uses of contraceptive was not low but were discontinued and irregular due to health concern, family objection and irregular supply. Further, many women in the study conducted by RUWSEC stated that they did not use oral pills or IUD because of their side effects. The Women strongly believed that the oral pills dry up blood in the body and cause infertility, thereby preventing them from doing any kind of hard labor.



### **2.5.1.b Widow**

The situation of widows in India is very pitiful. Though widow remarriage is legal in India religious perspective and social norms till date make it very difficult for widows to re-marry in Indian society. They are expected to remain faithful to the dead husband. Death of the husband often leads to exile, vulnerability and abuse of the widow. In some cases widows enter into other non-marital relationships or maybe victims of rape and incest. In case, such relationships result in pregnancies. Women have to resort to abortions due to fear of society.

### **2.5.1.c Separated, Divorced and never Married Women**

The plight of a separated, divorced and women has not married is similar to that of a widow in India. Due to Religious and social norms pregnancies outside the framework of marriage are characterized by shame and stigma. Pregnancies outside marriage have to be aborted to preserve family honor<sup>76</sup>. Often the abortions take place in unsafe, illegal clinics.

### **2.5.1.d Unmarried women**

In India due to strict social and religious norms sexual relations before marriage is considered immoral. Generally it is believed that women are to remain sexually inactive till marriage. However, this old principle of sexual morality is falling apart<sup>77</sup>. Further, non-marital modern concepts like Live-in-relations are being accepted by the upcoming generations. Even the Supreme Court of India has given legal recognition to Live-in-couples. However, it is looked upon as a foul act by the society. Any

---

<sup>76</sup>*Id* at 5.

<sup>77</sup>*Supra* note 69 at 15.

sexual activity outside marriage is considered immoral in Indian society. Often such relations result in pregnancies and due to fear of the society the women has to seek abortion. Being too young or fearing parents or objection from society are common reasons why unmarried women seeks abortion<sup>78</sup>.

### **2.5.2 Limiting Family size and birth timing**

Studies have shown that one of the most common reason for seeking abortion among married women has been the limiting the family size and postponing childbirth<sup>79</sup>. In India, one-half to two-thirds abortion are due to desire for small family and birth timing<sup>80</sup>. There can be many reasons behind this including poverty, unemployment and inability to afford educations and other facilities to any additional children, Childbearing at a young age disrupts education, working women will consider limited family size and birth timing essential to her working environment. Deepa Sarkar in her book *Abortion in India: facts and realities* has stated that in a study conducted among women in Maharashtra, Gujarat, Andhra Pradesh and Tamil Nadu, they stated limiting family size was the chief reason for seeking abortion.

### **2.5.3 Inadequate use and insufficient use of contraceptives**

Non use of contraceptives is one of the main reasons for unwanted pregnancy in India<sup>81</sup>. Women often might restrain from using contraceptives due to incomplete knowledge and fear of side-effects, family objection, insufficient supply etc.

---

<sup>78</sup>*Supra note 75* at 125.

<sup>79</sup>Leela Visaria, Vimala Ram Chandra, *Abortion in India: Ground realities* 3 ( Routledge, New Delhi, 2007).

<sup>80</sup>*Id* at 20.

<sup>81</sup>*Id* at 21.

#### **2.5.4 Rape and Incest**

Rape and Incest are both criminal acts. Girls/women who become pregnant because of rape and incest often have to face a decision about whether to continue with the pregnancy or seek abortion. Often they seek abortion due to physical, emotional and psychological difficulties resulting from the pregnancy of the criminal act. Law only allows abortion for a certain period of time. However, in case of rape one can seek abortion after the prescribed time limit.

#### **2.5.5 Economic reasons**

Economic reasons are also an important reason for abortion. Lack of financial stability or women saying that they could not afford to properly care for a child is also considered an important reason for abortion. The importance of women's economic situation as the main reason for seeking an abortion is evident in both developed and developing countries<sup>82</sup>.

#### **2.5.6 Fetal defect**

It is an often-inherited medical condition that occurs before or at birth. It affects the well-being of the child after birth and can also pose threat to the life of the mother. In Nikita Mehta case the Supreme Court of India allowed the termination of pregnancy beyond the prescribed time limit when it was found that the malformed fetus was a threat to the life of the mother<sup>83</sup>.

Further other reasons for seeking abortion include problem with partner, pressure exerted by others to have an abortion, risk to maternal health, unwilling to carry out

---

<sup>82</sup>*Supra* note 75 at 128.

<sup>83</sup>PTI, High Court Refuses permission to abort 26-week fetus, Economic times, August 4, 2008.

the pregnancy. In a country like India where there exists the preference of male children, selective sex abortion is also a reason for seeking abortion. Another important factor that has resulted in the acceptance of abortion and one of the essential reasons for abortion is that the women today are not simply recognized as reproducers, wives and mothers, they take equal part in different activities in the social, political and business field. Often women seek to stay away from pregnancy or seek abortion as it would be detrimental to their development. The MTP Act of 1971 makes abortion legal up to 24 weeks in India.

## **2.6 Right to Privacy as a Right to abortion: History and meaning**

The dominant image of privacy has always been liberal i.e. an idea of private sphere in which the state could not interfere<sup>84</sup>. The idea of liberty from excess authoritarianism has existed from a very early time. The earliest examples of liberty can be traced back to the earliest Greek, Roman, English Empire, where the idea liberty was used to protect the people from the authoritative rule of the rulers<sup>85</sup>. There is fundamental belief that under the privacy law every person has right to choose his private life, unless it is repugnant to any moral, public or legal norm<sup>86</sup>. Over the years right to privacy has grown into an important human right. After the Second World War it was given International recognition. Perhaps the most essential mention of right to privacy can be found under the Universal Declaration of Human Rights, 1948<sup>87</sup>, and article 12 and article 17 of the International Covenant on Civil and

---

<sup>84</sup>J S Mill, *On Liberty* 4 (Batoche Books, Ontario, 1859).

<sup>85</sup>*Id* at 12.

<sup>86</sup>*Id* at 18.

<sup>87</sup> Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

Political Rights, 1966<sup>88</sup> which protect persons from arbitrary interference with their privacy. In India, it has been subject gradual development through judicial interpretation and activism. .

There is no direct link between rights to abortion as a right to privacy. It was decided by the court to include right to abortion as a right to privacy. The decision was taken in the landmark case of Roe vs. Wade. The idea that the right to abortion could be included as a fundamental right before Roe vs. Wade was an odd idea. The Judiciary in this case took the criminal act of abortion and turned it into a Constitutional right over night. The American Supreme Court articulated right to abortion as a fundamental right in a 7-2 bench decision. The Court while deciding the matter it mentioned that Abortion is a private matter and when the matters are purely private .The general Constitutional principles obstructs the state to interfere.

The Supreme Court of America ruling in the case of Roe vs. Wade opened the way for freedom of choice to exist within certain limits<sup>89</sup>. It has been argued that right of privacy is not a meaningful concept for women if it allows the state conceptually to sever her womb and represent its contents as separate<sup>90</sup>. However, the decision to include right to abortion as a right to privacy was not welcome to all and has been subject to criticism. It has been argued that the unborn child's right to privacy is less stringent than that of an adult's is because the infringing of a child's right to life is more easily justified than infringing an adult's right to privacy. There is no recognition of fetal personhood. Although the state has an interest in unborn life, it does not arise till the fetus was viable outside the womb.

---

<sup>88</sup> The International Covenant on Civil and Political Rights (ICCPR) is a multilateral treaty adopted by the United Nations General Assembly through GA. Resolution 2200A (XXI) on 16 December 1966, and in force from 23 March 1976 in accordance with Article 49 of the covenant.

<sup>89</sup> Carol Edelson, *Supreme Court abortion ruling*, 3 off our backs, Inc, 4 (1973).

<sup>90</sup> Christyne L. Neff, *Womb, and bodily integrity*, 3 YJLM 12 (1991).

## 2.7 Unsafe Abortion

Unsafe abortion is global concern faced by women all over the world. It is a major health concern issue. Thousands of women die due to lack of access to safe abortion. This situation is directly related to the fact that abortion is criminalized and legally restricted in many countries. One of the most significant impacts of criminalizing abortion has been the alarming rise of unsafe abortion all around the globe.

The World Health Organization has defined safe abortion as:

*An abortion is considered to be a safe Abortion when the termination of pregnancy is done under the guidelines provided by the WHO<sup>91</sup>.*

The World Health Organization has defined unsafe abortion as:

*“A procedure to for the termination of unwanted pregnancy by person lacking the necessary skill or in an environment lacking minimum medical standards”<sup>92</sup>.*

It is estimated that out of 73.3 abortion worldwide 45 percent abortion are carried in the least safe and dangerous conditions<sup>93</sup>. 13 percent of maternal mortality worldwide being due to unsafe abortions<sup>94</sup>. Over half of the estimated abortion took place in Asia, specially south and central Asia<sup>95</sup>. Unsafe abortion is the fourth leading cause of

---

<sup>91</sup> WHO, Safe abortion: technical and policy guidance for health systems, 17 Available at [https://apps.who.int/iris/bitstream/handle/10665/70914/9789241548434\\_eng.pdf](https://apps.who.int/iris/bitstream/handle/10665/70914/9789241548434_eng.pdf) (Visited on July 23, 2021).

<sup>92</sup>*Id* at 19.

<sup>93</sup>*Supra* note 97 at 1.

<sup>94</sup>*Id* at 7.

<sup>95</sup>*Ibid*.

maternal death in India<sup>96</sup>. It is estimated that 67 % of abortions in India are unsafe abortions, varying in different states according to the sample research conducted<sup>97</sup>.

Even after forty years of liberalization of abortion laws. India continues to face the problem of unsafe abortion which leads to maternal death and serious health issues for the women. Public health sector facilities provide for one-quarter of abortion facilities<sup>98</sup>. The health sectors that provide induced abortion are in the private sector. Many public service sectors fail to provide abortion service<sup>99</sup>. This leads to the problem of accessing abortion facilities for the rural and poor women. As many public health sectors fail to provide affordable abortion services women from the rural and poor sections of the society have no option but to secure unsafe abortion which are provided at affordable rates by unskilled practitioners. Further, in a country like India access to abortion is also obstructed by lack of knowledge about the abortion laws, use of contraceptives and social stigma surrounding abortion. Over the years gaps, weakness and ambiguity in law have handicapped the successful implementation of Abortion law and instead help develop the prevalence of unsafe abortion facilities that are an obstruction to safe and hygienic abortion.

Unsafe abortion can be greatly reduced by providing affordable access to abortion specially among the rural and poor women. Abortion facilities have remained a major issue of concern for access to abortion. Legal and practical barriers to abortion violate a number of human rights, including the rights to life, privacy, Reproductive rights, equality, health concern, freedom from gender discrimination, and freedom from ill-

---

<sup>96</sup>Khalid S Khan, Daniel Wojdyla et al. *WHO analysis of causes of Maternal death: A Systematic Review*. 10 TL 1069 (2006).

<sup>97</sup>Ryo Yokoe, Rachel Roweetel, *Unsafe abortion and abortion-related death among 1.8 million women in India*, 4 BJM-GHJ, 7 (2019).

<sup>98</sup>Susheela Singh, Chander Shekhar et al, *The Incidence of Abortion and Unintended Pregnancy in India, 2015*, 6 TL-GH 116 (2018).

<sup>99</sup>*Id* at 121.

treatment. Human Rights can be applied to reduce unsafe abortion and provide legal access to safe abortion. Lastly, one can say that where there is no legal restriction, abortion services are likely to be safe.

## **2.8 Religion and Abortion**

Abortion is not just a legal and medical issue, but essentially a moral issue in society. Right to Abortion encompasses issues of life and death, right and wrong, sexual morality and nature of society which make it a major religious concern. Historically, right to abortion has seen staunch opposition from various religious institutions all over the world, particularly the Roman Catholic Church. Therefore, for the purpose of this research it is important to understand views of different religions on the matter of Abortion.

### **2.8.1 Hindu view on Abortion**

Hinduism is considered to be one of the oldest religions in the World. Although, the term Hinduism is considered to be relatively new, having been coined by British writers in the first decade of the 19<sup>th</sup> Century, its existence can be traced to a much earlier period of time<sup>100</sup>. Hinduism is quite different from the western concept of religion. It has been often described as:

*“A complex set of interrelationship among many sorts of people, belief system, and practices rather than a then a single uniform, structured bureaucratically organized, centrally codified religion”<sup>101</sup>*. Further, the Supreme Court of Indian has defined Hinduism as *“Unlike other religions in the world, the Hindu religion does not*

---

<sup>100</sup> David N Loenzen, *Who Invented Hinduism?* 40 CUP, 632 (1999).

<sup>101</sup> Constantin-Iulian Damian, *Abortion from the perspective of the eastern religion: Hinduism and Buddhism*, 8 RJB 126 (2010).



*claim any one prophet; it does not( worship any one God; it does not subscribe to any one dogma, it does not believe in any one philosophic concept; it does not follow any one set of religious rites or performances. In fact, it does not satisfy the traditional features of a religion or creed. It is a way of life and nothing more. The Constitution makers were fully conscious, of the broad and comprehensive character of Hindu religion, and while guaranteeing the fundamental right to freedom of religion made it clear that reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jain or Buddhist religion<sup>102</sup>”.*

Hinduism has complex roots and involves a vast array of beliefs and practices. They have a number of deities. Hinduism does not strictly follow the principles of monotheism. Hinduism was not founded by any one entity. Its spiritual authority rests upon sacred texts. Hinduism does not have any particular single religious text. It includes a large number of sacred books. To understand the Hindu view on Abortion we must look into a various Hindu religious scriptures that include Shruti (includes Vedas and Upanishads) and Smriti (Includes Dharamsastras, Puranas and texts like Mahabharata).

The Hindu sacred texts mention Abortion as “Garbhahatya” (pregnancy destruction) and “Bhurnahatya” (fetus murder)<sup>103</sup>. Hatya in both the words means murder, indicating voluntary act of killing<sup>104</sup>. Another Suggestive Sanskrit word for Abortion is “Bhrunahan” which means “Killer of an Embryo” and “Killer of learned Brahmin”<sup>105</sup>. Brahmins hold highest status in the four Hindu varnas or social classes. They belong to the priestly class. The study and recitation of sacred Hindu texts was

---

<sup>102</sup>*Sastri Yagnapurushadji and Ors.vs. Muldas Bhudardas Vaishya and Anr*,AIR1966 SC 1119.

<sup>103</sup>*Supra* note 101 at 128.

<sup>104</sup>Garima Yadav., *Abortion (Hinduism)*,Hinduism and Tribal Religions: Encyclopedia of Indian Religion,1(2018).

<sup>105</sup>*Supra* note 101 at 129.

traditionally reserved to this class. The similarity drawn between the killing of an unborn child and killing of a Brahmin denotes a strong sense of resentment towards Abortion. According to the ancient Hindu texts, it was considered as one of the most terrible sins<sup>106</sup>. In Gautama dharmasastra and Manu Smriti Involuntary miscarriage is termed *sramsana*<sup>107</sup>. It means involuntary killing the embryo or fetus. The social distinction between abortion and miscarriage can be seen through the lenses of ancient Hindu texts. While Abortion or voluntary act of killing was looked upon as a severe sin Miscarriage or involuntary act of killing was not considered a severe sin but morally neuter<sup>108</sup>. The purana talks about the law of Karma. The cycle of birth and death is determined by the law of Karma, it is stated there that the act of abortion hinders the natural progression and the cycle of a soul<sup>109</sup>. In Atharvaveda, abortion is described as a heinous crime and the abortionist is described as a person destined to be burdened with all the misdeeds of human<sup>110</sup>.

In Hinduism embryo or fetus is regarded as a living person from conception and abortion as the termination of life. It equates killing of an embryo or fetus as killing a human being. In RgSamhita, Lord Vishnu is termed at the protector of the embryo or the fetus<sup>111</sup>. This implies that due to the vulnerability of the embryo or fetus special protection was given to them in the form of protection from a deity (Lord Vishnu is the protector of life and order in Hinduism). The Rgveda provides for different religious rites to be accomplished during pregnancy starting with conception known as Garbhadhana and Garbhalambhana, continuing with Pumsavana, at the end of the first trimester, Garbharakṣana, in the fourth month, and Jatakarma at the time of

---

<sup>106</sup>*Id* at 132.

<sup>107</sup>*Supra* note 110 at 2.

<sup>108</sup>*Supra* note 107 at 132.

<sup>109</sup>*Supra* note 110 at 2.

<sup>110</sup>*Supra* note 107 at 133.

<sup>111</sup>*Ibid*

delivery<sup>112</sup>. These rites indicate special status of the embryo or fetus. In Brhadaranyaka Upanishad, killing of an embryo or the fetus is considered a morally wrong act<sup>113</sup>. In Gautama dharmasastra, a women stands to lose her caste status if she commits the act of abortion<sup>114</sup>. Loss of caste is a severe form of punishment in Hindu society. It basically restricts the women s access to resources, position in society and path to salvation<sup>115</sup>.

The ancient Hindu physician, Charaka (200- 500 CE) states conception in the following biologic and religious terms: “*Conception occurs when intercourse takes place in due season between a man of unimpaired semen and a women whose generative organ, (menstrual) blood and womb are unvitiated - when, in fact, in the event of intercourse thus described, the individual soul (jiva), descends into the union of semen and (menstrual) blood in the womb in keeping with the (karmically produced) psychic disposition (of the embryo matter)*”<sup>116</sup>. The ancient physician has emphasized on the entering of the soul at the time of conception. Therefore, recognizing life of embryo as an embodied soul. In Caraka Samhita it is stated “*The combination of sperm, ovum and life-principle implanted in the womb is known as embryo. Embryo is the product of akasa (wether), vayu (air), tejas (fire), ap (water) and prthvi (earth), being the seat of consciousness*”<sup>117</sup>. Here, there is an indication of intervention of superior agents in conception and formation of life. However, in

---

<sup>112</sup>*Id* at 134.

<sup>113</sup>*Ibid.*

<sup>114</sup>*Supra* note 110 at 2.

<sup>115</sup>*Ibid.*

<sup>116</sup> Moira Stephens, Christopher F. C. Jorden, *Religious Perspectives on Abortion and a Secular Response*, 49 *JRH*, 515(2010).

<sup>117</sup>*Supra* note 107 at 135.

Garuda Purana, it is mentioned that a soul enters the womb around seventh month of pregnancy<sup>118</sup>.

The dharmasastras express disagreement with abortion, leading to a social-religious sanction for the abortionist causing the loss of caste<sup>119</sup>. Lowering of caste in Hindu society is considered a severe punishment in Society. In Kausitaki Upanishad and Mahanarayana Upanishad, an abortionist is considered the highest offender and the act is equivalent to the act of betraying a Guru<sup>120</sup>. Betraying a Guru is considered to be one of the highest forms of offence in Hinduism. It was often followed by social sanction.

Besides Hindu sacred texts, moral arguments against abortion can be found in doctrine of Karma and Ahimsa. Abortion violates the Hindu ethical principle of non-injury (ahimsa), a value that expresses the traditional Hindu reverence for life, and especially toward those life-forms that are helpless and vulnerable<sup>121</sup>. Since abortion is killing of an unborn child. It goes against this sacred principle. Karma on the other hand is a religious concept found in Hinduism, Jainism, Sikhism and Buddhism. The law of Karma basically states that every action has a reaction and whatever you do will return to you and we will be held accountable for our good or bad deeds. It is much related to the concept of rebirth according to one's Karma. Taking into account the Hindu principle of Karma and the belief in rebirth determined by karma the fetus is not developing into a person but, rather, is already a person in the moment of conception<sup>122</sup>.

---

<sup>118</sup>*Supra* note 110 at 2.

<sup>119</sup>*Supra* note 107 at 135.

<sup>120</sup>*Supra* note 110 at 3.

<sup>121</sup>*Supra* note 122 at 521.

<sup>122</sup>*Ibid.*

Like most of the religion around the world, Hinduism too considers abortion as a morally and ethically wrong act. It has been sharply criticized in many of the Ancient sacred Hindu texts. Various religious texts of the Hindus talk about Abortion. The Sacred texts clearly highlight abortion as a wrong doing and empathize on the life of the unborn embryo or fetus. The general idea about life according to the Hindu texts is that life begins at conception. Abortion is also against the principles of Ahimsa and Karma in Hindu Philosophy. Hinduism provided for Social and religious sanctions, for example a woman who willingly aborts is said to lose her caste in the Hindu Society which is a serious punishment in the Hindu society. The woman who loses her caste is deprived of many social and religious rights. An Abortionist could also face similar social and religious sanctions for acts of Abortion. An abortionist is considered a wrongdoer and his actions are equated with the act of betraying a Guru.

Overall we can say that Abortion in Hinduism is a heinous offence according to the Hindu Sacred Texts. However today, in contemporary India and Nepal (having majority Hindi Population) confronted with serious public health problems, uncontrollable population growth rate, and large-scale of illegal abortions, abortion has been made legal. It was a welcome step and did not meet with many controversies. Abortion is considered wrong in Hinduism. However, a large number of Abortions are taking place in India and Nepal today (legal and illegal) due to modern economic and social concerns. The present legal systems in both the countries allow abortion but are subject to conditions.

### **2.8.2 Buddhist view on Abortion**

Buddhism is one of the most practiced religions in the world. Buddhism includes a number of traditions, beliefs and spiritual practices based on the Buddha's teachings.

Buddhism believes that through meditation, good behavior and spirituality one can achieve nirvana or enlightenment<sup>123</sup>. The study here includes both the Theravada and the Mahayana traditions in Buddhism. They do not see themselves completely distance from each other as in the case of Roman Catholic and Protestants.<sup>124</sup> In case of Roman Catholic and Protestants one started as protest against the other. Both the sects of Buddhism see the core teachings of Buddha as the main principle. Buddhist view in general prohibits abortion as Buddhism includes a number of moral vows and the first precept is the vow to never end a sentient life<sup>125</sup>. Since abortion includes the ending of life it can be said that abortion Buddhism condemns abortion. It is looked upon as a sin and incurring bad karma<sup>126</sup>.

Buddhist belief is that life begins at conception<sup>127</sup>. One of the most essential aspects of Buddhism is Re-birth<sup>128</sup>. Buddhism emphasizes that the souls undergo the cycle of birth-death-rebirth and have been undergoing the same for countless number of times. They will further continue to follow the cycle until they achieve enlightenment, which is the goal in Buddhism. To commit the act of Abortion would include the soul from being born and achieving the ultimate aim of enlightenment. Human birth is considered special and important and is thus protected under the Buddhist belief system.

According to Vasubandhu (4<sup>th</sup> and 5<sup>th</sup> century exegete) Buddhism traditionally hold that human life begins at the conception when sperm, egg and Vijnana

---

<sup>123</sup>Soraj Hongladarom, Buddhism and Abortion, S, 2019 Available at <https://www.researchgate.net/publication/335985378> (Visited on November 23, 2021)

<sup>124</sup>*Id* at 10.

<sup>125</sup>*Id* at 9.

<sup>126</sup>*Ibid*.

<sup>127</sup>Phillip A Lasco, *A Buddhist View of Abortion*, 26 JRH 215 (1987).

<sup>128</sup>*Id* at 216.

(consciousness) come together<sup>129</sup>. Therefore there is no difference between an unborn child and a born individual.

Buddhaghosa, a fifth century Theravada commentator has an extensive commentary on this precept:

*“I undertake to observe the rule to abstain from taking life.’... ‘Taking life’ means to murder anything that lives. It refers to the striking and killing of living beings.... ‘Taking life’ is then the will to kill anything that one perceives as having life, to act so as to terminate the life-force in it, in so far as the will finds expression in bodily action or in speech. With regard to animals it is worse to kill large ones than small. because a more extensive effort is involved. Even where the effort is the same, the difference in substance must be considered. In the case of humans the killing is the more blameworthy the more virtuous they are. Apart from that, the extent of the offence is proportionate to the intensity of the wish to kill”<sup>130</sup>.*

It is important to mention here that some scholars strongly believe that the Buddhist principles of compassion or Karuna include performing abortion when it done for performing the lesser of the two evils<sup>131</sup>. For example an unwanted pregnancy of a single young female would lead to a life of pain for both the child and the mother. The child would be unable to get proper care and the mother would have to sacrifice her education, youth to take care of the child. Bring shame to the family. In such situation it is better to have and abortion and the principles of compassion would deem it fit Buddhist Countries like Taiwan and Thailand strongly condemns abortion. On the other hand Japan which is also a Buddhist Country has legalized abortion.

---

<sup>129</sup> R. E. Florida, *Buddhist Approaches to Abortion*, 1 Asian Philosophy: IJPT 41(1991).

<sup>130</sup>*Id* at 45.

<sup>131</sup>*Supra* note 128 at 11.

### 2.8.3 Christian view on Abortion

Christianity is one of the most followed religions of the world. It is a monotheistic religion based on the life and teachings of Jesus the son of God. It is a popular religion in many Countries around the globe. Christian ethics includes finding the will of God, in other words to do what God wants to be able to achieve ultimate happiness<sup>132</sup>. The Christian religious text includes the Bible which can be divided into Old Testament which includes pre-Christian Jewish Scripture and the New Testament which includes gospel, life and teachings of Jesus Christ.

The Bible as such does not say anything about Abortion<sup>133</sup>. This led the Christian anti-abortionists to argue that that as unborn child is a Human Being, which makes its killing a Crime. The Old Testament case law (Exodus 21:22-25) propounds that's in case a pregnant women is injured, the person injuring the pregnant women has to pay compensation. In case of death of the pregnant women the punishment is capital punishment. Historically around AD 65, first Christian writings opposing the act of abortion stated coming out<sup>134</sup>. As stated by the early Roman Catholic Church the reasons included.

- 1) "Original Sin" that an unbaptized person would never receive salvation<sup>135</sup>
- 2) Merger of soul and body formed a human being<sup>136</sup>.

These issues are debated till date and are the reason for modern day controversy on the issue of abortion. Historically, Christian school of thought

---

<sup>132</sup> Helen Oppenheimer, *Abortion: a sketch for a Christian view*, 5 JCE 48 (1992).

<sup>133</sup> Hensman, R. (2020). *Christianity and Abortion Rights*, 5 Feminist Dissent 157(2020).

<sup>134</sup> Kathryn G. Milman, *Abortion Reform: History, Status, and Prognosis*, 21 Case Western Reserve Law Review 525(1970).

<sup>135</sup>*Id* at 525.

<sup>136</sup>*Ibid*.



accepted that the soul entered the body of the unborn child after quickening (today known as concept of viability)<sup>137</sup>. Which takes place much after conception. It was only in 1869 that the Catholic Church under the Pope Pious IX adopted the current position that the soul enters the fetus at the time of conception<sup>138</sup>. This action condemned abortion in Christianity.

The Christian view on Abortion was not as strict as it can be seen today. Today the Roman Catholic Church stands in direct opposition against Abortion. The earlier Christian theologians St. Augustine in the 5<sup>th</sup> century and St. Thomas Aquinas in the 13<sup>th</sup> century view on abortion undermine sweeping claims about a definitive Christian Anti-Abortion position<sup>139</sup>. The Anti- Abortion view of Christianity was only formed in the 19<sup>th</sup> Century which continues to dominate the overall Christian view till date. Countries with majority Christian population are also the countries where the notion of Abortion is opposed the most and subject to deliberation thereby creating the a movement for the Pro-Abortionists and making it a political issue.

#### **2.8.4 Islam View on Abortion**

Followers of Islam are called Muslims. Muslims are monotheistic and worship one, all-knowing God, who in Arabic is known as Allah. It is one of the most popular religions in the world. To understand the Islamic view on Abortion we have to refer to Quran and Sunnah, which are the guiding religious text in Islamic religious authority. For Muslims Quran and Sunnah is the main source of Sharia Law. Notably, neither

---

<sup>137</sup>*Supra* note 138 at 49.

<sup>138</sup>*Supra* note 140 at 49.

<sup>139</sup>Ignacio Castuera, *A Social History of Christian Thought on Abortion: Ambiguity vs. Certainty in Moral Debate*, 76 AJES 122 (2017).

the Quran nor the Sunnah opposes Abortion directly<sup>140</sup>. The passages are generally understood to refer live offspring and not a fetus.

*6:137- And likewise, to many of the polytheists their partners have made [to seem] pleasing the killing of their children in order to bring about their destruction and to cover them with confusion in their religion. And if Allah had willed, they would not have done so. So leave them and that which they invent (Surat Al-'An`ām).*

*6:151 Come; I will recite what your Lord has prohibited to you. [He commands] that you not associate anything with Him, and to parents, good treatment, and do not kill your children out of poverty; we will provide for you and them. And do not approach immoralities - what is apparent of them and what is concealed. And do not kill the soul which Allah has forbidden [to be killed] except by [legal] right. This has He instructed you that you may use reason (Surat Al-An am).*

*17:33 And do not kill the soul which Allah has forbidden, except by right. And whoever is killed unjustly - We have given his heir authority, but let him not exceed limits in [the matter of] taking life. Indeed, he has been supported [by the law] (Surat Al-Isa).*

The Sunnah does not include any direct reference to Abortion. Though there is reference to forced miscarriage. In a case whereby a woman killed her pregnant co-wife, Muhammad requires the murderer's kin to play blood money (diya) for the co-wife and a payment (ghurra) for the unborn fetus<sup>141</sup>. This case provides an understanding of the legal position of the fetus. As the value of the ghurra is usually

---

<sup>140</sup>Gilla K Shapiro, *Abortion law in Muslim-majority countries: an overview of the Islamic discourse with policy implications*, 29 HPP486(2013).

<sup>141</sup>*Id* at 488.

one-twentieth of the diya, it appears that the fetus has some legal protections but is not a “full-fledged human being”<sup>142</sup>.

In Principle, Quran and Sunnah do not specifically address the issue of Abortion. The matter has been subject to interpretation. Many Muslim theologians have different view point on abortion while some believe that abortion can be allowed up to 40 or even 120 days, others interpret these precepts to protect the unborn child more conservatively<sup>143</sup>.It is argues that abortion is permissible if the fetus is younger than 40 days or 120 days. They quote a statement from the Prophet that refers to a human being starting as a fertilized ovum in the uterus of the mother for forty days, then it grows into a clot for the same period, then into a morsel of flesh for the same period, then an angel is sent to that fetus to blow the Ruh into it and to write down its age, deeds, sustenance, and whether it is destined to be happy or sad<sup>144</sup>. It is understood that before the Ruh is blown into the fetus at 120 days, the fetus is not a living entity, and therefore aborting it does not amount to killing it<sup>145</sup>.

The access to abortion varies greatly in Muslim Majority Countries. Countries like Turkey and Tunisia allow abortion on request<sup>146</sup>. While Countries like Bangladesh, Yemen, Afghanistan allows abortion only in case to save the life of the mother<sup>147</sup>. This is due of different interpretation of religious texts in different Countries. However, no Islamic Country has absolute ban on abortion.

All major religions around the world, irrespective of their origin and theology disagree with the right to abortion, but few are absolute. Hinduism, Buddhism and

---

<sup>142</sup>*Id* at 490.

<sup>143</sup> Ibrahim B. Syed, *Abortion an Islamic Perspective*, 1 IRFI, Inc 3 (2019).

<sup>144</sup>*Id*, 5.

<sup>145</sup>*Ibid*.

<sup>146</sup>*Supra* note 145 at 487.

<sup>147</sup>*Id* at 489.

Christianity hold strong opinion that life begins at conception making abortion a sin from the very beginning. Islam approves and disapproved abortion under different circumstances. Religious Institutions advocate control over the reproductive rights as part of their belief. Religious beliefs are part of argument used by the anti-Abortions. However, it is not legally recognized by the judiciary or the legislation. Now the challenge lies in how to reconcile religion and abortion.

## **2.9 Conclusion**

The question as to whether an Abortion is right or wrong is closely related to the position of women in that particular society. Where men and women are treated equally the issue of abortion is not taken up as a major issue as women have more control over their reproductive rights. However, most ethical arguments on Abortion tend to focus on the act. It is debated that whether the fetus can be considered a person, at what age of gestation the fetus should be considered to have life, at what age the fetus has a viable nervous system, etc.

The other matter for consideration is whether the right of the mother can be more important than the right of the fetus, whether the mother has a choice to control her body. These considerations focus exclusively on the fetus and the women, but not on how both the women and the fetus are related to the wider social and cultural contexts. Social and cultural contexts are essential deciding factors especially in a Country like India. It is through change in Social and Cultural outlook that issues like gender equality and related matters like abortion can be solved.

Social change and social view have shown tremendous change over the past few centuries and there is no doubt that society will continue to change. The role of

women in Society is changing. There is increased recognition of gender equality. The road maybe long but if we keep moving in the right direction that there is no doubt that we will be able to achieve the same in time. With the change in social and cultural view and gender equality in Society issues like Abortion at request will be possible as women will have more control over their Reproductive rights.

## CHAPTER 3: ABORTION LAW AND POLICY IN INDIA: AN OVERVIEW

### 3.1 Introduction

During the last few decades we have seen the liberalization of abortion laws all over the world. Many countries have reformed their laws to allow abortion at the request of the pregnant woman while some Countries still continue to follow strict laws that restrict abortion. India liberalized abortion by enacting the Medical Termination of pregnancy Act 1971 which was designed with certain exception to the strict provisions of miscarriage in the Indian Penal Code, 1860. It is a landmark legislation which in the course of time has been subject to reform through legislative reforms and judicial opinion. The most recent amendment was done by the Medical Termination of Pregnancy Amendment Act passed in the year 2021.

### 3.2 Indian Penal Code, 1860

Abortion laws in India were first framed during British India as part of Indian Penal Code 1860 and the Code of Criminal Procedure 1873, which made abortion a crime punishable for both the woman and the abortionist except in case when the abortion is done to save the life of the woman<sup>148</sup>. Causing miscarriage has been made a punishable offence under Sec 312-316 of the Indian Penal Code. It has been placed in the chapter “Offences Affecting Human Body”.

Section 312<sup>149</sup> of the IPC states that in case a person voluntarily<sup>150</sup> causes miscarriage<sup>151</sup> to a pregnant woman. The person shall be punishable with

---

<sup>148</sup>Siddhivinayak S Hirve, *Abortion Law, Policy and Services in India: A Critical Review*, 12 IJSR 114(2004).

<sup>149</sup> Indian Penal Code, 1860(Act no. 45 of Year 1860) S 312: 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

imprisonment for three years or fine or both. The offence has been made non-cognizable, bailable and non-compoundable. In case the woman is "quick with child"<sup>152</sup> the person can be imprisoned up to seven years and fined. A woman who causes miscarriage to herself will be held liable under this section. However, no person shall be punishable if the miscarriage is caused to save the life of the woman. It must be an act done in good faith<sup>153</sup>. It can be said that sec 312 is applicable when the abortion is done with the consent of the pregnant woman. The accused can be the woman herself or another person who has acted on her consent.

In the case *State of Maharashtra vs. Flora Satuno Kutino*<sup>154</sup> an unmarried woman died while causing abortion due to perforation of the uterus. It was held that the accused was instrumental in causing the miscarriage and it was not done in good faith to save the life of the mother. The miscarriage was with a view to wipe out all the evidence that the girl was pregnant. The accused was convicted under Sec 312, 315, 316 and 201 of the Indian Penal code.

---

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.

In the I.P.C. (Amend.) Bill, 1972, it has been proposed to insert the words "except in accordance with the provisions of the Medical Termination of Pregnancy Act, 1971, Sec cl. 127 of the Bill.

<sup>150</sup>Indian Penal Code, 1860(Act no. 45 of Year 1860) S 39 defines "voluntarily," as "a person is said to cause and effect "voluntarily" when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reasons to believe to be likely to cause it."

<sup>151</sup> It is the premature expulsion of the fetus from the mother's womb at any period of time before the gestation is completed.

<sup>152</sup>*Queen Empress vs. Ademma*, III I. D. Madras (N.S.) 653, (1886), I.L.R. 9, 369 defined 'Quickening' or "Quick with Child" as perception by the mother that the movement of the fetus has taken place or the embryo has a fetal form. It generally takes place in the fourth or fifth month of the pregnancy.

