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**WOMEN’S RIGHT TO ABORTION: A  
CONSTITUTIONAL APPROACH CONCERNING  
HUMAN RIGHTS**

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## 1. ABSTRACT

The origin of word Abortion can be traced back from the Latin term that is ‘Abortus’. It means the object is separated from its original place. It means the removal of a foetus from the womb before the term of pregnancy. According to *Webster's New International Dictionary* 'abortion' means “*an act of giving premature birth*”, specifically the expulsion of human foetus prematurely at any time before it is viable or capable of sustaining life. In the twentieth century, the position was such that approximately more than half of the population in the world was against the abortion laws. The women at that time were having other options to get rid of the unwanted child. The only option left for them was to go for self-abortion or illegal abortion. The modification in the laws relating to abortion was the reaction of these incidents. People starting demanding lenient laws regarding abortion.

In the Indian context, we have a very detailed law on the termination of pregnancy which was done in 1971. The Constitution of India guaranteed every person to protect their fundamental rights and Human Rights. Constitution valued women more than men, Women has more right than men. But according to the current situation, these laws are found to be outdated. But if we compare it with the religious sanctity whether the laws in our country are sufficient or does it need to be changed to analyze all this we will be discussing the laws in India and also the religious aspects of abortion, especially among Hindus and Muslims. The law governing abortion in India is known as the Medical Termination of Pregnancy Act 1971. This Act was enacted to liberalize the law relating to abortion.

**Keywords: Abortion, Pregnancy, Constitution, Human Rights.**

## 2. INTRODUCTION

The origin of word Abortion can be traced back from the Latin term that is ‘Abortus’. It means the object is separated from its original place. It means the removal of a foetus from the womb before the term of pregnancy. According to Webster's New International Dictionary 'abortion' means an act of giving premature birth, specifically the expulsion of human foetus prematurely at any time before it is viable or capable of sustaining life. Abortion is such a topic that it revolves around many controversies, the reason can be the aspects involved in it like social,

moral, religious. They want to have a family when they wish or desire. They also try to control the population by one or the other way.

But one thing was common that they all agreed to risk the life of a foetus in one situation and that was to protect the mother from harm. If her life was at risk then in such a situation abortion was allowed. Hygienic abortion is also one of the aspects which helped to bring about gender justice in society. Abortion, in the beginning, was never accepted by the religious people. It was always neglected by the legislators also and now it became necessary for female emancipation. It was now understood that it was a women's right to have a baby or not to have it, she was at liberty

The advancement of Science and Technology has to lead to many developments one of them is that the deformities in the child can be detected even after the 20 weeks of pregnancy. If the women come to know about it she can abort the child as it is her right under Article 21 and the person refusing her will be violating her right to privacy. We can find in many cases it has been allowed by the Supreme Court and High Court after keeping all the circumstances in mind.

In 2018 a bill was proposed as for there should be some provision for the child born with deformities or severe disease or heart disease. It has been urged that the termination of a child with deformities should be allowed at advanced stages if the mother becomes aware of it.

### **3. ANALYSIS OF LAW RELATING TO ABORTION**

Abortion is the term in criminal law, which describes aborting a child knowingly or intentional abortion. But miscarriages are not considered to come within the definition of abortion nor does the induced abortion come in the context of abortion. If we talk about the situation in common law it is such that the person performing an abortion on the lady or the person bringing women for abortion are considered to be held guilty for abortion. The women who are undergoing abortion or have herself went for abortion procedures have been exempted from the liability.<sup>1</sup> The definition of Abortion has gone through tremendous changes in the modern and common law era. There are many reasons behind this it can be modernization or liberalization of the religious views. With the emergence of changes in these laws of abortion, there have been drastic transformations in the scientific and obstetric knowledge about the

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<sup>1</sup> Perkins, p.139.

