

# ILLEGAL ABORTIONS: A GRAVE PUBLIC HEALTH CONCERN IN INDIA

Dr. Monika Negi\*  
Mehak Chadha\*\*

*“No woman can call herself free until she can choose consciously whether she will or will not be a mother.*

—MARGARET SANGER<sup>1</sup>

## Abstract

*Abortion has become a critical issue in recent times, questioning the reproductive rights of the women which encircles around whether to prevent or terminate the child in womb. Thus, it becomes importance to ponder over the issue of abortion and abortion practices in India.*

*Abortions have always been a topic for debates, discussions and concerns. At different junctures in history, the issue of abortion has been raised to witness differing opinions of scholars, jurists, governments and the common man. Some have been supportive of this issue and some always against the notion of abortion. But this issue needs a discussion with concerted efforts to arrive at the optimal perspective as abortion is an issue of serious health concern that has been accorded to women. The medical method of inducing abortion is straightforward and frequent. Every year, 121 million pregnancies—or over half of all pregnancies—are unplanned; 6 out of 10 unwanted pregnancies and 3 out of 10 pregnancies overall result in induced abortions. The Sustainable Development Goals (SDGs) for gender equality and good health and wellbeing (SDG3) both depend on ensuring that women and girls have access to evidence-based abortion care that is safe, respectful, and non-discriminatory. (SDG5).*

**KEYWORDS:** *Gender Equality; Reproductive Rights; Social Stigma.*

## 1. INTRODUCTION

Abortion is a very grave health concern that requires imminent attention as in the contemporary scenario, abortion is being driven by the patriarchal mindset that often leads curbs the right to women to get the abortion as a matter of their individualistic right. Abortion has been a controversial topic, both in national and international sphere.

According to a 2016, study published in *The Lancet* by the Guttmacher Institute and the World Health Organization, an estimated 56 million abortions took place globally each year between 2010 and 2014. These numbers make a strong case that abortion is a vital part of health care and should be easily available when needed.<sup>2</sup> One of the pertinent causes of high level of female mortality rate in India is the issue of illegal abortions, majority of which can be avoided

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\* Assistant Professor, University Institute of Legal Studies, Panjab University Swami Sarvanand Giri Regional Centre, Hoshiarpur.

\*\* Research Scholar (Ph.D), Department of Laws, Panjab University, Chandigarh.

<sup>1</sup> Susheela Singh, *Good reproductive health policy starts with credible research* (Mar. 25, 2023, 10:04 AM), [https://www.guttmacher.org/sites/default/files/report\\_pdf/abortion-unintended-pregnancy-six-states-india.pdf](https://www.guttmacher.org/sites/default/files/report_pdf/abortion-unintended-pregnancy-six-states-india.pdf).

<sup>2</sup> *Ibid.*

by sensitization of this issue amongst the masses. Every day 13 women die in India due to unsafe abortion-related causes. Nearly 6.4 million pregnancies are terminated every year in India. Unsafe abortion, the third leading cause of maternal deaths in the country, contributes eight per cent of all such deaths annually.<sup>3</sup> Thousands of deaths are reported from unsafe abortions due to lack of trained abortion providers, lack of knowledge about the legality of abortion and availability of safe services, compounded by the social stigma surrounding abortion.<sup>4</sup>

The WHO defines unsafe abortions as “the termination of an unintended pregnancy either by persons lacking the necessary skills or in an environment lacking the minimum medical standards or both”<sup>5</sup> The reality today has devastating impacts in India as besides a legislative enactment i.e., Medical Termination of Pregnancy Act being in place, there were still 15.6 million unsafe abortions in 2015 and the figures gets alarming with each passing year. There are multiple causal factors for this problem be it the socio-economic status of women, the educational qualifications that women achieve and the preference for a male child in the Indian society etc. The research paper tries to analyze the socio-economic factors associated with the issue of unsafe abortions in India and critically examine the abortion policies prevalent in India and their evolution.

Every Individual ponders over the question as to whether the mother has the right to abort the child or whether that unborn child has the right to be born and live a wholesome and fulfilling life. The right to life is a very essential question that has been explicitly mentioned in Article 21 of the Constitution of India.<sup>6</sup> Article 21 states that No person shall be deprived of his life or personal liberty except according to procedure established by law.<sup>7</sup> Referring to abortion, it has been covered under the ambit of Article 21 and comes under the Right to Privacy which further emanated from Right to life.

Unsafe abortions and its complications are alarming and they are even more detrimental to the health of the women who is undergoing this process of unsafe termination of pregnancy. Unsafe abortions are a major public health issue that is being witness by the women in many developed and developing

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<sup>3</sup> Aarzo Snigdha, *13 women die in India every day due to unsafe abortions*, (Mar. 25, 2023, 10:24 AM), <https://www.indiatoday.in/india/story/13-women-die-in-india-every-day-due-to-unsafe-abortions-12968502018-07-26>.

<sup>4</sup> *Id.*

<sup>5</sup> *Unsafe Abortion: global and regional estimates of the incidence of unsafe abortion and associated mortality in 2008* (Mar. 25, 2023, 10:04 AM), <https://www.who.int/publications/i/item/9789241501118>.

<sup>6</sup> *Protection of Life and Personal Liberty*, (Mar. 25, 2023, 10:38 AM), <https://www.constitutionofindia.net/articles/article-21-protection-of-life-and-personal-liberty>.