<sup>153</sup>Indian Penal Code, 1860(Act no. 45 of Year 1860) S 52 defines "good faith" states "Nothing is said to be done believed in 'good faith' which is not done or believed without due care and attention." In the case *Bux Soo Meah Choudry vs. The King* (1938) 39 Cri. L. J. 985. It was held that absence of good faith means negligence and carelessness.

<sup>154</sup>*Maharashtra vs. Flora Satuno Kutino*, 2007 Cr LJ 2233 (Bom)

In case the miscarriage is caused without the consent<sup>155</sup> of the woman. It is covered under Sec 313<sup>156</sup> of the Indian Penal Code. Unlike Sec 312, Sec 313 does not distinguish between “with child” and “quick with child” and punishes the person who caused the miscarriage. It is cognizable, not bailable, non-compoundable.

In the case *Hasi Mohan Barman vs. State of Assam*<sup>157</sup>. The accused had physical relation with the victim who eventually became pregnant. The accused wanted the victim to get an abortion which she refused. The accused then took the victim to a pharmacy where she was administered an injection, which led to abortion. The after few days the victim lodged an FIR against the accused. The Court found the accused guilty under sec 313 read with sec 34 of the Indian Penal Code.

In case of a person with the intention to cause only miscarriage causes the death of the person. The person is punishable under Sec 314 of the Indian Penal Code<sup>158</sup>. The punishment is increased to life imprisonment if the person has acted without the consent of the pregnant woman. The offence under section 314 is cognizable, not bailable and not-compoundable.

---

<sup>155</sup>Indian Penal Code, 1860(Act no. 45 of Year 1860) S 90: A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or If the consent is given by a person who, from unsoundness of mind, or intoxication is unable to understand the nature and consequence of that to which he gives his consent; or Unless the contrary appears from the context, if the consent is given by person who is under twelve years of age.

<sup>156</sup>Indian Penal Code, 1860(Act no. 45 of Year 1860) S 313: Whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years and also be liable to fine.

<sup>157</sup>*Hasi Mohan Barman vs. State of Assam*, 2007 (2) GLT 98.

<sup>158</sup>Indian Penal Code, 1860(Act no. 45 of Year 1860) S 314: Whoever, with intent to cause the miscarriage of a woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term a which may extend and ten years, and shall also be liable to fine; and if the act is done without the consent of the woman, shall be punished either with imprisonment for life, or with the punishment above mentioned.

Explanation: - It is not essential to this offence that the offender should know that the act is likely to cause death.



In the case *Jacob George vs. State of Kerala*<sup>159</sup>, a homeopathic doctor operated on a pregnant woman to cause abortion. However, the woman died few hours after the operation because her uterus got perforated. He was convicted under section 314 of the Penal code. Similarly in *Surendra Chauhan vs. State of Madhya Pradesh*<sup>160</sup> the accused had illicit relation with the deceased woman. After becoming pregnant the accused took her to the doctor for the purpose of causing abortion. The doctor was not qualified for this purpose, nor was his clinic approved by the Government authorities. The doctor did not have the basic facilities for abortion. The accused was convicted under sec 314 read with sec 34 of the Indian Penal Code.

Section 315<sup>161</sup> and 316<sup>162</sup> of the Indian Penal Code deals with acts akin to miscarriage. It penalizes causing death of a born or unborn Child at the time of birth. Sec 315 provides punishment for act done with an intention of preventing the child from being born alive or causes it to die after birth. The offence is cognizable, non-bailable and non-compoundable.

In the case *Leela Wati vs. State of Punjab*<sup>163</sup>, three girls were put up to face charges under sec 315, 318 and 109 of the Penal code. An unwed pregnant girl along with another girl had taken steps with the aid of Leela Wati, a nurse, to prevent the child of the unwed girl to be born alive. The child died after birth. The act was not done in good faith and the accused were convicted by the Court.

---

<sup>159</sup>*Jacob George vs. State of Kerala*, 1994 Cr LJ 3851.

<sup>160</sup>*Surendra Chauhan vs. State of Madhya Pradesh*, AIR 2000 SC 1436.

<sup>161</sup> Indian Penal Code, 1860(Act no. 45 of Year 1860) S 315: Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth and does by such act prevent that child from being born alive, or causes it to die after its birth, shall if such act be not caused in good faith for the purpose of saving the life of the mother be punished with imprisonment of either description for a term which may extend to ten years, or with fine or with both.

<sup>162</sup> S Indian Penal Code, 1860(Act no. 45 of Year 1860) S 316: Whoever does any act under such circumstances, that if he thereby causes death he would be guilty of culpable homicide, and does by such act cause the death of quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

<sup>163</sup>*Leelawati vs. State of Punjab*, 1982 Cri LJ 27.

Section 316 deals with acts which results in causing death to the quick unborn child, as culpable homicide. In this section if a person does an act likely to cause the death, need not be intended or desired, the person would be guilty under this section.

In the case *Murugan vs. State of Tamil Nadu*<sup>164</sup>, the accused caused the death of his wife, as well as his 5 month old baby in her womb by hitting her with a shard object to the head and later strangling her with a rope. The court sentenced him life imprisonment under sec 316 of the Indian Penal Code.

Sec 312-316 of the Indian Penal code strictly dealt with abortion before the MTP Act of 1971. It can be noted that abortion was illegal and could be only performed to save the life of the pregnant woman and in no other cases was abortion allowed. The pregnant woman had no say on the issue of abortion. The liberalization of abortion in India was first advocated as a family planning measure by the Central Planning Board, Government of India in the year 1964<sup>165</sup>. Accordingly, in 1964 the Government of India constituted the Shantilal Shah Committee to suggest reforms to the existing abortion laws and policies in India<sup>166</sup>. The Shantilal Shah Committee submitted its report on December 30, 1966<sup>167</sup>. On the basis of this report, the government passed the Medical Termination of Pregnancy Act, 1971 which became applicable from 1<sup>st</sup> April 1972. It was enacted two years before the landmark *Roe vs. Wade*<sup>168</sup> judgment<sup>169</sup>. The act is considered a major milestone in social legislation and had far reaching impact on unwanted and undesired pregnancies for women in India.

---

<sup>164</sup>*Murugan vs. State of Tamil Nadu*, 1991 Cri LJ 1680.

<sup>165</sup>Amar Jesani, and Aditi Iyer, *Women and Abortion*, 27 EPW (1993).

<sup>166</sup>Bhavish Gupta, Meenu Gupta, *The Socio-Cultural Aspect Of Abortion in India: Law, Ethics and Practice*, Winter Issue, ILI, 140(2016).

<sup>167</sup>*Id* at 142

<sup>168</sup>*Roe vs. Wade*, 410 U.S. 113 (1973).

<sup>169</sup>The basic objective of the act was to avoid the misuse of induced abortion and provide relaxation to the strict provisions of miscarriage under the Indian Penal Code.

### 3.3 Medical Termination of Pregnancy Act, 1971

The legislation for the first time provided legal provisions for abortion in India. The MTP Act of 1971 is a short act with 8 sections.

#### 3.3.1 Termination of Pregnancy

Sec 2 of the act basically deals with the definition. Section 3 deals with when a termination pregnancy can take place<sup>170</sup>. The section provides for the termination of pregnancy where the length of the pregnancy does not exceed 24 weeks. If the woman has been pregnant for less than 20 weeks, the permission of one medical practitioner is mandatory (Sec 3 (2) a). If the pregnancy is between 20 and 24 weeks, the authorization of two medical practitioners is mandatory (Sec 3 (2) b). In both the cases the medical practitioners must be of the opinion that the continuation of the pregnancy would be a risk to the life of the pregnant woman (Sec 3 (2) i) or a grave threat to her mental and physical health or when there is substantial risk to the child born including physical and mental abnormalities and serious handicap (Sec 3 (2) ii). Section 3 is also applicable in case of pregnancy due to Rape or when pregnancy occurs due to failure of any device or method used by married couples to limit the number of children<sup>171</sup>. The section provides that to determine the risk to the pregnant

---

<sup>170</sup>Medical Termination of Pregnancy Act, 1971(Act no 37 of 1972) S 3 (1) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.

(2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,-

(a) where the length of the pregnancy does not exceed twenty weeks, if such medical practitioner is, or  
(b) where the length of the pregnancy exceeds twelve weeks but does not exceed twenty four weeks, if not less than two registered medical practitioners are, of opinion, formed in good faith, that—

(i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or

(ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped

<sup>171</sup>Medical Termination of Pregnancy Act, 1971(Act no 37 of 1972) S 3 - Explanation 1: where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation 2: where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused

woman actual or reasonably foreseeable environment should be taken into account (sec 3 (3))<sup>172</sup>. Beyond 24 weeks, the Act permits abortion only in situations where the medical practitioner believes that abortion is immediately necessary for saving the life of the mother (Sec 5).

An essential ingredient for the termination of pregnancy is the consent of the pregnant woman. It has been laid down in Sec (3 (4) b) of the MTP Act, 1971<sup>173</sup>. However, in case a pregnant woman who has not attained the age of 18 years, or is a mentally ill person the prior written consent of the guardian is essential for the termination of pregnancy. It has been laid down in Sec (3 (4) a) of the MTP Act, 1971<sup>174</sup>. The MTP rules as devised by the Government in 1975 have made consent of the husband unnecessary for the termination of unwanted pregnancy by the pregnant woman<sup>175</sup>.

Sec 5 (1) of the MTP Act provides exception in case a pregnant woman crossed the prescribed time limit provided in Sec 3 of the Act<sup>176</sup>. It permits a registered medical practitioner to terminate a pregnancy when the person in good faith is of the opinion that the termination of pregnancy is necessary for saving the life of the woman. Sec 5 (2) provides the punishment in case of termination of pregnancy by a non-registered medical practitioner, which is minimum two years and can be extended upto seven

---

by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman

<sup>172</sup>Medical Termination of Pregnancy Act, 1971(Act no 37 of 1972) S 3 (3) - In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or reasonably foreseeable environment.

<sup>173</sup>Medical Termination of Pregnancy Act, 1971(Act no 37 of 1972) S 3 (4) b - Save as otherwise provided in cl (a), no pregnancy shall be terminated except with the consent of the pregnant woman.

<sup>174</sup>Medical Termination of Pregnancy Act, 1971(Act no 37 of 1972) S 3 (4) a - No pregnancy of a women, who has not attained the age of 18 years, or, who having attained the age of 18, is a lunatic, shall be terminated except with consent in writing from the Guardian.

<sup>175</sup>Medical Termination of Pregnancy Act, 1971(Act no 37 of 1972) S 6-Rules framed in 1972 by the GOI.

<sup>176</sup>Medical Termination of Pregnancy Act, 1971(Act no 37 of 1972) S 5 (1) - The provisions of section 4, and so much of the provisions of sub-section (2) of section 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman

years under the Indian Penal Code<sup>177</sup>. Sec 5 (3) provides the punishment in case a pregnancy is terminated in a place not prescribed in Sec 4 of the MTP Act<sup>178</sup>. The punishment provided in the section includes rigorous imprisonment for minimum two years which can be extended up to seven years. Sec 5 (4) provide punishment to the owner of a place performing termination of pregnancy not approved under Sec 4 (b) of the MTP Act, which includes imprisonment for minimum two years and can be extended up to seven years<sup>179</sup>.

The MTP Act allows abortion up to 24 weeks. This means abortion is legal upto second trimester. However, it is also important to note that there is absolute discretion on the medical opinion. This means that a woman cannot directly state that she has an unwanted pregnancy. The MTP Act does not allow termination of pregnancy on the demand of the pregnant woman<sup>180</sup>. The Pregnant woman has to meet the various conditions provided by the MTP Act. It is the Medical opinion that decides that the pregnant woman meets the conditions provided by the act. That is, the medical experts must in good faith opine that there is risk to the life of the mother or causes grave mental and physical health problems and that is case the child born will be seriously handicapped, rapeetc. to allow abortion.

---

<sup>177</sup>Medical Termination of Pregnancy Act, 1971(Act no 37 of 1972) S 5 (2) - Notwithstanding anything contained in the Indian Penal Code (45 of 1860), the termination of pregnancy by a person who is not a registered medical practitioner shall be an offence punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years under that Code, and that Code shall, to this extent, stand modified.

<sup>178</sup>Medical Termination of Pregnancy Act, 1971(Act no 37 of 1972) S 5 (3) - Whoever terminates any pregnancy in a place other than that mentioned in section 4, shall be punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years

<sup>179</sup>Medical Termination of Pregnancy Act, 1971(Act no 37 of 1972) S 5 (4) Any person being owner of a place which is not approved under clause (b) of section 4 shall be punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years.  
Explanation

1.--For the purposes of this section, the expression "owner" in relation to a place means any person who is the administrative head or otherwise responsible for the working or maintenance of a hospital or place, by whatever name called, where the pregnancy may be terminated under this Act. Explanation

2.--For the purposes of this section, so much of the provisions of clause (d) of section 2 as relate to the possession, by registered medical practitioner, of experience or training in gynaecology and obstetrics shall not apply.

<sup>180</sup>*V Krishnan vs. G. Rajan & others*, HCHP 1450/93.

### 3.3.2 Registered Medical Practitioner

It is essential under the person authorized to terminate a pregnancy to be a registered medical practitioner under Sec 3(1) read with sec 2(d) of the MTP Act. Further, Rule 4 of the MTP Rule 2003 provides qualifications for a registered medical practitioner<sup>181</sup>.

### 3.3.3 Places Authorized for termination of Pregnancy

Sec 4 of the MTP Act provides the places where the termination of pregnancy can take place<sup>182</sup>. The Rules 3 of MTP Rules 2003 provides that one member of the district level committee provided under S.4(b) of the MTP Act shall be Gynaecologist /Surgeon/ Anaesthetist and other members from local medical profession, Non-Governmental Organization and Panchayati Raj Institution of the district. It further provides that one of the members of the committee should be a woman. Further, rules are provided under rule 5 of MTP Rules<sup>183</sup>.After receiving the application under sub-

---

<sup>181</sup>Rule 4:In the case of medical practitioner, who was registered in a State Medical Register immediately before the commencement of the Act, experience of gynecology and obstetrics for a period of not less than 3 years. 2. In the case of a medical practitioner, who was registered in a State Medical Register: (a) If he has completed six months of house surgency in gynecology and obstetrics; or (b) Unless the following facilities are provided therein, if he had experience at any hospital for a period of not less than one year in the practice of gynecology and obstetrics; (c) If he has assisted a registered medical practitioner in the performance of 25 cases of medical termination of pregnancy of which at least 5 have been performed independently, in a hospital established or maintained, or a training institute approved for this purpose by the government.(i) This training would enable the Registered Medical Practitioner to do only first trimester terminations.(ii) For terminations up to 24 weeks the experience or training as prescribed under sub-rules (a), (b) and (d) shall apply. (d) In the case of a medical practitioner, who has been registered in a State Medical Register and who holds a postgraduate decree or diploma in gynecology and obstetrics, the experience or training gained during the course of such degree or diploma.

<sup>182</sup>(a) A hospital established or maintained by Government or, (b) A place for the time being approved for the purpose of this Act by Government or a District Level Committee constituted by that Government with the Chief Medical Officer or the District Health Officer as a Chairperson of the said Committee: Provided that the District Level Committee shall consist of not less than three and not more than five members, including the Chairperson, as the Government may specify from time to time.

<sup>183</sup>(1) No place shall be approved under clause (b) of section 4- (i) Unless the Government is satisfied that termination of pregnancies may be done therein under safe and hygienic conditions; and (ii) Unless the following facilities are provided therein, namely :- in case of first trimester, that is, up to 20 weeks of pregnancy, a gynaecology examination/labour table, resuscitation and sterilization equipment, drugs and parental fluid, back up facilities for treatment of shock and facilities for transportation; and in case of second trimester, that is up to 24 weeks of pregnancy:-(a) An operation table and instruments for performing abdominal or gynaecological surgery. (b) Anesthetic equipment, resuscitation equipment

rule 2 of rule 5 for approval of a place for termination of pregnancy, the chief medical officer has to verify the information contained in the application or inspect the place to verify that the facilities provided in sub-rule 2 are provided, so that the termination of pregnancy can be provided in safe and hygienic conditions. After inspection if the medical officer finds that the place meets the conditions provided in the MTP rules for places where termination of pregnancy can be allowed and the place can provide safe and hygienic abortion. The place has to be inspected within two months of receiving the application. The medical officer then recommends the place to the committee. The Committee after consideration can approve such place by a certificate of approval under form B. The Certificate of approval has to be displayed in a place which is visible to every person coming into the place easily. The certificate of approval has to issue within the next two months of inspection. In case of any problem if found by the Medical Officer for approval. The medical officer holds inspection within two months of rectification of the problem by the applicant. All places approved under MTP Rules 1975, are deemed to be approved under these rules.

Under Rule 5 of the MTP Rules the Chief Medical Officer has the power to inspect the place approved as often as may be necessary in view of verifying that the termination of pregnancy is taking place in safe and hygienic conditions. If the Chief Medical officer has reasons to believe that the termination of pregnancy is not being done in safe and hygienic conditions, the medical officer has been given the power to seize any article, medicine, registrar maintained, kept or found in the place. The provisions of Code of Criminal Procedure, 1973 apply to any seizure made by the Medical Officer under Sub-Rule 2 of Rule 6. If after investigation the Medical Officer

---

and sterilization equipment. (c) Drugs and parental fluids for emergency use, notified by Government of India from time to time.

is of the view that the place has failed to provide the condition and facilities specified in Rule 5. A detailed report shall be submitted to the committee and if the committee is satisfied that the place has failed to provide safe and hygienic termination of pregnancy under the MTP Rules then the approval certificate suspended or cancelled under Rule 7. However, the owner of the place must be given a chance of making representation before cancellation. In case of cancellation, the owner can make necessary improvements and apply for approval again under Rule 5. In case of suspension, the place cannot perform any termination pregnancy from the date of communication of the suspension.

### **3.3.4 Miscellaneous**

Sec 6<sup>184</sup> and 7<sup>185</sup> of the MTP Act gives the Central and State Government power to frame rules and regulations accordingly. The MTP Rules and MTP Regulations 2003

---

<sup>184</sup>Medical Termination of Pregnancy Act, 1971(Act no 37 of 1972) S 6 - Power to make rules – (1) The Central Government may, by notification in the Official Gazette, make rules to carry out the provisions of this Act. (2)

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely: (a) the experience or training, or both, which a registered medical practitioner shall have if he intends to terminate any pregnancy under this Act; and (b) such other matters as are required to be or may be, provided by rules made under this Act.

(3) Every rule made by the Central Government under this Act shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions, and If, before the expiry of the session which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

<sup>185</sup>Medical Termination of Pregnancy Act, 1971(Act no 37 of 1972) S 7: Power to make regulation :-

(1) The State Government may, by regulations, - (a) require any such opinion as is referred to in sub-section(2) of Sec. 3 to be certified by a registered medical practitioner or practitioners concerned in such form and at such time as be specified in such regulations, and the preservation or disposal of such certificates; (b) require any registered medical practitioner, who terminates a pregnancy to give intimation of such termination and such other information relating to the termination as maybe specified in such regulations; (c) prohibit the disclosure, except to such persons and for such purposes as may be specified in such regulations, of intimations given or information furnished in pursuance of such regulations.

(2) The intimation given an the information furnished in pursuance of regulation made by virtue of Cl.(b) of Sub-section (1) of shall be given or furnished, as the case may be, to the Chief Medical Officer of the State.

(2A) every regulation made by the State Government under this Act shall be laid as soon as may be after it is made, before the state legislature. (ins. by Act 4 of 2005, s.2).



were framed by Central Government under Sec 6 of the MTP Act. Sec 8<sup>186</sup> of the MTP Act provides protection to registered medical practitioner who perform termination of pregnancy in good faith. No legal action can be taken against the registered medical practitioner for any damage caused or likely to be caused done in good faith under the framework of the MTP Act.

### **3.4 Abortion law reform after 2000: Legislative View**

Major reforms under the MTP Act started after 2000, they include:

#### **3.4.1 Medical Termination of Pregnancy (Amendment) Act, 2002**

The Medical Termination of Pregnancy Amendment Act was passed in the year 2002 that brought about few changes to the Medical Termination of Pregnancy Act, 1971. Firstly the word “Lunatic” was replaced by the words “Mentally Ill Person”<sup>187</sup>. The amendment also decentralized the approval and regulation of abortion facilities from the central to the state level<sup>188</sup>. It was done to reduce bureaucracy in obtaining approval. It also provided punitive punishment of 2 to 7 years of imprisonment for providers and owners of abortion facilities not maintained or approved by the

---

(3) Any person who willfully contravenes or willfully fails to comply with the requirements of any regulation made under sub-section 91) shall be liable to be punished with fine which may extend to one thousand rupees.

<sup>186</sup>Medical Termination of Pregnancy Act, 1971(Act no 37 of 1972) S 8 Protection of action taken in good faith.—No suit or other legal proceeding shall lie against any registered medical practitioner for any damage caused or likely to be caused by anything which is in good faith done or intended to be done under this Act.

<sup>187</sup> The Medical Termination of Pregnancy (Amendment) Act, 2021 (no. 8 of 2021) S 2 - In section 2 of the Medical Termination of Pregnancy Act,-34 of 1971, (hereinafter referred to as the principal Act), -- (i) In clause (a), for the word lunatic , the words mentally ill person shall be substituted. (ii) For clause (b), the following clause shall be substituted, namely :- (b) Mentally ill person means a person who is in need of treatment by reason of any mental disorder other than mental retardation. 3. In section 3 of the principal Act, in sub-section (4), in clause (a), for the word lunatic, the words mentally ill person shall be substituted.

<sup>188</sup> The Medical Termination of Pregnancy (Amendment) Act, 2021 (No. 8 of 2021) S 4 - No termination of pregnancy shall be made in accordance with this Act at any place other than (a) a hospital established or maintained by Government, or (b) a place for the time being approved for the purpose of this Act by Government or a District Level Committee constituted by that Government with the Chief Medical Officer or District Health Officer as the Chairperson of the said Committee : Provided that the District Level Committee shall consist of not less than three and not more than five members including the Chairperson, as the Government may specify from time to time.

Government<sup>189</sup>. Further, to reduce administrative delay the MTP amendment Rules, 2003 provided for time frame for registration and directs the District Committee to verify the request for approval within two months of receiving the application for registration and to process the approval if the place is found appropriate or two months after the ratification of the noted deficiencies. The physical standards for facilities provided for the second trimester termination of pregnancy remain the same. The amended MTP Rules rationalize the physical standards for the first trimester termination of pregnancy. It needs to be noted here that every facility needs a personal trained to recognize complications and provide or be able to refer to facilities of emergency care. The amendment is silent on what happens in case the authorities do not complete the task in the stipulated time.

### **3.4.2 Medical Termination of Pregnancy (Amendment) Act 2021**

The MTP Amendment Act of 2021 was a much awaited amendment to the MTP Act of 1971. The amendment has substituted certain sub-sections and inserted certain new clauses. Notably, termination of pregnancy has been defined as “means a procedure to terminate a pregnancy by using medical or surgical methods”<sup>190</sup>. The new amendment has increased the upper limit for abortion from 20 weeks to 24 weeks,

---

<sup>189</sup> The Medical Termination of Pregnancy (Amendment) Act, 2021 (No. 8 of 2021) S 2 - In section 5 of the principal Act, for sub-section (2) and the Explanation thereto, the following shall be substituted, namely :-

(2) Notwithstanding anything contained in the Indian Penal Code, the termination of pregnancy by a person who is not a registered medical practitioner shall be an offence punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years under that Code, and that Code shall, to this extent, stand modified.

(3) Whoever terminates any pregnancy in a place other than that mentioned in section 4, shall be punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years. (4) Any person being owner of a place which is not approved under clause (b) of section 4 shall be punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years. Explanation 1. For the purposes of this section, the expression owner in relation to a place means any person who is the administrative head or otherwise responsible for the working or maintenance of a hospital or place, by whatever name called, where the pregnancy may be terminated under this Act.

Explanation 2. For the purposes of this section, so much of the provisions of clause (d) of section 2 as relate to the possession, by registered medical practitioner, of experience or training in gynaecology and obstetrics shall not apply.

<sup>190</sup>The Medical Termination of Pregnancy (Amendment) Act, 2021 (No. 8 of 2021) S 2 (e).

for special categories of women which has been defined in the amendments to the MTP Rules and victims of rape, incest and differently-abled women, minors etc.<sup>191</sup> Further, the composition, functions and other details of Medical Board has been prescribed subsequently in Rules under the Act<sup>192</sup>. Lastly, the Amendment Act states that the name and other particulars of a woman who has undergone abortion shall not be revealed except to the person who is authorized by law<sup>193</sup>.

The MTP Act of 1971 is a significant piece of legislation as it legalized abortion in India. It provides for time limit for abortion along with place and condition under

---

<sup>191</sup> The Medical Termination of Pregnancy (Amendment) Act, 2021 (No. 8 of 2021) S 3-In section 3 of the principal Act, for sub-section (2), the following sub-sections shall be substituted, namely:—  
(2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,—

(a) where the length of the pregnancy does not exceed twenty weeks, if such medical practitioner is, or  
(b) where the length of the pregnancy exceeds twenty weeks but does not exceed twenty-four weeks in case of such category of woman as may be prescribed by rules made under this Act, if not less than two registered medical practitioners are, of the opinion, formed in good faith, that— (i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or (ii) there is a substantial risk that if the child were born, it would suffer from any serious physical or mental abnormality. Explanation 1.—For the purposes of clause (a), where any pregnancy occurs as a result of failure of any device or method used by any woman or her partner for the purpose of limiting the number of children or preventing pregnancy, the anguish caused by such pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman. Explanation 2.—For the purposes of clauses (a) and (b), where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by the pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

<sup>192</sup> The Medical Termination of Pregnancy (Amendment) Act, 2021 (No. 8 of 2021) S 3 (2A) the norms for the registered medical practitioner whose opinion is required for termination of pregnancy at different gestational age shall be such as may be prescribed by rules made under this Act.

3 (2B) the provisions of sub-section (2) relating to the length of the pregnancy shall not apply to the termination of pregnancy by the medical practitioner where such termination is necessitated by the diagnosis of any of the substantial fetal abnormalities diagnosed by a Medical Board.

3 (2C) Every State Government or Union territory, as the case may be, shall, by notification in the Official Gazette, constitute a Board to be called a Medical Board for the purposes of this Act to exercise such powers and functions as may be prescribed by rules made under this Act. (2D) The Medical Board shall consist of the following, namely:—

(a) a Gynaecologist;  
(b) a Paediatrician;  
(c) a Radiologist or Sonologist; and  
(d) Such other number of members as may be notified in the Official Gazette by the State Government or Union territory, as the case may be.

<sup>193</sup>The Medical Termination of Pregnancy (Amendment) Act, 2021 (No. 8 of 2021) S 4- After section 5 of the principal Act, the following section shall be inserted, namely

(1) No registered medical practitioner shall reveal the name and other particulars of a woman whose pregnancy has been terminated under this Act except to a person authorized by any law for the time being in force.

(2) Whoever contravenes the provisions of sub-section

(1) shall be punishable with imprisonment which may extend to one year, or with fine, or with both."

which abortion can take place. It also provides punishment for defaulters under the Act. However, it is far from being a complete act which truly advocates the rights of women. Recently in the landmark case K.S.Puttaswami, right to privacy was recognized as a fundamental right and right to reproductive choices as part of Right to Privacy. Still this is not reflected in the MTP Act. The MTP Amendment Act of 2021 has brought significant changes to the old act. Most notably the upper gestation limit has been increased to 24 weeks. It is a very welcome step. However, it is impossible to ignore the fact that the pregnant women have no choice in this regard she still has to get permission from the registered medical practitioner for abortion as prescribed by the Act. At no point of time under the MTP Act can a woman choose to have an abortion according to her choice. This leads us to the question. Why the state ignores a Pregnancy women's right to privacy? How can an unborn life be more important already existing life? All though the Supreme Court of Indian has time and again interpreted a women's reproductive rights as part of her personal liberty and right to privacy as stated in the case Suchita Srivastava and K S Puttaswami. The legislators time and again completely ignore it. This in turn leads to a growing illegal and unsafe abortion. Women have no choice but to seek illegal and unsafe abortion. Until and unless the MTP Act recognizes the right to privacy of a pregnant woman the Act will never achieve the aim of controlling morbidity and mortality due to unsafe abortion. Presently, despite the legalization of abortion nearly 56 % of all abortions in India are done under unsafe and unhygienic conditions and amount to 9 % of maternal fatalities.<sup>194</sup>

---

<sup>194</sup> Report on Medical Certificate of death, 2015 New Delhi Registrar General of India, 2015 available at <https://www.censusindia.gov.in> (visited on 24 August, 2021).

### 3.5 Abortion law reform after 2000: Judicial View

The MTP Act, 1971 was challenged in the case *Nanda Kishore vs. Union of India*<sup>195</sup> in the year 2005. The issue brought before the Court was that in particular section 3 (2) a and b along with explanation I and II of the same section were unethical and a clear violation of Article 21 of the Constitution of India. The court was asked to determine whether a right to life of an unborn child was violated by the above mentioned provisions. However, the court refused to enter into this debate and stated that they were only concerned with the validity of the questioned provisions of the MTP Act. The court refused to comment on the status of a fetus. The court held that the MTP Act was valid and in consonance with Art 21 of the Constitution.

In the case *Dr Nikhil Dattar and Ors vs. Union of India*<sup>196</sup> a 24 week pregnant woman filed for terminating of pregnancy on the ground that the unborn child had multiple cardiac problems. The doctor consulted by the pregnant woman was of the opinion that the child if born would suffer from serious handicap and could suffer sudden death. They also expressed that they could not handle the emotional stress and monetary burden if the child is born with serious handicap or needs continuous medical treatment. However, the court appointed medical panel did not hold a similar view it held that the baby born would have a good chance of survival. Keeping in view the report of the medical board the Court did not allow the Termination of pregnancy. One more key issue raised in this case was whether the prescribed statutory time limit should be increased from 20 weeks to 24 weeks. The MTP Act mainly prescribed termination of pregnancy up to 20 weeks at that point of time. Similar issues were raised in other cases like *Amita Kujur vs. State of Chhattisgarh* and

---

<sup>195</sup>*Nanda Kishore vs. Union of India*, AIR 2006 Raj. 166.

<sup>196</sup>*Dr Nikhil Dattar and Ors vs. Union of India*(2008) 110 BOM L R 3293.

Ors<sup>197</sup>, Mrs. X and Ors vs. Union of India<sup>198</sup>, Sarmistha Chakraborty and Ors vs. Union of Indian Secretary and Ors<sup>199</sup>. This forced the government to take up this issue seriously; the Medical Termination of Pregnancy amendment Act of 2021 was passed. It replaced the 20 weeks gestation period to 24 weeks in the MTP Act.

In the case of Suchita Srivastava vs. Chandhigarh Administration<sup>200</sup> the High Court set up an independent board consisting of medical experts and judges to examine the facts of the case. The expert board found the person to be intellectually disabled and stated that the woman is “unable to appreciate and understand the consequences of her own future and that of the child she is bearing”. However, they also stated that the woman wanted to continue the pregnancy. The High Court directed termination of pregnancy by invoking the ‘parens patriae doctrine<sup>201</sup>. The woman appealed to the Supreme Court of India.

The Supreme Court examined Sec 3 of the MTP Act which provides for consent of the pregnant woman for the termination of pregnancy and the right to life and liberty in the Constitution of India to examine if forcible termination of a pregnancy would violate women’s reproductive rights under Art 21 of the Constitution. The court examined the High Court’s findings and noted that the woman was not capable of taking care of the child and would need support and supervising and also took note that she knew of the pregnancy and wanted to continue the pregnancy to full term. The Court determined that the appellant was capable of consent as she was not a

---

<sup>197</sup>*Amita Kujur vs. State of Chhattisgarh and Ors*, Writ Petition(Civil) no 976/2016.

<sup>198</sup>*Mrs. X and Ors vs. Union of India*, Writ Petition(Civil) no 81 of 2017.

<sup>199</sup>*Sarmistha Chakraborty and Ans vs. Union of Indian Secretary and Ors*, Writ Petition(Civil) no 431 of 2017.

<sup>200</sup>*Suchita Srivastava vs. Chandhigarh Administration*, (2009) 9 SCC 1

<sup>201</sup>Parens patriae is Latin for "parent of the nation". In law, it refers to the public policy power of the state to intervene against an abusive or negligent parent, legal guardian, or informal caretaker, and to act as the parent of any child, individual or animal who is in need of protection.

minor and her intellectual disability did not warrant her consent to be neglected and replaced by the state's decision. It was held that the MTP Act clearly upholds personal autonomy of a person with intellectual disability in cases where the person has reached the age of majority. The Court also differentiated between intellectual disabilities and mental disability and stated that under the MTP Act a guardian can make decisions on behalf of a mentally disabled person and not an intellectually disabled person. The court held that the consent of the pregnant woman is essential under the MTP Act and its dilution would mean arbitrary and unreasonable restriction of the liberty of the pregnant woman.

The Supreme Court also referred the right to equality of the United Nation Declaration on the Rights of Mentally retarded Person, 1971<sup>202</sup>. India as a party to the convention was obliged to respect it. Finally the Supreme Court quashed the order of the High Court. The doctrine of *parens patriae* was held not applicable in this case. The Court further held that the decision of the high Court for termination pregnancy was not in the best interest of the applicant. The Court reasoned that forced termination of pregnancy was high risk as the pregnancy was in its 19<sup>th</sup> week and would create emotional stress to the pregnant woman who had not consented to the termination of her pregnancy. The Supreme Court effectively denied the termination of pregnancy which was the request of the applicant.

Most recently on 24 August, 2017, a nine-judge bench of the Supreme Court of India agreed that privacy was a fundamental right under Art 21 of the Constitution of India in the case of *K.S Puttaswamy vs. Union of India*<sup>203</sup>. The bench stated that privacy is an inalienable right, upholding dignity which underlies all our fundamental rights, and

---

<sup>202</sup>General Assembly of the United Nations, in its resolution 2856 (XXVI).

<sup>203</sup>*K.S Puttaswamy vs. Union of India*, (2017) 10 SCC 1

it also stated that privacy is located in the individual. While different judges put forward their views of privacy differently, the bench unanimously held privacy to cover personal autonomy relating to the body, mind, and to making choices.

The judgment given the case of K S Puttaswamy also recognized the right of women to make reproductive choices as part of her right to privacy. It reiterated the judgment held by a three bench Judge in the case of Suchita Srivastava.

### **3.5.1 Medical Termination of Pregnancy Act 1971: Judicial View**

The MPT Act liberalized the right to abortion in comparison to the various provisions provided in the IPC. However, it does not provide an absolute right to abortion. The MPT Act provides certain restrictions on the right to abortion. For this reason, the issue of the right to abortion has frequently come up for adjudication before the various courts in India (This section also includes cases before the MTP Amendment Act of 2021). The issues mainly consist of:

- 1) Judicial authorization for termination of pregnancy.
- 2) Termination of pregnancy beyond the prescribed period by law.
- 3) Consent of Minor for termination of pregnancy.
- 4) Consent of mentally disabled women for medical termination of pregnancy.
- 5) Consent of Spouse for termination of pregnancy.

Prosecution for contravention of the MTP Act,

### **3.5.2 Judicial authorization for termination of pregnancy**

The MPT Act generally does not require permission from the judicial authorities to indicate the process of termination of pregnancy. However, in case of women who



have crossed the prescribed legal time limit or guardian (in case of a minor) applicants have sought permission from the court for the termination of pregnancy due to various reasons. The Courts have permitted the medical termination of pregnancy in consonance with Sec 3 of the MTP Act or establish a medical board for termination of pregnancy under Sec 3 of the MTP Act.

In the Case High Court on its Own Motion v. State of Maharashtra<sup>204</sup>, A Judge during her visit to a women prison was requested by an inmate to the termination of her 16 week pregnancy. On further investigation it was known that a request for the termination of her pregnancy was pending before the hospital authorities. The Judge treated the request as a Public Interest Litigation and brought the matter before the High Court of Maharashtra. The Court held that continuing an unwanted pregnancy “represents a violation of the woman's bodily integrity and aggravates her mental trauma which would be deleterious to her mental health.”