gestational period. Even the United States of America's SC's 1973 invalidated the abortion limitation in most of the states and the congressional debates that followed turned, in large part, on differing medical assessments of human reproduction.<sup>2</sup> If we look back into History we will find many a time the women have used different methods to control the pregnancies and birth of the child. Due to this behavior, there have been large debates and arguments going on legal, political, and ethical aspects of abortion therefore, it is not merely an issue of medical importance now. It is the difference of ideologies of people like on the matter of motherhood, family, and state.<sup>3</sup> If the mother's right is protected they will argue that the foetus has been deprived of the basic law of the right to live and on the other hand if the child is protected mother is said to be deprived of her Right to life. So this has been a great tussle between the supporters. This issue is not only related to religion but it is as important as a public policy matter as that of religious matter. Some may say that abortion is a murder that is why it should be prohibited under law. In such an argument, it should be considered by Govt. as legally prohibited to abort a child even in rarest of rare case. The rape or sexual victimization should no more be the ground for abortion. The Govt. tries to protect foetus at all costs but the foetus itself does not have the life or personhood criteria fulfilled. Then came a landmark case that changed the problem of abortion whole world that is the case of Roe v. Wade is this case it was held for the very first time that the women have got right to decide about there bodies as they have got the right of privacy. Also, we will discuss how the termination of pregnancy laws came in India. How it has been liberalized time to what all amendments have been made in the MTP Act all this will be discussed. There will be a detailed analysis of the history along with the current law in this chapter. Here we will look at the Women's right of reproductive decision and the emergence of laws in India, the amendments, the Bill proposed, and the analysis of legislation on termination of pregnancy in India.

#### **4. HISTORICAL EVOLUTION OF ABORTION LAWS**

If we look back into the history of abortion laws we will find how it has influenced the lives of men and women in different times and places. It was first enacted by the sixth King of Babylonian that is Hammurabi.<sup>4</sup> This code was such that it imposes fine or compensation if a

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<sup>2</sup> Roe V. Wade, 410, U.S. (1973); Doe V. Bolton, 410, U.S. 179 (1973); Cohodas, 1981b.

<sup>3</sup> R.P. Petchesky 1986 vii.

<sup>4</sup> The code of Hammurabi is a well-preserved ancient law code created ca. 1790 BC in ancient Babylon.

miscarriage of women was caused. There were different laws among Romans which shows the sign of acceptance towards abortion. But till the end of the thirteenth century, we were not having any detailed legislation accepting abortion. Although Romans were having a law it was to control family or population but, it did not consider foetus not being part of women's body they were considered as part of each other. In 211 A.D. at the time of the reigns of Septimius Severus and Caracalla, abortion was outlawed for some time as it was considered to be violating the rights of parents, punishable by temporary exile. Moreover, the late legislation by Romans was made not out of the protection of morality but it was made due to the issue of population growth and as a measure to control it. It is not clear that in history how was abortion looked upon as ethical or not, thus there was no such legislation till the end of the 18<sup>th</sup> century. Among all other factors, one of the reasons was the socio-economic tussle between the midwives and the male medical physicians. In the 18th century, American and English Common law<sup>5</sup> permitted abortion if it took place before “quickening” of the child. Till the end of the nineteenth century, most of the nations have a ban on abortion by making laws. But then in the latter half of the twentieth century, many western nations made laws to legalize abortion. Under the English Common law<sup>6</sup> abortion of a child after “quickening” was punished as it was considered a homicide, and if the foetus was already a child but not quickened and if abortion takes place it was a punishable offence.

We will now discuss the history of abortion in chronological order. The very first law legalizing abortion was passed in Colorado, it was the victory of abortion movements taking place. It was based on the Model Penal Code. Then further, following the provisions of Model Penal Code where abortion was permitted on the grounds other than the mother's life in being danger one-third of the states opted this law either completely or partially. This happened between 1967 – 1973. In 1973 there came a ruling in Roe and Doe pointing the legislation regarding abortion in the state of Georgia and Texas was violating the women's right to terminating her child. This Judgement was given based on the fourteenth amendment that took place in the USA on the Right to privacy comprised of the women's decision of her pregnancy whether she wants it or not.

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<sup>5</sup> Common law refers to “law developed by judges through decisions of Court's and similar tribunals (called case law), rather than through legislative statutes or executive action, and to corresponding legal system that rely on precedential case law”.

<sup>6</sup> English law is the legal system of England and Wales, and is the basis of common law legal systems used in most common wealth countries and the United States.