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

nations. Unsafe abortion and abortion-related death among 1.8 million women in India is a cause of concern.<sup>8</sup>

Unsafe abortion is one of the preventable causes of maternal mortality yet, of the 55.7 million abortions that occurred globally each year between 2010 and 2014, an estimated 25.1 million (45.1%) were unsafe.<sup>9</sup> Unsafe abortion is one of the most neglected problems of health care in developing countries and a serious concern to women during their reproductive lives.<sup>10</sup>

## 1.1 OBJECTIVES OF STUDY

The author is trying to specify the object that despite abortion being legal, the high estimated prevalence of unsafe abortion demonstrates a major public health problem in India. Socioeconomic vulnerability and inadequate access to healthcare services combine to leave large numbers of women at risk of unsafe abortion and abortion-related death.<sup>11</sup> Despite recent advancements in abortion safety, there are still numerous entrenched and long-standing barriers that must be overcome before unsafe abortion is completely eradicated. Stigma, legality, and the prevalence of unwanted pregnancy, which frequently leads to unsafe abortion, are three of the most significant obstacles to continued progress on reducing unsafe abortion.

Where abortion is most regulated, it is least safe: Only 25% of abortions are safe in nations where access to abortion is severely restricted; 87% of abortions are safe in nations where access to abortion is unfettered. Unintended pregnancy is the main reason for almost all abortions. The highest unintended pregnancy rates are in Latin America and the Caribbean (96 per 1,000 women aged 15–44) and Africa (89 per 1,000)—well above the rate in developed regions (45 per 1,000).<sup>12</sup> It is more crucial than ever for other donors, governments, and civil society actors to support abortion rights and pledge to take an evidence-based and human rights-oriented approach to protecting women's health, including by working to prevent unsafe abortion, at this pivotal time when hard-won improvements to women's health are in danger.

## 2. RESEARCH METHODOLOGY

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<sup>8</sup> R. Koe, R. Rowe, SS Choudhury et al., *Unsafe abortion and abortion-related death among 1.8 million women in India* (Mar. 25, 2023, 10:38 AM), <https://gh.bmj.com/content/4/3/e001491>.

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

<sup>10</sup> Manju V. Mataliya, *Unsafe Abortions*, (Mar. 25, 2023, 10:38 AM), [https://jogi.co.in/articles/files/filebase/Archives/1999/oct/1999\\_149\\_151\\_Oct.pdf](https://jogi.co.in/articles/files/filebase/Archives/1999/oct/1999_149_151_Oct.pdf).

<sup>11</sup> R. koe, R. Rowe, *supra* note 8.

<sup>12</sup> Bearak J et al., Global, regional, and subregional trends in unintended pregnancy and its outcomes from 1990 to 2014: estimates from a Bayesian hierarchical model, *Lancet Global Health*, 2018 (Mar. 25, 2023, 10:40 AM), [https://www.thelancet.com/journals/langlo/article/PIIS2214-109X\(18\)30029-9/fulltext](https://www.thelancet.com/journals/langlo/article/PIIS2214-109X(18)30029-9/fulltext).

The research methodology adopted for this research is doctrinal method. The doctrinal method comprises of the study of relevant legislations, judicial precedents, legal and jurisprudential doctrines. The data used for the study is secondary in nature and will be collected from annual reports of Ministry of Home Affairs, Ministry of Women and Child Development, Ministry of External Affairs, Government of India, various journals and periodicals, newspapers and different working committee reports.

### 3. GLOBAL TREND TOWARD ABORTION LAWS:

Unintended pregnancy and abortion are experiences shared by people around the world. These reproductive health outcomes occur irrespective of country income level, region or the legal status of abortion.<sup>13</sup>

For decades, the overwhelming global trend has been towards liberalization of abortion laws and increased access to abortion services.<sup>14</sup> Since 1994, 59 nations from all continents have liberalized their abortion laws to broaden the justifications for abortion. Only El Salvador, Nicaragua, Poland, and the United States have experienced declines on abortion rights during that time. As the U.S. Supreme Court did in June when it revoked the constitutional right to abortion and made it possible for states to completely outlaw it, each of these nations has eliminated the legal justifications for abortion care.

Although the legal status of abortion varies considerably by region, a large majority of countries permit abortion under at least some circumstances; globally, two dozen countries ban abortion entirely.<sup>15</sup>

The Preamble of the Universal Declaration of Human Rights describes the Declaration as, “a common standard of achievement for all peoples and nations” and states that “the peoples of the United Nations have reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights of men and women.”<sup>16</sup> The second article stresses further that these rights and freedoms belong to everyone, without discrimination, by virtue of being a human being: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind.”<sup>17</sup> International Covenant on Civil and Political Rights (ICCPR) also states that “Every human being has the inherent right to life. Law shall protect this right. No one shall be arbitrarily deprived of his life.”<sup>18</sup> This article clearly

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<sup>13</sup> Unintended Pregnancy and Abortion Worldwide (Mar. 26 2023, 10:38 AM), <https://www.guttmacher.org/fact-sheet/induced-abortion-worldwide>.

<sup>14</sup> Global Trends: Abortion Rights (Mar. 15, 2023, 10:38 AM), <https://reproductiverights.org/global-trends-abortion-rights-infographic/>.

<sup>15</sup> Abortion Law: Global Comparisons (Mar. 25, 2023, 11:38 AM), <https://www.cfr.org/article/abortion-law-global-comparisons>.