In X vs. Govt. of NCT of Delhi<sup>205</sup>, Four girls including the petitioner were rescued from GB Road, Delhi, where they were forced into prostitution. The petitioner was found to be HIV positive and 19 weeks pregnant. She was lodged under the Government protection home and requested termination of pregnancy. However, the concerned authorities denied it. She then moved to the high court of Delhi under Art 226 of the Constitution of India. The High Court allowed the termination of the pregnancy as provided under Sec 3 of the MTP Act.

In Bashir Khan vs. State of Punjab<sup>206</sup> and Kamala Devi vs. State of Haryana<sup>207</sup>, both the High courts clarified the issue that in case of termination of pregnancy under the

---

<sup>204</sup>High Court on its Own Motion vs. State of Maharashtra, Writ Petition (Civil) No 295/2012.

<sup>205</sup>X vs. Govt. of NCT of Delhi, 8 2013 SCC Online Del 6473.

<sup>206</sup>Bashir Khan vs. State of Punjab, 9 AIR 2014 P&H 150.

prescribed gestation time period, the woman requesting termination of pregnancy does not need permission from the courts. The MPT framework requires only medical opinion of the requisite number of medical practitioner and consent of the woman or guardian in case of a minor.

In *Hallo Bi vs. State of Madhya Pradesh*<sup>208</sup>, An under trial prisoner was 12 weeks pregnant due to forced prostitution. The petitioner was seeking permission for the termination of pregnancy from the High court of Madhya Pradesh after her initial request for the termination of pregnancy was denied by the jail authorities. However, the High Court held a different view. The High Court allowed the termination of pregnancy citing right to abortion as a part of personal liberty.

### **3.5.3 Termination beyond the prescribed period of time**

In India, MTP Act provides the procedure of medical termination of pregnancy and as discussed above, Sec 3 of the MTP Act provides for abortion up to 24 weeks (MTP Amendment Act, 2021) with the consent of requisite number of medical practitioner as prescribed by law. Further, Sec 5 of the MTP Act provides for termination of pregnancy beyond 24 weeks if permitted by one registered medical practitioner is of the opinion, in good faith, that the termination is “immediately necessary” for saving for the life of the mother. The section does not provide for any special judicial authorization for the termination of pregnancy. However, in case the medical practitioner does not allow the termination of pregnancy post 24-weeks, the pregnant woman can approach the high court or Supreme Court seeking termination of the pregnancy. In such cases, the courts set up a medical board comprising of medical

---

<sup>207</sup>*Kamala Devi vs. State of Haryana*, 10 CWP No 2007 of 2015.

<sup>208</sup>*Hallo Bi vs. State of Madhya Pradesh*, 11 2013 Cri LJ 2868 (M.P.).

experts to examine the pregnant woman and provide a report to the Court. In different cases, the courts have looked upon different factors to determine termination of pregnancy beyond the prescribed time limit, it includes:

#### **3.5.4 Risk from continuing the pregnancy**

In abortion cases that are beyond the prescribed time limit the Court seeks medical opinion to determine the danger to the life of the mother. In *Meera Santosh Pal vs. Union of India*<sup>209</sup>, A 24 week pregnant woman approached the Supreme Court seeking permission for termination pregnancy as she had passed the time limit prescribed by the MTP Act. The Supreme Court provided for a medical board for determining the termination of pregnancy. The Medical Board held that since the baby was suffering from anencephaly, which is untreatable and would ultimately cause the death of the child during or after birth. It would also have serious impact on the health of the mother. The Court allowed termination of pregnancy.

#### **3.5.5 Risk to the Pregnant Women**

Courts are bound to seek medical opinion on the risks involved to the pregnant woman before they allow termination of pregnant post the prescribed time limit. Though termination of pregnancy at any stage of the pregnancy is generally not considered dangerous keeping in mind the prescribed medical standards. When the Court appointed medical board held that there is no risk involved to the pregnant woman or the fetus. The courts cannot allow termination of pregnancy. In the case of *Alakh Alok Srivastava vs. Union of India*<sup>210</sup> a Writ petition was filed requesting for the termination of pregnancy of a 32 week pregnant minor girl resulting due to rape

---

<sup>209</sup>*Meera Santosh Pal vs. Union of India*, (2017) 3 SCC 462.

<sup>210</sup>*Alakh Alok Srivastava vs. Union of India*, 19 W.P. (C) 565 / 2017.

on the grounds of health concerns of the minor girl. The medical board setup to examine the health of the pregnant woman and concluded that there is no risk to the mother and the fetus. The Court declined the instant prayers made in the petition.

Similarly in the case of *Jamana Suthar vs. State of Rajasthan*<sup>211</sup> and *Kavita vs. State of Haryana*<sup>212</sup> the Courts disallowed the termination of pregnancy based on the medical opinion that continuation of pregnancy did not pose any immediate threat to her life. In both the cases gestational time limit prescribed under Section 3 of the MTP Act of 1971 had been crossed. However in the case of *Murugan Nayakkar vs. Union of India*<sup>213</sup> and *Chanchala Kumari vs. Union of India*<sup>214</sup> the medical board constituted by the Court held the opinion that the risk of termination of pregnancy was less than the risk of carrying out the pregnancy to its full term. Termination of pregnancy was permitted in both the cases by the Supreme Court. Both the cases exceeded the time limit prescribed in the MTP Act of 1971 and both were minors who got pregnant due to rape.

### **3.5.6 Fetal Impairment**

The Supreme Court and different High Courts in India have time and again faced the question of termination pregnancy after the limit prescribed by law when there is fetal impairment, which will ultimately lead to the death of the child after birth or have serious disabilities the will have serious consequences on the life of the child. In such cases the Courts have often resorted to allow termination of pregnancy with reasons

---

<sup>211</sup>*Jamana Suthar vs. State of Rajasthan*, 2009 SCC Online Raj 3468.

<sup>212</sup>*Kavita vs. State of Haryana*, 2015 SCC OnLine P&H 7425.

<sup>213</sup>*Murugan Nayakkar vs. Union of India*, W.P. (C) 749 / 2017 (Order dated Sept. 6, 2017) (Supreme Court). See also *Gausiya Gulam Pathan vs. Union of India*, W.P. 13228/2017 (Order dated Dec. 5, 2017) (Bombay High Court) (permitting termination of a 25-week pregnancy of a 13 years old girl, in line with the decision of the Supreme Court in *Murugan Nayakkar*).

<sup>214</sup>*Chanchala Kumari vs. Union of India*, W.P. (C) 871 / 2017.

that carrying out such pregnancy poses serious risk to the mental and physical health of the pregnant woman. In *Meera Santosh Pal vs. Union of India*<sup>215</sup>, a Writ petition was filed in the Supreme Court of India requesting for the termination of a 24 week old pregnancy. The medical board held the opinion that there was fetal impairment and the fetus was not compatible to extra-uterine life. Further, continuing the pregnancy was harmful to the mental and physical health of the pregnant woman. The Court in this case allowed termination of pregnancy.

In *Shaikh Ayesha Khatoon vs. Union of India*<sup>216</sup>, writ petition seeking the termination of a 27 week old pregnancy was raised before the High Court of Bombay on grounds of fetal impairment. A medical board was established which concluded that the fetus has several impairments (including bowel, neurological and cardiac impairment). It was held that if the baby was born then it would have several physical disabilities and had low chances of survival after birth. It thus ruled that in cases of fetal impairments, mental injury caused to the women would be sufficient to meet the requirement of Section 5 and denial of her choice to terminate the pregnancy would violate her personal liberty under Article 21.

The courts have followed a similar approach in cases where extensive surgical interventions are required carrying a very high risk of mortality or morbidity. In *Sarmishtha Chakraborty vs. Union of India*<sup>217</sup> a 26 week pregnant woman filed a petition seeking termination of pregnancy on the grounds of fetal impairment. The Court appointed medical board found that the fetus had cardiac malformation and would require surgeries after birth and would have high risk of mortality and

---

<sup>215</sup>*Supra* note 214.

<sup>216</sup>*Shaikh Ayesha Khatoon vs. Union of India*, 2018 SCC OnLine Bom 11.

<sup>217</sup>*Sarmishtha Chakraborty vs. Union of India*, 2017 SCC OnLine SC 897.

morbidity. The Supreme Court allowed the termination of pregnancy as it would pose a threat to the mental health of the pregnant woman.

In *Sonali Sandeep Jadhav vs. Union of India*<sup>218</sup>, a 22 week pregnant women filed a writ petition in the Supreme Court seeking termination of pregnancy on the grounds of fetal impairment. The Medical board on further investigation found that the fetus had brain damage and cognitive impairment. This would pose a serious threat to the mental health of the women. The Supreme Court allowed the termination of pregnancy.

In *Geeta Devi vs. State of Himachal Pradesh*<sup>219</sup> a 32 week pregnant women filed a writ petition to the High Court for the termination of pregnancy. She was diagnosed with moderate mental retardation and atrial spatial defect. The medical board found the fetus to have a abnormal head growth and concluded that it would not survive after birth. The Court allowed termination of pregnancy as the mental and physical health of the mother was at risk.

In *Tapasya Umesh Pisal vs. Union of India*.<sup>220</sup> A 24 week pregnant woman filed a petition seeking termination of pregnancy on the grounds that there was fetal impairment and a threat to the life of the mother. The medical board opined the same. The Supreme Court allowed termination of pregnancy solely on the ground of fetal impairment. Contrary to the above mentioned cases where the fetal impairment does not affect the extra-uterine life and the medical board does not hold the opinion that there is a mental or physical health to the pregnant woman. The Courts cannot allow

---

<sup>218</sup>*Sonali Sandeep Jadhav. vs. Union of India*, Writ Petition (Civil) No. 551 of 2017.

<sup>219</sup>*Geeta Devi vs. State of Himachal Pradesh*, Writ Petition No. 11940 of 2017 (Order dated Nov 6, 2017) (Bombay High Court).

<sup>220</sup>*Tapasya Umesh Pisal vs. Union of India*, 2017 SCC OnLine HP 1574.

the termination of pregnancy. In the case *Sheetal Shankar Salvi vs. Union of India*<sup>221</sup> a 27 week pregnant woman filed a petition on the Supreme Court seeking termination of pregnancy for fetal impairment. The medical board report showed fetal impairment. However, it also opined that there was no physical threat to the mother and the baby could survive for a viable period of time after birth. The Supreme Court in this case dismissed the petition and did not permit the termination of pregnancy.

Similarly in the case *Savita Sachin Patil vs. Union of India*<sup>222</sup> a 26 week old fetus was diagnosed with Down syndrome. The pregnant mother moved the Court for termination of pregnancy on the grounds of fetal impairment. However, the medical board held the opinion that there was no mental and physical threat to the life of the mother. The Court dismissed the petition.

### **3.5.7 Pregnancy from Rape**

Different High Courts in India have given different judgments on the question regarding abortion due to Rape beyond the gestation limit given in law. The Gujarat High Court in the cases *Ashaben vs. State of Gujarat*<sup>223</sup> and *Chandrakant Jayantilal Suthar vs. State of Gujarat*<sup>224</sup> applied a strict interpretation of sec 5 of the MTP Act which allows termination of pregnancy beyond the provided gestation time period only in case the life of the mother was in danger and not on the ground that the pregnancy was due to rape. However, the Kerala High Court in the case *Ms. X vs. State of Kerala*<sup>225</sup>, allowed termination of pregnancy of a rape victim beyond the prescribed limit. The High Court concluded the continuation of the pregnancy would

---

<sup>221</sup>*Sheetal Shankar Salvi vs. Union of India*, (2018) 11 SCC 606.

<sup>222</sup>*Savita Sachin Patil vs. Union of India*, (2017) 13 SCC 436.

<sup>223</sup>*Ashaben vs. State of Gujarat*, 2015 AIR CC 3387.

<sup>224</sup>*Chandrakant Jayantilal Suthar vs. State of Gujarat*, (2016) 2 GLH 662.

<sup>225</sup>*Ms. X vs. State of Kerala*, (2016) 4 KLT 745.

lead to grave mental stress and changes in her normal life that she is not prepared which would be covered under Sec 5 of the MTP Act.

In the cases *Bashir Khan vs. State of Punjab*<sup>226</sup> and *Kamla Devi vs. State of Haryana*<sup>227</sup> the Punjab and Haryana High Court recognized the mental and physical harm caused by delay in termination of pregnancy to a rape survivor. Further, it directed the state authorities to provide assistance to rape survivors seeking medical opinion and services for abortion.

### **3.5.8 Rape of a Minor**

*Suchita Srivastava* case does not directly deal with abortion in case of rape of a minor but High Courts have applied the “best interest” approach in determining permission for abortion in case of rape of a minor. In the case *Bhavikaben vs. State of Gujarat*<sup>228</sup> the High Court allowed termination of pregnancy on the grounds of young age and health of the young rape survivor. The medical board has opined that there was no risk to the life of the minor from termination of pregnancy. Similarly, in *Madhuben Arvindbhai Nimavat vs. State of Gujarat*<sup>229</sup> and *Pujaben Subedar Yadav vs. State of Gujarat*<sup>230</sup> the court took into account the “best interest” approach for determining the termination of pregnancy in case of a minor rape victim.

In the case *X vs. Union of India*<sup>231</sup>, the Bombay High Court allowed the termination of pregnancy of a deaf and dumb minor rape victim considering the metal trauma

---

<sup>226</sup>*Bashir Khan vs. State of Punjab*, AIR 2014 P&H 150.

<sup>227</sup>*Kamla Devi vs. State of Haryana*, CWP No 2007 of 2015.

<sup>228</sup>*Bhavikaben vs. State of Gujarat*, (2016) 3 RCR (Cri) 362.

<sup>229</sup>*Madhuben Arvindbhai Nimavat vs. State of Gujarat*, 2016 SCC OnLineGuj 662.

<sup>230</sup>*Pujaben Subedar Yadav vs. State of Gujarat*, 2017 Cri LJ (NOC 719) 225.

<sup>231</sup>*X vs. Union of India*, 2017 SCC OnLineBom 9334.



caused due to the unwanted pregnancy and held that the continuation of the pregnancy would be a violation of her personal liberty and against her best interest.

### **3.5.9 Consent of the Minor**

Section 3(4)(a) of the MTP Act states that the written permission of the guardian of a minor is necessary for the termination of the pregnancy. In the case *V Krishana vs. G Rajan*<sup>232</sup> it was held that if a minor wished to continue the pregnancy the guardian consent is not necessary, especially when the medical board does not find any fetal impairment and the minor is completely aware of the consequences. Similarly, in *Marimuthu vs. Inspector of Police*<sup>233</sup>, the Court relied of the Convention of Rights of Child, the objectives of MTP Act and a women's liberty to hold that Sec 3(4) cannot make a minor terminate her pregnancy on the wish of the guardian when she wishes to continue the pregnancy. Apart from the above mentioned cases, the Madhya Pradesh High Court in *Sundralal vs. State of M.P*<sup>234</sup>, held that it is not necessary to take the permission from a minor in case of termination of pregnancy where the guardian has already given a consent.

### **3.5.10 Consent of a Mentally Disabled Women**

The most important and landmark case on this issue would be *Suchita Sirvastava* case. The Supreme Court in this case was approached on behalf of a mentally retarded person for termination of her pregnancy without her consent. It was held that consent of the woman who had reached the age of majority and does not suffer from mental illness (different from "mental retardation") is essential for termination of pregnancy.

---

<sup>232</sup>*V Krishana vs. G Rajan*, (1994) 2 MWN (Cri) 333.

<sup>233</sup>*Marimuthu vs. Inspector of Police*, (2016) 6 CTC 90.

<sup>234</sup>*Sundralal vs. State of M.P*, AIR 2018 (NOC 589) 205.

### **3.5.11 Consent of Spouse for termination of pregnancy**

Section 3(4)2 of the MTP Act requires the consent of the woman for termination of pregnancy and further mentions that the consent of the husband is not required. In the case *Anil Malhotra vs. Ajay Pasricha*<sup>235</sup> the Supreme Court rejected an appeal against the decision given by the High Court of Haryana and Punjab in the case *Dr Mangla Dogra vs. Anil Kumar Malhotra*<sup>236</sup> seeking damages from his wife and doctor who performed the abortion. The Court stated that the consent of the husband for abortion is not necessary. The Gujarat High Court in *Nirav Anupambhal Tarkas vs. State of Gujarat*<sup>237</sup> dismissed a criminal complaint filed by the husband against her wife and her family for termination of pregnancy despite his opposition, on the grounds that consent of the husband is not necessary under the MTP Act.

### **3.5.12 Prosecution in case of contravention of the MTP Act**

The Courts have applied a very strict approach while considering bail application or petitions for quashing criminal proceedings in cases pertaining to violation of MTP Act. Termination of pregnancy without the consent of the woman is a non-bailable offence under Sec 313 of the Indian Penal Code. The Supreme Court in the case *Surendra Chauhan vs. State of M.P*<sup>238</sup> upheld the decision of the High Court of Madhya Pradesh decision to convict the accused and the Doctor who caused the death of the pregnant woman due to miscarriage.

---

<sup>235</sup>*Anil Malhotra vs. Ajay Pasricha*, Civil Appeal No. 4704 of 2013.

<sup>236</sup>*Dr. Mangla Dogra vs. Anil Kumar Malhotra*, 60 ILR (2012) 2 P&H 446.

<sup>237</sup>*Nirav Anupambhal Tarkas vs. State of Gujarat*, 61 2011 SCC OnLineGuj 5577.

<sup>238</sup>*Surendra Chauhan vs. State of M.P.*, 2018 Cri LJ 2676.

The Orissa High Court in the case *BinodBihariNaikvs State of Orissa*<sup>239</sup> quashed the petition of the Doctor for dismissing of criminal proceedings for termination of pregnancy without the consent of the woman as prima facie case was already established against him. Similarly in *Dr Saraswati vs. State of Maharashtra*<sup>240</sup> the Bombay High Court rejected the bail application when abortion was carried out contrary to the MTP Act. The Delhi High Court in the case *Sushil Kumar vs. Govt. of NCT of Delhi*<sup>241</sup> rejected anticipatory bail filed by the accused and his family for forcing his wife to take abortion pills.

Termination of Pregnancy within the prescribed time limit (24 weeks) does not require the permission of the Court. In case where people have approached the court on this matter the Court has not hesitated to allow termination of Pregnancy as it is what the law has prescribed. The issue becomes complex when the courts have to address petitions seeks abortion after the lapse of the prescribed time limit under the MTP Act. In such cases Courts constitute a medical board consisting of experts to examine the feasibility of abortion. If the Medical board is of the opinion that in good faith that the abortion needs to done to save the life of the mother then the Court has to allow termination of pregnancy. However, in case the medical board is of the view that there is no immediate threat to life of the mother (even in case of rape victims). The Courts are reluctant to allow termination of pregnancy. In case of fetal impairment the courts have often used mental and physical risk as a ground allowing termination pregnancy. However, since this not an established rule the courts have decided otherwise in many cases. The opinion of the medical board continues to play an important role in deciding the termination of pregnancy in case of fetal

---

<sup>239</sup>*Binod Bihari Naik vs. State of Orissa*, 2013 SCC OnLine Del 2068.

<sup>240</sup>*Dr. Saraswati vs. State of Maharashtra* 2013 SCC OnLineBom 1014.

<sup>241</sup>*Sushil Kumar vs. Govs.t of NCT of Delhi*, AIR 2000 SC 1436.

impairment. In case of request for abortion for rape victims later than the prescribed time limit different Courts have given different judgments whereby some have allowed abortion on the grounds of mental and physical risk to the pregnant woman others have not allowed abortion as there is no risk to the life of the mother.

Consent is essential when it comes to abortion. An abortion without the consent of the woman is a crime. In case of a minor though the MTP Act provides for the consent of the guardian in case of the minor the judiciary has given judgments otherwise. The courts in some cases have held that the consent of the minor is equally necessary if she wishes to continue the pregnancy. The consent of a mentally challenged person has been made equally necessary for termination of pregnancy as stated in the Suchita Srivastava Case where a mentally challenged person was allowed to continue her pregnancy on her request. The consent of the Spouse is deemed unnecessary by the law and the judiciary. The issues of abortion have been made the sole decision of the women.

The Judicial view on abortion has been different depending on the stage of the pregnancy of the applicant. Different courts have held different opinion on same issue's where the Supreme Court has failed to give a conclusive judgment. Therefore, many grey areas in the MTP Act which has been explained differently by different High Courts. Most importantly, the Courts have recognized the right to abortion as a right to privacy which is not visible in the MTP Act. The MTP Amendment Act of 2021 also fails to recognize the right to privacy of a pregnant woman.

India has chosen a middle path instead of choosing outright a pro-life or pro-choice approach, given the sensitivity of the issue. A balanced approach appears sensible. A balance between the respective interests of the pregnant woman, the unborn child and

the state. In the case (Nanda Kishore) It might be interesting to note here that an opinion emerged that terminating the life of a viable unborn on grounds of possible handicap is akin to mercy killing.

The essential holding of Roe, as summarized in Planned Parenthood, comprised of the following three parts: (1) a recognition of a women's right to choose to have an abortion before fetal viability and to obtain it without undue interference from the State, whose pre-viability interests are not strong enough to support an abortion prohibition or the imposition of substantial obstacles to the women's effective right to elect the procedure; (2) a confirmation of the State's power to restrict abortions after viability, if the law contains exceptions for pregnancies endangering a women's life or health; and (3) the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the women and the life of the fetus that may become a child.

### **3.6 Reproductive rights in India: Judicial View**

International Agreements and conference especially in the 21<sup>st</sup> Century have seen the recognition of Women rights in different spheres as an essential Human right. The International Treaties and agreement have sought to end gender discrimination and gender based violence. The Agreements takes women and man as equals before law and advocate for the punishment for any discriminatory practices. The Vienna Declaration and Program of Action, 1993, the Program of Action of the International Conference on Population and Development (ICPD), 1994, Action adopted at the Fourth World Conference, Conference on Women (FWCW) Beijing, 1995, are important international agreements that direct gender equality and women's

rights. Particularly, the ICPD and FWCW authenticate reproductive rights as essential human rights.

The World Health Organization has defines reproductive rights as follows:

*“Reproductive rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have information to do so, and right to attain the highest standard of sexual and reproductive health. They also include the right of all to make decisions concerning reproduction free of discrimination, coercion and violence.”<sup>242</sup>*

Over the last few decades, the Supreme Court of India along with many High Courts has recognized the Reproductive rights as a key fundamental right under the Constitution of India.

In the year 2011 the Delhi High Court gave a landmark joint decision in the cases Laxmi Mandal vs. Deen Dayal Harinagar Hospital &Ors<sup>243</sup> and Jaitun vs. Maternity home, MCD, Jungpura and Ors<sup>244</sup>. The High Court in this case had to determine two petitions which questioned the implementation of a Government funded schemes aimed at reducing infant and maternal mortality. As two pregnant women below the poverty line were denial benefits to the Government Scheme during their pregnancy and also thereafter. The court held that the case involved two essential human right that is right to health and reproductive rights of the women. Citing CEDAW and ICESCR the court stated that a women, especially pregnant woman should not be denied treatment at any stage due to their social and economic background. It would

---

<sup>242</sup>Carmel Shalev, Rights to Sexual and Reproductive Health - the ICPD and the Convention on the Elimination of All Forms of Discrimination against Women. Available at <https://www.un.org/womenwatch/daw/csw/shalevhtm>(Visited on 23 August, 2021)

<sup>243</sup>Laxmi Mandal vs. Deen Dayal Harinagar Hospital &Ors, W.P.(C) 8853/2008.

<sup>244</sup>Jaitun vs. Maternity home, MCD, Jungpura and Ors, W.P.(C) 10700/2009.

amount to the violation of right to health and reproductive rights under the right to life an essential human right under the Constitution of India.

In 2012, the Madhya Pradesh High Court reiterated the decision of the Delhi High Court in the case *Sandesh Bansal vs. Union of India*<sup>245</sup>, a Public Interest Litigation was filed in the High Court seeking accountability for maternal death. The court held that it is the duty of the Government to ensure that every woman survive child birth and pregnancy and establish that the obligation of the Government under Art 21 required immediate implementation of Government Schemes, including basic infrastructure, food, water, health facilities, etc. it also rejected financial constraints as a justification for reproductive violations.

In the case *Devika Biswas vs. Union of India &Ors*<sup>246</sup>, the petitioner filed a public interest litigation claiming that women in Bihar were being subject to sterilization procedures in dangerous and unsanitary sterilization camps. No authorized protocols were being followed. Women were made to undergo sterilization without any proper counseling and information about the procedure. Further, the procedures were taking place in School, often desks were used as operating tables. The operations were taking place without the use of basic essentials like sanitary gloves. The court held this as a violation of right to health as well as reproductive rights which are an essential part of Art 21 of the Constitution. Further, the Court stated that right to make choices with regard to sterilization free from any coercion was also guaranteed under the Art 21 of the Constitution. The Court held that consent in sterilization procedures is part of the right to reproductive health.

---

<sup>245</sup>*Sandesh Bansal vs. Union of India*, Writ Petition No.9061/2008.

<sup>246</sup>*Devika Biswas vs. Union of India &Ors*, (2016) 10 SCC 726.

The Court integrated the guidelines provided in the case *Ramakant Rai vs. Union of India*<sup>247</sup> and emphasized that the procedure and the consequences of the sterilization procedure must be explained to the woman in detail. The Government was directed to discontinue sterilization camps. The judgment also noted that the poor quality of healthcare during sterilization camps led to several deaths in the states of Chhattisgarh, Uttar Pradesh, Kerala, Rajasthan, Madhya Pradesh and Maharashtra during the course of hearing.

In the case *Samar Ghosh vs. Jaya Ghosh*<sup>248</sup> it was held that if a wife undergoes vasectomy or abortion without any medical reason or without the consent or knowledge of her husband, such an act of the spouse would amount to cruelty and vice versa. However, after the decision given in the case of *Samar Ghosh vs. Jaya Ghosh* the Judiciary has moved towards greater protection of reproductive rights of the women under life and liberty of Art 21 of the Constitution of India. In the case *Suchita Srivastava vs. Union of India*, the court held that reproductive autonomy of a woman was a fundamental right.

In the case *Dr. Mangla Dogra & Others vs. Anil Kumar Malhotra & Others*<sup>249</sup> the petitioner filed a suit against the Doctor who had performed an abortion on the petitioner's wife with her consent however without the consent of the petitioner. The High Court of Haryana and Punjab held that Sec 3 4 (b) of the MTP Act required the permission of the pregnant woman and not anyone else. Further, a husband cannot force a woman to continue her pregnancy it would amount a violation of her reproductive autonomy.

---

<sup>247</sup>*Ramakant Rai vs. Union of India*, (2009) 16 SCC 565.

<sup>248</sup>*Samar Ghosh vs. Jaya Ghosh*, (2007) 4 SCC 511.

<sup>249</sup>*Dr. Mangla Dogra & Others vs. Anil Kumar Malhotra & Others*, 60 ILR (2012) 2 P&H 446.



In the case *Hallo Bi vs. State of Madhya Pradesh &Ors*<sup>250</sup> the court stated that the rape victims should be provided access to abortion without judicial authorization. It held that the court could not force a victim of rape to give birth to the child of the rapist. It would cause great injury to the mental health of the victim. After 2015, the Supreme Court in the cases *Ms X vs. Union of India &Ors*<sup>251</sup>, *Chandrakant Jayantilal Suthar vs. State of Gujarat*<sup>252</sup> and *Mr X and Mrs Y vs. Union of India &Ors*<sup>253</sup> have permitted abortion post 20 weeks of gestation period provided in the MTP Act on the grounds of a Women's mental health and wellbeing (before the MTP Amendment Act of 2022). The Bombay High Court, in the case *High Court in its own motion vs. State of Maharashtra*<sup>254</sup>, has opined that:

*“A woman's decision to terminate a pregnancy is not a frivolous one. Abortion is often the only way out of a very difficult situation for a woman. ... These are decisions taken by responsible women who have few other options. They are women who would ideally have preferred to prevent an unwanted pregnancy, but were unable to do so. If a woman does not want to continue with the pregnancy, then forcing her to do so represents a violation of the woman's bodily integrity and aggravates her mental trauma which would be deleterious to her mental health.*

*..... According to international human rights law, a person is vested with human rights only at birth; an unborn fetus 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*

---

<sup>250</sup>*Hallo Bi vs. State of Madhya Pradesh &Ors*, W P No 408 of 2013.

<sup>251</sup>*Ms X vs. Union of India &Ors*, 2016 14 SCC 382.

<sup>252</sup>*Chandrakant Jayantilal Suthar vs. State of Gujarat*, 2015 SCC Online SC 668.

<sup>253</sup>*Mr X and Mrs Y vs. Union of India &Ors*, W P (C) NO. 81 OF 2017.

<sup>254</sup>*High Court in its own motion vs. State of Maharashtra*, 2017 Cri LJ 218.

*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.”*

India was one of the first countries to legalize abortion and also made contraceptives accessible. However, the acceptance and recognition of women's reproductive and sexual rights still remains negligible. Reproductive rights in India is accepted and recognized in limited spheres like child marriage, sex selection, female feticide and menstrual health and hygiene issues.

### **3.7 Human Rights Standards and Jurisprudence for access to Abortion**

This section consists of international and regional human rights standards and jurisprudence relating to state duty to ensure safe and hygienic access to abortion. International Human rights standards have recognized that denial of abortion service and information have great effect on the lives and health of women, moreover it leads to the denial of fundamental civil, political, economic, and social rights. Therefore, human rights standards and jurisprudence seek state obligations to decriminalize abortion and provide access to safe and hygienic abortion.

The Government of India is bound constitutional obligations to comply with international Human Right treaties to protect the sexual and reproductive rights of women to which they are signatories.

In the case *Vishaka vs. State of Rajasthan*<sup>255</sup> it was held that:

---

<sup>255</sup>*Vishaka vs. State of Rajasthan*, AIR 1997 SC 3011.

*“Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into (fundamental rights) to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.”*

International Treaties.

**3.7.1 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979. Articles 1-3<sup>256</sup>, 5(a)<sup>257</sup>, 10(h)<sup>258</sup>, 12<sup>259</sup>, 16(e)<sup>260</sup>**

---

<sup>256</sup>Convention on the Elimination of All Forms of Discrimination against Women, Art I For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Art 2 States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g) To repeal all national penal provisions which constitute discrimination against women.

Art 3 States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

<sup>257</sup> Convention on the Elimination of All Forms of Discrimination against Women, Art 5(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

<sup>258</sup>Convention on the Elimination of All Forms of Discrimination against Women, Art 10(h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.

<sup>259</sup>Convention on the Elimination of All Forms of Discrimination against Women, Art 12 1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. 2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy,

The mentioned article above outline women's rights to equality in law and health including access to family planning information and services, determining the number and spacing of children, defining states' duty to eliminate cultural prejudices based on stereotyped roles for men and women.

### **3.7.2 International Covenant on Economic, Social and Cultural Rights (ICESCR), 1976. Articles 2(2)<sup>261</sup>, 3<sup>262</sup>, 12(1)<sup>263</sup>**

The mentioned articles guarantee the rights to health, equality, and non-discrimination.

### **3.7.3 International Covenant on Civil and Political Rights (ICCPR), 1976. Articles 2(1)<sup>264</sup>, 6<sup>265</sup>, 7<sup>266</sup>, 17<sup>267</sup>**

---

confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

<sup>260</sup> Convention on the Elimination of All Forms of Discrimination against Women, Art 16 (e): The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.

<sup>261</sup>International Covenant on Economic, Social and Cultural Rights, Art 2(2)- The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

<sup>262</sup>International Covenant on Economic, Social and Cultural Rights, Art 3-The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

<sup>263</sup>International Covenant on Economic, Social and Cultural Rights, Art 12(1)- The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

<sup>264</sup>International Covenant on Civil and Political Rights, Art 2(1)-Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

<sup>265</sup>International Covenant on Civil and Political Rights, Art 6-1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the

The mentioned articles protect the rights to life, non-discrimination and equality, freedom from torture and ill-treatment, and privacy.

**3.7.4 Convention on Rights of the Child, 1989. Articles 2(2)<sup>268</sup>, 3<sup>269</sup>, 5-6<sup>270</sup>, 12<sup>271</sup>, 16<sup>272</sup>, 24<sup>273</sup>**

---

Crime of Genocide. 4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women. 6. Nothing in this article shall be invoked to delay or to present the abolition of capital punishment by any State Party to the present Covenant

<sup>266</sup>International Covenant on Civil and Political Rights, Art 7- No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

<sup>267</sup>International Covenant on Civil and Political Rights, Art 17- The States Parties to the present Covenant shall furnish their reports in stages, in accordance with a program to be established by the Economic and Social Council within one year of the entry into force of the present Covenant after consultation with the States Parties and the specialized agencies concerned. 2. Reports may indicate factors and difficulties affecting the degree of fulfillment of obligations under the present Covenant.

3. Where relevant information has previously been furnished to the United Nations or to any specialized agency by any State Party to the present Covenant, it will not be necessary to reproduce that information, but a precise reference to the information so furnished will suffice.

<sup>268</sup> Convention on the Rights of the Child Art,2 (2)- States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

<sup>269</sup>Convention on the Rights of the Child Art 3- 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

<sup>270</sup> Convention on the Rights of the Child, Art 5 States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Art 6 1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

<sup>271</sup>Convention on the Rights of the Child, Art 12- 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

<sup>272</sup>Convention on the Rights of the Child, Art 16- 1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honor and reputation. 2. The child has the right to the protection of the law against such interference or attacks.1. No child shall be subjected to arbitrary or unlawful interference with his or

Protects the rights to life, health, non-discrimination, development, privacy, and to express their views and having them given due weight; and outlining that all rights are to be interpreted through the lens of the best interest of the child, with respect for their evolving capacities.

### **3.7.5 Convention on the Rights of Persons with Disability (CRPD), 2006.**

**Articles 3<sup>274</sup>, 5-7<sup>275</sup>, 8(1)(b)<sup>276</sup>, 10<sup>277</sup>, 12<sup>278</sup>, 17<sup>279</sup>, 22<sup>280</sup>, 23(1)(b)<sup>281</sup>, 25<sup>282</sup>**

---

her privacy, family, home or correspondence, nor to unlawful attacks on his or her honor and reputation. 2. The child has the right to the protection of the law against such interference or attacks.

<sup>273</sup>Convention on the Rights of the Child Art 24- 1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services. 2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: (a) To diminish infant and child mortality; (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care; (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution; (d) To ensure appropriate pre-natal and post-natal health care for mothers; (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents; (f) To develop preventive health care, guidance for parents and family planning education and services. 3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children. 4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

<sup>274</sup>Convention on the Rights of Persons with Disability, Art 3, In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.

<sup>275</sup>Convention on the Rights of Persons with Disability, Art 5. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law. 2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds. 3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided. 4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

Art 6-1. States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.

2. States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.

Calling for respect for the inherent dignity, individual autonomy including freedom to make one's own choices and guaranteeing rights to life, privacy, personal integrity, non-discrimination, legal capacity on an equal basis with others and support in exercising this capacity; outlining state duties to "combat stereotypes, prejudices and

---

Art 7-States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.

2. In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration. 3. States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.

<sup>276</sup>Convention on the Rights of Persons with Disability, Art 8(1)(b)-To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life;

<sup>277</sup>Convention on the Rights of Persons with Disability, Art 10- States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.

<sup>278</sup>Convention on the Rights of Persons with Disability, Art 12- 1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law. 2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. 3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests. 5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

<sup>279</sup>Convention on the Rights of Persons with Disability, Art 13- 1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages. 2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

<sup>280</sup>Convention on the Rights of Persons with Disability, Art 17- Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.

<sup>281</sup>Convention on the Rights of Persons with Disability, Art 23(1) (b)- The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided.

<sup>282</sup>Convention on the Rights of Persons with Disability, Art 25- States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. In particular, States Parties shall:

harmful practices relating to persons with disability, including those based on sex and age;” and safeguarding the rights to sexual and reproductive health founded on a basis of free and informed consent, including the rights to decide on the number and spacing of children, to access age-appropriate reproductive and family planning information, and to access the necessary means to exercise these rights.