The U.S. Supreme Court, in *Roe V Wade*, gave a judgement that bans on abortion within the first trimester of pregnancy by all the individual states is unconstitutional, within the Sectionond trimester it was declared that abortion is not forbidden but permitted, and in the third trimester of pregnancy, the abortion is permitted not banned but only when there is some danger to the life of the mother the injury can be to mental as well as physical health both. Also, abortion was allowed in all the trimesters of pregnancy if there was a belief that the continuation of a child may lead to mental or physical trauma. Moving further in 1989 in the case of *Webster V. Reproductive Health Services*, 492, U.S., 490, it was held that the decision of *Roe and Doe* has not been overruled but the restrictions were reviewed on the women’s right of abortion and her right was respected. Then, in 1992, in *Planned Parenthood of Southeastern Pennsylvania V. Casey*,<sup>7</sup> the court rejected specifically *Roe’s* “Strict Scrutiny Standard” and adopted the “undue burden analysis”. The Supreme Court of the United States overturned the trimester framework in *Roe V. Wade*,<sup>8</sup> made it legal for states to forbid abortion, except the instances where the woman’s health was at risk. Finally, in 2000, the court in *Carhart N. Stenberg*,<sup>9</sup> determined that Nebraska Statute prohibition on the performance of “partial-birth” abortion was held unconstitutional, without providing exceptions to preserve a woman’s health.

## **5. INTERNATIONAL CONVENTIONS ABORTION OF CHILD**

Article 1 of the Inter-American Commission of Human Rights and the American Declaration of Rights and Duties of Man states that “abortion is legalized until the end of the First trimester”. “The Right to life has been protected from the moment it has been conceived” Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR). Article 4 of the African Charter of Human and People’s Right and Article 2 of the European Convention of Human Rights but they are silent on the issue of when does life begin. Moreover, it is believed that child has never been protected from the moment it is conceived. There has to be a balance between the foetus and the mother’ s rights. The International Tribunal and courts have tried their best on the philosophical discussion of when the life of a child begins, but they also are stuck to the definitions and interpretations given under different treaties. The importance has been given to women having The Right to Privacy that is the reason she

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<sup>7</sup> 505, U.S., 833 (1992).

<sup>8</sup> 410 U.S. 113 (1973).

<sup>9</sup> 530 U.S., 914, 120 S. ct. 2597 (2000).

has been given abortion as her right. It is her Right to choose as it is her body her life. The decision should be complete of a woman whether she wants to abort or keep the child.

### **The Landmark Decision of Roe v. Wade:**

In the twentieth century, it never happened that such a controversial judgement is passed by the SC of America as that of Roe V. Wade<sup>10</sup> it was held that women decide that whether she wants an abortion or not as it is her Right to privacy and her right to choose. The effect of this decision was breathtaking as now the women were at liberty to go for abortion by the medical experts and were to get safe abortions. Due to this, there was a drastic decrease in the number of deaths that were taking place at the time of pregnancy. The day January 22, 1973, is looked upon as the historical day for the feminists and was the big step towards achieving women's equality. As the judgement gave women right on their own body and they got the right to choose what they want and whatnot. All the laws in the states forbidding abortion were declared to be unconstitutional. The mother's right was given importance as the foetus was not having enough grounds to have precedence over the mother's right. There was 14<sup>th</sup> and 9<sup>th</sup> amendment about the Right to Privacy and the women's right to abortion was included under these amendments. Other than this there were various other reasons to permit the termination of pregnancy as the legal option for women.

## **6. HISTORY OF ABORTION LAWS IN INDIA:**

### **6.1. INDIAN PENAL CODE, 1860-**

In India Abortion is allowed only if required to protect the life of women. Earlier we were having only law on abortion in the name of Section 312 of the Indian Penal Code. Later on, The Medical Termination of Pregnancy Act came into force. The law envisaged under Section 312 was of such a nature that India was counted with the countries having very strict abortion legislation.

The Section 312,11 of the Indian Penal Code, provided: "Whoever voluntarily causes a woman with child to miscarry shall if miscarriage is not carried in good faith to save the life of the woman, be punished with imprisonment of either description for a term which may extend to

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<sup>10</sup> 410 U.S. 113 (1973).

<sup>11</sup> The Indian Penal Code 1860.

three years, or with fine or with both, and if the woman is 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”. Also, heavy penalties were imposed in case of infanticide or if the consent of women has not been taken before the abortion. Till 1971, abortion in India was governed by IPC and CRPC. The procedure was laid down in CRPC and rest provisions were in IPC. Abortion in India was ban before 1971 under Section 312 of the IPC, 1860. The only exception was if the mother's life is in danger so to save her, also it was to punish the providers carrying abortion “with whoever voluntarily caused a woman with child to miscarry facing three years in prison and/or a fine, and the woman availing of the service facing seven years in prison and/or a fine.”