<sup>16</sup> *Universal Declaration of Human Rights*, Dec. 10, 1948, G.A. Res. 217 A (III), U.N. Doc.A/810 (1948) (Mar. 29, 2023, 10:38 AM), <http://www.un.org/Overview/rights>.

<sup>17</sup> *Id.*, art. 2.

<sup>18</sup> *International Covenant on Civil and Political Rights*, 1966, art. 6.

specifies that it is applicable to all human beings. Article 12 of the CEDAW Convention that provides that, “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.”<sup>19</sup>

From time immemorial, concerted efforts have been made to liberalize the abortion laws to give the desired human rights that women are required to deserve in order to have a wholesome life. Since 1994, nearly 60 countries across all regions of the world have liberalized their abortion laws to expand the grounds under which abortion is legal.<sup>20</sup> Abortion is a phenomenon that has been deliberated upon since times immemorial and continues to be a topic of contention even today.<sup>21</sup>

The Supreme Court’s decision on June 24, 2022, to strike down *Roe v. Wade*, overturns almost fifty years of precedent that conferred a constitutional right to receive an abortion.<sup>22</sup> The 1973 *Roe* decision allowed for restrictions after the first trimester of pregnancy while maintaining that the Constitution preserves the right to choose to have an abortion. Along with numerous countries in Western Europe, the United States was among the first to liberalize its abortion laws.

The right to an abortion was upheld in *Planned Parenthood v. Casey in 1992*, but new limitations, like waiting periods and parental consent requirements, were enabled. States have created and put into effect a variety of abortion-related regulations for many years. While some states approved legislation to safeguard access to abortion, other states sought to restrict abortion at earlier stages of pregnancy and placed more stringent requirements on abortion clinics. Many states have implemented more stringent abortion regulations in recent years, including Oklahoma, where the governor approved legislation barring abortions after six weeks except in life-threatening circumstances. The law is similar to one that was enacted in Texas in 2021; both empower individual citizens to bring legal action against anyone they believe is responsible for providing or assisting an abortion.

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<sup>19</sup> *Convention on the Elimination of All Forms of Discrimination against Women* (Mar. 05, 2023, 12:38 AM), [https://www.ohchr.org/sites/default/files/Documents/Professional Interest/cedaw.pdf](https://www.ohchr.org/sites/default/files/Documents/Professional%20Interest/cedaw.pdf).

<sup>20</sup> *The World’s Abortion Laws* (Mar. 27, 2023, 11:38 AM), <https://reproductiverights.org/maps/worlds-abortion-laws/>.

<sup>21</sup> Bhavish Gupta, Meenu Gupta, *The Socio-Cultural Aspect Of Abortion In India: Law, Ethics And Practise*, ILI LAW REVIEW 40 (2016).

<sup>22</sup> Abortion Law, *supra* note 15.

As per Health Ministry's data of Poland, 98 percent of the legal abortions each year in Poland owing to fatal defects in foetus, which means the new ruling is a near complete ban on abortions in the conservative country.<sup>23</sup>

The global trend in abortion law has been toward liberalization. Since 2000, thirty-eight countries have changed their abortion laws, and all but one—Nicaragua—expanded the legal grounds on which women can access abortion services.<sup>24</sup> Since 2020, South Korea, Mexico, and Thailand have decriminalized abortion, while New Zealand has loosened its regulations on the procedure, with certain restrictions on the age of gestation. The most recent example of a "green wave" in Latin America can be seen in Colombia, which recently legalised abortion on demand up to twenty-four weeks of pregnancy. While most nations have moved to broaden the legal justifications for abortion, some, like Honduras and the United States, are enforcing stricter rules and regulations. The targets outlined in various global goals and programmes must be met in order to uphold commitments to sexual and reproductive health and rights and improve results for all.

### **3.1 HUMAN DIGNITY AND PERSONHOOD POSSIBLE FOR WOMEN VIS-VIS ABORTION RIGHTS:**

“There is no freedom, no equality, no full human dignity and personhood possible for women until they assert and demand control over their own bodies and reproductive process...The right to have an abortion is a matter of individual conscience and conscious choice for the women concerned.”<sup>25</sup>

Of the 48.1 million pregnancies that occur in India annually, approximately half are unintended. A third of all pregnancies are aborted.<sup>26</sup> 12.3 million abortions, accounting for 78% of all abortions are illegal as per the terms of the Medical Termination of Pregnancy Act, 1971 (“MTP Act”) - even though they may otherwise be safe - solely because they occur outside of health care facilities.<sup>27</sup> The most vulnerable section of women are those who are impoverished, lives in rural areas, belongs to the ostracized segment of the society, don't have any educational qualifications and keep themselves under the constraints of the Indian society. they all are at the heightened risk of having unsafe abortions

<sup>23</sup> Rinki Sanyal, *This is War: Why Women in Poland are fuming over Abortion Rights*, THE QUINT (Mar. 25, 2023, 10:04 AM), <https://www.thequint.com/voices/women/poland-protests-over-abortion-ban#read-more>.

<sup>24</sup> Abortion Law, *supra* note 15.

<sup>25</sup> BETTY FRIEDAN, ABORTION: A WOMAN'S CIVIL RIGHT, 39 (reprinted in Linda Greenhouse and Reva B. Siegel, 1st ed. 1999).