### **3.8 Human Rights Standards and Jurisprudence for Right of Child**

Under the international framework we have various instruments that deal with rights of an unborn child, it includes:

#### **3.8.1 The Universal Declaration of Human Rights, 1948**

Firstly, we have The Universal Declaration of Human Rights (UDHR), it is a landmark document in the history of Human rights. The preamble of the legal document states “equal and inalienable rights of all members of the human family”. Article 1 “All human beings are born free and equal in dignity and right” it applies that a person must be born to be able to acquire human rights. The deletion of the term born in Art 1 was proposed and rejected in the general assembly in favor of right to life of an unborn<sup>283</sup>. In Art 2 of the declaration it states that “Everyone is entitled to all the rights and freedom set forth in the declaration, without distinction of any kind .....” Art 3 states “everyone has the right to life, liberty and security of person”. The document has a total of 30 articles which discusses different rights available to the all human beings. The declaration take note of all essential rights for human beings after bring born. There is no mention of any human rights of an unborn Child. Further, it fails to define who all are included in “People”, “Human Family” and “Everyone”.

---

<sup>283</sup>UN GAOR 3rd Comm., 99th mtg. at 112, UN Doc.A/PV/99, 1948.



This leads us to the grey area in the law where it can be said that UDHR as such does not provide for any protection to an Unborn Child directly. It cannot be firmly ascertained that “People”, “Human Family” or “Everyone” used in the declaration includes an unborn child and may or may not include an unborn child.

### **3.8.2 The International Covenant on Civil and Political Rights 1966**

Article 6 of the ICCPR states that “Every human being has the inherent Right to Life”. At the time of its formulation it was argued that the sentence should include “the right to life is inherent in the human person from the moment of conception”<sup>284</sup>. This was done with intention to include the right to life of an unborn child<sup>285</sup>. However, it was rejected and the line “from the moment of conception” was never added. The Human right committees that are responsible for the application of the covenant have repeatedly emphasized on the need to decriminalize abortion<sup>286</sup>. Recognition of right to life of an unborn child would be a problematic for decriminalization of abortion. The term “every human being” has not been defined which makes it open to interpretation.

### **3.8.3 Declaration on the Rights of the Child**

The League of Nations for the first time recognized the rights of the Child in Geneva Declaration, 1924. It states that humanity” owes to the child the best that it has to give”. However, it was not legally binding on its member states. The first declaration

---

<sup>284</sup> UN GAOR Annex, 12th Session, Agenda Item 33, at 96, UN Doc. A/C.3/L.654.

<sup>285</sup> *Id* at 97

<sup>286</sup> Concluding Observations of the Human Rights Committee, UN Doc. CCPR/C/79/Add.104, Concluding Observations of the Human Rights Committee Chile, 30/3/1999, UN GAOR, Hum. Rts. Comm., 65th Session, 1740th mtg. Para.15e: Argentina, 15/11/2000, UN Doc. CCPR/CO/ 70/ARG, Para.14, Concluding Observations of the Human Rights Committee: Costa Rica, 08/04/99, UN Doc. CCPR/ C/79/Add.107, Para.11, Concluding Observations of the Human Rights Committee: Peru, Concluding Observations of the Human Rights Committee: United Republic of Tanzania, 18/08/98, UN Doc. CCPR/C/79/ Add.97, Para.15, Concluding Observations of the Human Rights Committee: Venezuela, 26/04/2001, UN Doc. CCPR/CO/71/VEN, Para.19.

on right of a child under the United Nations was made in 1959<sup>287</sup>. The preamble of the declaration states “appropriate legal protection, before as well as after birth”. The refection, at the most signifies the states duty to provide special care and protection, through nutrition, health and support to the pregnant women<sup>288</sup>. In 1989, the world leaders in a historic step adopted the United Nations Convention on the Rights of the Child. It was the most widely ratified treaty regarding the right of a child. The convention defines a child as a human being under the age of 18<sup>289</sup>. The Human right treaty defines various civil, political, economic, social, health and cultural rights of children. However, it does not in particular recognize the unborn child as a child within the meaning of this convention.

Though the Human Rights of a child are fully recognized under International law, the rights of an unborn child are still a matter of debate. This issue has been subject to deliberation during the process of development of various International documents. The United Nation has repeatedly given recognition to reproductive rights including access to legal and safe abortion of a woman. In case of right to life an unborn the international documents have neither overwhelmingly accepted nor rejected the idea. It is subject to interpretation by the sovereign member state in its application.

Right of an unborn child has been given recognition under different laws in India.;

#### **3.8.4 The Hindu Succession Act, 1956**

The Hindu succession Act recognizes the right of an unborn. It states that a unborn child in the womb of the mother can inherit instate in case of death the interstate takes

---

<sup>287</sup> United Nation General Assembly Resolution 1386 (XIV)

<sup>288</sup> Rhonda Copelon, Christina Zampas at el, *Human Rights Begin at Birth: International Law and the Claim of Fetal Rights*, 13 RHM 123 (2005).

<sup>289</sup>Convention on the Rights of the Child, Art 1.

place when the child is still in the womb of the mother<sup>290</sup>. In the case *M S Subbukrishna v. Parvathi*<sup>291</sup>, it was held that a child born after the partition would have a right to claim his father's share in the property partitioned.

### **3.8.5 The Indian Succession Act, 1925**

The Indian Succession Act recognizes the rights of an unborn at two instances. Firstly the Act provides the domicile of origin of every person of legitimate birth to be in the Country in which at the time of birth the father was domiciled, or in case of a posthumous child, the country in which the father was domiciled at the time of birth<sup>292</sup>. Secondly, the Act gives recognition to a person coming into existence after the death of the testator<sup>293</sup>.

### **3.8.6 The Transfer of Property Act, 1882**

The Transfer of Property recognizes the right of an unborn under Sec 13 and 20 of the Act. Sec 13 provides that when an interest is created for the transfer of property to an unborn child, a prior interest is to be created in respect of the same transfer. Interest created for the unborn child shall not take effect, unless it extends to the whole of the remaining interest of the person transferring the property<sup>294</sup>. Further, Sec 20 deals with circumstances under which a unborn child acquires vested interest. Where, an interest is created for the benefit of an unborn child, the unborn child acquires the

---

<sup>290</sup>Hindu Succession Act, 1956 (Act no 30 of 1956) S 20.

<sup>291</sup>*M S Subbukrishna vs. Parvathi*, 2008, (1) KarLJ 438

<sup>292</sup>Indian Succession Act, 1925 (Act no 39 of 1935) S 7.

<sup>293</sup>Indian Succession Act, 1925 (Act no 4 of 1882) S 112.

<sup>294</sup>Transfer of Property Act, 1882 (Act no 4 of 1882) S 13.

same at birth, a vested interest, although the unborn child may not be entitled to the same immediately after birth<sup>295</sup>.

### **3.8.7 Indian Penal Code, 1860**

Rights of an unborn Child have been placed in the chapter “Offences Affecting Human Body” of the Indian Penal Code. It is dealt as causing miscarriage and has been made a punishable offence under Sec 312-316 of the Indian Penal Code. The Penal code provides punishment for causing miscarriage under different circumstances.

### **3.8.8 The code of Criminal Procedure,1973**

The Code of Criminal Procedure indirectly recognizes the right of an unborn child. In case a pregnant woman is sentenced to Capital Punishment, it is mandated that the Capital Punishment be postponed or converted to life imprisonment<sup>296</sup>. The Code of Criminal Procedure indirectly gives recognition to right to life of an unborn child.

### **3.8.9 The Limitation Act, 1963**

The limitation act provides that incase a minor (including an unborn child) entitled to institute a suit or make an application for the execution of a decree, within the provided limitation may do the same after the legal disability ceases to exist<sup>297</sup>.

---

<sup>295</sup>Transfer of Property Act, 1882 (Act no 4 of 1882) S 20.

<sup>296</sup>The Code of Criminal Procedure (Act no 2 of 1974) 1973, S 416.

<sup>297</sup>Limitation Act, 1963 (Act No. 36 of 1963)S 6.

### **3.8.10 Medical Termination of Pregnancy Act, 1971**

The MTP Act does not directly provide protection the right to life of an Unborn Child. However, it does provide protection to life of the unborn by limiting abortion except in the case or Rape, failure of contraceptive pills, mental and physical danger, risk to the life of the mother, etc<sup>298</sup>. A woman cannot seek abortion on demand but has to have seek abortion in compliance to sec 3 and 4 of the MTP Act.

### **3.8.11 Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994**

The PNDT Act, 2002 prohibits the use of technology to determine the sex of the unborn child. This was done keeping in sight the problem of female feticide in India. The Act indirectly protects the life of the unborn child. Right to life of an Unborn Child is a very controversial issue. The issue for consideration is weather an unborn child can be given an important Human Rights i.e. right to life, as any human being or the unborn child is not eligible to hold such rights. Right to life is considered an important human right. Human rights are rights which are available to everyone who qualifies as a human being. However, an important question is whether an “Embryo” or “fetus” falls within the definition of “human beings”, “Person” and “Human Family”? The legal status of the unborn child is very unclear and confusing in almost all International legal instruments that have defined essential human rights. Sovereign nations all around the world have adopted different legal methods to deal with abortion. The situation is no different in India. The legislature and Judiciary has failed to answer this question properly. Though, different rights of an unborn are recognized in different laws in India. Right to life of an unborn child is not subject to recognition.

---

<sup>298</sup>Medical Termination of Pregnancy Act, 1971(Act no 37 of 1972), Ss 3, 5.

This is mainly because the recognition of right to life of an unborn child will directly obstruct a women's right to abortion.

### **3.9 Conclusion**

The laws and policies regarding termination of pregnancy in India include a number of gaps and weaknesses which create a significant barrier to abortion. Firstly, Abortion is not allowed at the request of the Women at any stage of the pregnancy. This makes them dependent of the discretion of the medical practitioner. The ability of taking decisions regarding a woman's body by herself is completely absent. The MTP Act permits abortion to be carried out only in a limited number of Health care providers, according to law, abortion can be provided by recognized medical practitioners and under hospitals established or maintained by the State or approved by the state or district level authority. The insufficient number of trained, legally recognized medical practitioners contributes to the denial and delay in safe abortion in the Country. Research has shown that there is shortage of trained staffs and inadequate supplies in the India causing absence of abortion services in primary health centers. The Abortion law in India does not include unmarried Women and girls from the preview of contraceptive failure. The law further imposes parental/guardian for anyone under the age of 18. The judiciary has had to play an important role in case of post the prescribed time limit for abortion. The Courts have established a third party medical board authorization for such abortions. The Legislature has failed to give recognition to right to abortion as a right to Privacy established by the Indian Judiciary. Until such gaps are not removed the women will continue to face barriers to access safe abortion, including vulnerability to criminal

penalties under the IPC and being forced to seek third-party authorization from the Court and medical boards for the termination of pregnancy.

Medical practitioners along with women face a risk of punishment for abortion and related issues under other laws in India. Providers are often subject to investigation and prosecution related to performing abortion under Pre-Conception and Pre-Natal Diagnostic Techniques Act, 2002 (PCPNDT Act) and the Protection of Children from Sexual Offenses Act of 2012 (POCSO Act). In the current scenario, the PCPNDT and POCSO Acts are providing legal barriers to access to legal abortion which is discussed below.

Widespread use of Pre-Conception and Pre-Natal diagnostic Techniques for the purpose of female sex selected abortion in Indian was the main reason for the development of Prenatal Diagnostic Techniques Act of 1994. However, the Act of 1994 failed to provide the desired results and therefore it was replaced by the Pre-Conception and Pre-Natal diagnostic Techniques (Prohibition of Sex Selection) Act, 2002. The Act of 2002 aims to provide proper regulation of Prenatal Diagnostic Techniques in India; it was passed by the legislature.

Female Sex selective abortion is a major problem in India. The preference of male child has always been there for various social-cultural reasons. Family planning program and small family norms coupled with preference of male child have added pressure to families for sex selection as a desired way to build a desired family composition<sup>299</sup>. Prenatal Diagnostic Techniques like amniocentesis and sonography which are meant for detecting genetic disorders or congenital malformations or sex-

---

<sup>299</sup>Dr. K. Shanmugavelayutham, *The Pre-conception and Pre-natal Diagnostic Techniques (prohibition of Sex Selection) Act, 2002-A Bold Step*, 17LNV 5(2003).

linked disorders etc. They are misused for the purpose of sex determination of an unborn Child which in turn leads to female feticide. These practices are fully discriminatory to the female sex. The PCPNDT Act and MTP Act are in conflict in their working. There have been cases of denial of abortion requested during the second trimester, despite studies showing that only a small proportion of these abortions are sex selective<sup>300</sup>. During a research related to attitudes and practices of 19 gynecologists conducted in the state of Maharashtra in the year 2015 it came out that the gynecologist regularly refused abortion on the grounds of PCPNDT Act<sup>301</sup>. Generally according to the Ministry of Health and Family welfare 9% of all abortion in India are Sex selective. The PCPNDT Act is currently providing legal restrictions to the MTP Act by imposing criminal charges on medical providers and women seeking abortion.

The Protection of Children from Sexual Offences Act (2012) has made any legal consent to sexual activity by a minor below the age of 18 illegal, criminalizing a wide spectrum of consensual sexual acts including touching, penetrative sexual intercourse or any physical contact with sexual intent involving all minors (below 18 years of age). Under the POSCO Act, 2012 all pregnant minors are considered Rape Victims. The medical provider is under obligation to report the same to the police who has knowledge, or has an apprehension, that an offence punishable under POCSO Act has been committed or is likely to be committed<sup>302</sup>. The mandatory reporting under the POCSO Act creates an area of conflict with MTP Act. It obstructs cases of abortion among minors when the sexual activities are consensual. It is a serious problem in a

---

<sup>300</sup> Susanne Sjoström, Birgitta Essen et al, *Medical students are afraid to include abortion in their future practices: In-depth interviews in Maharashtra, India*, 16 BCME 4(2016).

<sup>301</sup> Pritam Potdar, A Barua et al, *If a woman has even one daughter, I refuse to perform the abortion,* "Sex determination and safe abortion in India", 23 RHM 121 (2015).

<sup>302</sup> India's Protection of Children from Sexual Offences Act 2012, S 19(1), 21.



Country like India when a major section of girls are married under the age of 18. This effectively prevents medical Providers to duty to provide confidentiality under the MTP Act. The POCSO Act also prevents women from access to health and reproductive health service.

The above the mentioned legislation deals with three different issues. However, in its working are in conflict with each other. Currently, access to abortion is obstructed by the above mentioned Acts.

## **CHAPTER 4: RIGHT TO ABORTION AS A RIGHT TO PRIVACY: COMPARATIVE STUDY BETWEEN USA AND INDIA**

### **4.1 Introduction**

The birth of a child in any family is often marked with celebration. However, in case the pregnancy is due to contraceptive failure, rape, incest, etc., the scenario is completely different. In such cases, the pregnant woman would normally seek an abortion. If properly and securely performed abortion is no doubt the safest way to end an unplanned pregnancy, but with that keep in mind, that precarious abortion is a great source of maternal deaths, especially in developing countries. Induced abortion and the fight to legalize it has always been a hot topic and have a considerable number of debates. The debates between abortion rights advocates and anti-abortion advocates revolve around whether or not it is justifiable to kill an unborn child. In recent times the pro-abortion and anti-abortion parties are often seen having political agendas attached to them to gather votes for the targeted audience especially in the United States. With this we will study the difference in the right to abortion as a right to privacy among the countries of the USA and India; we shall also review the past and present scenarios involving both countries. Since the 19<sup>th</sup> century we have seen women struggle with unplanned pregnancies and abortion law reforms, all of this has continued in the 21<sup>st</sup> century and the right to abortion as the right to privacy remains a topic of debate with the coming of organizations and movements such as the pro-life movements all around the world. In the USA, abortion rights are very much involved in the political debates of the Republican Party and The Democrats. Talking about

India, abortion rights are not yet talked about in the political scenario, but illegal abortions remain a huge issue in general.<sup>303</sup>

#### **4.2 Social movement regarding abortion in India and United States of America**

In modern India, there were no huge or significant movements regarding right to abortion, though there were some voices here and there to make abortion a legal and rightful option for the women and should be able to opt for abortion without having any social or legal pressure. Between mid-19<sup>th</sup> century and mid-20<sup>th</sup> century, some loud voices became quite vocal in the outskirts of Bombay presidency; these inquests were for the Hindu widows who died attempting abortions<sup>304</sup>. The coroner led to big questions such as whether the death of a woman attempting abortion is a suicide, homicide, or an accident, this question obliged the judicial and governmental bodies to think and decide whether or not abortion should be legalized in India. This also had further complications because if the woman's surgeon who conducted the postmortem examination declares the death was a murder and not an accident or suicide then there can be a criminal trial (provided there is a chance of any potential suspect involved with the deceased). And if the postmortem surgeon declares the death of the woman was an accident or suicide, there would be no criminal case following up and the case would end there. Even when there were no big-scale movements in India regarding abortion, Hindu women poisoning themselves to death to carry out abortions can be termed as a way to protest and raise their voices against the unfair laws that make them kill themselves.

---

<sup>303</sup>N. Kim, *Breaking free from patriarchy: A comparative study of sex selection abortions in Korea and the United States*, 17 PBLJ 301 (1999).

<sup>304</sup>A.E. Michel, *Abortion and international law: the status and possible extension of women's right to privacy* 20 JFL. 241 (1981).

In one such instance, a young widow residing in Ahmedabad died after taking drugs to perform an abortion on her own, the drug was supplied to her by her secret lover. Further, women who died attempting abortion from local fake doctors were more alarming and the government had to do something about it at some point in time. Women were subject to misery and suffering because the legal system provided imprisonment for performing abortions as it was illegal. In such cases, the Hindu women were portrayed as criminals and not as victims who did immense damage to their social status. Abortion was a crime for pregnant woman and abortionists before 1971 under the Indian Penal Code, 1860<sup>305</sup>.

Comparing India to the USA, the United States of America witnessed a huge movement to legalize abortion; the movement was called Pro-Choice Movement. The famous women among the feminist organizations namely Elizabeth Cody Stanton and Susan B Anthony they argued that instead of just passing a law legalizing abortion, the root causes of abortion in women should be addressed first which includes solving abortion-related deaths in the USA.<sup>306</sup> Just passing a law to legalize abortion would only be mowing the top of the poisonous weed, while the actual root of the plant is still strong and intact. They said that even if abortion gets legalized, the guilt among the women who commit the deed will remain prevalent. They argued that the guilt will psychologically affect the women who are indulging in performing abortions and will be a forever burdened. In the USA, the abortion rights movement started in the 1960s. In 1964, a woman by the name of Gerri Santoro of the USA died trying to perform an abortion from an illegal pharmacist and after that; her photo became the face of the Pro-Choice Movement in the USA. After that many women's rights

---

<sup>305</sup>B.E. Hernandez, *To Bear or Not to Bear: Reproductive Freedom as an International Human Right*, 17 BJIL 309 (1991).

<sup>306</sup>P. Baruah and Z. Deva, "Justifying privacy: The Indian Supreme Court's Comparative Analysis. *In the Indian Yearbook of Comparative Law 2018*" Springer 198 (2018).

activists and NGOs came forward, to help women get safe abortions, who would not have been able to perform the act by themselves.<sup>307</sup> In 1960 a woman's rights organization namely "Jane" came forward and made a floating Abortion clinic to help women who seek abortions and operated throughout the states roaming around to help women in need. They managed to have a helpline number for themselves to be readily available for women all around the states, one just had to simply dial the helpline number to get treated by the floating clinic. By the end of the 1970s, many organizations stepped in to help and march forward for the pro-choice movement such as NARAL, Pro-Choice America, Planned Parenthood, Catholics for Choice, Reproductive Choice Religious Coalition, Women's National Organization, Civil Liberties Union of America, etc. were the most notable among them. Though all of them came forward to help, the first one to join the race as a forerunner was NARAL Pro-Choice America as its only purpose and sole reason for creating the union was to legalize abortions in the USA and help women have a choice for themselves. NARAL stands for National Abortions Rights Action League, it was created in 1973 to help women have legalized abortion and the right to have a choice for having or not having a child.<sup>308</sup> This organization stood not only to legalize abortions in the USA, but its main motive was that women living in any part of the world must have a right to choose and decide for themselves whether or not to have a baby, as having a baby at odd times or when one is not mentally prepared for motherhood is equally harmful both for the child and the mother.<sup>309</sup>

---

<sup>307</sup>A. Tarafder, *Surveillance, privacy and technology: A comparative critique of the laws of USA and India*, 2 JILI Institute 560 (2015).

<sup>308</sup>L.L. Manzione, *Is There a Right to Die: A Comparative Study of Three Societies (Australia, Netherlands, United States)*, 30 GJICL 443, (2001).

<sup>309</sup>Anu Kumar, and L. Hessini, *Conceptualizing abortion stigma* 11(6) CHS 643 (2009).

The Supreme Court of America in *Roe v. Wade* in 1973 gave the landmark judgment stating that abortion will not only be done when it is necessary to save the life of the mother but is a right to privacy for all women living in the state of Texas and ruled that the law which made abortion illegal was unconstitutional. Historically, getting an abortion was legal only when the mother's life was at risk, thus by the judgment the rule was abolished, and abortion could be provided to any woman even when the mother's life was not at risk. It was then decided and ruled by the court that abortion and abortion rights must fall under the section of right to privacy of any women.<sup>310</sup> The court made it clear that a right to privacy for women in general and particularly for pregnant mothers existed and falls under the right to privacy. The court determined and stated that the right to abortion should be allowed if a mother wants to have her unborn child aborted then it should be further determined and operated by the doctor that is consulted by the mother. The woman must be checked on her condition both physically and psychologically. After the checkup of physical and psychological fitness, then the doctor has to perform the abortion based on health reasons of the pregnant woman and cannot deny any woman her right to abortion. From the 1970s, with the 2<sup>nd</sup> wave abortions rights began. As the abortion rights movement spread in the other states of the USA, the anti-abortion movement also started emerging in the USA, known as the pro-life movement. Throughout the years both the pro-choice movement advocates and the pro-life movement advocates have had heated debates on whether or not to legalize. A major disappointment for the pro-choice movement organizations was when the House of Representatives voted to defund abortion providing institutions working under the government. However, this

---

<sup>310</sup>J.K. Krishnan and K.R. Den Dulk, *So help me god: A comparative study of religious interest group litigation* 30 GJICL.233 (2001).

did not stop the pro-choice advocates for abortion rights as a right to privacy. They came up with a new organization namely “Shout Your Abortion” to remind and challenge the critics and anti-abortion organizations that abortion is a legal right for women. The message from the organization was very clear that abortions will remain legal and anyone who is trying to criminalize it will never be successful.<sup>311</sup> The organization and the women involved with it encouraged other women to step forward and share their pragmatic and useful experiences about abortions online with the hashtag (#shoutyourabortion) as means to abolish and erase the stigma regarding abortions. After this, the group became very popular and was very successful in passing other abortion rights bills in other states most notably in Ohio, Georgia, and Alabama. With all this, there are still some states in the USA which still have not legalized abortion and see it as a criminal offense, so the pressure from the pro-choice movement parties and committees is still very much prevalent in the states and the fight will continue to be fought in the future. As days are passing by in the USA, the pro-life movement organizations are also taking a good dig at the abortion laws and are trying to show their dissatisfaction by stating that people must not be able to murder an unborn child, this argument seems vague in the modern times as the pro-life movement are generally have a very traditional mentality. Few states in America after 2019 have passed the Heartbeat law which makes abortion illegal after 6 weeks of pregnancy. These states include Texas, Ohio, Alabama, etc.

#### **4.2.1 Anti-Abortion movement (Pro-Life movement) America**

As discussed above the Roman Catholics and the Protestants church do not support the concept of abortion and just to protect their ideas of pro-life numerous

---

<sup>311</sup>T.K. Sundari Ravindran, “Yes” to abortion but “No” to sexual rights: the paradoxical reality of married women in rural Tamil Nadu, India 12(23) RHM 93 (2004).

organizations work for this anti-abortion movement in America. Anglicans for Life (AFL) is a ministry that works to support the pro-life movement. They are internationally connected to the Anglican Communion and support the pro-life movement completely by opposing abortion and infanticide.<sup>312</sup> They have been against abortion for ages. In collaboration with the Priests for Life which is yet another organization that opposes abortion, AFL launched a silent campaign in 2003 as an effort to educate the general public on pro-life issues. The campaign was named *Silent No Mor*. The pro-life or right-to-life movement contains elements that oppose the idea of the personal liberty of the mother on moral and religious grounds. This is a body opposing abortion with small groups working in favor of the life of the unborn and having no specific leading heads to it. Southern Baptist Convent (SBC) the largest Protestant convent in the Christian society also is a part of this movement. However, the anti-abortion teachings of all these organizations vary greatly depending on their ideologies but the one thing that brings them all together is the consistent life ethics. There are about 419 pro-life organizations in the United States. Life Happens is also a pro-life organization based in Arlington which was founded in 1994. They say that they help the common people to take responsibility by providing them with life insurance and related schemes including disabilities and long-term care insurance making them financially sound so they do not decide to choose pro-life over pro-choice. In March 2016 presidential candidate Donald Trump said that women who have had access to illegal abortion should be punished and it became a national issue. Though he later revised his comment, the pro-choice advocates had taken up the issue and very seriously highlighted the presidential candidate as anti-women. Though in the past two centuries the idea of pro-life has changed a lot what remains is the effect

---

<sup>312</sup>Saseendran Pallikadavath and RW Stones, *Maternal and social factors associated with abortion in India: a population-based study*, 32(3) IFPP 123 (2019).



it had on the woman's lives which restricts them from taking their own body as the most important existential unit and choosing as they wish.<sup>313</sup>

Historically, the American legal system used the Quickening Doctrine as the point from which abortion could not be allowed i.e during the time the mother could feel the fetus move within the womb which was between the fourth to sixth week of pregnancy. Further, there were herbal methods that were used to abort the fetus in case there was a high possibility of death if instruments were used to abort the fetus. The then legal abortion was uprooted but the activist who does not include the above-mentioned organizations working at the grassroots level but the physicians who felt the risk of their position, owing to the punishment provided to physicians. Right-to-life during the early phase was based on a vague concept that blamed the woman for not knowing about the embryonic development in their own body. This concern that the physicians showed was taken to make the fetus a borderline to protect its position. The ones who could understand and translate embryonic development and required safety took the power into their hand and translated it according to their convenience. Thus, the abortion law which made it illegal to terminate the pregnancy was passed and was only allowed if the life of the pregnant mother was at risk. Later during the 1960 pictures of middle-class white women with their deformed infants came out and that lead to the change and curbing of the laws because the photographs made it very much obvious that besides the issue of risk to the life of the pregnant mother there were other issues that they must consider for abortion.<sup>314</sup>

---

<sup>313</sup>K Coyaji, *Early medical abortion in India: three studies and their implications for abortion services*, 55(3) JAMWA191 (2000).

<sup>314</sup>SreejaJaiswal, *Commercial surrogacy in India: an ethical assessment of existing legal scenario from the perspective of women's autonomy and reproductive rights*, 16(1) GTD12 (2012).

Facing a threat of losing the power the pro-life or anti-abortion activists made different moves and the best they could think of was to make graphic pictures of a fetus that are asking for life but are aborted. As we all know that mind captures pictorial representations more than words and stays for a longer duration thus did show effects on common folks. Such pictures were later called the “Bible of the pro-life movement”.<sup>315</sup>

### **4.3 Abortion law in India and United States of America**

Talking about history, development, and the law on abortion in India. Firstly, the Indian penal code of 1860 under the British government dealt with abortion (Sec 312-316). The law made abortion illegal and if any pregnant woman wanted to abort her child at any time then she was arrested and had to risk a penalty of seven years to life imprisonment as well as have to pay a huge fine for this crime. In case any doctor or medical sergeant performed an abortion or helps perform an abortion they would be liable to 3 years of life imprisonment as well as a fine. The Indian government took notice of the fact that many pregnant women were undergoing illegal abortion against the provisions of the penal code of India. This was causing a huge health issue for those pregnant women. High maternal mortality due to unsafe abortion was also becoming a serious problem. Further, in India, there is a huge trend of illegal abortion in rural areas because people desire male children more than female children. Ultrasonography test was used to check whether it is a boy or girl if they find it is a girl then they perform an abortion. the Indian Government appointed the Shantillal Shah Committee to look into this matter. After studying the whole condition and circumstance the Indian government decided to bring the medical termination of

---

<sup>315</sup>Betsy Hartmann, *Reproductive rights and wrongs: the global politics of population control* 45(South End Press, Brooklyn, 2016).

pregnancy act in India. The medical termination of pregnancy act of 1971 came into effect in 1972 and lay down laws regarding Indian abortion. This law says that any pregnant woman can get an abortion within twenty-four weeks of pregnancy.

In case of abortion within the first twenty weeks of pregnancy, the mother must have the permission of one registered medical practitioner which means a doctor who is registered by the Government under the MTP Act. The doctor's opinion is essential that there is a danger to the life of the woman or any mental or physical health problem to a woman because of the unborn child, etc. then the woman can have an abortion. Further, in case a pregnant woman is with an abnormal baby or handicapped baby that if the baby is born, then the baby would suffer from physical disability or any mental disability the mother can seek an abortion. In case a married couple the woman gets pregnant due to contraceptive failure or any similar measures taken to prevent pregnancy can have an abortion. It must be noted here that this applies to a married couple and not an unmarried couple. If any woman is a victim of sexual assault or gets raped then the lady can seek an abortion. In case any woman whose age is below eighteen years old or she is mentally ill in both conditions can seek abortion legally, the guardian's permission is necessary. Abortion can only be done in a government hospital or in those hospitals which are approved by the government. However, if the woman is pregnant for more than twenty-four weeks there is no legal right to seek an abortion unless it is necessary to save the life of the pregnant mother<sup>316</sup>.

Under section 3 of The Medical Termination of Pregnancy Act 1971. The doctor is eligible of performing the abortion only in the following circumstances-

---

<sup>316</sup>R.A Posner, *The economics of privacy*, 71(2) AER 412 (1981).

- If the pregnancy seems to be harmful to the woman who has pregnant be it for her mental or physical health or even for her financial sake.
- If there's a good possibility that the child will be suffering from major health issues and abnormalities.
- If the pregnancy has not exceeded 20 weeks of pregnancy then one doctor needs to be convinced to perform the first-trimester abortion.
- If the pregnancy has exceeded 20 weeks two doctors have to be convinced that abortion is necessary for health benefits.<sup>317</sup>
- In the case of abortion after 24 weeks, it must be established that abortion is utterly important for the doctors to save the life of the mother.
- The doctor who will be convinced needs to be a "registered medical practitioner" approved by the government.

If anyone gets the fetus aborted just because the sex of the fetus is female it is a punishable offense with jail time of three to seven years of imprisonment. It's a punishable offense to get an ultrasound done just to find out the sex of the fetus. Both the patient, the family involved and the doctor can be severely punished if found guilty. Sex determination test is a crime. Ultrasound can only be done if the doctor sees some abnormalities in the health of the mother and to find out about the health of the fetus.<sup>318</sup>

In the United States of America during the eighteenth century, abortion was allowed and legal for pregnant women till the fetus inside the womb of the mother starts moving, it was only then that abortion became illegal(quickening). In 1880 some state

---

<sup>317</sup>L. Finer and J.B Fine, *Abortion law around the world: progress andpushback*103(4) AJPH 586 (2013).

<sup>318</sup>R. Boland and L. Katzive, *Developments in laws on induced abortion: 1998-2007* International family planning perspectives 115 (2008).

governments of the United States took some serious steps by enforcing abortion laws to stop the high abortion rate. However, it did not work and many women started doing illegal abortions soon it becomes a political issue. Abortion rate increased six times during this period. The consumption of contraceptive pills, as well as other measures to prevent pregnancy, increased rapidly. The demand for these products increased drastically and many companies made huge profits by advertising and selling it openly. The government took notice of this problem due to the high use of contraceptive pills otherwise government did not even know about the abortion problem. In 1973 with Roe vs. Wade government legalized abortion in the United States of America based on the fourteen Amendment. The fourteen Amendment gave its citizens equal, civil and legal rights to all those American citizens who were born in the united states in America.<sup>319</sup>

The laws of America do not focus right to privacy but at the same time, they can be interpreted subject to court decisions. These laws are made under the right to personal Liberty. It is extensive and sufficient to comprise the correct choice with reverence to abortion. In 1992 a new case comes in the state of South Pennsylvania court where the judge reinterpreted the Roe case judgment. The American Supreme court ruled that Texas cannot create boundaries on right to abortion as well as facilities that generate an unwarranted barrier to a women's right to abortion. After the Judgment of the Roe case, abortion rights for women were established. Due to the Roe case and subject to the fourteen Amendment in America women were given the right to decide

---

<sup>319</sup>D.E Roberts, *Punishing drug addicts who have babies: Women of color, equality, and the right of privacy*, HLR1454 (1991).

on abortion. It states that the state will not divest any woman's life, freedom, or property, without knowing the process of law.<sup>320</sup>

The American law on abortion has to be studied through the legislation of each particular state as each state is given powers to legislate in all aspects, including abortion. This leads us to understand that each state in America has its law on Abortion. Many states in America have stuck to the judgment of Roe v. Wade on the other hand some have tried to divert from the judgment given in the case of Roe by legislative enactments that do not run in course with the Roe judgment.

**a) Texas.**

The Texas Heartbeat Act was passed by the Texas legislature in the year 2021 and bans abortion from the point when fetal embryonic or cardiac activity can be detected, which normally occurs after 6 weeks of pregnancy. It is the first law after Roe v. Wade judgment to ban abortion in America. It solely depends on enforcement through private individuals. The law includes private individuals filing civil suits rather than state-authorized officials enforcing the law that provide criminal or civil penalties. The law empowers the public to sue anyone who performs or facilitates illegal abortion for a minimum of \$10,000 in statutory damages per abortion, plus court costs.

**b) Alabama**

The Alabama code presently provides abortion up to 20 weeks of gestation period. A person can have an abortion after 20 weeks only in cases where the fetus is found

---

<sup>320</sup>E. Chemerinsky, *Rediscovering Brandeis's right to privacy* 45 BLJ 643 (2006).

unviable or there is a threat to the life of the pregnant mother. Recently, the Alabama state assembly has tried to pass The Human Life Protection Act, 2019 which is constructed on the lines of the Heartbeat law of Texas that bans abortion after 6 weeks. However, since it was challenged it is yet to be implemented.

**c) Louisiana**

The state of Louisiana bans abortion after 22 weeks of gestation period. An abortion request after 22 weeks can only be made on the grounds of an unviable fetus and a threat to the life of the pregnant mother. Recently, in 2020 the state voters passed a measure seeking to amend the state constitution that would exclude any language that provides women with the right to abortion. Further, the state house voted to pass the bill (HB813), the bill seeks to recognize the right to life of the unborn child. This means that killing an unborn child would be considered homicide and punishable from the moment of fertilization.

The true federal structure of the United States of America allows states to legislate on all matters within the state. This has led to different abortion laws in different states. Presently few states are trying to overturn the Roe vs. Wade judgment that provides for the right to abortion. These states include Texas, Alabama, Ohio, Missouri, Mississippi, Kentucky, Louisiana, Iowa, and Georgia. The doctor is supposed to check the heartbeat of the unborn child before authorizing abortion. In case of activity is seen then abortion cannot be performed. There are 51 states in the United States of America while the above-mentioned states have been trying to overturn the Roe v. Wade judgment the majority of the states have adhered to the Roe judgment and have maintained laws that allow the right to abortion as a right to privacy as described in the case of Roe.