Nearby the 1960s, approximately 15 countries decriminalized abortion and it was the moment when India thought about it and initiated a step towards it. There were a large number of abortions taking place which made the Ministry of Health and Family Welfare concerned about it.<sup>12</sup> To resolve this issue a step was initiated by Govt. of India. They constituted a Committee in the year 1964 known as Shantilal Shah and asked for suggestions and recommendations on the modification of abortion laws in the country. The MTP Act was the result of recommendations and suggestions of this committee which was introduced in both the Houses of Parliament as the Medical Termination of Pregnancy Bill in the year 1970. The report was given by committee majorly focused on the unhygienic abortion and its ill effects. We can say that in the 1990s many tremendous changes took place in the field of abortion as new laws were made the technology was also growing and taking new shape along with this sex-selective abortion demand was also increasing which was increasing the cases of female infanticide. Few developments can be pointed out as introduction of the law for abortion and new techniques like vacuum aspiration technique and medical abortion which increased the rate of safe termination of pregnancies.

In *Murari Mohan Koley v. The State and Anr.*<sup>13</sup> the women approached the court with the plea that she has six months old daughter and want to go for abortion. For this purpose, she has already contacted a medical practitioner and the officer accepted and took her for the same. Due to certain inevitable circumstances, the condition of women deteriorated in the hospital and she was taken to another hospital. But unfortunately, she died. Here the burden was on the

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<sup>12</sup> Unsafe abortion: the preventable pandemic. 25 November 2006. *The Lancet*. Vol. 368, No. 9550. Pp.

<sup>13</sup> (2003) cited in *Women and Law: Protection to Pregnancies*, p. 241.

practitioner to prove that he did the act in good faith to save women then only he will be exempted under Section 3 of the Act.

**Where pregnancy may be terminated** is given under Section. 5,<sup>14</sup>that “no termination of pregnancy shall be made under this Act at any place other than a hospital established or maintained by Government, or a place for the time being approved for this Act by Government”.

Further Section. 6,<sup>15</sup>of the Act, states that the Central Government is authorized to make rules that are to be carried while applying this Act-

(a) they can lay down provisions regarding training and experience required by the medical practitioner under this Act; and

(b) also, they can make rules regarding any other matter which may be mentioned in the Act.

The Section. 7 of the Act states when the State Government can make rules and regulations-

“(a) 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; (b) 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.”

Section. 8 is to protect the medical practitioner from any type of liability arising out of the act done by him in good faith to protect his patient. He cannot be held guilty if there is an occurrence of some mishappening with the child or mother.<sup>16</sup>

In **Surendra Chauhan v. State of M. P** (Criminal Appeal No. 342 of 1998)<sup>17</sup> the Supreme Court held that now the IPC is the Submissive Act for abortion from the time Medical Termination of Pregnancy Act came into force.

Therefore, with the passing of this Act, we can say that now IPC is the child Act and MTP is the parent Act. but this new Act has in no case overturn the IPC as unconstitutional. Both are to be used together and interpreted. We can say the abortion law has been made liberal only by

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<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> <http://egazette.nic.in/WriteReadData/1971/E-1383-1971-0034-61647>

<sup>17</sup> <https://www.lawyerservices.in/Surendra-Chauhan-Versus-State-of-MP-2000-03-27>

the coming of Medical Termination of Pregnancy Act. We can say that the MTP Act lays down certain exceptions to the general law of IPC that was strict.<sup>18</sup>

## **6.2. THE MEDICAL TERMINATION OF PREGNANCY AMENDMENT ACT, 2002:**

According to Section 2 of the Act,-

(i) the word “lunatic” should be replaced with a “mentally ill person” in clause (a) for this Act.

(ii) In clause (b) the meaning of mentally ill person shall be “a person who needs treatment because of any mental disorder other than mental retardation”,<sup>19</sup>

Section 4 of the Act, shall be modified as follows:

“ No termination of pregnancy shall be made under 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 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.”<sup>20</sup>

Section 5 of the Act, shall be changed and the modification was recommended on subSection (2) and explanation:

“(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.