<sup>26</sup> Aparna Chandra, *Legal Barriers to Accessing Safe Abortion Services in India: A Fact-Finding Study* (Mar. 15, 2023, 10:34 PM), [https://reproductiverights.org/wp-content/uploads/2021/08/Legal-Barriers-to-Accessing-SafeAbortion-Services-in-India\\_Final-for-upload.pdf](https://reproductiverights.org/wp-content/uploads/2021/08/Legal-Barriers-to-Accessing-SafeAbortion-Services-in-India_Final-for-upload.pdf).

<sup>27</sup> *Id.*

and having a deteriorated health in the long run. Abortion is a very sensitive topic and touches on the varied dimensions be it social, economic and political. It can be seen as a double-edged weapon having both positive and negative impacts on the society.

India, being a country with abundance of societal evils existing be it illiteracy, population explosion, untouchability, poverty and patriarchal mindset, the issue of abortion seems to be a cause of concern. The moral and legal debate with respect to the prevention of unwanted pregnancies seems to be going on since ages and it requires concerted efforts to come at a unified stance. In India, despite the fact that legislations exist, still the ethical controversies seem to have an upper hand because of which the women don't get to exercise their fundamental rights in its entirety.

Certain segment of the society holds the view that medical termination of Pregnancy and is immoral or derogatory to the rules of nature, but being in 21<sup>st</sup> Century, it is high time that people understand that abortion is a right of a woman and it cannot be taken away from her just because the student is adamant to not allow the women to live a life as per their own terms and conditions and live a dignified life. The society needs to change its mindset. Every person has a right to bodily sovereignty and human rights and various international instruments protect such rights. Thus, it becomes important to secure the right to abortion to every woman<sup>28</sup>

Seeing this scenario, various efforts were being made both at the national and international level to curb the issue of unsafe abortions, specifically at the national level, concerted efforts were made both legislatively as well as by judicial intervention.

### **3.2 ABORTION: RISKS AND ISSUES INVOLVED**

Unsafe abortions may be induced by the woman herself, by non-medical persons or by health workers in unhygienic conditions. Such abortions may be induced by insertion of a solid object (usually root, twig, or catheter) into the uterus, an improperly performed dilatation & curettage, ingestion of harmful substances or exertion of external force. Mortality & morbidity risks of induced abortions depend upon the facilities and skill of the abortion provider, method used, general condition of the woman, presence of reproductive tract infections and STD's, age and stage of pregnancy.<sup>29</sup>

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<sup>28</sup> *Abortion Arguments from Pro-Life and Pro-Choice Sides & Main Points of Debate* (Mar. 14, 2023, 10:38 AM), <https://www.thoughtco.com/arguments-for-and-against-abortion-3534153>.

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

### 3.3 COMPLICATIONS FROM UNSAFE ABORTION

According to the World Health Organization, 23,000 women die of unsafe abortion each year and tens of thousands more experience significant health complications.<sup>30</sup> Unsafe abortions unfurl tremendous changes in the anatomy of the women. It comes with loads of complications that prove to detrimental for the well-being and the holistic development of the women.

Variety of severe complications occur following unsafe abortions. Severe complications like sepsis, haemorrhage, genital and abdominal trauma, perforated uterus or poisoning can lead to death if left untreated. Death can also result from secondary complications like gas gangrene and renal failure.<sup>31</sup> Anemia and prolonged weakness are conditions that may persist long after an abortion takes place.<sup>32</sup> According to the State of the World Population Report 2022 by the United Nations Population Fund (UNFPA), unsafe abortions are the third most prevalent cause of maternal mortality in India. Each day, over 8 women pass away from causes associated to unsafe abortions. Unsafe abortion continues to be an important factor affecting women's reproductive lives and survival in the developing world, where 98% of all unsafe abortions occur<sup>33</sup>

An estimated 13% of maternal fatalities in developing nations are attributed to unsafe abortion, and 5 million women need treatment each year for problems related to induced abortion. In addition to its direct financial impact on healthcare systems, abortion has indirect financial effects on women, their families, and society as a whole. Budgetary effects of abortion include how much it costs to have an unsafe abortion, costs to treat any complications, and costs to be temporarily unable to carry out basic household and economic tasks. Some chronic conditions that result from unsafe abortion (e.g., pain, inflammation of the reproductive tract and pelvic inflammatory disease) may continue indefinitely, severely compromising women's health. These conditions, as well as other postabortion complications, may also result in secondary infertility.<sup>34</sup>

### 3.4 DATA ANALYSIS- ABORTION LAWS IN INDIA

Abortion has always been a controversial issue since ancient times. In the past, abortion was considered as a taboo in India. In modern times, the famous propagator of non-violence, Mahatma Gandhi quoted, It seems to me clear as daylight that abortion would be a crime. But with changing times, the ideology

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<sup>30</sup> Manju V. Mataliya, *supra* note 10.

<sup>31</sup> Manju V. Mataliya, *supra* note 10.

<sup>32</sup> Susheela Singh, *Global consequences of Unsafe Abortion* (Mar. 7, 2023, 11:04 AM), <https://journals.sagepub.com/doi/pdf/10.2217/WHE.10.70>.

<sup>33</sup> The Health, Social, and Economic Consequences of Unsafe Abortions (Mar. 7, 2023, 11:04 AM), <https://obgyn.onlinelibrary.wiley.com/doi/pdf/10.1016/S0020-7292%2812%2960002-2abortion>.