#### 4.4. Judicial view in India and United States of America

Advertisements and hoardings that promise safe and hygienic abortions are only that much murkier with the doctor that has no degree and surgical equipment that has never been sanitized. All of that considered, abortion has been legal in India for over 50 years now. Though abortion has been a sensitive issue. The medical termination of pregnancy Act of 1971 legalizes abortion between 20-24 weeks after consulting a registered medical practitioner. Beyond 24 weeks abortion is allowed only for the purpose of saving the life of the pregnant mother.<sup>321</sup> Within 20-24 weeks they have to get consent from a recognized medical practitioner authorized by the government. As wonderful as is, it does come with a whole lot of terms and conditions. Abortion can only be opted for in certain cases, the law puts down four cases of the sort. First - if the pregnancy contains any risks to the mother. Second- if the fetus has any serious medical abnormalities. Third- if the pregnancy takes place due to the failure of contraception. Fourth- if pregnancy is the result of sexual harassment or rape. Even after one of the four conditions is met, there comes yet another restriction. This law only applies to married women. Further, the husband does not get a say in the process. His opinion is irrelevant. The right to women's bodies has been under the control of the government and their partners but this condition makes it easier for women to decide for themselves whether or not to opt for abortion. But of course, the doctor has the final word.

The Supreme Court stated that – “a woman's freedom of choice whether to bear a child or abort her pregnancy is an area which falls in the realm of privacy”. Chapter 3 subsection 3.5 deals in detail with the various cases that have recognized the right to

---

<sup>321</sup>A Marmor, *What is the right to privacy?* USC-LLSP 14 (2014).



abortion as a right to privacy. The only flaw it highlights is the lack of these abortion rights for unmarried women when it comes to the failure of contraceptives. The Medical Termination of Pregnancy Act, 1971 has helped women gain back the right to their bodies.<sup>322</sup> The laws framed for the termination of pregnancy under the MTP Act are followed very rigorously in India. The courts have set out the repeated judgments wherein they have defined how the medical practitioners should act when the request is made by a woman, and also, they have set out precedence wherein it amounts to miscarriage, not a termination of pregnancy, as per the request. It should not be used in any manner to facilitate female feticide. But recently, the union cabinet cleared a bill on medical termination of pregnancy. The Amendment Act raises the time limit for abortion to 24 weeks instead of 20 weeks along with some minor changes, while the MTP act has legalized abortion. However, still, it is misused in various parts of the country. The main misuse of the law is terminating the pregnancy in the bias of the gender. But it is made very clear by the government that termination of pregnancy based on gender is strictly prohibited.<sup>323</sup>

The legal efforts to reform abortion laws in America began in the 1960s. More than 20 cases challenging state abortion laws were filed during this period in the Supreme Court of America. This period can be marked as the beginning of the pregnant women's right to privacy and LGBTQ rights movements. During this period four states namely New York, Alaska, Hawaii, and Washington took steps to revoke their regulations forbidding pregnancy termination while almost around 13 states did make effort to open their regulations making abortion a criminal act. More than 20 or more states, reformed regulations that completely banned abortion and provided exceptions

---

<sup>322</sup>E Volokh, *Personalization and privacy*, 43(8) CACM 86 (2000).

<sup>323</sup>L.R Bevier, *What privacy is not*, 12 HJL & PP 99 (1989).

in circumstances where it would be essential to preserve the women's well-being or lifespan or in the matter of rape incest, or fetus irregularity. Jane Roe was a person who discovered herself gravid and pregnant for the third time.<sup>324</sup> Jane Roe is a pseudonym name. She was not in favor of having a third child. However, the Texas law did not allow abortion. Eventually, she filed a case in the Supreme Court of America. The Supreme Court rewrote the national law for abortion in which they declared that the states could not control or perimeter abortion in the primary trimester, they could adjust in the second quarter to defend the mother's health and they could control abortion in the last quarter of pregnancy to guard parental health and the unborn child. Advocates of the accusers demanded that abortion falls inside the right for confidentiality even though confidentiality is not in the manuscript of the constitution, they believed it was resultant or based in the dialectal of the 14<sup>th</sup> Amendment of the constitution even though the 14<sup>th</sup> Amendment does not cover anything about abortion or the child that is not born yet. The court held that the right to terminate a pregnancy is the right to privacy based on the 14<sup>th</sup> adjustment. Justice Blackmun wrote that a string of periods created a right to include abortion, though he confesses that abortion is a far-off dissimilar situation from other confidentiality rulings. Right to privacy and abortion has their origin in the case of *Griswold vs Connecticut* (1965). Planned Parenthood had opened up a birth control health center in New Haven, Connecticut and they were promptly arrested, and the clinic was shut.<sup>325</sup> Accordingly, the case was brought before the court.

In a 7-2 ruling, the Court held that the Constitution protected the right to marital privacy against the state law restricting the use of contraceptives. The court held that

---

<sup>324</sup>B. Bratman, *Brandeis and Warren's The Right to privacy and the Birth of the Right to privacy*, 69 TLR 623 (2001).

<sup>325</sup>G.J Annas, *The impact of medical technology on the pregnant woman's right to privacy*, 13 AJL & M 213 (1987).

constitution does not explicitly protect the right to privacy in general. However, various rights given in the bill of Rights provide space for the establishment of the right to privacy to exist. It was held that the first, third, fourth, and ninth provide the right to privacy in marital affairs. The Connecticut law which provided restrictions to the use of contraceptives conflicted with the mentioned rights and therefore null and void. Although it was a long journey for the judicial system of America regarding taking steps toward abortion, it is now legal in the country through the rules may differ from state to state.<sup>326</sup>

Although there was no movement regarding abortion in India and there were no specific laws concerning abortion, the women did not have many choices left for themselves, and they either poisoned themselves or committed suicide. This raised further complications as it could not be called suicide or homicide. After that abortion was taken seriously in India and finally the Medical Termination of Pregnancy Act of 1971 was enacted which legalized abortion. America had two main movements for the right to abortion. The first one is the women's liberation movement. It was a movement in which women sought equal rights and equal opportunities. It all began in 1848 when a group of women decided to take a stand and make it known that they did not like the way women were being treated in America. They held a two-day convention in Seneca Falls, where they discussed how women were being treated and how they can fight against that treatment. Inspired by the convention different associations were formed to support the fight for women's rights and in 1920 the 19<sup>th</sup> amendment was rectified<sup>327</sup>. They protested the objectification of women, reproductive rights, and opportunities for women in the workplace, and redefining of

---

<sup>326</sup>L. Shepherd, *Looking forward with the right of privacy*, 49 UKLR251 (2000).

<sup>327</sup>*Supra* at 310 at 12.

familial roles. Along with that, they challenged the definition of femininity without compromising the principles of feminism. In 1963, the federal government amended the equal right act, this prevented wage discrimination between men and women in the same work establishment. In 1964 President Johnson signed the civil rights act, this was to protect women from being discriminated against in the workplace. In 1965, the equal employment opportunity commissioners (EEOC) were appointed to enforce the civil rights act. Unfortunately, women were still not being treated fairly and the EEOC was unable to enforce the civil rights act. Instead, the national organization for women was founded. This organization was created to bring women into full participation in American society and teach them how to exercise their rights to be in an equal partnership with them.<sup>328</sup>

The second one is the Pro-choice movement which was initiated by framing a view for the women of the USA to have their right to abortion, which means that they should have the right to terminate the pregnancy. It was a movement that was led by several parties in the USA. There was a time when abortions were simply a part of life in the United States. Before 1880, termination of pregnancy was lawful and extensively practiced. They were prohibited only after quickening. Before 1880, abortion medicine was a flourishing business. Those who sought to control that business or were mostly concerned about intoxicating. But the American medicinal organization initiated a campaign in 1857, to make termination of pregnancy prohibited. In 1873, congress approved the Comstock rule which debarred abortion medicines countrywide. By 1880, abortion was prohibited in most states except it was essential to protect the life of the mother. The Roman Catholic Church has been time again opposed abortion rights. It was not till the 1960s that the women's freedom

---

<sup>328</sup>Radhika Roe, *Property, privacy, and the human body*, 80 BULR.359 (2000).

movement gathered momentum. In, *Roe vs. Wade*, the Supreme Court's concluded to authorize termination of pregnancy in the United States approved as per the right to privacy.<sup>329</sup>

#### **4.5 Social acceptability and stigma in India and United States of America**

Abortion practices have been a part of India since time immemorial. References can be found in ancient Indian texts like *Manu Smriti*, *Vedas*, etc. It has been discussed in Chapter 2 Sub Chapter 2.9(1). Sex and sexual morality are still seen as taboo in Indian Society and abortion is part of that. It has been discussed in Chapter 2 Sub 2.6. The act of abortion is considered negative and positive depending on the way it's done.<sup>330</sup> With the increasing population in India, this term might sound positive to some extent when it comes to performing it with the consent of the parents and specifically the mother. But that's not something we often find when we flip to the darker side where hundreds of such cases are registered and the history of India altogether has chapters of stories of deeds unforgivable. In Indian society "abortion" does not work based on the "reality principle" but rather on the "moral principle". It's done when society thinks it needs to be. In the 21st century where women are fighting for equal rights and to correct that unfortunate oppression for thousands of years. They are fighting for their rights to gender equality, women of the weaker sections have no idea about their basic rights. It's a shame for them to live in a society where they can have the right to say what they want but are obstructed by the government and legislative actions. The stigma of "unsafe abortion" has become a living, breathing, and spreading culture. There are thousands of reports where unsafe

---

<sup>329</sup>R.L Rausch, *Reframing Roe: property over privacy* 28 BJGLJ 27 (2012).

<sup>330</sup>P Nonet and P Selznick et al, *Law and society in transition: Toward responsive law*, 45(Routledge, London, 2017).

abortions have led to maternal mortality or some sort of permanent damage to the life of the pregnant woman.<sup>331</sup>

That's just one part of the story while there is another part to it and what is amusing is that it's a part of the same society. That's the silent culture of no abortion. It is said that kids are gifts to mankind, subject to be interpreted in the best and worst possible way by a different group of people, and quite a large number of people believe that having several kids from one mother is also a gift and one must never say no to it. Abortion is considered a sin and morally people are supposed to abstain from it. This part of the society does not feel the need to understand that motherhood is a choice, a free will for any woman and that is her decision based on not only her physical capabilities but also her psychological abilities. So, in a country where pregnancy is a gift people at times fail to understand that gifts are planned and not forced practices. So here lies the hypocrisy where a pregnant unmarried woman is a black spot and needs to abort the unborn child even if she is mentally, and financially capable. A married woman suffering from health problems or thinking of herself to be incapable of being a mother has to keep the fetus because people in society think it's a gift even if it is unplanned. Where on one hand a married woman is forced to abort a child based on family greed for a male child, and a rape victim is harassed with questions before abortion just to find out if she was a part of it willingly. That's the stigma of Indian society.<sup>332</sup>

The social movement against female feticide in India started in the early 1980s and was directed toward the abortion of female fetuses the movement seems to last for

---

<sup>331</sup>K.D Askin, *Prosecuting wartime rape and other gender-related crimes under international law: Extraordinary advances, enduring obstacles*, 21BJILerkeley J. Int'l L 288 (2003).

<sup>332</sup>Sushanta K Banerjee and K.L Andersen et al, *Woman-centered research on access to safe abortion services and implications for behavioral change communication interventions: a cross-sectional study of women in Bihar and Jharkhand, India*12(1) BMC PH 175 (2012).

more than four decades now. However, we tend to forget that many women themselves have chosen to get their fetus sex determination done and then moved ahead to abort them. So, at this point, it seems very wrong to just blame the men for this heinous work where the women are equally to be blamed.<sup>333</sup> Where on the one hand feminist perspective of working for this utterly important aspect becomes very necessary to its woman who will understand women and so abortion and the choice of how to keep a demanding body should forever be in the hands of the female. Even today in the West woman is fighting against the Christian right-wing for their right to abortion it is a shame to know that woman go for sex determination and then abortion. In a country where it's so difficult to differentiate between "female feticide" which means the killing of a fetus that is already a separate living being based on the sex of the fetus. The term was used for a long time as a synonym for abortion but doesn't mean the same. It was very difficult to know who those doctors are who have been practicing unsafe abortion methods and even if the doctors are traced it's impossible to find out the woman who gets the abortions done illegally. Monitoring sex-determination is one thing but to keep control of unsafe abortion by women who get the determination done in one clinic and get the baby aborted in another is utterly impossible. An ideal world according to feminism would not be one in which there is the legalization of abortion but one in which the woman gets to decide what she wants to do with her body after being informed about the health benefits and requirements that need to be taken care of through an authorized medical practitioner.

Today, equality is a fight that can only happen when both genders exist in harmony. However, that somehow seems impossible when females have to fight, right from the time of their birth and even before to live. In a country where the goddess is

---

<sup>333</sup>*Supra* note 315 at 628.

worshipped, their blessings week during different festivals. How hypocritical and double standards it seems from the eyes of female feticide. Well, when it comes to such practices conveniently, we move over to the blame game to the lower strata while in recent times it has been known that well-to-do and wealthy families have moved to foreign neighborhood countries to get the sex determination of the fetus done when they got pregnant. The human trend of materializing other humans begins right from the time of birth when boys are referred to as assets and girls as liabilities and so they decide to get rid of the debts. Not only this they take honor in the task by believing it to be a very pure practice as this being a male-dominated society bringing up a girl child will be very difficult so it is better to not take the risk and kill them before they have to suffer. Though there are steps that the government has taken with "Beti-Bachao" andolan where the soul moto of it is to save the girl child from pre-natal tests and sex determination and abortion advertised through television commercials, newspapers, and also celebrities whom people think are their ideals.<sup>334</sup> The ground reality depicts something completely different.

Americans seem to have quite a bit of a better understanding of abortion. America has seen both the pro-choice and pro-life movements. This is very much evident even today. It has become a political issue subject to debate during every Presidential election. After legalization, it's said that the female morbidity rate dropped by 45% and since then at least half of the American women have terminated their pregnancy at least once. For them, it was a criminal offense in the past.<sup>335</sup> Today it is a legal right. As such the country seems to have no issues regarding abortion and mostly 10% of the entire population who believe in the religious aspect of abortion have been seen

---

<sup>334</sup>Melissa Stillman and J.J Frost et al, *Abortion in India: a literature Review*, New York Report: Guttmacher Institute 22 (2014).

<sup>335</sup>Kathleen Broussard, *The changing landscape of abortion care: Embodied experiences of structural stigma in the Republic of Ireland and Northern Ireland*, 245 SSM 112 (2020).



to have a problem regarding abortion rest are mostly fine with it. For Americans, it's always either pro-choice or pro-life and fortunately, the votes have mostly been towards "pro-choice" where the country people do believe that the decision of abortion lies completely in the hands of the mother and her physical and psychological wellbeing. But there are other aspects to it as well. Specifically, the religious aspects where the Catholic Church gives preference to the right of the unborn child or personhood rather than the right to abortion. It is considered a sin to terminate a pregnancy. The Catholics seemed to be on the same page with the Protestants stating that it was against God's will to not let someone have "access to life".<sup>336</sup> So, to clearly say American society does not come up with any clear response toward abortion. The American federal system allows different states to formulate different laws on abortion according to its interest. The majority of the states have made laws in sequence with the Roe v. Wade decision while some states are trying to overturn the judgment. This also depicts the social view on abortion.

Respect for individual choices can be better observed in America. It can be generally said that in the case of American even if they do not prefer abortion they try not to interfere with the choice of the other person and prefer others to be able to make their own choices depending "situations the mother is in", "financial capabilities", "health issue and risks", etc.<sup>337</sup>

---

<sup>336</sup>Elizabeth A Mosley and B.A Anderson et al, *Attitudes toward abortion, social welfare programs, and gender roles in the US and South Africa*, 30(4) CPH 445 (2018).

<sup>337</sup>Anita Yadav and C Sharma et al, *Profile of abortion seekers and decision makers of post abortion contraceptive acceptability in Andaman and Nicobar Islands, India*, 5(10) IJRCOG 349 (2016).

#### 4.5.1 Psychological effect of abortion on women

Data has revealed that abortion has different effects on woman. One of the most important of all is the psychological effect; it lasts for more than the physical effects and can neither be easily detected and nor easily treated. The saddest part is that such a critical issue has been often neglected most of the time. There are different types of psychological effects which require attention. In most cases the psychological effects of abortion affect the woman, the family of the woman, and child planning, especially in case it is a forced abortion by the family or a miscarriage that takes place due to accident. There are cases where a woman gets depressed weeks after aborting the fetus, the likeliness of having such a problem is for the woman who has planned the pregnancy but for various reasons is unable to give birth to the child, the greatest amongst all the psychological effects is when the woman becomes suicidal.<sup>338</sup>

Imagine an unmarried woman getting pregnant in a country like India. She will have to face several social sanctions for herself as well as the family for choosing to be sexually intimate and will be termed impure.<sup>339</sup> She is bound to stay at home and hide from the entire society that now will not allow her to live in peace. They call them names that are not very pleasant to hear. Many times the family is not supportive, and herself not being capable enough to make her own decision and financially stable is another psychological effect. The third psychological effect is when she is asked to abort the child. Even in a country like India where abortion is completely legal till the 24<sup>th</sup> week, it becomes very difficult to find a clinic where her personal choice is respected and she is questioned only for her health and not judged for the sake of

---

<sup>338</sup>Sarah Combellick-Bidney, *Reproductive rights as human rights: stories from advocates in Brazil, India and South Africa*. 21(7), IJHR 818 (2017).

<sup>339</sup>Virginie Rozee Gomez and Sayeed Unisa, *Surrogacy from a reproductive rights perspective: the case of India*. 2 SPP 192(2014).

society. In a place where she could have approached for help becomes a pressure for her because she knows that the moment, she enters the clinic there will be people who will indirectly if not directly question her for the sin that they think she has committed.<sup>340</sup> In a country where a psychologist is regarded as a doctor only for mentally retarded people. Any normal person seeking their help for different personal reasons is not considered correct. Further, the idea that a woman seeking help from a psychologist for abortion or who has had an abortion is not considered within the normal framework. The fourth psychological effect happens when the doctors without being emphatic enough question her and she has to answer all questions knowing that she is being judged. These are the four issues that lead to psychological effects on a woman mentally besides the pain that abortion involves, the sorrow of killing one's child without wanting to do it, and finally, all this together leads to depression. Often emotional and mental stress leads to mental and physical problems and could potentially lead up to suicide.<sup>341</sup>

Terminating a pregnancy can be a stressful event in life. Experiencing anger and emotional outburst is not an uncommon symptom after abortion. Abortion leads to a change in the hormone cycle and that affects behavior, according to American Pregnancy Association the negative feelings that a woman has are as follows:

- Guilt
- Anger
- Shame
- Regret

---

<sup>340</sup>Subha B Sri and T K Sundari Ravindran, *Safe, accessible medical abortion in a rural Tamil Nadu clinic, India, but what about sexual and reproductive rights?*22(44), RHM 141 (2015).

<sup>341</sup>Srinivas Kosgi, Vaishali Hegde N et al, *Women reproductive rights in India: prospective future*, 10 (1) OJHAS, 223 (2011).

- Loss of self-confidence
- Feeling of loneliness
- Sleeping problems
- Relationship issues with the partner
- Depression and suicide.

Here's an experience of a woman that led to what she calls to be her "messed up state". She choose to have intimate relations with someone which led to her getting pregnant. This led her to a state of trauma that she had never expected. It started with the feeling of nausea, vomiting, and lack of clarity regarding the pregnancy.<sup>342</sup> With that, she started with a mild depression and a small lack of self-confidence that came with the fear of getting caught or someone else knowing it. As the days passed she took her pregnancy test which came positive, then decided to have an abortion. Having the relief that she would get the fetus aborted she thought that she would feel better as she read that women generally do feel better after abortion of an unwanted pregnancy. But that was not the case; she started questioning herself "what now?" Psychology is a part of one's body that is never in control, and that was when she started questioning her morality without even realizing that she was doing it. Slowly she started getting trapped in her self-esteem. Even while being in the office she started having chest pain, started shaking, and a sense of not belonging to one's own body for doing something that was not required and required at the same time. Slowly she started keeping herself isolated from others in a motif of feeling. The more she did the lonelier she become. Everything that felt enjoyable to her lately didn't and nowhere did she feel safe. The worst of all the feelings was the thought of not having

---

<sup>342</sup>Lakshmi Lingam and V. Yelamanchili, *Reproductive rights and exclusionary wrongs: Maternity benefits*.46(43) EPW 98 (2011).

a future as if everything has ended with the fetus.<sup>343</sup> The only way to come out of depression and anxiety is when you accept that you have it and are ready to treat it ultimately helping you out in healing mentally.

That's one story of an Indian woman who had to go through the psychological effects of abortion before and after abortion. Further, there are woman who feel they should have or should not have continued the pregnancy and didn't realize it until very late, and the regret of not being able to do so lead them to form a kind of regret which makes living in peace difficult. Anger on the family members or on the society that makes them go through the kind of emotions because of abortion by illegal means when the fetus is a girl and the desire of the family of a male child makes them take the step. Forcing anyone to do something that they may not desire to do make them angry at their helplessness and the mindset the family and society is yet another psychological loophole especially in the case of India. Some women also has posttraumatic stresswhich is caused by abortion on the whole and such women even after willingly going through abortion face health issues or might have a sleep disorders. The very idea of being a mother for a woman is something that is normal human behavior. Regardless of gender, we will never be able to feel the same unless we have been in the situation and when the fetus is aborted no matter what the reason was or how early the pregnancy was aborted can never really accept it with open arms. It's true that some experience huge mental trauma and some deal with the minor ones but there is not a single time when women have gone thoughtless about the fact.

344

---

<sup>343</sup>Carolyn Heitmeyer and M Unnithan, *Bodily rights and collective claims: the work of legal activists in interpreting reproductive and maternal rights in India*.21(2), JRAI 381 (2015).

<sup>344</sup>Sonia Correa and Rebecca Reichmann, *Population and reproductive rights: Feminist perspectives from the South*. 243(Zed Books, London, 1994).

We can also see the case study of a 17-year-old girl from America who shares her experience of being pregnant, abortion, and loss of relations that she had to suffer from because of that unplanned choice. She shares that after being intimate with her partner as per her choices she got pregnant. When the family came to know about it, she sought support from neither her parents nor her partner or his family members. For weeks she had fought for her rights with the family and wanted to keep the baby but her family did not allow that to happen. The 17-year-old did not understand the body changes and how to deal with them, her family did not talk to her, and her partner who was supposed to be with her wasn't interested. Unable to understand she was forced to drag herself to the hospital did as the family wanted and got the fetus aborted. For weeks she had stopped meeting people after that, for months she had isolated herself in a room just thinking about what was wrong with asking to let her choose her liberty, was she supposed to ask others for her wishes, and all that slowly lead to loss of her self-confidence, loss of her wish to live and think about the future. Even the boy had dropped the desire of meeting or keep any kind of contact with her. All losses and lack of will made her write an unnamed letter on the social platform speaking up about what had happened to her and how she had to deal with it all by herself without any help but even when she did that, she had to keep her identity hidden with the fear of being exposed and having to face yet another criticism and this time with a whole new dimension and that would be from the people she did not know. This is how abortion ruins all mental health if not dealt with care and concern and in the right manner.<sup>345</sup>

---

<sup>345</sup>Jameen Kaur, *The role of litigation in ensuring women's reproductive rights: an analysis of the Shanti Devi judgment in India*.20(39) RHM 28 (2012).

Not only this now we have social bullying and the whole family suffers from it. There are movies in Indian cinema like *Amitraz* where a woman aborts her child based on her choice and is portrayed as a bad or negative character. While being in a relationship with the male lead she gets pregnant and because it was an unplanned pregnancy, she aborts the fetus of her own will. Here we can see the mindset of the society when she is called names and is also seen being blamed for not taking the permission of her partner before seeking an abortion. We may argue legally but the social view may differ. Legally, this is not supposed to be the case as wanting to be a mother or not is all that the woman decides. This kind of psychological pressure on the woman's character is drawn and also pictured in the minds of the people who watch and learn from these films. There are other films in Indian cinema where the woman who decides not to abort her wish are also psychologically affected as being pregnant without marriage is a sin and one should choose to die than live with that shame.<sup>346</sup> Cinemas often depict social view and certainly have their share of influence on society and depicting a pregnant woman's choice to have or abort a child negatively leads us to understand the situation of women who is supposed to live in that same society. This affects a women's thought process when she starts thinking that her personal choices are not hers to decide and will be subject to social sanction.

#### **4.5.2 Accessibility to Abortion in India and United States of America**

While talking about how accessible abortion is in India it's a known fact that abortion no matter how legalized is still not accessible for the ones who need it the most, especially the people of the economically weaker section. Neither in the form of information or knowledge nor as facilities. Unawareness about the right to abortion

---

<sup>346</sup> Myra Marx Ferree and William Anthony Gamson et al, *Shaping abortion discourse: Democracy and the public sphere in Germany and the United States* 112 (Cambridge University Press Cambridge, 2002).

and administrative failure to provide proper facilities for abortion is a big problem in India. Though abortion is legal in India and comes under the preview of the Medical Termination of Pregnancy Act 1971 yet some loops-holes obstruct its proper implementation. In a country like India where sex and sexual morality are seen as taboo, it's very difficult to find a doctor who can help one without being judgmental. The socio-cultural aspect of Indian society further provides problems to access abortion. It is very difficult to think about abortion as more of a "medical health step" and less of a "societal issue" in Indian society.

There are cases where people are blackmailed by fake doctors after abortion, so much so that girls to maintain their dignity had to commit suicide for the fear of being exposed. Laws cannot single-handedly change the way society has been working where there are people who for a long period of time have considered abortion as a sin. Though there are NGOs and help groups who are working to make people aware of the fact that it's not a sin if the mother wants to have an abortion and if it's done in due time and under proper conditions, it will not affect the health of the mother and that they do not need to be ashamed. Further, many women don't even know to what extent abortion is legal and where is it done, and who is capable of getting it done. In India where getting proper food, shelter, and a hygienic environment is difficult getting an abortion often becomes secondary. Where every 5th child out of 10 is suffering from malnutrition, where a huge bulk of the population is still in poverty struck and people have a notion that more kids in a family mean more labor and more workforce. It's difficult for them to understand that it's not healthy for the mother to keep producing kids. It's very difficult to understand why abortion as a health benefit is not available for the ones who need it but it's accessible for the ones who greed for it. Though abortion is legally accepted by laws it still seems unapproachable in India.



There are hundreds and thousands of debates that argue about abortion based on moral, philosophical, ethical, religious as well as political grounds. However, socio-cultural and lack of proper facilities are also major reasons for the lack of accessibility of abortion in India. Abortion accessibility can be divided into three categories on the grounds of safety and those are safe, less safe, and least safe abortion. Safe abortion is when it is done by health care workers abiding by the rules of WHO, less-safe abortion is done by trained workers but in not so expertise methods or mostly outdated methods that might not be safe anymore medically and the least-safe ones are the illegal ones that happen to persist in the remote villages that are illegal.<sup>347</sup>

Abortion in India is a controversial, difficult to speak about, ethically wrong and religiously sinned yet legally accessible on pen and paper with a handful of health care workers trying hard every day to make things right. When it comes to how accessible abortion is in America. The situation looks better than in India. When you first go to read about abortion and its accessible implications the very first line that pops up is that the country has been toiling very hard to maintain its legal standards since 1973 i.e. right after the Roe v. Wade decision. The people seem to be much more aware of the right to abortion and the government has tried to provide proper facilities to facilitate safe and hygienic abortion. This could very well be because the right to abortion is a social movement in America, where people have actively taken part in the movement or opposed it. As mentioned earlier abortion has been a subject of debate during every Presidential election in America in recent times. The majority of people vote depending on the actions the elected government is going to take on the issue of abortion.

---

<sup>347</sup>Ushma D Upadhyay, *Innovative models are needed for equitable abortion access in the USA*, 2(11) TLPH 484 (2017).

In India even though abortion is legally accessible depends on ethics, morality, socio-cultural values, proper facilities, and religion. In America, it depends on mental ability, health risks, and finance.<sup>348</sup> This does not undermine the fact that religious institutions in America also oppose abortion but its role in society is not as predominant as it can be seen in India. India fails to provide proper health care abortion facilities. In America, there are special abortion centers that have been working only for the betterment, knowledge, understanding, and life of such women who feel the need to get an abortion without the fear of being judged or exposed. Further, the cost of an abortion is a big question mark on the ones who cannot afford it, and that in a way make the otherwise accessible process more difficult. Distance of such medical setups for abortion in some states also make abortion inaccessible for the ones who belong to the rural areas. Another important fact that obstructs abortion in India is the fact that unmarried women are not recognized by the MTP Act. This means an unmarried woman cannot access any abortion facilities in case she gets pregnant and has to seek illegal facilities. The American law on abortion does not discriminate between married and unmarried women. Though there are a series of cases of harassment from the anti-abortion activists who believe in pro-life above pro-choice. However, this has not predominantly affected the abortion rate. Still, it's very difficult to draw a very clear conclusive picture of the American view on abortion. America cannot be considered a country where abortion is easily accessible because there are parts where there are strict laws for a doctor to perform an abortion. This means that even after being the citizens of the same county their state laws do not provide them with equal benefits of the law. People have to travel to different states to avail the benefit and get the unplanned pregnancy terminated. Some states have just

---

<sup>348</sup>Frances Doran and S. Nancarrow, *Barriers and facilitators of access to first-trimester abortion services for women in the developed world: a systematic review*, 41(3) JFPRHC 175 (2015).

one abortion center and it's practically very difficult to travel for that one purpose. So basically, India and America are two sides of the same problematic issue.<sup>349</sup>

There are cases where women have gotten their fetuses aborted by inexperienced, fraudulent doctors which have led to medical issues and even death. WHO has a set of guidelines on how the entire process has to be carried out in different ways. It includes both Induced Abortion and Spontaneous Abortion. However, most of the problems occur when uneducated, less informed people get it done by taking drugs that are not legally authorized or abortions performed by unqualified doctors<sup>350</sup>. The role of the government is also very important as it is responsible for providing proper and accessible facilities for abortion. In a country like India, such facilities must provide secrecy to pregnant woman seeking abortion as the Socio-cultural view of society still considers abortion as a sin. Especially in the case of unmarried, widow and divorced women.

#### **4.6 Reproductive Rights in India and United States of America**

It is essential to know what reproductive rights are. It has also been discussed in Chapter 3 in detail. They are a combination of civil, economic, social, and political rights. It covers a vast range of rights starting from the Right to health to the right to life, from the right to information to the right to privacy.<sup>351</sup> Over time Indian court has issued several notable judgments for the betterment of woman's reproduction rights. The basic amongst them is the “inalienable privacy rights”, which is strongly protected under the fundamental rights of life. Not only have this but in several

---

<sup>349</sup>Maureen Paul and S Lichtenberg et al (ed), *Management of unintended and abnormal pregnancy: comprehensive abortion care*, 74(Wiley-Blackwell, New Jersey, 2011).

<sup>350</sup>Duff .G. Gillespie, *Making abortion rare and safe*, 363(2) IPSRH 74 (2004).

<sup>351</sup>Barbara Hobson, *Recognition struggles and social movements: Contested identities, agency and power*, 123(Cambridge University Press, Cambridge 2003).

courts, there been landmark judgments by the court that have formed the basis of woman's equality and their choices. The power of decision-making willingly has been passed on to women by the court. Based on child marriage and pregnancy, rape victims, violence, and abortion the courts have given decisions framing women's reproductive rights as part of the right to privacy under the right to life. Not only is this on the global stage India amongst the first states to recognize the importance of mental health and its effects as a major issue of concern in abortion and reproduction. Indian court through judicial pronouncement has made sure that women are not only given proper knowledge regarding all that's important for them to know about reproductive rights. Furthermore, the Constitution of India recognizes many of the above-mentioned points under the frame of fundamental rights. The Right to Equality and Non-discrimination under articles 14 and 15 and the right to life under Article 21 which is understood to include the right to dignity.<sup>352</sup>

The Constitution of India obligates us to abide by these rights and never in any circumstances, whatsoever the reason may be work towards its violation, it is a punishable offense. Art 39(a) allows citizens to access justice and free legal assistance in case all the above-mentioned rights are denied. It's sad that even after being one of the first countries to legalize abortion somewhere there have been loopholes in providing a woman with the ability to fully enjoy all of her rights.<sup>353</sup> Article 21 which can be interpreted to include woman's personal liberty was set up because even after several laws and women's rights women were unable to access these right properly. The freedom to exercise these laws would therefore mean exercising reproductive rights including the right to choose which very clearly showed that India is in favor of

---

<sup>352</sup>Suzanne Staggenborg, *The pro-choice movement: Organization and activism in the abortion conflict* 114 (Oxford University Press, Oxford 1991).

<sup>353</sup>Deana A Rohlinger, *Abortion politics, mass media, and social movements in America* 231 (Cambridge University Press, Cambridge 2015).

the Pro-Choice. Not only this there was a change of rule as compared to the 2004 decision of the Supreme Court that had stated that an abortion can only be conducted if there is a consent of the husband involved<sup>354</sup>. This judgment which made abortion without the consent of the husband amount to mental cruelty and grounds for divorce somewhere worked negatively for women, especially in the case of orthodox families who didn't want the woman in their family to get the fetus aborted without the consent of the husband. However, the recent amendment to the MTP Act, 1971 says that only if the mother is willing to abort the fetus she is free to do so and the husband has no say on the matter as it comes under Article 21 of Personal Liberty. In 2011 the High courts of Punjab and Haryana dismissed two cases where the husband had filed a case against the doctor who had executed the abortion without his consent. The court held that it's a personal right of a woman to give birth or not. Nobody, not even the husband can interfere because a forceful pregnancy would affect the mental health of the wife and that could not be allowed under the fundamental right to life.

Further, in 2013 the High Court of Madhya Pradesh allowed termination of pregnancy for a rape victim stating that they cannot force a victim of violent rape to give birth to a child even if the accused was not declared a culprit yet.<sup>355</sup>

In 2016 Bombay High Court made abortion accessible to the women prisoners by stating that the right to life is equal for all including women prisoners who seek help. An unborn child cannot be given rights like a human being mostly because it's still a part of someone else's body if the pregnant woman does not want it, it should be her personal choice. It affects the mind and mental wellbeing of the woman and that risk

---

<sup>354</sup>*Suman Kapur vs. Sudhir Kapur*, 2009 1 SCC 422.

<sup>355</sup>Annula Linders, *Victory and beyond: a historical comparative analysis of the outcomes of the abortion movements in Sweden and the United States*. In *Sociological Forum*, 29(3) KAPPP 384(2004).

should not be taken. There are cases of child marriage in India where as soon as a girl hits puberty and the family knows that she is ready to reproduce they are married off and the family being poor enough gets money in return for doing that. Later such girls just become machines for child birth and one woman gives birth to 5-7 children in 20 years and by the time they reach the age of 40 they either suffer from major health issues. Such is the condition of women in India that slowly seems to be changing but the destination as such is covered with many pit holes.<sup>356</sup>

Various problems do not allow the complete realization of reproductive rights including:

- Public policies that surround the laws majorly focus on sterilization while abortion also happens through contraception and other herbal ways in remote places that go unnoticed.
- There is a lack of awareness among the masses. Further, due to lack or limited awareness programs basic aims of reproductive rights and awareness remain unfulfilled.
- Corruption is also a huge problem in every sector of work be it medical or administrative. The funds that come for clinics and tender that the hospitals get for spreading awareness often do not reach the required destination.
- Lack of datafication and data fixation is a huge problem. The exact count and results do not even reach the government.

Although several laws ensure women's safety, health and life the problem is that the states differ in their way of interpretation and implementation.

---

<sup>356</sup>Drude Dahlerup, *The new women's movement: feminism and political power in Europe and the USA*, 12 Sage Publications (CA) 121 (1986).