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<sup>18</sup> I. Jaising (Ed.), Pre-Conception & Pre-Natal Diagnostic Techniques Act: A Users Guide to the Law, Universal Law Publishing Co, Delhi (2004), p. 63-64.

<sup>19</sup> [http://www.rajswasthya.nic.in/PCPNDT%2005.12.08/\(11\)/MTP%20Amendmend%20act%202002%20\(8\)](http://www.rajswasthya.nic.in/PCPNDT%2005.12.08/(11)/MTP%20Amendmend%20act%202002%20(8)).

<sup>20</sup> Ibid.

(3) Whoever terminates any pregnancy in a place other than that mentioned in Sectiontion 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 the owner of a place that is not approved under clause (b) of Sectiontion 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 this Sectiontion, the expression “owner” concerning 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 this Sectiontion, so much of the provisions of clause (d) of Sectiontion 2 as relating to the possession, by a registered medical practitioner, of experience or training in gynecology and obstetrics shall not apply”.

### **6.3. MEDICAL TERMINATION OF PREGNANCY RULES 2003,<sup>21</sup>-**

Definitions – There are few terms defined for this Act by these rules they are:

(a) “Act means the Medical Termination of Pregnancy Act, 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 concerning 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 provision to clause (b) of Sectiontion 4 read with rule 3”.

(1) it comprises of one person being Gynaecologist, Anaesthetist or Surgeon and other persons should be from local medical jobs, Panchayati raj or NGOs in the District level Committee. Also, one member of all must be a woman.

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<sup>21</sup> Vide S. O. 485 (E), dt. 13-6-2003, published in the Gazettee of India, Extra Pt. I, S. 3 (i), dt 13-6-2003p. 11-20.

(2) the tenure of members of the committee will be of two years and not more than that but for the persons from Non Governmental organizations, they cannot become a member of two terms of membership has crossed already.<sup>22</sup>

The training and experience required under clause (d) of Section 2:-

“For clause (d) 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 not less than three years.

(b) In the case of a medical practitioner, who is registered in a State Medical Register,<sup>23</sup>:-

(i) If he has completed six months of house surgery in gynaecology and obstetrics; or

(ii) Unless the following facilities are provided therein, if he had experienced at any hospital for 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. with this training the practitioner will be able to do an abortion on only up to 12 weeks pregnant women 1<sup>st</sup> trimester and not beyond that.

ii. the sub-rules under (b), (c) and (d) prescribe the training and qualification for the abortion to be done by medical practitioner beyond 12 weeks up to 20 weeks

(d) if the medical practitioner is registered under state medical register and has done diploma or masters then the experience of such degree training will be held valid for this purpose.<sup>24</sup>

#### **6.4. A PLACE TO BE APPROVED BY GOVERNMENT – RULE 5 OF THE ACT:**

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<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid

(1) the approval should not be given to place until and unless following has been ensured:

(i) the Government should inspect that the place is in hygienic condition and also safe for abortion purpose,

(ii) that place should be inclusive of the following facilities:

If the termination of pregnancy is to be made up to 12 weeks or of the first trimester-

“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 the Sectionond trimester, that is up to 20 weeks of pregnancy:-

(a) an operation table and instruments for performing abdominal or gynaecological surgery;

(b) anaesthetic equipment, equipment;

(c) drugs and parental fluids for emergency use, notified by the Government of India from time to time”.<sup>25</sup>

(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 to satisfy 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.

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<sup>25</sup> **Explanation-** In the case of termination of early pregnancy up to seven weeks using RU-486 with Misoprostol, the same may be prescribed by a Registered Medical Practitioner (RMP) as defined under clause (d) of Sectiontion 2 of the Act and Sectiontion 4 of MTP Rules, at his clinic provided such a Registered Medical Practitioner has access to a place approved under Sectiontion 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.

(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 8.