<sup>34</sup> The Health, Social, and Economic Consequences of Unsafe Abortions, *supra* note 33.



of people has become more liberal and subsequently many laws have developed, legalizing abortion in India.<sup>35</sup> The right to safe and legal abortion is a fundamental human right protected under numerous international and regional human rights treaties and national-level constitutions around the world.<sup>36</sup>

### **The Indian Penal Code, 1860**

The IPC, taking into consideration the social, emotional and medical implications of abortion, declares induced abortion as illegal all throughout India. **Section 312** of the Indian Penal Code, 1860 spells out abortion as causing miscarriage. It is specifically in respect of the women who is aborting a child intentionally and on purpose<sup>37</sup>.

**Section 313 of the IPC** states that under the provisions of this section, a person who causes the miscarriage without the consent of the pregnant woman, irrespective of the stage of her pregnancy, shall be punished with life imprisonment or a jail term extending up to 10 years, as well as a fine.<sup>38</sup>

It is pertinent to mention that Therapeutic abortion is legal and there is no bar on them. Abortion is also allowed in cases where there is a danger to the life of the women and her child. The foremost thing to be kept in mind is that the abortion must not be done till the time the sole purpose is to save the life of the mother.

### **Constitution**

No person shall be deprived of his right to life and personal liberty except according to procedure established by law. The Supreme Court has given wide amplitude to the expression Right to Life. This right covers right to sleep, right to live with dignity, right to privacy, right to move freely, right to health, etc. However, the predicament that arises is whether right to life includes the right to abortion. Another dilemma in the arena of abortion laws is the right of the mother to abort vis-à-vis the right of the unborn child to live.<sup>39</sup>

The Supreme Court of India has not ruled directly on the constitutionality of abortion restrictive laws for violating human rights of pregnant persons, although some such challenges are pending before the Court.<sup>40</sup> However, court pronouncements on the scope of fundamental rights guaranteed by the

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<sup>35</sup> Lisa Coutinho, *Constitutionality of Abortion Laws in India* (Mar. 4, 2023, 8:10 AM), <https://www.legalserviceindia.com/legal/article-1691-constitutionality-of-abortion-laws-in-india.html>.

<sup>36</sup> *The World's Abortion Laws*, *supra* note 20.

<sup>37</sup> *Abortion in India*, (Mar. 15, 2023, 09:04 AM), <https://timesofindia.indiatimes.com/readersblog/digitaldiary/abortion-in-india-34404/>.

<sup>38</sup> Jis John Sebastian, *Abortion Laws in India* (Mar. 25, 2023, 10:14 AM), <https://www.clearias.com/abortionlaws/>.

<sup>39</sup> Unsafe Abortion, *supra* note 5.

<sup>40</sup> *Swati Agarwal v Union of India WP (C) 825/2019 (India)*.

Constitution provide a normative framework for locating the right to access safe abortion services, and the harms caused due to abortion restrictive laws.<sup>41</sup>

The Indian Supreme Court has recognised that the right to life and liberty under Article 21 of the Constitution encompasses the right to reproductive autonomy which includes the right to make “reproductive choices ... to procreate as well as to abstain from procreating.”<sup>42</sup>

The Honourable Bombay High Court Stated that “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.”<sup>43</sup>

In *Independent Thought v. Union of India*<sup>44</sup>, the Supreme Court recognised minor girls’ reproductive autonomy and right to bodily integrity and noted that, “the discussion on the bodily integrity of a girl child and the reproductive choices available to her is important only to highlight that she cannot be treated as a commodity having no say over her body.”

The apex court has also stated in a remarkable judgement that “The marital status of a woman can't be grounds for depriving her right to abort an unwanted pregnancy. Single and unmarried women have the right to abort under the Medical Termination of Pregnancy Act and rules till 24 weeks of pregnancy”.<sup>45</sup>

### **Article 21 of Indian Constitution**

Article 21 of the Indian Constitution provides that no one's right to life or personal liberty shall be violated except in accordance with the procedure established by law.<sup>46</sup> The phrase "Right to Life" has gained new relevance since the Supreme Court firmly ruled that Article 21 protects a person's "reproductive rights." This right includes, among other things, the right to privacy, the right to a decent existence, the right to travel, and the right to health. In this situation, the issue of whether the right to abortion is protected by the right to life arises. The mother's right to end the pregnancy against the unborn child's right to live is a key topic of dispute in the abortion discussion. Since only "persons" are protected by the Right to Life under Article 21 of the Indian Constitution, the

<sup>41</sup> Aparna Chandra, *supra* note 28.

<sup>42</sup> Suchita Srivastava v Chandigarh Administration, (2009) 9 S.C.C. 1 (India).

<sup>43</sup> High Court on Its Own Motion v State of Maharashtra, 2017 Cri.L.J. 218 (Bom HC) (India).

<sup>44</sup> Independent Thought v Union of India, 2017 S.C.C. Online SC 1222 (India).

<sup>45</sup> Nalini Sharma, Aneasha Mathur, Srishti Ojha, *All women, married or unmarried, have right to safe abortion under law, says SC* (Mar. 22, 2023, 10:04 AM), <https://www.indiatoday.in/law/story/supreme-court-abortionmarried-unmarried-women-legal-safe-medical-termination-pregnancy-2006116-2022-09-29>.

<sup>46</sup> High Court on Its Own Motion, *supra* note 43.

right of a "unborn child" is essentially significant in this situation. Since a kid is considered a foetus while in the mother's womb until it is born, the question of whether an unborn child is a person is also very important.