There are places where the availability and accessibility of proper medical aids are not possible. It becomes very much difficult to reach out to women in those places mostly including the rural areas. In these places, women often opt for quacks that treat them with herbs and traditional methods to induce abortion. Such places have high cases of unregistered deaths due to illegal abortion. People here do not realize that herbs are not medically proven methods due to a lack of awareness along with a lack of proper facilities that could help educate the rural population about reproductive rights and also provide safe and legal facilities for abortion. That's the harsh reality of unsafe abortion in Rural India. Inside a clinic in a small place in Maharashtra, a girl was seen comforted by the medical staff and the doctor. The girl seemed traumatized. The reason was that she was 3 months pregnant due to rape. She was 22 years old. She wanted to abort the baby but wherever she went she was unable to access government-authorized abortion safe facilities. So, she had to travel 90 km to get her abortion done. It's a shame that statistics every two hours a woman dies because of illegal abortion. Further, the cases are not confidential at times.<sup>357</sup> It's a shame that as a culture and as a society where on one hand there are open TV serials that show how little children suffer due to child marriage, there are advertisements that show that men should not be ashamed of their genital problems, that women should be educated and empowered abortion is still a taboo. This also happens because there are doctors who are not trained and have no idea how to differentiate between pre-natal sex determination and abortion and take up illegal means to perform it and leave the patients with complications that are beyond repair. Clinics that perform such unsafe abortions are found in some dark corners of the rural areas for the fear of being caught. The saddest part is people approach such places for help with the hope of

---

<sup>357</sup> Dorothy McBride Stetson, *Abortion politics, women's movements, and the democratic state: A comparative study of state feminism* 334 (OUP Oxford, Oxford, 2001).

being economically less strenuous and confidential or for no reason at all and then face complications that lead to the death of the pregnant mother.<sup>358</sup>

Abortion has been around since time immemorial but the conditions under which it was performed vary from time to time in history. The general reason why Indian women generally terminate their pregnancy is sadly because of family pressure rather than being financially incapable. This happens mainly in case the child to be born is a female child. This in most cases has to be done illegally. This shows that even if the law and judiciary have provided us with important reproductive rights but lack of awareness of these laws, family pressure, and administrative failure have led to morbidity and mortality in India. Morbidity and mortality remain high and are still a major issue in the existing times. The studies have shown that unsafe abortion is a very common practice among adolescents in rural areas or who are unmarried or in case of child marriage.<sup>359</sup> Until and unless proper education is provided to the people and women are not made aware of their abortion rights and health risks involving illegal abortion nothing such can be achieved.

#### **4.7 Comparing Abortion laws in different countries**

Complications of unsafe abortion have led to a huge number of maternal deaths around the world. Though there has been a huge drop in the abortion rate in developed countries. The issue of maternal death due to unsafe abortion has not been eliminated. Legally even if the laws of different countries differ depending upon circumstances the law is meant to help and protect the woman in any and every way possible. Presently, there are around seven countries including El Salvador,

---

<sup>358</sup>Bishakha Datta and G Misra, *Advocacy for sexual and reproductive health: The challenge in India*, 8(16) RHM 28 (2000).

<sup>359</sup>Stepen Isaacs, *Reproductive rights 1983: An international survey*, 14 BJIL 311 (1982).



Philippines, Egypt, Madagascar, Jamaica, Honduras and Nicaragua that still ban abortion (including rape, incest and mothers life being in danger) and about 125 countries have a filter on abortion laws depending on the circumstances that are medically allowed in extreme cases which include socio-economic reasons, medical health issues, or fetal obligations.

**a. Canada**

Canada prohibited abortion without any exception in 1869. These restrictive laws were subject to change from 1939 to 1969. The Supreme Court of Canada in the case *R vs. Morgentaler* (1988)<sup>360</sup> culminated the right to abortion without restriction. It overturned the then-existing restrictive laws on abortion. The Government did try to criminalize abortion however failed. Currently, Canada is only one of few countries that allow abortion on request at any stage of the pregnancy.

**b. China**

China was one of the first countries around the world to removed restrictions on abortion laws. It liberalized abortion laws in 1950, which later came down to a mix with the One-Child Policy Act of 1979. It was made to put a check on the population growth by restricting its citizens to one child per family. It was the motif of the country and had to loosen the knots of abortion because in case of an unplanned pregnancy they should have a way out of it and that could not have been possible without abortion. Not only this anyone not abiding by the policy made in 1979 would

---

<sup>360</sup>*R vs. Morgentaler* (1988) 1 S.C.R. 30.

have to pay severe fines, compulsory sterilization, and imprisonment in extreme cases.<sup>361</sup>

### **c. Kenya**

The scenario of postcolonial Kenya and the laws of abortion was deeply rooted in the British code of Pro-life that somewhere criminalized the idea of abortion and banned its practice. The situation shifted and changed when Kenya adopted a new constitution in 2010. The changes were on the grounds of emergency cases like the times in which the life of the mother is at stake. This law continued till 2019 when a new clause was introduced where a woman could get an abortion done when she was unfortunately rape victim. In recent times many countries around the globe have been changing their laws on abortion, especially the European countries. The grounds on which abortion have been legalized in these countries are incest, rape, and fetal abnormalities.<sup>362</sup>

### **d. Ireland**

Irish Parliament legalized the termination of abortion for up to twelve weeks. Abortion in Ireland is under the regulation of the Health (Regulation of termination of pregnancy) Act 2018. grounds of abortion is when the life of the mother is at risk and in case there are any fetal abnormalities.<sup>363</sup> Before the enactment of the present abortion law in Ireland fetus was given equal rights as the mother by the 8<sup>th</sup> Constitutional amendment. It was overturned by a popular referendum. The scenario would not have changed if the case of Savita Halappanavar had not come up in 2012

---

<sup>361</sup>Anna Popinchalk and Gilda Sedgh, *Trends in the method and gestational age of abortion in high-income countries*, 45(2) *BMJ-SRH* 97 (2019).

<sup>362</sup>Akinrinola Bankole and Susheela Singh, et al, *Characteristics of women who obtain induced abortion: a worldwide review*, 11 *IFPP* 71 (1999).

<sup>363</sup>*Supra* note 357 at 321.

where the woman was denied an abortion on emergency grounds which later led to her death. This led to an outburst of debates and protests which ultimately led to the referendum and the 36<sup>th</sup> Constitutional amendment which made abortion legal in Ireland. The results of the referendum were that 66% of voters were in favor of changing the abortion law and overturn the 8<sup>th</sup> Constitutional amendment.<sup>364</sup>

Some Countries that have banned or restricted abortion include:

- Common-Law Countries: United Kingdom, Australia, Malaysia, Pakistan, Singapore, Bangladesh, United States, Ireland, Singapore
- Civil Laws Countries: Spain, Portugal, Latin America, Soviet Republic, Western Asia, Turkey, Japan, Middle Eastern Countries, Laws of several North African countries.
- Islamic Law Countries: Islamic countries or places where the Muslim population is more like Bangladesh, Pakistan, and Malaysia.<sup>365</sup>

With the passing years, women have become more aware of their rights regarding abortion and the right to safe abortion. In recent times a growing number of governments and institutions have begun to understand the need for abortion and the risks involving unsafe abortion. The need to reduce maternal deaths due to unsafe abortion and correct information regarding safe abortion is the need of the hour.<sup>366</sup>

Reed Boland has found that the distinction between laws and regulations governing abortion is not always clear and that some countries, usually those where abortion

---

<sup>364</sup> Stephanie A. Kung and Blair G. Darney, *Access to abortion under the health exception: a comparative analysis in three countries* 15(1) RH 7 (2018).

<sup>365</sup> *Supra* note 350 at 191.

<sup>366</sup> Serena C. Houghton and Susan E. Hankinson, *Breast cancer and abortion: collaborative reanalysis of data from 53 epidemiological studies, including 83 000 women with breast cancer from 16 countries*, 363(14) TLGH 1013 (2021).

laws are highly restrictive, have issued no regulations at all. In the most complex cases, there are multiple texts over many years that may contain conflicting provisions and are obscure and framed in outdated language.<sup>367</sup> No one is sure when abortion is allowed and when it isn't, which may serve to stop it from being provided safely and openly. For example, Uganda has a national reproductive health policy; however, it is not supported in law and is not being implemented. In 2015, to clarify this situation, the minister of health and other stakeholders developed Standards and Evidence-based Guidelines on the Prevention of Unsafe Abortion. These included details of who can provide abortions, where and how, and assigned health service responsibilities, such as level of care for pre and post-abortion.

Restrictive abortion laws are being broken daily by millions of women and numerous abortion providers. Even in countries where the law is less restrictive, research shows that the law is being stretched in all sorts of ways to accommodate women's needs. Yet opposition and stubborn unwillingness to act for various reasons continue to hamper efforts to meet women's need for abortion without restrictions.

#### **4.8 Constitutional protection to Abortion India and United States of America**

The principle of gender equality enshrined in the Indian Constitution includes the Preamble, Fundamental Rights, Fundamental Duties, and Directive Principles of State policy. The constitution not only makes the fundamental rights positively available but provides for remedy in case of discrimination. India is also a signatory

---

<sup>367</sup>J Bearak, A Popinchalk, et al, *Unintended pregnancy and abortion by income, region, and the legal status of abortion: estimates from a comprehensive model for 1990–2019*, 8(9) TLGH, 1158 (2020).

to the Convention on Elimination of All Forms of Discrimination against Women (CEDAW) in 1993.<sup>368</sup>

Although India was among the first countries in the world to develop legal and policy frameworks guaranteeing access to abortion and contraception, women continue to experience significant barriers to the full enjoyment of their reproductive rights, including poor quality of health services and denials of women's decision-making authority. Historically India has failed to keep the rights of women intact, liberal choice of women, population control and undermine woman's autonomy based on spouse pressure, moral policing, and the societal ideologies that were not supposed to be maintained. Even after child marriage was made a punishable offense in India and even after being one of the countries being strictest about laws on Child marriage. It is the same country that marks the highest percentage of child marriage. Although India's National Population Policy guarantees women voluntary access to the full range of contraceptive methods, in practice state governments continues to introduce schemes promoting female sterilization that are coercive, risky substandard sterilization procedures, and denial of access to non-permanent methods.

U.N. human rights experts have raised concerns to the Indian government about human rights violations arising from a range of reproductive rights issues, including maternal mortality and morbidity, unsafe abortion and poor quality of post-abortion care, lack of access to the full range of contraceptive methods and reliance on coercive and substandard female sterilization, child marriage, and lack of information and education on reproductive and sexual health. These experts have called for India to address these violations, as well as disparities in access to reproductive health care.

---

<sup>368</sup>Mary Ann Glendon, *Abortion and divorce in western law*, 222(Harvard University Press, Harvard 1989).

Courts in India have an important role to play in ensuring women's reproductive rights as guaranteed by their constitutional and human rights. The Supreme Court of India and several state high courts have made important strides in recognizing the denial of reproductive rights as a violation of women's fundamental human rights. The Constitution of India as such doesn't directly protect the right to abortion. However, it is subject to interpretation under Art 14 right to equality and 21 rights to life and liberty of the Indian Constitution. It was established in the case of Suchita Srivastava and K S Puttaswami respectively.

Similarly in America the Constitution as such doesn't directly protect the right to abortion but it was subject to judicial interpretation. In the case Roe v. Wade the Supreme Court established right to privacy protected by the due process clause that includes a women's right whether or not to bear a child. The Court held that the fourteenth amendment concept of personal liberty restricts state interference in personal matter i.e. right to privacy. Further, the court determined that the term "person" used in the due process clause or other provisions of the constitution did not include an unborn child. Therefore the unborn child lacked Constitutional protection. However, it is important to mention that right to abortion is not an absolute right and though an unborn child is not protected by law. Law in both the Courtiers allows absolute right to abortion by legislation.

#### **4.9 Conclusion.**

Abortion has faced resentment from different sections of society. It continues to do so. However, we cannot deny the fact that over the last century abortion laws have been progressive throughout the world. With every legislation made or judgment pronounced. Restrictive abortion laws are being increasingly erased in favor of

women's right to abortion. Historically, in India as well as America abortion was strictly prohibited except in case if it was done to save the life of the mother. However, this has changed over time and presently in India we have the MTP Act and America has its individual state laws based on the Roe v. Wade judgment that legalizes abortion up to the point of viability. Right to abortion under the zone of right to privacy has been essential for the progressive change of abortion laws. Law must be dynamic and must change with time. Abortion laws have changed a lot depending on social circumstances and the advancement in technology that has taken place.

Comparative we can see that abortion laws in both the countries are similar with some differences. America was the first to declare the right to abortion as a right to privacy under the due process clause of the fourteenth amendment. The right to abortion as a right to privacy was given recognition much later in India. In India, it has been recognized under Art 21 of the Constitution of India. America has a strong social movement consisting of both pro-abortion as well as anti-abortion. As mentioned earlier currently some states trying to overturn the Roe v. Wade judgment which made the right to abortion a right to privacy. In the case of India, there was no mass movement to legalize abortion and there is no anti-abortion movement as such. The lack of movement in India is often blamed for the lack of awareness about abortion rights in India. Right to abortion has never been a political issue India as it is in America.

Recently, the right to abortion as a right to privacy and a constitutionally protected human right has proved controversial globally after the Supreme Court of the United States overturned the landmark judgment given in the case Roe vs. Wade and Planned

Parenthood vs. Casey<sup>369</sup>. Recently, in the case Dobbs vs. Jackson Women’s Health Organization<sup>370</sup>, the Supreme Court of United States held that right to abortion is not a constitutionally protected right. The judgment gives full power to the individual States to regulate abortion. In India, right to abortion is a constitutionally protected right. Over the years the Supreme Court of India and different High Courts as well as the legislature have taken a pro-choice stand through judicial decisions and legislative enactments that felicitate right to abortion. It includes the MTP (Amendment) Act of 2021. Further, in September 2022 the Supreme Court of India held that lack of marital status cannot be held as a ground to deny abortion<sup>371</sup>.

---

<sup>369</sup>*Planned Parenthood vs. Case*, 505 U.S. 833 (1992).

<sup>370</sup>*Dobbs vs. Jackson Women’s Health Organization*, 2022 U.S. LEXIS 305.

<sup>371</sup>Apurva Vishwanath, “*Supreme Court abortion ruling*” The Indian Express, Sept. 30, 2022.



## CHAPTER 5: HUMAN RIGHT PERSPECTIVE ON RIGHT TO ABORTION IN INDIA

### 5.1. Introduction

According to literature first abortion law reforms took place in the Soviet Union around 1920<sup>372</sup>. It was taken up as a women health care concern<sup>373</sup>. Since then abortion laws have been subject to reform all over the world. It has been justified mainly on health care and human rights grounds<sup>374</sup>. Over time human rights have become the central theme for the recognition of right to abortion. Denial of right to abortion simply means denial of human right, i.e. the right to privacy to be specific. In India, abortion is not an absolute right under the MTP Act. It is subject to state control from the very beginning and it is only on certain grounds that abortion is allowed. A woman has no control over her reproductive rights and is available in only limited spheres. Women's reproductive organs are subject to control of the state. This has become a matter of concern specifically after the recognition of right to privacy as a fundamental right in the case of Justice K.S Puttaswamy vs. Union of India<sup>375</sup>. The main issue that follows is whether the MTP Act can be constitutionally justified when right to abortion as a right to privacy of women is directly obstructed by its implementation. Is the human right such as right to privacy and reproductive rights any less important in case of a woman or that the right to life of an unborn child supersedes that of a woman? Can the regulation of abortion by the state be constitutionally justified?

---

<sup>372</sup> Marge Berer, *Abortion law and policy around the world: in search of decriminalization*, 19 HHRJ 15(2017)

<sup>373</sup> *Id* at 21

<sup>374</sup> *Id* at 23

<sup>375</sup> *K S Puttaswamy v Union of India*, (2017) 10 SCC 1.

## 5.2 Right to Privacy: Extended

The privacy judgment (Justice K S Puttaswamy case), we examine two reproductive rights issues that have featured prominently in recent public discourse: abortion and surrogacy. In this piece, we outline how the privacy judgment provides a much-needed impetus to the legislature to resolve potential constitutional challenges to laws on these two issues.

In India, article 21 of the constitution guarantees right to life and personal liberty. Among various rights available to a women's right to abortion is believed to be one of the facet of right to life. Abortion has been recognized under right to privacy which is an aspect of right to personal liberty which further stems from right to life.<sup>376</sup>

On 24 August, 2017, a nine-judge bench of the Supreme Court of India unanimously affirmed privacy as a fundamental right under the Constitution. The bench recognized privacy as an inalienable right, grounded in values such as dignity which underlie all our fundamental rights, and it categorically located privacy in the individual. While judges phrased their conceptions of privacy differently, the bench commonly held privacy to cover personal autonomy relating to the body, mind, and to making choices, as well as informational privacy.

A key aspect of this personal autonomy is reproductive rights, which entail rights to make sexual and reproductive decisions, as recognized by the 1994 United Nations International Conference on Population and Development (UNPIN 1994). These rights have been elaborated to include access to contraception, the right to a legal and safe abortion, the right to make decisions concerning reproduction free of

---

<sup>376</sup>*Roe vs. Wade*, 410 US 113(1973)

discrimination, coercion and violence, the right to not be subject to harmful practices such as the coerced bearing of children (including with their spouse); and equal entitlement of LGBTQ persons to the same sexual and reproductive health services as all other groups.

The Puttaswamy judgment specifically recognized the constitutional right of women to make reproductive choices, as a part of personal liberty under Article 21 of the Indian Constitution. The bench also reiterated the position adopted by a three-judge bench in *Suchita Srivastava vs. Chandigarh Administration*<sup>377</sup>, which held that reproductive rights include a women's entitlement to carry a pregnancy to its full term, to give birth, and to subsequently raise children; and that these rights form part of a women's right to privacy, dignity, and bodily integrity.

### **5.3 Right to life of an unborn Child**

Right to life of an Unborn Child is a very controversial issue. The issue for consideration is whether an unborn child can be given an important Human Rights i.e. right to life, as any human being or the unborn child is not eligible to hold such rights. Right to life is considered an important human right. Human rights are rights which are available to everyone who qualifies as a human being<sup>378</sup>. However, an important question is whether an "Embryo" or "fetus" falls within the definition of "human beings", "Person" and "Human Family"? The legal status of the unborn child is very unclear and confusing in almost all International legal instruments that have defined essential human rights. Sovereign nations all around the world have adopted different legal methods to deal with abortion. The situation is no different in India. The

---

<sup>377</sup>*Suchita Srivastava vs. Chandigarh Administration*, (2009) 9 SCC 1.

<sup>378</sup>Nidhi Madan, *History & Development of Human Rights in Indian*, 22 JHSS2(2017).

legislature and Judiciary have failed to answer this question properly. This is mainly because the recognition of right to life of an unborn child will directly obstruct a women's right to abortion.

#### **5.4 The Moral and legal Status of an Unborn Child**

There are divergent opinions on the point of time when an unborn child can be considered a human being. These include:

##### **5.4.1 Conception**

During the time of conception, the biological characteristics of an unborn child are determined by the genetic code which gives it unique individual characteristics<sup>379</sup>. Further development and birth is thereafter a process of achieving what the unborn child already is. According to John Noonan:

*“The positive argument for conception as the decisive moment of humanization is that at conception the new being receives the genetic code. It is this genetic information that determines his characteristics, which is the biological carrier of the possibilities of human wisdom, which makes him a self-evolving being.”<sup>380</sup>*

Secondly we have potentiality. There is a chance on less than 1 in 200 million that a spermatozoon will be able to develop into a person. However, at the moment of conception there is an 80% chance that the zygote will develop into a baby.

Lastly we have continuity. The moment of conception signifies the beginning of continuous development in the form a structure and characteristics. It is only at the time

---

<sup>379</sup>Machteld Nijsten, *Abortion, and Constitutional Law: A Comparative European-American Study* 59(European University Institute Florence, 1990).

<sup>380</sup>*Ibid.*

of conception that there is discontinuity. Therefore, it can be said that it is at the time of conception that the unborn child becomes a human being.

#### **5.4.2 Brain Activities**

Electroencephalographic (neurological) waves can be detected at about 6 weeks of fetal development. It implies that the fetal brain has started working<sup>381</sup>. It signifies that “symbolic activity” is based on the anthropological theory which considers a human being qualitatively distinct from the rest of nature because of the capability. As Joseph Fletcher has said

*The neocortical function is the key to humanness, the essential trait, the human sine qua non ... To be truly Homo sapiens we must be sapient, however minimally ... The brain is the singular focus of the embodiment of the mind, and in its absence man as a person is absent*<sup>382</sup>.

This argument is further supported by the “brain dead theory” which signifies that only the cessation of cerebral function marks the end of life of a Human Being.

#### **5.4.3 Sentience**

Sentience includes feeling and sensation distinct from perception and thought<sup>383</sup>. It is the ability to experience sensations of pleasure, pain, enjoyment, and suffering. It is marked by the emergence of the first vertebrae of the forebrain. Generally, 18-25

---

<sup>381</sup>*Id* at 60.

<sup>382</sup>*Ibid* .

<sup>383</sup>*Id* at 61.

weeks of gestation is considered the lowest boundary for the development of sentience in an unborn child.<sup>384</sup>

#### **5.4.4 Quickening**

Fetal movement is the most significant form of quickening. It generally occurs between 18-20 weeks of pregnancy<sup>385</sup>. The mother becomes conscious of the movement of the fetus in her abdomen. If the fetus is born at this time it would not be able to survive on its own due to insufficient development of the lungs.

#### **5.4.5 Viability**

Viability of Fetal Viability signifies the ability of the fetus to survive outside the uterus. Fetal viability is generally considered to begin from 24 weeks gestation period<sup>386</sup>. At the stage of viability, the fetus is still inside the womb of the mother. However, it is capable of surviving on its own and will need an artificial support system. It has been argued that since a viable fetus is capable of surviving outside the uterus it is similar to an infant baby<sup>387</sup>.

#### **5.4.6 Birth**

Birth of an infant signifies separate and independent existence. It is no longer a part of the woman. Although the fetus is capable of independent existence much before birth, it acquires independent existence only after birth. Though several years of care is

---

<sup>384</sup> Susan Tiwari, *When is the capacity of sentience acquired during human fetal development*, 1 JMF 154(1992).

<sup>385</sup> Carolyn W. Lerum and Geri LoBiondo-Wood, *The Relationship of Maternal Age, Quickening, and Physical Symptoms of Pregnancy to the Development of Maternal-Fetal Attachment* 16 Birth 15(1989).

<sup>386</sup> Astrid Christofferson-Deb, *A Cultural Calculus of Parenthood at the beginning of life*, 26 MAQ 580(2012).

<sup>387</sup> *Supra* note 384 at 63.

further needed till the infant is capable of taking care of itself. Birth is also significant for recognition of a fetus as a human being capable of holding human rights.

#### **5.4.7 Religious and Abortion**

The right to life of an unborn is not just a legal and medical issue, but essentially a moral issue. Historically, the right to life of an unborn child has been strongly supported by religious institutions. Almost all religions recognize the right to life of an unborn child. In Hinduism, an embryo or fetus is regarded as a living person from conception<sup>388</sup>. Similarly in Buddhism, life begins at conception<sup>389</sup>. In Christianity, the induced killing of an unborn child is considered a sin as an unbaptized soul could never attain salvation<sup>390</sup>. Other religions around the world hold a similar view.

There are many medical, moral, and ethical arguments in favor of the recognition of an unborn child as a Human Being. However, there is no fixed definition that could demarcate a human being from a potential Human Being before birth. A one-week-old embryo and a 6-month-old fetus are potential human beings. There are various theological, Scientific, and moral reasons for calling one stage of development more human than the other, but there is no rational reason for doing so. The point of compelling interest of the state to protect the life of the unborn has been made the point of viability. The main basis of this principle can be traced back to the case *Roe vs. Wade*<sup>391</sup> which stated that viability is the “compelling point ..... because the fetus then supposedly has the capacity to survive outside the womb of the mother”.

---

<sup>388</sup> Constantin-Iulian Damian, *Abortion from the perspective of the eastern religion: Hinduism and Buddhism*, 8 RJB 132 (2010).

<sup>389</sup> Phillip A Lasco, *A Buddhist View of Abortion*, 26 JRH 215 (1987).

<sup>390</sup> Kathryn G. Milman, *Abortion Reform: History, Status, and Prognosis*, 21 Case Western Reserve Law Review 525 (1970).

<sup>391</sup> *Roe vs. Wade*, 410 U.S. 113 (1973).

The point of viability is often the cut-off point for Abortion. Abortion laws around the world including India ban abortion entirely after the point of viability except in cases where the life of the mother under threat. The viability threshold has been upheld in the case of *Planned Parenthood v. Casey*<sup>392</sup>.

### **5.5 Legal Status of an Unborn Child**

Before going into the question as to whether or not an unborn child has a right to life it is important that we establish whether or not an unborn child has legal personality. Having a legal personality means being capable of holding rights and duties. To be able to hold legal personality means to be a Human Being. There are various laws in India that recognize the rights of an Unborn Child. It has been dealt in detail under chapter; Indian law recognizes the rights of an Unborn Child. However, the rights become enforceable only after birth.

The concept of legal personality of an Unborn Child is expressed in Salmonds Jurisprudence as *“Though the dead possess no legal personality, it is otherwise with the unborn. There is nothing in law to prevent a man from owning property before it is born. His ownership is necessarily contingent, indeed for he may never be born at all, but it is none the less a real and present ownership...”*<sup>393</sup>

The Right to life and liberty is one of the most important if not the most important human right is protected by Art 21 of the Constitution of India. However, does is also provide protection the life of the Unborn Child. This right basically states that “No person shall be deprived of his life and personal liberty except according to procedure

---

<sup>392</sup>*Planned Parenthood vs. Casey*, 505 U.S. 833 (1992).

<sup>393</sup> John William Salmond, *Jurisprudence* 277 (11th Edition, London, Sweet & Maxwell, 1966)



established by law”. The term “person” used here is very important as it describes who can hold this right and a person described under different law in India does not include an unborn Child. An unborn child is not included in the meaning of the term person. This is also the major reason for uncertainty regarding the legal status of the unborn child. To be able to hold human rights one has to be recognized as a human being first.

There is no definite answer to this question as to whether an Unborn Child has a right to life. At best we can say that law provides limited legal personality to an Unborn Child. There is no rational defensible to the question as to when an Unborn Child becomes a Human Being. Generally it is taken that an Unborn Child is not a Human being capable of holding Human Rights. It is only after birth an Unborn Child becomes a Human Being capable of holding rights. Human rights are essential for all human beings to be able to exercise inherent rights and develop. However, in the case of the question of when does a human being acquire Human Rights? It can be best understood that it begins after birth. Though there are various legislations which recognize the right of the unborn child. The right to life of the unborn child is not recognized which renders no value to the unborn child. It can simply be said that it is considered a part of the mother and has no independent existence. However, the situation changes after the birth of the child. A Child after birth has full human rights and is a recognized human being. The law states as such.

There are various laws like the MTP Act PNDT Act which protect the interest of the Unborn Child. Further, we have the Transfer of property Act, Indian Succession Act, etc. which recognizes the rights of an Unborn Child. However, there is no recognition of right to life of an Unborn Child under the Constitution of India. It seems

hypocritical yet necessary as the recognition of this right would lead to further complications. Directly, it would restrict a Pregnant Women's right to abortion which is a recognized right by the judicial system in India. The judiciary in the Nanda Kishore case refused to comment on the legal status of the Unborn Child. The Judicial decision in Nanda Kishore sums up the status of Right to life of the Unborn Child which is confusing and yet to be answered beyond doubt.

The right to life of the unborn child is unrecognized by law. However, an unborn child is subject to protection by the state. Sections 312 to 316 of I.P.C, 1860 deals with miscarriage and provides punishment for causing or intending to cause harm to an unborn child. The CrPC, 1973 recognizes the right to life of the unborn child in case of a pregnant woman sentenced to capital punishment. The capital punishment is postponed or converted to life imprisonment. Further, sec 3 of the MTP Act, 1971 the state forbids abortion after 24 weeks unless to save the life of the mother on the grounds of "compelling state interest". It was stated in the case Roe v. Wade that only "compelling interest" could justify the state laws that limit the right. It was stated that the state had a legitimate interest to protect and maintain the health of the pregnant woman and the human life inside her. The Supreme Court of India in the case of Suchita Srivastava held that the right to abortion is subject to certain qualifications. This is because of compelling state interest to protect the life of the unborn child. A compelling state is often used by the Courts to limit the right to privacy it was first developed in the case *Sweezy v. New Hampshire*(1957)<sup>394</sup>.

There are various scientific, moral and ethical arguments as discussed above that argue that the unborn child has value before birth. However, they are not recognized

---

<sup>394</sup>*Sweezy vs. New Hampshire*, 354 U.S. 234 (1957).

by law. The main reason for this is that recognition of the right to life of the unborn child would directly oppose the right to abortion of a pregnant woman which is a part of her right to life and liberty. The international organization of Human rights which campaigns for legal and safe abortion cannot simply recognize the right to life of the unborn child and this would lead to more chaos and confusion. This leads us to the grey area in law where certain rights of an unborn child are recognized like the right to inherit property and legal protection from criminal actions but have no human rights.

## **5.6 Access to Safe and Legal Abortion as a Human Right**

*“There is no generally accepted right to abortion in international human rights law.”*  
Amnesty International<sup>395</sup>

We have discussed the legal status of the unborn Child. We now move on to discuss the rights safe and legal abortion as a human right. Right to Abortion as a Right to Privacy was first advocated in the case Roe vs. Wade. Since then it has gained recognition as an essential human right. Though no international law in particular specifically recognizes right to abortion. It is subject to interpretation from the right to privacy which is recognized as a human right under different international organization. International human rights law provides a clear and universal framework for the promotion and protection of the right to privacy.

Abortion depends on various factors such as a woman’s health, family relationship, economic resources and availability of medical health care. Further, there are other reasons that might lead women to carry or terminate her pregnancy. The complications

---

<sup>395</sup> Statement by Amnesty International on whether a “right to abortion” exists in international law made prior to Amnesty’s 2007 decision to abandon neutrality on the abortion issue. Available at <http://www.amnesty.org/en/library/asset/ACT77/001/2005/en/dom-ACT770012005en.html>.

of this decision can be best understood by the pregnant herself. It is the duty of the state to respect a women's human right to make decisions regarding her reproductive life. A pregnant woman seeking abortion must be given access to safe and hygienic facilities to terminate her pregnancy. States that prosecute and punish women seeking abortion obstruct women's basic rights. International legal documents support a women's right to safe and legal abortion. Important documents include Universal Declaration of Human Rights<sup>396</sup>, Civil and Political Rights<sup>397</sup>, Covenant Economic, Social and Cultural Rights<sup>398</sup> Women's Convention<sup>399</sup>, Right to choose to have abortion can be supported by guarantees of life, health, freedom from discrimination, autonomy in reproductive decision-making, freedom from cruel, inhuman, or degrading treatment and the right to enjoy the benefits of scientific progress

### **5.6.1 Right to Life.**

All the major International Human Right instruments protect the right to life. It is a fact that where abortion is prevented by law the women are forced to seek unsafe abortion. Under conditions that are unsafe and life threatening. According to WHO key facts 47% of all abortions are done under unsafe conditions, of which 97% is taken up by developing Countries<sup>400</sup>. It has been estimated that 67% of all abortions are unsafe in India, varying widely among the states<sup>401</sup>. Every year it is estimated that

---

<sup>396</sup>Universal Declaration of Human Rights, 1948 Art 2, 3,5, 12, 25, 27

<sup>397</sup> International Covenant on Civil and Political Rights, 1966 Art 2.1,3,6.1,7,9.1,15(b),17

<sup>398</sup> International Covenant on Economic, Social and Cultural Rights, 1976 Art 2.2,3,12

<sup>399</sup> Convention on elimination of all forms of discrimination against women, 1979 Art 1,2,3,5,11.1(f), 11.3, 12, 14.2(b), 16.1(e)

<sup>400</sup> WHO, Safe abortion: technical and policy guidance for health systems, 17 Available at [https://apps.who.int/iris/bitstream/handle/10665/70914/9789241548434\\_eng.pdf](https://apps.who.int/iris/bitstream/handle/10665/70914/9789241548434_eng.pdf) (Visited on December 23, 2021).

<sup>401</sup> Ryo Yokoe and Rachel Rowe et al, *Unsafe abortion and abortion related death among 1.8 million women in India*, BJMHJ4(2019).

4.7-13.2 maternal deaths around the globe are due to unsafe abortion<sup>402</sup>. It is estimated that 30 women die per 100,000 unsafe abortions in developed countries and in the case of developing countries the rate is 220 per 100,000 women<sup>403</sup>. Unsafe abortions are closely associated with high maternal mortality rate. Therefore, it can be said that laws which force a women to seek unsafe abortion infringe a women's right to life.

Human Right bodies under the United Nations have on several occasions characterized maternal death due to abortion a violation of women's right to life<sup>404</sup>. Further, in order to reduce abortion different bodies of the United Nations have advocated for the strict review of laws that criminalize abortion<sup>405</sup> and provide access to information regarding family planning<sup>406</sup> and sexual and reproductive health<sup>407</sup>.

---

<sup>402</sup>*Supra* note 408 at 7.

<sup>403</sup>*Ibid.*

<sup>404</sup> See, e.g., Rep. of the Comm. on the Elimination of Discrimination against Women (CEDAW Committee), 20th Sess., Jan. 19 – Feb. 5, 1999, 21st Sess., June 7-25, 1999, pt. 2, Ch. IVS., Belize, Para. 56, U.N. Doc.A/54/38/Revs.1, GAOR, 54th Sess., Supp. No. 38 (1999) [hereinafter CEDAW 1999]; CEDAW 1999, pt. 1, Ch. IVS., Colombia, Para. 393; Rep. of the CEDAW Committee, 18th Sess., Jan 19 – Feb. 6, 1998, 19th Sess., June 22 – July 10, 1998, pt. 1, Ch. IVS., Dominican Republic, Para. 337, U.N. Doc.A/53/38/Revs. 1, GAOR, 53rd Sess., Supp. No. 38 (1998) [hereinafter CEDAW 1998]; Rep. of the Human Rights Committee, 76th Sess., Oct. 14 – Nov 1, 2002, 77th Sess., Mar. 17 – Apr. 4, 2003, 78th Sess., 78th Sess., July 13 – Aug. 8, 2003, Para. 81(14), U.N.

<sup>405</sup> See, e.g., CEDAW 1999, *supra* note 6, pt. 2, Ch. IV, Chile, Para. 229; CEDAW 1998, *supra* note 6, at pt. 2, Ch. IVS., Peru, Para. 340; CEDAW Committee, Concluding Observations: Philippines, Para. 28, U.N. Doc. CEDAW/C/PHI/CO/6 (2006); Human Rights Committee, Concluding Observations: Poland, Para. 8, U.N. DOC. CCPR/CO/82/POL (2004).

<sup>406</sup> See, e.g., Rep. of the CEDAW Committee, 32nd Sess., Jan 10-28, 2005, 33rd Sess., July 5-22, 2005, pt. 2, Ch. 4, Burkina Faso, Para. 350, U.N. Doc. A/60/38, GAOR, 60th Sess., Supp. No. 38 (2005); Rep. of the CEDAW Committee, 26th Sess., Jan. 14 – Feb. 1, 2002, 27th Sess., June 3-21, 2002, Exceptional Sess., Aug. 5-23, 2002, pt. 3, Ch. 4, Czech Republic, Para. 102, U.N. Doc. A/57/38, GAOR, 57th Sess., Supp. No. 38 (2002); CEDAW Committee, Concluding Observations: Mali, Para. 34, U.N. Doc. CEDAW/C/MLI/CO/5 (2006); CEDAW Committee, Concluding Observations: Nicaragua, Para. 18, U.N. Doc. CEDAW/C/NIC/CO/6 (2007).

<sup>407</sup> See, e.g., CEDAW Committee, Concluding Observations: Bosnia and Herzegovina, Para. 36, U.N. Doc. CEDAW/C/BIH/ CO/3 (2006); CEDAW Committee, Concluding Observations: Cape Verde, Para. 30, U.N. Doc. CEDAW/C/CPVS./CO/6 (2006); CEDAW Committee, Concluding Observations: Namibia, Para. 25, U.N. Doc. CEDAW/C/NAM/CO/3 (2007).

### 5.6.2 Women's Right to Health

Women's right to highest standard of mental and physical health is recognized under International law<sup>408</sup>. In the year 2000, the committee on Economic, Social and Cultural Rights recognized that the right to health includes "the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference." Therefore it can be said that right to health requires states to provide proper health care and working towards the achievement of good health. Further, right to health required removal of all barriers that obstruct access to health care service, information and education, including sexual and reproductive health.