(7) The certificate of approval issued by the Committee shall be conspicuously displayed at the place to be 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 under the Medical Termination of Pregnancy Rules 1975 shall be deemed to have been approved under these rules.”<sup>26</sup>

## **7. CONSTITUTIONAL PERSPECTIVE AND JUDICIAL ATTITUDE**

Abortion has been defined in Law Dictionary as the termination of Pregnancy that is Spontaneous or artificial and it is done on the stage when the foetus is such that it will not be able to live without the mother’s womb.<sup>27</sup> It is “the spontaneous or artificially induced expulsion of an embryo or foetus. As used in the legal context, the term usually refers to induced abortion.”<sup>28</sup> Black’s Law Dictionary defines abortion as “the knowing destruction of the life of an unborn child or the intentional expulsion or removal of an unborn child from the womb other than for the principal purpose of producing a live birth or removing a dead foetus”. Moreover, the doctor or attending physician of women may decide on the termination of pregnancy with the will of the patient in the first trimester of pregnancy and there will be no state or legal limitation upon him in doing so. He can decide whether termination is possible or not and then abortion can be done without any limitation of law or state.<sup>29</sup> The Supreme Court of the United States in *Roe v. Wade*<sup>30</sup> in this case women were granted legal permission for induced abortion at any time before the fetus becomes feasible. In another case, *Doe v. Bolton*,<sup>31</sup> it was held by the court that the state can not deny women her right to abortion which

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<sup>26</sup> Supra Note 26.

<sup>27</sup> The Law Dictionary Featuring Black’s Law Dictionary 2nd Ed. Law Dictionary <http://thelawdictionary.org/>. Retrieved on 15 March 2020.

<sup>28</sup> <http://legal-dictionary.thefreedictionary.com/abortion>.

<sup>29</sup> *Roe v. Wade* 410 U. S. 11393 S. Ct 763,35 L. Ed. 2 d 147.

<sup>30</sup> *Ibid*.

<sup>31</sup> 410 U. S. 179 (1973).

is a Fundamental Right, the state cannot in any way restrict a women's decision of abortion. Therefore, we can define abortion as "a term that, in philosophy, theology, and social debates, often means the deliberate termination of pregnancy before the foetus can survive outside the uterus. However, participants in these debates sometimes use the term abortion simply to mean the termination of pregnancy before birth, regardless of whether the foetus is viable or not."<sup>32</sup>

### **7.1. ABORTION RIGHTS OF WOMEN UNDER THE CONSTITUTION OF INDIA**

In the last decade, the Indian courts have given certain notable decisions recognizing the reproductive rights of women as the “inalienable survival rights” that have been given protection under the Fundamental Rights. In many landmark judgments court has said for the first time about reproductive rights of women as important to achieving gender equality and also women has got right to bodily autonomy and they have the right to decide on abortion. Where there is a case of maternal health courts, child marriage, abortion, and contraception courts adopt such definition which matches the standards of Human Rights. But these decisions were not uniform and many a times court decided against the reproductive rights of women. Also, the case which gave the reproductive right for the first time in the world has recognized maternal health as a right. This is the foundation for the Indian courts which helps in preventing the violation of abortion rights.<sup>33</sup>

### **7.2. FUNDAMENTAL AND HUMAN RIGHTS IN INDIA**

The Reproductive Rights are as basic as any other Right to constitute a Human Right. They envisage the spectrum of economic, political, and social rights, then right to life and health, Right to Privacy, equality, non- discrimination. It is the duty upon states to guarantee women reproductive health services and information and also to reduce the unsafe abortions maternal mortality rate and the right to decide on the termination of pregnancy. There should be no discrimination, violence, and coercion. Women and girls should have access to all these rights about reproduction and sexuality. If the reproductive rights are violated it harms women disproportionately as they are the one who gives birth and become pregnant and they will then further violate the human right and effect the gender justice concept. The Indian Constitution recognizes these rights under Fundamental Rights and the Government is duty-bound to uphold it. It includes Article 15 and 15 Right to Equality and against non-discrimination and Article

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<sup>32</sup> Abortion. "Dictionary of World Philosophy. London: Routledge (2001).

<sup>33</sup> <https://reproductiverights.org/sites/default/files/documents/Reproductive-Rights-In-Indian-Courts.pdf>

21 Right to life and personal liberty, it is inclusive of many other rights such as the right to dignity, health, and privacy. India has also signed many International Treaties they are, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the Convention on the Rights of the Child (CRC), all these conventions have given recognition to reproductive rights. The judiciary and Article 51(c) of the Indian Constitution have made a bit mandatory for the Government to respect International Treaty and conventions. Also, the constitution under Article 32 provides legal remedies against violation of Fundamental Rights and Human Rights. Further Article 39(a) of the Constitution is about free legal aid and equal access to justice and it goes as “opportunities for justice are not denied to any citizen because of economic or other disabilities.”<sup>34</sup>