In the case of *XYZ v. Union of India*<sup>47</sup>, it was held that the term 'life' in Section 5 of the MTP Act<sup>8</sup> ought to be interpreted broadly following the scheme of Article 21 of the Indian Constitution, considering both the physical discomfort and mental trauma associated with an unwanted or forced pregnancy.

The Supreme Court said that women have a constitutional right to make their own reproductive choices. They also said that the right to "abstain from procreating" was in line with the right to privacy, liberty, bodily autonomy, and dignity. It was J. Chandrachud who explained how access to contraceptive options and abortion important part of due process is. He also said that volitional autonomy for ending a pregnancy is a part of privacy. Privacy is a place where people can be alone, but they also have a lot of freedom. He said that an "unreasonable" restriction cannot be put on that freedom, and so it can only be allowed if it meets the constitutional standard of reasonableness.<sup>48</sup> Reproductive rights are used selectively and are subject to the court's discretion, which is frequently based solely on the medical board's opinion, despite the fact that numerous court decisions have stated that a woman's right to make reproductive choices is a dimension of her "personal liberty" under Article 21 of the Constitution.

### **Medical Termination of Pregnancies Act, 1971 (MTP Act)**

In the 1960s, in the wake of a high number of induced abortions taking place, the Union government ordered the constitution of the Shantilal Shah Committee to deliberate on the legalisation of abortion in the country.<sup>49</sup> With deliberations and discussions this Act was brought in force in the year 1971 to witness the decline in the maternal mortality rates owing to unsafe abortions. This act works as an exception to Section 312 and 313 of IPC. This Act also sets rules as to when and how the medical abortions can be carried out.

The Medical Termination of Pregnancy Act, 1971 ("MTP Act") was passed due to the progress made in the field of medical science with respect to safer abortions.<sup>50</sup> A commendable move was made to provide women access to reproductive health services and with this view the MTP Act was further

<sup>47</sup> *XYZ v Union of India* [W.P. 10835 of 2018] (India).

<sup>48</sup> Justice K.S. Puttaswamy and Anr. vs. Union of India (UOI) and Ors. (2019) 1 S.C.C. (India).

<sup>49</sup> Diksha Munjal, *What are India's laws on abortions?* (Mar. 14, 2023, 8:04 AM), <https://www.thehindu.com/news/national/explained-what-are-indias-laws-abortions-amid-roe-vwade/article65567494.ece>.

<sup>50</sup> *Medical Termination of Pregnancy (MTP) Amendment Act, 2021* (Mar. 10, 2023, 4:04 PM), <https://www.drishtiiias.com/daily-updates/daily-news-analysis/medical-termination-of-pregnancy-mtpamendment-act-2021>.

amended to provide women with all the comprehensive abortion care. Every expecting woman should have the right to make choices and decisions of her own. Right to abortion is one such right and choice provided to the woman.<sup>51</sup>

The new Medical Termination of Pregnancy (Amendment) Act 2021 expands the access to safe and legal abortion services on therapeutic, eugenic, humanitarian and social grounds to ensure universal access to comprehensive care.<sup>52</sup> According to the Rural Health Statistics 2019–20 report from the Ministry of Health and Family Welfare, there is a 70% shortfall of obstetrician-gynecologists in rural India.<sup>53</sup>

In *Nikhil D. Dattar v. Union of India*,<sup>54</sup> section 3 and 5 of MTP Act was challenged on the ground of non-inclusion of eventualities vires of the Act. This case further reiterated that the physical and mental trauma which may be experienced by women in such circumstances. It also highlighted the ethical issue faced by the doctors in similar situations.<sup>55</sup>

A recent judgement by the honourable supreme court emphasized on the global trend of nations strengthening varied provisions with respect to the abortion rights of the women. The

Court ruled that under India's Medical Termination of Pregnancies Act, 1971 (MTP Act), and its related rules, all women are entitled to safe and legal abortion, regardless of their marital status.<sup>56</sup> While abortion remains criminalized in India, the MTP Act created exceptions to criminalization and set forth circumstances under which some abortions could be permitted— such as in cases of rape or foetal anomaly, or for women with disabilities.<sup>57</sup>

A bench headed by Justice DY Chandrachud held that unmarried or single women cannot be excluded from seeking safe abortion of pregnancies up to 24 weeks under the Medical Termination act and the rules.<sup>58</sup>

The new law will contribute towards ending preventable maternal mortality to help meet the Sustainable Development Goals (SDGs) 3.1, 3.7 and 5.6. SDG

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<sup>51</sup> *Abortion under the Medical Termination of Pregnancy Act* (Mar. 25, 2023, 10:04 AM), <https://blog.ipleaders.in/abortion-under-the-medical-termination-of-pregnancy-act/>.

<sup>52</sup> Aparna Chandra, *supra* note 26.

<sup>53</sup> Jis John Sebastian, *supra* note 38.

<sup>54</sup> *S.L.P. (Civ.) No. XXXX of 2008 (Supreme Court of India)*, (Mar. 07, 2023, 12:04 PM), <http://www.hrln.org/hrln/images/stories/pdf/xandy-petition-8-3-14.pdf>.

<sup>55</sup> Centre for Reproductive Rights, Human Rights Law Network (Mar. 07, 2023, 12:04 PM), [https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Datar\\_v\\_India.pdf](https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Datar_v_India.pdf).