Right to health in terms of abortion requires the State to provide access to quality health care as well as necessary information regarding sexual and reproductive health care. This is necessary for the women as it would be necessary for taking proper decisions regarding abortion and avoid unsafe abortion, which can have devastating effect on the health of the women including long term disabilities. These measures include access to safe abortion and any laws which restrict access to abortion contravene a woman's right to health.

Several United Nation bodies have time and again talked about the negative impact of restrictive laws on women's health<sup>409</sup> and inaccessibility to safe abortion<sup>410</sup>. The program adopted at the international Conference on Population and development in 1994 stated that the state should "deal with the health impact of unsafe abortion as a

---

<sup>408</sup>International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966, art.12 G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (1966) (entered into force Jan. 3, 1976).

<sup>409</sup> See, e.g., Human Rights Committee, Concluding Observations: Argentina, Para. 14, U.N. Doc. CCPR/CO/70/ARG (2000).

<sup>410</sup> See, e.g., Human Rights Committee, Concluding Observations: Mali, Para 14, U.N. Doc. CCPR/CO/77/MLI (2003); Human Rights Committee, Concluding Observations: Poland, Para. 11, U.N. Doc. CCPR/C/79/Add.110 (1999); CAT Committee, Concluding Observations: Chile, Para. 7(m), U.N. Doc. CAT/ CR/32/5 (2004).

major health concern”<sup>411</sup>. At the 1995 World Conference on Woman, international view on reviewing the laws punishing abortion was reiterated by the International community<sup>412</sup>.

### **5.6.3 A woman’s right to Equality and Non-Discrimination**

Right to equality is a fundamental right recognized by all major human right Instruments. It required freedom from discrimination under law. The Convention on the elimination of all forms of discrimination against women it has been stated that discrimination against women includes laws that have either the effect or purpose to prevent woman from exercising fundamental freedom on the basis of equality with men<sup>413</sup>. In 1999, all laws obstructing access to medical health care by women or even punishing such act were recognized as barriers to access to proper health care by the committee on Convention on the elimination of all forms of discrimination against women.

### **5.6.4 A woman’s right to Self Determination**

International Human Right Instruments provide the basis for women’s right to self-determination. The rights particularly include right to physical integrity, the right to decide freely and responsibly the number and spacing of one’s children and right to privacy. Unwanted pregnancy can take a heavy toll on the mental and physical health of a woman. A woman’s right to self-determination particularly in the field of

---

<sup>411</sup>Programme of Action of the International Conference on Population and Development, Cairo, Egypt, 5-13 September 1994, Para. 8.25, U.N. Doc. A/CONF.171/13/Revs.1 (1995) [hereinafter ICPD Programme of Action].

<sup>412</sup> The Beijing Declaration and The Platform for Action, Fourth World Conference on Women, Beijing, China, Sept. 4-15, 1995, Para. 106K, U.N. Doc. A/CONF.177/20 (1996).

<sup>413</sup>Convention on the Elimination of All Forms of Discrimination against Women, adopted Dec. 18, 1979, art.1, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979) (entered into force Sept. 3, 1981).

reproductive rights fall within the preview of right to privacy. The Government should play no role in making the decision for the pregnant woman. Denying women access to legal abortion has been recognized as arbitrary interference by in the state in the private life of the women<sup>414</sup>.

There are various Human Rights that can be invoked to protect a pregnant Woman's Right to Abortion. One of the most important Rights includes the Right to Privacy. One of the essential elements of privacy is "Autonomy" i.e. a space of personal freedom and choice where there should be no outside interference. Right to Privacy normally arises in the grey area between public and private space. The grey areas consist of space which has ceased to remain an area of public concern or morally unjustifiable. Right to Abortion falls within this grey area of public and private space.

### **5.6.5 A woman's Right to be free from Cruel, Inhumane, or Degrading Treatment**

International law recognizes that women have right to be freed from cruel, inhumane and degrading treatment. It has been stated that it includes mental suffering arising due to denial of access to abortion<sup>415</sup>. As a result of restrictive abortion laws and policies women often have to face physical and mental suffering which is a clear violation of human rights. The committee against torture has recognized the practice of legally forcing a woman to carry out a pregnancy as a cruel and inhumane<sup>416</sup>.

---

<sup>414</sup>Human Rights Committee, Communication No. 1153/2003, Para.6.4, U.N. Doc. CCPR/C/85/D/1153/2003 (2005).

<sup>415</sup> Human Rights Committee, General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7), (44th Sess., 1992), Ch. II, Para. 5 at 200, U.N. Doc. HRI/GEN/1/Revs.9 (Vol.I) (2008).

<sup>416</sup> Human Rights Committee, Concluding Observations: Peru, supra note 26, Para. 20.



Specially, when there is prohibition in case of gender based violence like Rape<sup>417</sup>. Criminalizing abortion is incompatible with a woman's Right to be free from cruel, inhumane, or degrading treatment.

#### **5.6.6 A woman's Right to Benefit from Scientific progress**

The Universal Declaration of Human Rights<sup>418</sup> and the International Covenant on Economic, Social and Cultural Rights include the right to benefits of scientific progress<sup>419</sup>. It has to be understood that abortion was banned partly because it was leading to maternal deaths at an early point of time. Now that abortion services have become technologically advanced and safe it is only right that the access to abortion be restricted as it would violate the right to scientific progress.

There are various International instruments that protect safe and legal abortion as human rights as discussed above. However, we still face the problem of unsafe abortion this mainly because legal restrictions imposed on right to abortion. Further, in a developing country like India besides the legal restriction we also have to consider the lack of knowledge regarding abortion rights along with states inability to provide safe and legal abortion to every woman seeking abortion, etc. denying access to safe and legal constitutes violation of a woman's human right. Therefore it is necessary that such restrictions be removed so that women have equal right to in all spheres of human rights.

---

<sup>417</sup> CAT Committee, Concluding Observations: Nicaragua, Para. 16, U.N. Doc. CAT/C/NIC/CO/1 (2009).

<sup>418</sup>Universal Declaration of Human Rights, adopted Dec. 10, 1948, art.27, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948)

<sup>419</sup>*Supra* note 406 art. 15(b).

## **5.7 Role of the state in regulating Abortion**

The present legal system in India provides the state with the power to regulate a pregnant woman's womb. This is directly opposed to the right to privacy of woman as she is deprived of control over their own body. The MTP Act, of 1971 is the instrument through which the state exercises control over the womb of pregnant woman. The right to privacy is lost during pregnancy. However, to what extent can MTP Act be justified?

Before the MTP Act abortion was only allowed on the ground to save the life of the mother. It legalized abortion for the first time. However, the role of the state remained predominant. Pregnant woman seeking an abortion must get permission from one state-authorized registered medical practitioner in case of abortion up to 20 weeks and permission from two state-authorized registered medical practitioners in case of abortion up to 24 weeks<sup>420</sup>. After 24 weeks abortion is only allowed if the life of the mother is in danger. In India, we can say that the state regulates abortion from the point of conception till the infant is born. The matter has been raised as a violation of the right to privacy before the judiciary time and again. The Judiciary has also accepted the matter and judged in favor of the right to abortion as a right to privacy. However, the legislature has been reluctant to act upon it.

### **5.7.1 Role of the state in regulating abortion: Compelling State Interest**

It can be clearly understood that the judiciary has recognized the right to abortion as a right to privacy. Any restriction would indicate a clear violation of a Human Right. However, to what extent is a different issue? The Judiciary has pointed out the

---

<sup>420</sup>Medical Termination of Pregnancy Act 1971, Ss 3, 5.

violation of the right to privacy in cases where abortion is denied but has also pointed out that there is a point from where state regulation on abortion is valid and there exists compelling state interest. In the case of *Roe v. Wade* abortion was recognized as a fundamental right and also stated that only “compelling interest” could justify the state laws that limit the right. The court also accepted the view that the state had a legitimate interest to preserve and protect the health of the pregnant woman and the potential human life inside her. This is because of compelling state interest to protect the life of the unborn child. In the Case of *K.S.Puttaswamy* it was held that:

*“..... in the case of pregnant women, there is also a “compelling state interest” in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.”*

Compelling state interest refers to a method by which the judiciary determines the Constitutionality of a law. The Compelling state interest test is part of the strict scrutiny doctrine which is used by the judiciary for judicial review of governmental legislation and action which encroach upon fundamental rights<sup>421</sup>. It was first developed by the Supreme Court of America in the case *Sweezy v. Hampshire*<sup>422</sup>. It was done to justify an infringement of constitutionally protected right to privacy<sup>423</sup>. It is indicated that in case the court does not find a particular right should be protected

---

<sup>421</sup> Stephen A. Siegal, *The Origin of the Compelling State Interest Test and Strict Scrutiny* by, 48AJLH 355(2006).

<sup>422</sup> *Sweezy vs. New Hampshire*, 354 U.S. 234 (1957)

<sup>423</sup> *Supra* note 415 at 364

as a fundamental right, it could be overridden only on the grounds of compelling state interest.

Right to Privacy is a constitutionally protected right; it is an integral part of liberty however it is not absolute and is subject to fulfill the compelling state interest test. In case a court finds that a claimed right is entitled to protection as a fundamental right to privacy under the Constitution of India, a law infringing it must satisfy the compelling State interest test. Compelling state interest has been given paramount importance which can be used to justify an infringement of a fundamental right.” In the case of abortion it can be said that under the present system it can be restricted by a regulation, however, it must be governed by an adequate “compelling state interest”.

Conclusively we can say that the right to abortion is not absolute. It is regulated by the state from the very beginning till the infant is born. A pregnant woman can seek an abortion under the MTP Act for only qualified reasons up to 24 weeks. The MTP Act bans abortion post 24 weeks of pregnancy except in case it is done to save the life of the mother, it can be marked as the point from which compelling state interest arises.

A pregnant woman needs the permission of the state-authorized medical officers for abortion. A pregnant woman has no control over her own body. It is a clear-cut violation of the pregnant women's right to privacy. It can be understood that even if the unborn child is not considered a human being and cannot hold any human rights the state is bound to protect the life of the unborn after a certain point of the pregnancy. The state in regulating abortion indirectly protects the potential life of the unborn child. However, to completely regulate the right to abortion from the moment of conception is a violation of human rights. For the first 24 weeks abortion should be

made a pregnant woman's choice and after 24 weeks when compelling state interest arise abortion can be banned except to save the life of the mother. The first 24 weeks of pregnancy should be free from any state regulation.

## **5.8 Pro-life and Pro-choice Argument: An Analysis**

### **5.8.1 A Woman's Right over her Body**

One of the most used as well as commonly accepted argument heard in favor of legal abortion is that women have full right over her body. The current debate is not over the fact that women around the globe have legal right to her body with respect to abortion. Since this matter has already been settled in the case of Roe v. Wade, a woman has that right. But should she have that right is the question?

The closest the Constitution comes to affirm a woman's right over her body is implied through the "right to privacy". The American Supreme Court in the case Roe v. Wade used the ninth<sup>424</sup> and fourteenth amendment<sup>425</sup> to give recognition to right to abortion. In India, similarly the Supreme Court acknowledged right to abortion as a right to privacy under Art 21 of the Constitution of India<sup>426</sup>. The pro-abortion advocates argue that it is none of the state's business whether a woman terminates her pregnancy or chooses to continue with it.

Immediately evident from a cursory reading of the amendments and Art 21 we can find that there is no specific mention of right to privacy. The concept of right to

---

<sup>424</sup> Ninth Amendment, 1791 The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people

<sup>425</sup> Fourteenth Amendment, 1868-All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law

<sup>426</sup> Constitution of India, 1950 Art 21-No person shall be deprived of his life or personal liberty except according to a procedure established by law.

privacy that legalized abortion is not mentioned. The Judiciary has founded it under personal liberty and restriction upon state actions. It is considered broad enough to encompass a woman's decision whether or not to terminate a pregnancy.

The anti-abortion advocates argue that right to privacy is not an absolute right. There are moral limitations to the right to privacy. Once again, the debate returns to the question of when life begins. If the Supreme Court had agreed that the unborn child was a living person it would be highly unlikely that they would right to abortion within right to privacy. Destruction of fetus would amount to criminal sanctions. The right to privacy could not be a higher right than right to life. If that was the case a person could have moral rights to take the life of the other in case the person's right to privacy is infringed. We can understand that a famous cricketer maybe is disturbed in public places, but we cannot argue that the cricketer has the right to kill a fan or reporter for invading his privacy. It would be wrong. Further, it is argued that whatever moral right a woman has over her body must be grounded are some norms, otherwise, the claim is arbitrary. In fact, no person, including the woman has an absolute right to do anything they wish to do with their body.

Contained with the argument concerning the right of a woman over her body is the prospect that the unborn child part of the woman's body and should not be treated otherwise. The fetus is contained within the body of the pregnant woman and is connected to it by the umbilical cord and placenta. The fetus is physiologically integrated into the pregnant woman. Note that this changes after birth as the infant is no longer connected to the woman. The anti-abortion advocates argue that though the fetus shares the same geographical space within the woman's body and is connected

to it. It has a distinct genetic imprint and in essence is a separate entity and not a part of the mother.

### **5.8.2 In case abortion is made illegal; women will seek back-alley abortions**

The pro-abortion advocates argue that if abortion is outlawed, women will be forced to stake their lives in the hand of unskilled and unscrupulous back-alley abortion facilities. This argument indicates that if abortion is made illegal a significant number of women will still have abortion. Instead of being performed by qualified physician in safe and hygienic condition, abortion will be performed in unsafe and illegal abortion facilities. It has historical precedence and is very much realistic. Maternal mortality due to unsafe abortion is a real problem that the world is facing. Especially, in the case of developing countries. It has been time and again mentioned by the WHO.

The anti-abortion advocates argue that more women have died in countries since abortion was made legal than in the preceding times of illegal abortion. This is due to the huge increase in the number of abortions performed. Anti-abortion advocates believe that if abortion is made illegal again then the number of women who die or are permanently injured will decrease.

### **5.8.3 The Pro-choice position**

The pro-choice argument has become essential and pivotal to public opinion. During the course of research it was found that half to three-fourth of the American people agreed that even though they personally felt that abortion is morally wrong, but the decision as to whether to have an abortion or not should be the woman's personal

choice. A woman may say that she personally would not have an abortion but would not deny someone else's right to do it. This is also a pro-choice stand. Pro-choice stand simply means that a person being able to choose. In the case of abortion it means the right to have or not to have an abortion for reasons that can be best understood by the pregnant woman.

The pro-choice argument has been very carefully integrated into the right to abortion movement as it does not directly oppose abortion but suggests a less offensive middle-position. It does not take a clear position on abortion, but seeks people to affirm a person's inalienable right to choose without government interference and coercion. It is socially, culturally and ethically correct. Legally we can say that a vote for choice is a vote for right to abortion. It is also understood that being anti-abortion means being anti-women.

The Anti-Abortion advocates argue that the right to choice stand taken by the pro-abortionist is an old but effective divide and rule policy. The policy suggests a less offensive middle ground position of pro-choice. A person may believe the unborn child has a right to life but may not prefer to impose same on others. This is the dilemma that has been created by the pro-choice stand. A person who is conscientiously pro-choice becomes a legal ally, willingly or unwillingly with the pro-abortion position.. Again, every law enacted limits or restricts someone's choices. It is the nature of law. Like right over one's own body the choice cannot say to be an absolute right.

The right to choose as sacred as it maybe, does not include the arbitrary right to destroy a human life even if it is unborn. Another crucial dimension of the right to choose is the question of when to make the moral choice concerning the unborn



child's life. Further, it has been argued that to be anti-abortion does not mean being anti-women and Abortion is not a gender issue it is a human life issue.

#### **5.8.4 The problem of unwanted pregnancies**

A woman may seek an abortion because she does not desire to have the baby. There may be various reasons associated with this decision. A woman may be pregnant because she is a victim of an involuntary event such as rape or incest. Medical report may indicate that if the fetus is let to develop to its full term, maybe deformed or suffer from serious medical conditions. The anticipated birth may bring economic hardship to the mother and possibly to the rest of her family as well. The parents may want to limit the size of the family or may desire to not have children at all. In case of Pregnancy out of wedlock social and familial embarrassment or trauma loom large and abortion is often the only way out.

The anti-abortion advocates argue that even though rape, serious fetal defect and incest are sensitive matter, which include complex ethical issues. It should not cloud the central debate. As only a small portion of abortion include rape, serious fetal defect and incest. Likewise, abortion performed to save the life of the mother is also very rare. The real reason for majority of abortion includes the reason that the child is simply not wanted and justifying abortion on the ground that the unborn child is a perilous one. This reason ignores the right of the fetus and the same reasoning could justify infanticide.

Pro-abortion advocates justify abortion on the grounds of economic hardships. They argue that since a child is destined to live in poverty or some sort of handicap. It is better to destroy the unborn child before birth. Certainly throughout history people

have despised the day that they were born. Their lives involve pain and suffering that in crisis moments they wished that they were never born. Yet some of them went on to be people of great historical significance. Further, the anti-abortion advocate's promote adoption as an alternative to abortion. In this way, the burden of taking care of an unwanted child is taken away from the pregnant woman. In this way the life of the unborn child can also be preserved.

The anti-abortion advocates strongly believe that though death of a pregnant woman by any abortion (legal and illegal) is tragic, but the focus point of the abortion debate must be on the unborn child. The thought that advocates the idea that a woman can have no control over her own body is inhumane. Therefore, time and again human rights been used to defend the abortion rights of women. Human rights are often regarded as the basic rights which are essential for every human being. The pro-abortion stand that an unborn child is not a living person is legally authentic and accepted by law. The judiciary in India as well as around the globe has time and again affirmed a women's right over her body. The assumption that if abortion is made illegal the women who die or are permanently injured will decrease is an enormous leap in faith. It is highly unlikely to happen.

The right to be able to choose is very essential to a democratic society. It includes basic rights like being able to choose the ruling government through voting. However, it cannot be absolute especially in a country like India as this would undoubtedly lead to dangerous consequences. Female infanticide is a major problem in India. Families prefer male child to a female child. It has historical precedence. Before the pre-natal sex determination Act, female infanticide was practiced in many areas of India, mainly north and north-west of the Country. While there has been decline in the

female infanticide over the years. It is still prevalent. Many academics and NGO organization have also confirmed passive elimination of the girl child thorough neglect like lack of food and nutrition, immunization and health care. Choice is very dangerous in this regard as a complete recognition of right to choose would also include choice to have only male child and not female child. As stated by J. S. Mill:

*If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind. Were an opinion a personal possession of no value except to the owner; if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference whether the injury was inflicted only on a few persons or on many.<sup>427</sup>*

Female child is often looked upon as a burden in Indian society. The complete recognition of right to choose would ultimately lead to more problems for women rather than solving any.

Unwanted pregnancies, fetal defect, limited family size etc. as mentioned above are valid justifications for abortion especially looking at the circumstances of over population, economic expenses and medical reasons. Further, women today are not just mothers, wife and reproducers. They work on equal footing with men and pregnancy sometimes can drag them back and effect their work. But the important decisions regarding abortion should be taken within stipulated time. It is the government's responsibility to provide safe and legal abortion facilities for women seeking abortion. However, abortion cannot be justified after the point of viability.

---

<sup>427</sup>J S Mill, *On Liberty* 18-19 (Batoche Books, Ontario, 1859).

## 5.9 Conclusion

Decriminalizing of abortion means removing all legal restrictions sought against abortion. It included:

1. No punishment for providing safe abortion.
2. No punishment for anyone seeking abortion.
3. No involvement of Courts in deciding to allow abortion or not.
4. Treating abortion as a part of health care system.
5. Not involving the police in investigating or prosecuting safe abortion provision or practice,
6. Not involving the courts in deciding whether to allow an abortion, and treating abortion like every other form of health care—that is, using best practice in service delivery, the training of providers, and the development and application of evidence-based
7. Guidelines, and applying existing law to deal with any dangerous or negligent practices.

In India, the state completely regulates the right to abortion from the moment of conception. It is a violation of human rights. For the first 24 weeks abortion should be made a pregnant woman's choice and after 24 weeks when compelling state interest arises abortion can be banned except to save the life of the mother. The first 24 weeks of pregnancy should be free from any state regulation and decriminalized.

Historically, through the review of literature we can understand that abortion was mainly restricted by law for three reasons:

1. Abortion was considered a sin and a form of transgression of morality. The law restricting abortion was intended for punitive and deterrent purposes.
2. Abortion was restricted to protect the unborn child in some or all circumstances.
3. Abortion laws had a public health concern. Abortions were dangerous and a lot of women had to face death or permanent impairment when abortion was done in dangerous conditions.

Now that abortion laws have become safe due to the advancement of technology and technically approved by WHO, laws restricting abortion make sense only for the purpose of protecting the life of the unborn child over the life of the mother and to punish and act as a deterrent.

Abortion is not only a volatile issue but also complex. It is directly related to many social movements. For example we have the feminist movement, who has struggled for decades to secure equal rights under law and equitable treatment in the business world. The reversal of abortion laws would surely cause loss to their achievement. Abortion is also closely related to the sexual movement that started in America and had global influence during the 1960's. Abortion also includes the issue of separation of religious institution and state. Advocates on both sides fear the loss of Constitutional rights due to abortion laws. The same Constitution that prohibits the establishment of a religious state guarantees free exercise of religion and belief. Abortion is also related to other issues like health care, social welfare, economic development and government regulation. It is also directly linked to the fundamental constitutional right to life.

The core issue of abortion involves the question, does the willful destruction of a fetus amount to murder? The pro- abortion advocates strongly argue that the unborn child is not a human being. Therefore abortion does not amount to killing a human being. On the other hand we have the anti-abortionists that argue that destruction of the fetus amounts to murder. They value the life of the unborn child. Human rights institutions, national and international law as it is strongly works in favor of the pro-abortion advocates. In fact the WHO has been working to provide access to legal and safe abortions around the globe. International human rights organizations have provided a framework that favors the pregnant woman's right to abortion. However, right to abortion cannot be said to be an absolute right. It seems it is absolute only in the case where the life of the mother is in danger and abortion is absolutely necessary. The stand has been made clear in the case of K.S.Puttaswamy it was held that:

*“..... in the case of pregnant women, there is also a “compelling state interest” in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.”*

Abortion is a matter that many believe should concern only a women and her physician. This is very true up to the point of viability. Human rights have provided absolute freedom to the pregnant woman to decide what she wants to do with her body up to the point of viability. Any restrictions up to that point are a violation of the pregnant woman's human right. After the point of viability abortion cannot be allowed. Abortion at the eighth month of pregnancy or a day before the delivery date

cannot be protected on the grounds of human right violation. This is because the unborn child though not born is viable and can survive outside the womb of the mother with or without the use of artificial stimulators. The present legal and judicial system provides the framework under “compelling state interest” to protect the life of the unborn child from point of viability.

## CHAPTER 6: CONCLUSION

Unwanted pregnancy will continue to exist till women are given control over their sexual behavior. Though Abortion has been legalized, a large amount of abortion in India still takes place in unsafe and unhygienic conditions. Women who seek abortion from unauthorized facilities or from unskilled person put not only their health in danger but also their lives at risk. Unsafe abortion is a public health concern. Economically weak woman have poor access to family planning and less contacts and money for safe abortion. Government facilities that can provide Abortion and important information regarding reproductive rights are not properly maintained in India. This is one of the main reasons for the systematic failure of MTP Act in India. Young girls seeking abortion are one of the main victims of unsafe abortions. Abortion related morbidity and mortality rate is much higher in the second trimester. Women seek abortion later because they neglect their health or due to lack of knowledge.

Data and information on illegal Abortion is fragmented and often inconclusive. Various factors like legal knowledge on abortion, accessibility and use of contraceptives, socio-economic conditions and cultural aspects influence a woman seeking abortion as someone who has already had one. However, the fact that large amount of illegal abortion takes place in India can be proved by a number of researches conducted. The amount of legal and illegal abortions may vary in different research.

The process of providing abortion in India has also changed a lot during the past 60 years. Earlier the process of Abortion was conducted by traditional methods using herbal products which are now classified as unsafe by WHO. Presently, Abortions are



mainly provided by professional healthcare experts using modern system of medicine and surgery. WHO provides the standards of Safe Abortion.

Morbidity and mortality from illegal unsafe abortions vary according to the conditions under which the abortions are performed. It depends on the stage of gestation, age and health of woman. It is a given fact that where abortion is legal the rate on morbidity and mortality is low. Where the access to abortion is illegal the rate of morbidity and mortality is very high. The risk is further high when the abortion is done in the second semester. Illegal abortion is also the cause of many short term complication and long term abnormality. The most common early complications include excessive blood loss, pelvic infection, uterine perforation, cervical injury, anesthetic complication, etc. the long term complications include infertility, ectopic pregnancy, and increased risk of spontaneous abortion. There is a dire need to increase awareness about legal abortion and abortion facilities, increase access to and choice regarding abortion facilities and provide proper abortion facilities. Obstructions of such services are a serious violation of the pregnant woman's essential Human Right.

There is an urgent need to provide safe abortion facilities to all those in need of abortion in India. Further, there is a need to fully meet the urgent need of contraceptives so as to meet the need of surgical abortion. Providing appropriate and accessible contraceptives will prevent women from unwanted pregnancy and induced abortion. The knowledge regarding the safety and legality of the use of contraceptives is also important for woman to be able to have control over their reproductive rights. All this is essential for substantial reduction in morbidity and mortality associated with induced abortion.

Throughout history, women have overtly or covertly practiced different forms of birth control and abortion. In the process their accesses to service have been countered by social and legal sanctions, mostly consisting of moral and religious sanctions. The ethics of abortion has been subject to time and social context in which they are set. One thing to be noted is that subject to time and social context the norms have been in direct relation to the social needs and not a woman's right to determine her sexuality, fertility and reproduction. These practices have led to intense moral, ethical political and legal debates which are considered more than a technological and medical issue. There has been a phenomenal change in the 21<sup>st</sup> century especially regarding the status of woman in every society. They are at par with men in any field. Woman is no longer recognized as inferior to men or some sort of reproduction machine. They play equal role in the development of the world. Today women are no longer bound to stay at home. Moral view on this issue has also changed to a large extent. However, it is often seen that the realization of a woman's freedom is obstructed by traditional belief systems and religion that are undergoing process of change. Abortion is very much a contested view in this regard. A Woman has to be given control over her body if they are to achieve the true aim of equality with men. Anything less should be regarded as injustice to Women.

The Osha Declaration by the World Medical Organization in 1970 stated that "where the law allows therapeutic abortion to be performed, the procedure must be performed by a physician competent to do so in premises approved by the appropriate authority". The definition of the term therapeutic has also expanded from including abortion only to save the life of the mother to include much more. Liberalization in such cases does not give any fundamental right to the pregnant women but does affect the access to abortion.

Much of the debate regarding abortion is centered on moral issues. The UN Declaration on the rights of the child states “the child by reason of his physical and mental immaturity needs special safeguards and care including appropriate legal protection before as well as after birth”. According to the Pro-life advocates the unborn child has as much claim to right to life as the mother and should have more protection to life as it is incapable of defending itself. The Pro-life advocates emphasize on the right if the unborn child. They advocate that the unborn child should not be robbed of its Constitutional and moral right to live.

On the other hand, the Pro-Abortion advocates are for the moral and legal rights of the pregnant woman. The Constitution provides for equality to all. It is morally wrong to force a woman to continue a pregnancy putting her life at risk when she can't economically sustain or when the fetus does not want or might be incapable of surviving after birth. They believe that it is morally wrong to bring a child into this world when it was never wanted by the mother. The moral dilemmas raised by abortion are not easy to solve in a country like India.

The Medical termination of Pregnancy Act of 1971 liberalized abortion. There was no mass social movement regarding the liberalization of Abortion. The results were due to movement focused on the subversion of criminal law, without a separate political demand on the issue. The major role for influencing the policy makers for taking the decision were taken up by demographers and doctors. Proponents of family planning and population control also favored liberalization of Abortion with a view to lower the birth rate. The medical professionals were also concerned about the adverse effects of Abortion conducted under unhygienic conditions by unqualified, ill-

equipped and untrained providers which could have serious impact on the health of the pregnant woman.

The MTP Act is based on the principles of the British Act which was passed by the British Parliament in the year 1967. In essence, the MTP Act provides liberalization and regulation of medical profession and institution in relation to Abortion. It allows relaxation from the strict provisions of IPC that criminalize Abortion. However, the MTP Act does not include the right to induced abortion. It includes liberalization of conditions under which a pregnant woman may seek abortion from approved medical practitioners.

The liberalized law provides a position of power to the medical practitioners. Women cannot be allowed to terminate a pregnancy unless approved by medical practitioners. The MTP Act provides two conditions for termination of pregnancy depending on the length and type of pregnancy. The Act provides for termination of pregnancy with the permission of one doctor for pregnancy up to 20 weeks and two doctors in case the pregnancy is between 20 to 24 weeks. The conditions for termination of pregnancy include Rape, failure of contraceptives, abnormalities and risk to the life of the mother, etc. A pregnant Woman has to give an explanation that fit into the liberal conditions recognized in the MTP Act. Further, this situation makes the Act open to different interpretations. The Act provides for termination of pregnancy by approve medical professionals and under recognized facilities. However, this becomes a problem in the absence of well-trained medical practitioners and well-developed abortion services at every state and district level. The MTP Act does not recognize the right to access to abortion which.

In India right to Abortion is not considered an integral component of feminism and women movement, even though in the last few decades the strength of feminism has grown. Perhaps, this is because of the non-combative stand of the Anti-Abortionist. The situation is very different in developed countries where there have been social movements against the Anti-Abortionist thoughts which are mainly backed by religious groups.

The role of liberal law on abortion in India must take cognizance of general health care system. Majority of Indian population live in rural areas and access to proper health care system is essential. However, the present system of health care is not accessible to all specially in case of Abortion. For the law to be effective the liberalized law on Abortion must be followed by empowerment of women especially with regard to control over her body and sexuality. The result of liberalization of law in countries where women are given greater control over decision making and use of contraceptives is much more positive. Statistically it can be seen that the legalization of law has not increased the rate of legal abortion or significantly decreased the rate of legal abortion. The control over the body of the woman is not justifiable in the 21<sup>st</sup> century which is against her individual freedom and privacy. Further, restrictions to the access of abortion are also a grave human right violation.

Abortion means termination of pregnancy before the Unborn Child is capable of Independent existence. In India, Abortion was illegal and amounted to homicide till the enactment of the MTP Act of 1971. The MTP Act was introduced as a maternal health measure and not as a population control measure. However, even after more than 50 years of its application it has failed to keep up with changing times. The most recent amendment to the MTP Act was made in 2021 which failed to recognize a

woman's right to privacy and control over her own body. The Judiciary has recognized right to abortion as a right to privacy under the Constitution. However, it has been completely ignored by the legislature. At no point of time under the MTP Act a pregnant woman can decide what she wants to do with her body. The MTP Act is a barrier that stops a pregnant woman from exercising her right to privacy which is a basic Human Right recognized under International documents and subject to interpretation under Art 21 of the Constitution of India.

In the opinion of the researcher abortion of an unborn child after viability constitutes murder on the basis that from the point of viability the unborn child is "capable of independent existence" though it may still be inside the womb of the pregnant woman. The point of viability has been made the cut off point for abortion in the case of Roe vs. Wade. However, the indirect control of the womb of the mother by the state before the period of viability is wrong and against the fundamental principles of the Constitution of India. The present legislation on the termination of pregnancy in India does not provide complete control over the reproductive rights. A woman should be free to decide herself what she wants do with her body. Restrictions on legal abortions give rise to unsafe abortions and morbidity and higher mortality rate. It should rather be treated as a part of her right to privacy. This point has been made clear by the Supreme Court's decision in the case Of Justice Puttaswamy. In the 21<sup>st</sup> Century, a government that cannot protect the citizens "right to privacy" cannot credibly maintain a democratic regime of equal treatment under the law.

## Suggestions

1. The MTP Act as it stands provides right to abortion for married women. It does not mention or give any recognition to the right to abortion of an unmarried woman. Therefore, it can be understood that in case an unmarried woman gets pregnant she cannot access government approved facilities and has to seek illegal abortion facilities. The MTP Act does not give recognition to marital rape. India is already struggling with a substantial illegal abortion and this loophole would certainly add to the problem of increasing illegal abortion. Currently, India has seen a growing western influence like in case of live-in-relations where couples live together without marriage. The courts have also given recognition to such relationships. It is a gross discrepancy that needs to be corrected; in fact unmarried women require more attention to their dilemma.
2. During the course of this research it was found that there exists a lack of knowledge regarding the right to abortion, use of contraceptive and safe and unsafe abortion. It is essential that appropriate government authorities provide proper awareness programs in this regard in both urban and rural areas. The problem of unsafe abortion will never end until and unless women are made to know of their rights and safe and legal facilities provided by the Government authorities.
3. The poor availability of safe and legal abortion facilities in India is also a major problem. From the various case studies discussed above we have seen that there have been instances where sterilization program were done on school tables. A woman seeking abortion had to travel 90 km to seek abortion. Further, there have been cases of lack of trained registered medical

practitioners in government approved facilities. These barriers seriously hinder the accessibility to abortion especially in rural areas.

4. Right to abortion should be completely a woman's choice up to 24 weeks without any state interference. This requires the legislative requirement of permission from one registered medical practitioner in case of abortion up to 12 weeks and two registered medical practitioners in case of abortion up to 24 weeks. Right to abortion has never been an absolute right. A pregnant woman cannot seek abortion in the 8<sup>th</sup> month of the pregnancy when the unborn child has become viable. There arises compelling state interest to protect the life of the unborn after 24 weeks. It has been established by the judiciary as well as the legislature. However, state control over the right to abortion before 24 weeks is a direct infringement of the right to privacy of a pregnant woman which is unconstitutional and violates human rights of the woman.
5. The MTP Act has been severely criticized for over-medicalization and physicians only show a strong medical bias completely ignoring the socio-political aspects related to abortion.
6. A man is not guilty unless and until proven guilty in the court of law. In case of Rape, the question arises whether or not a pregnant victim has to await the verdict of the court before she can apply for termination of pregnancy. It is a very complex issue as incase the pregnant victim has to wait for the courts verdict which might easily take up to 3 to 4 years. It will be too late and if the man is acquitted by the court the woman will be liable to punishment under sec 312 of I.P.C.
7. Sec 3 of the MTP Act does not recognize termination of pregnancy as a result of sexual offences relating to marriage such as bigamy, adultery and the



offences of fraudulent conduct in marriage. Sec 3 of the MTP Act should be amended to include these as a woman will face difficulty in termination of pregnancy if such circumstances arise.

8. Abortion policy in India lacks a clear link between standard clinical practice and research. The MTP rules and regulations have defined person and requirement for abortion facilities but provide no national or International standards or guidelines for safe abortion. The abortion policy should be made broad enough to encompass advanced abortion technology and newer practices.
9. The MTP rules allow monitoring the quality of abortion care in private sectors but exempt the public sectors from certification. This will no doubt lead to discrepancy between the facilities provided by the public and private sectors. The assumption that public health sectors are by virtue of being accountable to the public do not need extra checks of their functions is often valid only in theory and not in practice.

## BIBLIOGRAPHY

### Books

- Barbara Hobson, Recognition struggles and social movements: Contested identities, agency and power (Cambridge University Press, Cambridge, 1<sup>st</sup>edn, 2003).
- Betsy Hartmann, Reproductive rights and wrongs: the global politics of population control(South End Press, Brooklyn, 1<sup>st</sup>edn,2016).
- Deana A Rohlinger, Abortion politics, mass media, and social movements in America(Cambridge University Press, Cambridge,1<sup>st</sup>edn, 2015).
- Dorothy McBride Stetson, Abortion politics, women's movements, and the democratic state: A comparative study of state feminism (OUP Oxford, Oxford,1<sup>st</sup>edn, 2001).
- Glanville Williams, Textbook of criminal law (Sweet and Maxwell, London, 3<sup>rd</sup>edn, 2012).
- John Stuart Mill, On Liberty (Batoche Books, Ontario,1<sup>st</sup>edn,1859).
- John William Salmond, Salmond on Jurisprudence (Sweet & Maxwell, London, 11<sup>th</sup>edn, 1966).
- K. Mathiharan and Amrit K. Patnaik, Modi's Medical Jurisprudence & Toxicology (Lexis Nexis Butterworth, New Delhi, 23<sup>rd</sup>edn, 2008).
- Leela Visaria, Vimala Ram Chandra, Abortion in India: Ground realities (Routledge, New Delhi, 1<sup>st</sup>edn,2007).
- Machteld Nijsten, Abortion, and Constitutional Law: A Comparative European-American Study (European University Institute, Florence,1<sup>st</sup>edn,1990).