<sup>56</sup> *With Recent Ruling, India Follows Global Trend of Liberalizing Abortion Laws* (Mar. 25, 2023, 05:04 PM), <https://reproductiverights.org/india-abortion-mtp-act-supreme-court/>.

<sup>57</sup> *Id.*

<sup>58</sup> Nalini Sharma, *supra* note 45.

3.1 pertains to reducing maternal mortality ratio whereas SDGs 3.7 and 5.6 pertain to universal access to sexual and reproductive health and rights.

#### 4. ENSURING REPRODUCTIVE RIGHTS OF WOMEN

In May 2017, the Supreme Court of India denied a medical termination of pregnancy (MTP)<sup>59</sup> to Z., a 35-year-old woman from Patna, Bihar living with HIV who became pregnant as a result of rape.

The victim in a state of anguish may even think of surrendering to death or live with a traumatic experience which can be compared to have a life that has been fragmented at the cellular level. It is because the duty cast on the authorities under the Medical Termination of Pregnancy Act, 1971 is not dutifully performed, and the failure has ultimately given rise to a catastrophe; a prolonged torment<sup>60</sup>. The Human Rights Committee has repeatedly found that governments must ensure that their laws and policies do not force women and girls to continue pregnancies in cases of fatal foetal impairment, including the provision of appropriate and expansive interpretations of exceptions related to life and health.<sup>61</sup> The failure to do so violates many rights, including the rights to privacy, equality, and freedom from cruel, inhuman, and degrading treatment.<sup>62</sup>

The criminalization of abortion is recognized as a form of “gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment and also violate women’s rights to health, dignity, autonomy, and equality.”<sup>63</sup>

“Women die 'every day' due to unsafe abortion” as stated in United Nations Population Fund

(UNFPA)'s State of the World Population Report 2022 stated that about 67% of abortions in India are unsafe. Another issue which many women faces are that of geographical access. About 66% of India's population lives in rural parts of the country, where there is a severe shortage of obstetrician-gynecologists,

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<sup>59</sup> The terms “medical termination of pregnancy” (MTP) and “abortion” are both used in this briefing paper. Courts have used the term MTP to include terminations at advanced stages of pregnancy.

<sup>60</sup> Ms. Z v. The State of Bihar and Others, C.A. 10463 of 2017, S.C.C. (India).

<sup>61</sup> Johanna B. Fine, Katherine Mayall, Lilian Sepúlveda, *The Role of International Human Rights Norms in the Liberalization of Abortion Laws Globally* (Mar. 10, 2023, 11:10 AM), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5473039/>.

<sup>62</sup> *Id.*

<sup>63</sup> Committee on the Elimination of Discrimination against Women, General Recommendation No. 35: on article 4, paragraph 1 (Mar. 7, 2023, 05:20 PM), <https://www.ohchr.org/en/treaty-bodies/cedaw/launch-cedawgeneral-recommendation-no-35-gender-based-violence-against-women-updating-general>.

according to the Indian health ministry's 2019-20 Rural Health Statistics Report.<sup>64</sup>

Despite abortion being legal, the high estimated prevalence of unsafe abortion demonstrates a major public health problem in India. Socioeconomic vulnerability and inadequate access to healthcare services combine to leave large numbers of women at risk of unsafe abortion and abortion-related death.<sup>65</sup>

In a world where there has been a considerable backsliding of women's reproductive rights, this is a landmark judgment, as it allows for not just a recognition of fundamental rights of those with the reproductive abilities, but also creates a conducive environment to foster safe and legal access to reproductive health.<sup>66</sup> Each woman has the sole right to make decisions about what happens to her body - no one should force her either to carry or terminate a pregnancy against her will. Most abortions are carried out on the grounds of safeguarding the woman's mental health.<sup>67</sup> Act of performing an abortion to save the mother's life when occurs, however, the rationale is not that the foetus is seen to have less value than the mother, but that if no action is taken both will die. Aborting the foetus at least saves the mother's life.<sup>68</sup> Public health is not a running race. It is an integral part of a country's developmental path with several moving parts. It is important to set women's health in India in the trajectory it merits.<sup>69</sup>

## 5. CONCLUSION AND SUGGESTIONS

In India 7 million abortions are taking place annually. About 50 percent of total abortions in India are considered illegal.<sup>70</sup> Women in India have a range of health care needs related to pregnancy, and these vary according to the outcome of their pregnancy: For instance, women bringing a pregnancy to term, as well as some women who experience late miscarriages, need prenatal and delivery care; women experiencing complications of unsafe abortion need postabortion care; and women and their infants may need emergency maternal and new-born health services.<sup>71</sup>

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

<sup>65</sup> R. koe, R. Rowe, *supra* note 8.

<sup>66</sup> *What a landmark ruling on abortion will mean for women in India* (Mar. 25, 2023, 11:04 AM), <https://www.weforum.org/agenda/2022/10/what-a-landmark-ruling-on-abortion-will-mean-for-women-in-india/>.

<sup>67</sup> Manisha Garg, *Right to Abortion* (Mar. 27, 2023, 11:50 AM), [https://www.legalserviceindia.com/articles/adp\\_tion.htm](https://www.legalserviceindia.com/articles/adp_tion.htm).

<sup>68</sup> *Id.*

<sup>69</sup> Chitra Subramaniam, *India's new abortion law is progressive and has a human face* (Mar. 14, 2023, 8:10AM), <https://www.orfonline.org/expert-speak/india-new-abortion-law-progressive-human-face-62023/>.

<sup>70</sup> Jis John Sebastian, *supra* note 38.

<sup>71</sup> Susheela Singh Rubina, *supra* note 1.

970 million women, representing 59% of women of reproductive age, live in countries that broadly allow abortion. While a majority of women live in countries where they can exercise their right to abortion, 41 percent of women live under restrictive laws. The inability to access safe and legal abortion care impacts 700 million women of reproductive age.<sup>72</sup> Abortion is a serious and grave health concern that needs constructive attention at its earliest. It is a wavering right for the women to avoid her unintended and unwanted pregnancy sans getting her life in danger or violating her rights enshrined in Article 21 of the Constitution of India. Women as a matter of her fundamental right is entitled to safe abortion services as it will ensure and guard her against any dominant pressure existing in the society.

There should not be any attempt to coerce the women to carry on with her unwanted pregnancy. Its prevention must be given the foremost priority. We should also keep in mind to ensure that if the woman is willing to get her child aborted, she should be provided with the reliable information, counselling and service that is required. An appropriate strategy to reduce maternal mortality from unsafe abortions would be to offer information & services to ensure that every child is a wanted child and that no woman need face an unsafe abortion<sup>73</sup> Abortion rights have been a contentious issue across the world, especially after the U.S. Supreme Court in June overturned the **Roe v. Wade** judgment which had established a constitutional right to abortion in the country.<sup>74</sup>

Safe and legal abortion services are but one part of a package of necessary maternal health care, and strengthening and expanding abortion-related services is an important step toward bettering overall provision.<sup>75</sup> Contraceptive services are also very much the need of the hour to curb illegal and unsafe abortions in India. A continuous care for all the women of reproductive age is essential as it will help them to overcome any kind of adversity, they are facing with respect to their reproduction mechanisms, specifically as part of postabortion and postpartum services. This will be beneficial to address and prevent unintended and unsafe pregnancies. Various additional steps are required to be taken by India to ultimately eradicate the practice of illegal abortions before it spreads its tentacles exclusively in the Indian society. To permit the termination of pregnancies, the government must ensure that all professional standards and laws are upheld countrywide in hospitals and other healthcare facilities<sup>76</sup>. All initiatives must be operationalized keeping in mind all the strata of the society, specifically the disadvantaged and poor women.

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

<sup>73</sup> Manju V. Mataliya, *supra* note 10.

<sup>74</sup> Bhumika Saraswati, *India's top court rules abortions up to 24 weeks legal, regardless of marital status* (Mar. 2, 2023, 10:05 AM), <https://www.pbs.org/newshour/world/indias-top-court-rules-abortions-up-to-24-weekslegal-regardless-of-marital-status>.

<sup>75</sup> Susheela Singh, *supra* note 1.

<sup>76</sup> Jis John Sebastian, *supra* note 38

Whatever steps are taken must prioritize the needs of disadvantaged groups, including poor and rural women, ensuring that no groups are left behind. Since time immemorial, various forms of birth controls and abortion practices have been practiced by women. All of these practices have stirred mixed bag of reactions in terms of moral, political, ethical and legal debates as the ambit of abortion is very wide and it is not merely restrictive to the medical arenas. It signifies a fulcrum of a magnificent ideological struggle which questions the sexuality, reproductive rights of a woman. It is commendable that the Central Government is taking bold stands while balancing the diverse cultures, traditions and schools of thought that our country maintains, however, still it leaves women with various conditionalities, which in many cases become an impediment in access to safe abortion.<sup>77</sup>

It is on the shoulders of the law to take care of the independence and freedom of the mother as well as the life of unborn. The medical community and society need to offer love and support to women with unplanned pregnancies and to assist them in finding empathetic alternatives to abortion.<sup>78</sup> Women their right to determine their sexuality, fertility and reproduction are considerations that have seldom, if ever, been taken into account in the formation of policies related to abortion.<sup>79</sup> Looking at nations that are developing, 93% of them have restrictive laws, the picture is bleak. We must step up our efforts to promote fairness in sexual and reproductive health on a worldwide scale so that women won't turn to illegal means of abortion. The terms "termination of pregnancy" and "vulnerable women" should be clarified and enlarged in order to facilitate the beneficial legislation's intended interpretation. Additionally, including Ayurvedic, Unani, and similar genuine practitioners by adopting uniform rules under the scope of certified medical practitioners will go a long way in eliminating covert ways of abortion. The path to ensuring secure access to abortion, safer use of modern contraceptives, availability of medical abortion drugs in primary healthcare facilities, complete autonomy on abortion on request, and post-abortion services is essential to ensuring safe and equal abortion laws for everyone who becomes pregnant, including women, transgender etc. The stigma around abortion should cease with national health systems offering a full package of necessary sexual and reproductive health services, including contraception and safe abortion treatment.

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<sup>77</sup> *Indian laws on Abortions* (Mar. 14, 2023, 11:40 AM), <https://www.insightsonindia.com/2022/06/27/editorial-analysis-indian-laws-on-abortions/>.

<sup>78</sup> Bhavish Gupta, *supra* note 21.

<sup>79</sup> Amar Jesani and Aditi Iyer, "Women and Abortion" (6) *Economic and Political Weekly* (Mar. 12, 2023, 11:00 AM), <http://www.jstor.org/action/cookie>.



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