- Mary Ann Glendon, *Abortion and divorce in western law* (Harvard University Press, Harvard, 1<sup>st</sup>edn,1989).
- Maureen Paul, Steve Lichtenberg, Lynn Borgatta, David A. Grimes, Phillip G. Stubblefield and Mitchell D. Creinin (ed), *Management of unintended and abnormal pregnancy: Comprehensive abortion care* (Wiley-Blackwell, New Jersey, 1<sup>st</sup>edn, 2011).
- Myra Marx Ferree, William Anthony Gamson, JurgenGerhards and Dieter Rucht, *Shaping abortion discourse: Democracy and the public sphere in Germany and the United States* (Cambridge University Press, Cambridge, 1<sup>st</sup>edn,2002).
- P Nonet, P Selznick and R.A. Kagan, *Law and society in transition: Toward responsive law* (Routledge, London, 1<sup>st</sup>edn,2017).
- Ratanlal and Dhirajlal, *The Indian Penal Code* (Lexis Nexis Butterworth, New Delhi, 32<sup>nd</sup>edn, 2013)
- Robert L. Crooks and Karla Baur, *Our Sexuality* (Cengage, Boston,1<sup>st</sup>edn, 1993).
- S.G Kabra, *Abortion in India: Myth and Reality* (Rawat Publications, Jaipur, 1<sup>st</sup>edn,2013).
- Sonia Correa and Rebecca Reichmann, *Population and reproductive rights: Feminist perspectives from the South* (Zed Books, London,1<sup>st</sup>edn, 1994).
- Spencer A. Rathus, Jeffrey S. Nevid, Lois Fichner-Rathus (ed.) *Human Sexuality in a World of Diversity* (Pearson, London,1<sup>st</sup>edn, 1993).
- Suzanne Staggenborg, *The pro-choice movement: Organization and activism in the abortion conflict* (Oxford University Press, Oxford,1<sup>st</sup>edn, 1991).

## Articles

- Aaron E Michel, Abortion and international law: the status and possible extension of women's right to privacy, 20(2) *Journal of Family Law* (1981).
- Agnidipto Tarafder, Surveillance, privacy and technology: A comparative critique of the laws of USA and India, 2 *Journal of the Indian Law Institute* (2015).
- Akinrinola Bankole, Susheela Singh and Taylor Haas, Reasons why women have induced abortion: evidence from 27 countries, 24 *International Journal on Sexual and Reproductive Health* (1998).
- Amar Jesani, and Aditi Iyer, Women and Abortion, 27 *Economic and Political Weekly* (1993).
- Andrie Marmor, What is the right to privacy? *USC Law Legal Studies* (2014).
- Anita Yadav, Charu Sharma, Manju Mehrotra, Mrinmoy Kumar Saha, Sojia Yougin, P. Kaviya Lakshmi, Profile of abortion seekers and decision makers of post abortion contraceptive acceptability in Andaman and Nicobar Islands, India, 10(5) *International journal of Reproductive, Contraception, Obstetrics and Gynecology* (2016).
- Anna Popinchalk and Gilda Sedgh, Trends in the method and gestational age of abortion in high-income countries, 45(2) *BMJ Sexual and Reproductive Health* (2019).
- Annulla Linders, Victory and beyond: a historical comparative analysis of the outcomes of the abortion movements in Sweden and the United States. In *Sociological Forum*, 29(3) Kluwer Academic Publishers-Plenum Publishers (2004).

- Anu Kumar & Leila Hessini, Conceptualizing Abortion Stigma, 11(6) Culture Health and Sexuality (2009).
- Astrid Christofferson-Deb, A Cultural Calculus of Parenthood at the beginning of life, 26 Medical Anthropology Quarterly (2012).
- Asween Kaur, Mother and the fetus: A Socio-legal Conflict, Bharati law Review (2016).
- Benjamin E Bratman, Brandeis and Warren's The Right to privacy and the Birth of the Right to privacy, 69 Tennessee Law Reviews (2001).
- Berta E Hernandez, To Bear or Not to Bear: Reproductive Freedom as an International Human Rights, 17 Brook Journal of International Law (1991).
- Reed Boland and L Katzive, Developments in laws on induced abortion: 1998-2007, 34(3) International family planning perspectives (2008).
- Bhavish Gupta and Meenu Gupta, The socio-cultural aspect of abortion in India: law, ethics and practice, Winter Issue-ILI Law Review, (2016).
- Bishakha Datta and G Misra, Advocacy for sexual and reproductive health: The challenge in India, 8(16) Reproductive Health Matters (2000).
- Carol Edelson, Supreme Court abortion ruling, 3 off our back, Inc. (1973).
- Carolyn Heitmeyer and M Unnithan, Bodily rights and collective claims: the work of legal activists in interpreting reproductive and maternal rights in India. 21(2), Journal of the Royal Anthropological Institute (2015).
- Carolyn W. Lerum and Geri LoBiondo-Wood, The Relationship of Maternal Age, Quickening, and Physical Symptoms of Pregnancy to the Development of Maternal-Fetal Attachment, 16 Birth (1989).
- Christyne L. Neff, Woman, Womb, and Bodily Integrity, 3 Yale Journal of Law & Feminism (1990).

- Constantin-Iulian Damian, Abortion from the perspective of the eastern religion: Hinduism and Buddhism, 8 Romanian Journal of Bioethics (2010).
- D.E Roberts, Punishing drug addicts who have babies: Women of color, equality, and the right of privacy, Harvard Law Review (1991).
- Dallas A. Blanchard, the Anti-Abortion Movement and the Rise of the Religious Right: From Polite to Fiery Protest, Twayne Publishers (1994).
- David N Loenzen, Who Invented Hinduism? 40 Cambridge University Press (1999).
- Dipika Jain, U Garnaik, K McBroom, S Malik and B Tronic, Abortion laws in India: a review of court cases. Project Report, O.P. Jindal Global University, Sonipat (2016)
- Dr. K. Shanmugavelayutham, The Pre-conception and Pre-natal Diagnostic Techniques (prohibition of Sex Selection) Act, 2002-A Bold Step, 17Legal News and Views (2003).
- Drude Dahlerup, The new women's movement: feminism and political power in Europe and the USA, 12 Sage Publications (CA) (1986).
- Duff .G. Gillespie, Making abortion rare and safe, 363(2) International Perspective on Sexual and Reproductive Health (2004).
- E Chemerinsky, Rediscovering Brandeis's right to privacy, 45 Brandeis Law Journal (2006).
- E Volokh, Personalization and privacy 43(8) Communications of the Association for Computing Machinery Journal (2000).
- Elisabeth A. Mosleya, Barbara A. Anderson, Lisa H Harris, Paul J. Fleming and Amy J. Schulz, Attitudes toward abortion, social welfare programs, and gender roles in the US and South Africa, 30(4) Critical Public Health (2018).

- Elisabeth Porter, *Abortion Ethics: Rights and Responsibilities*, 9 Wiley on behalf of Hypatia Inc. (1994).
- F. Doran and S. Nancarrow. Barriers and facilitators of access to first-trimester abortion services for women in the developed world: a systematic review, 41(3) *Journal of Family Planning and Reproductive Health Care* (2015).
- G.J Annas, The impact of medical technology on the pregnant woman's right to privacy, 13 *American Journal of Law & Medicine* (1987).
- GarimaYadav, *Abortion (Hinduism), Hinduism and Tribal Religions: Encyclopedia of Indian Religion* (2018).
- Gilla K Shapiro, Abortion law in Muslim-majority countries: an overview of the Islamic discourse with policy implications, 29 *Health Policy and Planning* (2013).
- Helen Oppenheimer, Abortion: a sketch for a Christian view, 5 *Journal of Christian Ethics* (1992).
- R. Hensman, *Christianity and Abortion Rights*, 5 *Feminist Dissent* (2020).
- Ibrahim B. Syed, *Abortion an Islamic Perspective*, 1 *Islamic Research Foundation International, Inc.* (2019).
- Ignacio Castuera, A Social History of Christian Thought on Abortion: Ambiguity vs. Certainty in Moral Debate, 76 *American Journal of Economics and Sociology* (2017).
- Jayanth K. Krishnan and Kevin R. Den Dulk, so help me god: A comparative study of religious interest group litigation 30 *Georgia Journal of International & Comparative Law* (2001).

- James Andrew Moretto, *The Walk of Life: The History of the Anti-Abortion Movement and the Quest to Overturn Roe v. Wade*, Law School Student Scholarship (2013).
- Jameen Kaur, *the role of litigation in ensuring women's reproductive rights: an analysis of the Shanti Devi judgment in India*. 20(39) *Reproductive health matters* (2012).
- K Coyaji, *Early medical abortion in India: three studies and their implications for abortion services*, 55(3) *Journal of the American Medical Women's Association* (2000).
- K.D Askin, *Prosecuting wartime rape and other gender-related crimes under international law: Extraordinary advances, enduring obstacles*, 21 *Berkeley Journal of International Law* (2003).
- Kathleen Broussard, *The changing landscape of abortion care: Embodied experiences of structural stigma in the Republic of Ireland and Northern Ireland*, 245 *Social Science & Medicine* (2020).
- Kathryn G. Milman, *Abortion Reform: History, Status, and Prognosis*, 21 *Case Western Reserve Law Review* (1970).
- Khalid S Khan , Daniel Wojdyla, Lale Say, A Metin Gulmezoglu, Paul Fa Van Look, *WHO analysis of causes of Maternal death: A Systematic Review*. 10 *The Lancet* (2006).
- Krishna Kumar, “*Law of Abortion: Critical study from the perspective of Women’s Right to Privacy*”, 3 *International Journal of Applied Research* (2017).
- Lakshmi Lingam and V. Yelamanchili, *Reproductive rights and exclusionary wrongs: Maternity benefits*. 46(43), *Economic & Political Weekly* (2011).



- L. Finer and J.B. Fine, Abortion law around the world: progress and pushback 103(4) *American Journal of Public Health* (2013).
- L.L. Manzione, Is There a Right to Die: A Comparative Study of Three Societies (Australia, Netherlands, United States), 30 *Georgia Journal of International & Comparative Law* (2001).
- L.R. Bevier, What privacy is not, 12 *Harvard Journal of Law & Public Policy* (1989).
- Leo H. Kahane, Political, Ideological and Economic Determinants of Abortion Position: An Empirical Analysis of State Legislatures and Governors, 53 *American Journal of Economics and Sociology* (1994).
- Lynn M. Lindholm, Judicial Supremacy, Right-to-Life and the Abortion Decision, 2 *North American Philosophical Publications* (1988).
- Marilyn B. Cane, Who's Right to Life? Implications of *Roe v. Wade*, 7 *American Bar Association* (1973).
- Marge Berer, Abortion Law and Policy around the World: In Search of Decriminalization, 19 *Health and Human Rights Journal* (2017).
- Mary Ann Glendon, A World without *Roe*: How Different Would It Be? 19 *The Hastings Center Report* (1989).
- Melissa Stillman, Jennifer J. Frost, Susheela Singh, Ann M. Moore and Shveta Kalyanwala, Abortion in India: a literature Review, *New York Report: Guttmacher Institute* 22 (2014).
- Moira Stephens, Christopher F. C. Jordens, Ian H. Kerridge and Rachel A. Ankeny, Religious Perspectives on Abortion and a Secular Response, 7 *Journal on Religion and Health* (2010).

- N Kim, “Breaking free from patriarchy: A comparative study of sex selection abortions in Korea and the United States” 17 Pacific Basin Law Journal (1999).
- NidhiMadan, History & Development of Human Rights in Indian, 22 Journal of Humanities and Social Science (2017).
- Piyal Chatterjee, Right to Abortion is a basic Human Right: Special reference to India (2015) (Unpublished Conference: 2<sup>nd</sup> International Women’s Rights Assembly, New Delhi).
- PritamBaruah and Zaid Deva, Justifying privacy: The Indian Supreme Court’s Comparative Analysis. In the Indian Yearbook of Comparative Law 2018, Springer (2018).
- Phillip A Lasco, A Buddhist View of Abortion, 26 Journal of Religion and Health (1987).
- Pritam Potdar A Barua, Suchitra Dalvie and Anand Pawar, “If a woman has even one daughter, I refuse to perform the abortion,” Sex determination and safe abortion in India, 23 Reproductive Health Matters (2015).
- R.A. Posner, The economics of privacy, 71(2) The American economic review (1981).
- R. E. Florida, Buddhist Approaches to Abortion, 1 Asian Philosophy: An International Journal of the Philosophical Traditions of the East (1991).
- R.L Rausch, Reframing Roe: property over privacy, 28 Berkeley Journal of Gender Law & Just (2012).
- RadhikaRao, Property, privacy and the human body, 80 Boston University Law review (2000).

- Rhonda Copelon, Christina Zampas, Elizabeth Brusie, Jacquelinede Vore, Human Rights Begin at Birth: International Law and the Claim of Fetal Rights, 13 Reproductive Health Matters (2005).
- Ryo Yokoe, Rachel Rowe, Saswati Sanyal Choudhury, Anjali Rani, Farzana Zahir and Manisha Nair, Unsafe abortion and abortion-related death among 1.8 million women in India, 4 BJM Global Health Journal (2019).
- Sarah Combellick-Bidney, Reproductive rights as human rights: stories from advocates in Brazil, India and South Africa. 21(7), The International Journal of Human Rights (2017).
- Saseendran Pallikadavath and RW Stones, Maternal and social factors associated with abortion in India: a population-based study, 32(3) International Family Planning Perspectives (2019).
- Serena C. Houghton and Susan E. Hankinson, Breast cancer and abortion: collaborative reanalysis of data from 53 epidemiological studies, including 83 000 women with breast cancer from 16 countries, 363(14) The Lancet (2021).
- Siddhivinayak S Hirve, Abortion Law, Policy and Services in India: A Critical Review, 12 International Journal on Sexual and Reproductive Health and Rights (2004).
- Sonali Regmi, Unsafe Abortion: violation of women's right to reproduction and sexual health, study with reference to Nepal (2001) (Unpublished LLM Dissertation, Toronto University, Canada).
- SreejaJaiswal, Commercial surrogacy in India: an ethical assessment of existing legal scenario from the perspective of women's autonomy and reproductive rights, 16(1) Gender, Technology and Development (2012).

- SrinivasKosgi, Vaishali Hegde N, Satheesh Rao Yenepoya, Shrinivasa Bhat Undaru and Nagesh B. Pai, Women reproductive rights in India: prospective future, 10 (1) Online Journal of Health and Allied Sciences (2011).
- Stephen Isaacs, Reproductive rights 1983: An international survey, 14 Brooklyn Journal of International Law (1982).
- Stephanie A. Kung, Blair G. Darney, Biani Saavedra-Avendano, Patricia A. Lohr and Laura Gil, Access to abortion under the health exception: a comparative analysis in three countries 15(1) Reproductive health (2018).
- Subha B Sri and T K Sundari Ravindran, Safe, accessible medical abortion in a rural Tamil Nadu clinic, India, but what about sexual and reproductive rights? 22(44) Reproductive Health Matters (2015).
- Susanne Sjostrom, Birgitta Essenl, Kristina Gemzell-Danielsson and Marie Klingberg-Allvin, Medical students are afraid to include abortion in their future practices: In-depth interviews in Maharashtra, India, 16 Biomed Central Medical Education (2016).
- Sushanta K Banerjee, Kathryn L Andersen, Rebecca M Buchanan and Janardan Warvadekar, Woman-centered research on access to safe abortion services and implications for behavioral change communication interventions: a cross-sectional study of women in Bihar and Jharkhand, India 12(1) BMC Public Health (2012).
- Susheela Singh, Chander Shekhar, Rajib Acharya, Ann M Moore, Melissa Stillman, Manas R Pradhan, Jennifer J Frost, Harihar Sahoo, Manoj Alagarajan, Rubina Hussain, Aparna Sundaram, Michael Vlassoff, Shveta Kalyanwala, Alyssa Browne, The Incidence of Abortion and Unintended Pregnancy in India, 6 The Lancet: Global Health (2018).

- Sybil Shainwald, Reproductive Injustice in the New Millennium, 20 William & Mary Journal of Race, Gender, and Social Justice (2013).
- T.K. Sundari Ravindran, “Yes” to abortion but “No” to sexual rights: the paradoxical reality of married women in rural Tamil Nadu, India, 12(23) Reproductive Health Matters (2004).
- Ushma D Upadhyay, Innovative models are needed for equitable abortion access in the USA, 2(11) The Lancet Public Health (2017).
- Virginie Rozee Gomez and Sayeed Unisa, Surrogacy from a reproductive rights perspective: the case of India. 2 Sciences Po de Presses (2014).

### **Report**

- Report on Medical Certificate of death, 2015 New Delhi Registrar General of India, 2015 available at <https://www.censusindia.gov.in> (visited on 24 August, 2021).

### **Website**

- WHO, Abortion Key Facts, available at <https://www.who.int/news-room/fact-sheets/detail/abortion> (visited on June 21, 2021).
- WHO, Complications of abortion: Technical and managerial available at <https://apps.who.int/iris/handle/10665/40349> (visited on January 23, 2021).
- WHO, Technical and Policy Guidance for health systems available at [https://apps.who.int/iris/bitstream/handle/10665/70914/9789241548434\\_eng.pdf](https://apps.who.int/iris/bitstream/handle/10665/70914/9789241548434_eng.pdf) (visited on July 23, 2021).

### **Statutes/Covenants**

- Abortion Act 1967.
- Code of Criminal Procedure, 1973.

- Constitution of India, 1950.
- Convention on the Elimination of All Forms of Discrimination against Women. 1979.
- Convention on the Rights of Persons with Disability 2007.
- Declaration on the Rights of the Child, 1989.
- Health (Regulation of termination of pregnancy) Act 2018.
- Hindu Succession Act, 1925.
- Human Fertilization of Embryology Act 1990
- Human Life Protection Act, 2019.
- Indian Penal Code, 1860.
- Indian Succession Act, 1925.
- International Covenant on Civil and Political Rights, 1966.
- International Covenant on Economic, Social and Cultural rights. 1966
- Limitation Act, 1963.
- Medical Termination of Pregnancy Act, 1971.
- Medical Termination of Pregnancy (Amendment) Act, 1971.
- Medical Termination of Pregnancy Rules, 2003.
- One Child Policy Act, 1979.
- Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act,  
2002.
- Texas Heartbeat Act 2021.
- Transfer of Property Act, 1882.
- Universal Declaration of Human Rights, 1948.

## ANNEXURE

### THE MEDICAL TERMINATION OF PREGNANCY ACT, 1971

ACT NO. 34 OF 1971 [10th August, 1971.]

An Act to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto.

Be it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:

1. Short title, extent and commencement(1) This Act may be called the Medical Termination of Pregnancy Act, 1971.

(2) It extends to the whole of India.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Definitions. In this Act, unless the context otherwise requires,

(a) “guardian” means a person having the care of the person of a minor or a [mentally ill person;

(aa) “Medical Board” means the Medical Board constituted under sub-section (2C) of section 3 of the Act.

(b) “mentally ill person” means a person who is in need of treatment by reason of any mental disorder other than mental retardation.

(c) “minor” means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875), is to be deemed not to have attained his majority;

(d) “registered medical practitioner” means a medical practitioner who possesses any recognised medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956 (102 of 1956), whose name has been entered in a State Medical Register and who has such experience or training in gynaecology and obstetrics as may be prescribed by rules made under this Act.

(e) “termination of pregnancy” means a procedure to terminate a pregnancy by using medical or surgical methods.

3. When pregnancies may be terminated by registered medical practitioners(1)  
Notwithstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.

(2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,

(a) where the length of the pregnancy does not exceed twenty weeks, if such medical practitioner is, or

(b) where the length of the pregnancy exceeds twenty weeks but does not exceed twenty-four weeks in case of such category of woman as may be prescribed by rules made under this Act, if not less than two registered medical practitioners are,

of the opinion, formed in good faith, that

(i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or



(ii) there is a substantial risk that if the child were born, it would suffer from any serious physical or mental abnormality.

Explanation 1. For the purposes of clause (a), where any pregnancy occurs as a result of failure of any device or method used by any woman or her partner for the purpose of limiting the number of children or preventing pregnancy, the anguish caused by such pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation 2. For the purposes of clauses (a) and (b), where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by the pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

(2A) The norms for the registered medical practitioner whose opinion is required for termination of pregnancy at different gestational age shall be such as may be prescribed by rules made under this Act.

(2B) The provisions of sub-section (2) relating to the length of the pregnancy shall not apply to the termination of pregnancy by the medical practitioner where such termination is necessitated by the diagnosis of any of the substantial foetal abnormalities diagnosed by a Medical Board.

(2C) Every State Government or Union territory, as the case may be, shall, by notification in the Official Gazette, constitute a Board to be called a Medical Board for the purposes of this Act to exercise such powers and functions as may be prescribed by rules made under this Act.

(2D) The Medical Board shall consist of the following, namely:

(a) a Gynaecologist;

(b) a Paediatrician;

(c) a Radiologist or Sonologist; and

(d) such other number of members as may be notified in the Official Gazette by the State Government or Union territory, as the case may be.]

(3) In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or reasonably foreseeable environment.

(4) (a) No pregnancy of a woman, who has not attained the age of eighteen years, or, who having attained the age of eighteen years, is a [mentally ill person], shall be terminated except with the consent in writing of her guardian.]

(b) Save as otherwise provided in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman.

4. Place where pregnancy may be terminated.No termination of pregnancy shall be made in accordance with this Act at any place other than—

(a) a hospital established or maintained by Government, or

(b) a place for the time being approved for the purpose of this Act by Government or a District Level Committee constituted by that Government with the Chief Medical Officer or District Health Officer as the Chairperson of the said Committee:

Provided that the District Level Committee shall consist of not less than three and not more than five members including the Chairperson, as the Government may specify from time to time.

5. Sections 3 and 4 when not to apply.(1) The provisions of section 4, and so much of the provisions of sub-section (2) of section 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.

(2) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), the termination of pregnancy by a person who is not a registered medical practitioner shall be an offence punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years under that Code, and that Code shall, to this extent, stand modified.

(3) Whoever terminates any pregnancy in a place other than that mentioned in section 4, shall be punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years.

(4) Any person being owner of a place which is not approved under clause (b) of section 4 shall be punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years.

Explanation 1. For the purposes of this section, the expression “owner” in relation to a place means any person who is the administrative head or otherwise responsible for the working or maintenance of a hospital or place, by whatever name called, where the pregnancy may be terminated under this Act.

Explanation 2.—For the purposes of this section, so much of the provisions of clause (d) of section 2 as relate to the possession, by registered medical practitioner, of experience or training in gynaecology and obstetrics shall not apply.]

5A. Protection of privacy of a woman.(1) No registered medical practitioner shall reveal the name and other particulars of a woman whose pregnancy has been terminated under this Act except to a person authorised by any law for the time being in force.

(2) Whoever contravenes the provisions of sub-section (1) shall be punishable with imprisonment which may extend to one year, or with fine, or with both.

6. Power to make rules.(1) The Central Government may, by notification in the Official Gazette, make rules to carry out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:

(a) the experience or training, or both, which a registered medical practitioner shall have if he intends to terminate any pregnancy under this Act; and

(aa) the category of woman under clause (b) of sub-section (2) of section 3;

(ab) the norms for the registered medical practitioner whose opinion is required for termination of pregnancy at different gestational age under sub-section (2A) of section 3;

(ac) the powers and functions of the Medical Board under sub-section (2C) of section 3.

(b) such other matters as are required to be or may be, provided by rules made under this Act.

(3) Every rule made by the Central Government under this Act shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

7. Power to make regulations.(1) The State Government may, by regulations,

(a) require any such opinion as is referred to in sub-section (2) of section 3 to be certified by a registered medical practitioner or practitioners concerned, in such form and at such time as may be specified in such regulations, and the preservation or disposal of such certificates;

(b) require any registered medical practitioner, who terminates a pregnancy, to give intimation of such termination and such other information relating to the termination as may be specified in such regulations;

(c) prohibit the disclosure, except to such persons and for such purposes as may be specified in such regulations, of intimations given or information furnished in pursuance of such regulations.

(2) The intimation given and the information furnished in pursuance of regulations made by virtue of clause (b) of sub-section (1) shall be given or furnished, as the case may be, to the Chief Medical Officer of the State.

(2A) Every regulation made by the State Government under this Act shall be laid, as soon as may be after it is made, before the State Legislature.

(3) Any person who wilfully contravenes or wilfully fails to comply with the requirements of any regulation made under sub-section (1) shall be liable to be punished with fine which may extend to one thousand rupees.

8. Protection of action taken in good faith.No suit or other legal proceeding shall lie against any registered medical practitioner for any damage caused or likely to be caused by anything which is in good faith done or intended to be done under this Act.

## The Medical Termination of Pregnancy Rules, 2003

G.S.R. 485(E), dated 13.6.2003. - In exercise of the powers conferred by section 6 of the Medical Termination of Pregnancy Act, 1971 (34 of 1971), the Central Government hereby makes the following rules, namely:

1. Short title and commencement. - (1) These rules may be called The Medical Termination of Pregnancy Rules, 2003.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. Definitions. - In these rules, unless the context otherwise requires,

(a) Act means the Medical Termination of Pregnancy Act, 1971 (34 of 1971);

(b) Chief Medical Officer means the Chief Medical Officer of a District, by whatever name called;

(c) Form means a form appended to these rules;

(d) owner, in relation to a place means any person who is the administrative head or otherwise responsible for the working or maintenance of a hospital or place, by whatever name called, where the pregnancy may be terminated under this Act;

(e) Committee means a committee constituted at the district level under the proviso to clause (b) of section 4 read with rule 3.

[(f) "Medical Board" means the medical Board Constituted under sub-section (2C) of section 3 of the Act.]

3. Composition and tenure of District Level Committee. - (1) One member of the district level committee shall be the Gynecologist/Surgeon/Anaesthetist and other members from the local medical profession, non-governmental organisations, and Panchayati Raj Institution of the district:

Provided that one of the members of the committee shall be a woman.

(2) Tenure of the Committee shall be for two calendar years and the tenure of the non-Government members shall not be more than two terms.

3A. Powers and functions of Medical Board. For the purposes of section 3,

(a) the powers of the Medical Board shall be the following, namely:

(i) to allow or deny termination of pregnancy beyond twenty-four weeks of gestation period under sub-section (2B) of the said section only after due consideration and ensuring that the procedure would be safe for the woman at that gestation age and whether the foetal malformation has substantial risk of it being incompatible with life or if the child is born it may suffer from such physical or mental abnormalities to be seriously handicapped;

(ii) co-opt other specialists in the Board and ask for any additional investigations if required, for deciding on the termination of pregnancy;

(b) the functions of the Medical Board shall be the following, namely :

(i) to examine the woman and her reports, who may approach for medical termination of pregnancy under subsection (2B) of section 3;

(ii) provide the opinion of Medical Board in Form D with regard to the termination of pregnancy or rejection of request for termination within three days of receiving the request for medical termination of pregnancy under sub-section (2B) of section 3;

(iii) to ensure that the termination procedure, when advised by the Medical Board, is carried out with all safety precautions along with appropriate



counselling within five days of the receipt of the request for medical termination of pregnancy under sub-section (2B) of section 3.

3B. Women eligible for termination of pregnancy up to twenty-four weeks. - The following categories of women shall be considered eligible for termination of pregnancy under clause (b) of subsection (2) Section 3 of the Act, for a period of up to twenty-four weeks, namely: -

- (a) survivors of sexual assault or rape or incest;
- (b) minors;
- (c) change of marital status during the ongoing pregnancy (widowhood and divorce);
- (d) women with physical disabilities [major disability as per criteria laid down under the Rights of Persons with Disabilities Act, 2016 (49 of 2016)];
- (e) mentally ill women including mental retardation;
- (f) the foetal malformation that has substantial risk of being incompatible with life or if the child is born it may suffer from such physical or mental abnormalities to be seriously handicapped; and
- (g) women with pregnancy in humanitarian settings or disaster or emergency situations as may be declared by the Government.

4. Experience and training under clause (d) of section 2. - For the purpose of clause (d) of section (2), a registered medical practitioner shall have one or more of the following experience or training in gynaecology and obstetrics, namely:

- (a) In the case of a medical practitioner, who was registered in a State Medical Register immediately before the commencement of the Act, experience in the practice of gynaecology and obstetrics for a period of not less than three years;

(b) in the case of a medical practitioner, who is registered in a State Medical Register:

(i) if he has completed six months of house surgency in gynaecology and obstetrics; or

(ii) unless the following facilities are provided therein, if he had experience at any hospital for a period of not less than one year in the practice of obstetrics and gynaecology; or

(c) if he has assisted a registered medical practitioner in the performance of twenty-five cases of medical termination of pregnancy of which at least five have been performed independently, in a hospital established or maintained, or a training institute approved for this purpose by the Government.

(i) This training would enable the Registered Medical Practitioner (RMP) to do only 1st Trimester terminations (up to 12 weeks of gestation);

(ii) For terminations up to [twenty-four weeks] the experience or training as prescribed under sub-rules (a), (b) and (d) shall apply;

(ca) A Registered Medical Practitioner shall have the following experience and training for conducting termination of pregnancy upto nine weeks of gestation period by medical methods of abortion, namely:

(i) experience at any hospital for a period of not less than three months in the practice of obstetrics and gynaecology; or

(ii) has independently performed ten cases of pregnancy termination by medical methods of abortion under the supervision of a Registered Medical Practitioner in a hospital established or maintained, or a training institute approved for this purpose, by the Government.]

(d) in case of a medical practitioner who has been registered in a State Medical Register and who holds a post-graduate degree or diploma in gynaecology and obstetrics, the experience or training gained during the course of such degree or diploma.

4A. (1) For the purposes of sub-section (2A) of section 3 of the Act, the opinion of Registered Medical Practitioner which is required for termination of pregnancy at different gestation ages shall be the following, namely:

(a) till nine weeks of gestation period, by Medical Methods of Abortion: Registered Medical Practitioner eligible under clauses (a), (b), (c), (ca) and (d) of rule 4;

(b) till twelve weeks of gestation period, by surgical method: Registered Medical Practitioner eligible under clauses (a), (b), (c) and (d) of rule 4;

(c) beyond twelve weeks till twenty weeks of gestation period: Registered Medical Practitioner eligible under clauses (a), (b) and (d) of rule 4;

(2) For the purposes of sub-section (2A) of section 3 of the Act, the opinion of two Registered Medical Practitioners eligible under clauses (a), (b) and (d) of rule 4, which is required for termination of pregnancy beyond twenty weeks till twenty-four weeks of gestation period, shall be in Form E.

(3) For the purposes of sub-section (2B) of section 3, the opinion for medical termination of pregnancy beyond twenty-four weeks gestation period: Shall be given by a Medical Board duly constituted by the respective State Government or Union territory Administration at approved facilities and two Registered Medical Practitioners eligible under clauses (a), (b) and (d) of rule 4, shall perform the termination of pregnancy based on the decision of such Medical Board.]

5. Approval of a place. - (1) No place shall be approved under clause (b) of section 4,

(i) unless the Government is satisfied that termination of pregnancies may be done therein under safe and hygienic conditions; and

(ii) unless the following facilities are provided therein, namely:

in case of first trimester, that is, up to 12 weeks of pregnancy:

a gynaecology examination/labour table, resuscitation and sterilization equipment, drugs and parental fluid, back up facilities for treatment of shock and facilities [for transportation] in case of second trimester, that is up to [twenty-four weeks] of pregnancy:

(a) an operation table and instruments for performing abdominal or gynaecological surgery;

(b) anaesthetic equipment, resuscitation equipment and sterilization equipment;

(c) drugs and parental fluids for emergency use, notified by [the Central Government from time to time and]

in case of termination beyond twenty-four weeks of pregnancy:(a) an operation table and instruments for performing abdominal or gynaecological surgery; (b) anaesthetic equipment, resuscitation equipment and sterilisation equipment; (c) availability of drugs, parental fluids and blood for emergency use, as may be notified by the Central Government from time to time; and (d) facilities for procedure under ultrasound guidance.

Explanation. - In the case of termination of early pregnancy up to [nine weeks] using RU-486 with Misoprostol, the same may be prescribed by a Registered Medical Practitioner (RMP) as defined under clause (d) of section 2 of the Act and rule 4 of MTP Rules, at his clinic, provided such a Registered Medical

Practitioner has access to a place approved under section 4 of the MTP Act, 1971 read with MTP Amendment Act, 2002 and rules 5 of the MTP Rules. For the purpose of access, the RMP should display a certificate to this effect from the owner of the approved place.

(2) Every application for the approval of a place shall be in Form A and shall be addressed to the Chief Medical Officer of the District.

(3) On receipt of an application under sub-rule (2), the Chief Medical Officer of the District may verify any information contained, in any such application or inspect any such place with a view to satisfying himself that the facilities referred to in sub-rule (1) are provided, and that termination of pregnancies may be made under safe and hygienic conditions.

(4) Every owner of the place which is inspected by the Chief Medical Officer of the District shall afford all reasonable facilities for the inspection of the place.

(5) The Chief Medical Officer of the District may, if he is satisfied after such verification, enquiry or inspection, as may be considered necessary, that termination of pregnancies may be done under safe and hygienic conditions, at the place, recommend the approval of such place to the committee.

(6) The committee may after considering the application and the recommendations of the Chief Medical Officer of the District approve such place and issue a certificate of approval in Form B.

(7) The certificate of approval issued by the committee shall be conspicuously displayed at the place to be easily visible to persons visiting the place.

(8) The place shall be inspected within 2 months of receiving the application and certificate of approval may be issued within the next 2 months, or in case any

deficiency has been noted, within 2 months of the deficiency having been rectified by the applicant.

(9) On the commencement of these rules, a place approved in accordance with the Medical Termination of Pregnancy Rules, 1975 shall be deemed to have been approved under these rules.

6. Inspection of a place. - (1) A place approved under rule 5 may be inspected by the Chief Medical Officer of the District, as often as may be necessary with a view to verify whether termination of pregnancies is being done therein under safe and hygienic conditions. (2) If the Chief Medical Officer has reason to believe that there has been death of, or injury to, a pregnant woman at the place or that termination of pregnancies is not being done at the place under safe and hygienic conditions, he may call for any information or may seize any article, medicine, ampoule, admission register or other document, maintained, kept or found at the place. (3) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), relating to seizure, so far as it may, apply to seizure made under sub-rule (2).

7. Cancellation or suspension of certificate of approval. – (1) If, after inspection of any place approved under rule 5, the Chief Medical Officer of the District is satisfied that the facilities specified that the facilities specified in rule 5 are not being properly maintained therein and the termination of pregnancy at such place cannot be made under safe and hygienic conditions, he shall make a report of the fact to the committee giving the detail of the deficiencies or defects found at the place and the committee may, if it is satisfied, suspend or cancel the approval provided that the committee shall give an opportunity of making representation to the owner of the place before the certificate issued under rule 5 is cancelled. (2) Where a certificate issued under rule 5 is cancelled, the owner of the place may make such additions or improvements

in the place and thereafter, he may make an application to the committee for grant of approval under rule 5.

(3) In the event of suspension of a certificate of approval, the place shall not be deemed to be an approved place during the suspension for the purposes of termination of pregnancy from the date of communication of the order of such suspension.

8. Review:(1) The owner of a place, who is aggrieved by an order made under rule 7, may make an application for review of the order to the Government within a period of sixty days from the date of such order:

Provided that the Government may condone any delay in case it is satisfied that applicant was prevented by sufficient cause to make application within time.

(2) The Government may, after giving the owner an opportunity of being heard, confirm, modify or reverse the order.

9. Form of consent: The consent referred to in sub-section (4) of the section 3 shall be given in Form C.

10. Repeal and saving: The Medical Termination of Pregnancy Rules, 1975, are hereby repealed except as respects things done or omitted to be done before such repeal.