#### **7.4. RIGHT TO LIFE AND PERSONAL LIBERTY:**

This Article 21 of the constitution is one of the celebrated provisions which is inclusive of many other rights, it goes as “no person shall be deprived of his life and personal liberty except the procedure established by law.” This Right is Sine Qua Non it supplements all other rights they are incomplete without this Right. It has got precedence over all other rights. That is why Right to Life is considered as the important facet of Fundamental Rights by our Constitution and courts. If the Right to life and liberty is violated it shakes the whole Human Rights jurisprudence which is built on the bedrock of the Right to life and all the other rights are subsidiary to it and they lose its importance on the invasion of Right to life. By emphasizing Right to Life, Field, J. has said that it does not mean mere existence like an animal, it is something more than that. The deprivation of this Right extends to faculties and all the limbs by the way of which life is lived by a person. This provision also prohibits the amputation of any body part or mutilation of arm or leg or injury to the organs of the human body the link by which communication takes place between the outer world and the soul.<sup>35</sup> This right also supports the right to live with human dignity and all the things that are required to make a life dignified. It is inclusive of the right to food, shelter, and clothing. Therefore, all the bare necessities that are important it also includes the reading, writing expressing yourself, freely moving anywhere.<sup>36</sup> Commenting on the right to life, Bhagwati, J. said that “any act which

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<sup>34</sup> Ibid.

<sup>35</sup> *Munn v. Illinois* (1877) 94 U.S. 113.

<sup>36</sup> *Francis Coralie v. Union Territory of India*, AIR 1981 SC 746.

damages or interferes with the use of any limb or faculty of a person, either temporarily or permanently would be within the inhibition of Article 21 of the Indian Constitution.”<sup>37</sup>

### **MANEKA GANDHI CASE-NEW DIMENSION:**

In *Maneka Gandhi v. Union of India*,<sup>38</sup> the Supreme court took notice of the word personal liberty and gave it a different meaning. The Supreme Court held that it was not justified act of the Government that is impounding of passport and further Bhagwati, J. observed that:

“The expression ‘personal liberty’ in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19.”

Maneka Gandhi case was a revolutionary judgment of the Supreme Court, which gave entry of the American ‘due process clause’ into the Indian constitutional jurisprudence, particularly Article 21. The judgment accorded an unprecedented expansion to the substantial terms of ‘life’ and ‘personal liberty’. This case revealed that Article 21 as interpreted in the *A.K Gopalan* case did not protect the individual against the harsh law and the person was deprived of his liberty. This law under Article 21 was in the dormant state from the last three decades and by this case, it was brought into the light.

### **7.5. RIGHT TO PRIVACY:**

The Right to Privacy is conjointly used along with Article 14 and 19 together, it came up for the first time for interpretation by the Supreme Court in ***Kharak Singh v. State of Uttar Pradesh***,<sup>39</sup> wherein the question arose before the Court of law that whether ‘surveillance’ under Chapter XX of the U.P. Police Regulations will amount to an infringement of Article 21. Regulation 236 (b) has authorized surveillance by the way of domiciliary visits was held to violate Article 21. The expressions ‘life’ and ‘personal liberty’ used in Article 21 were elaborately dealt with by the Court in this case. The Constitution has not given us any provision regarding the right to privacy but it was held that there is implied Right to life if we interpret Article 19(1)(d) and Article 21 of the Constitution and this came up for the first time in the case of *Kharak Singh*. As the majority decision was that of right to life is not a constitutional mandate. But the minority judgement by J. Subba Rao was in favour of Right to privacy as

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<sup>37</sup> Supra note 11.

<sup>38</sup> AIR 1978 SC 597.

<sup>39</sup> Supra note 15.

Fundamental Right interpreted from ‘personal liberty’ under Article 21. Justice Subba Rao observed that:<sup>40</sup>

“The right to personal liberty takes in not only a right to be free from restrictions placed on his movements but also free from encroachments on his private life. It is true our Constitution does not expressly declare a right to privacy as a Fundamental Right, but the said right is an essential ingredient of personal liberty.”

In **R.M. Malkani v. the State of Maharashtra**,<sup>41</sup> in this case, the telephonic conversation of the petitioner was recorded to prove extortion of money by him. His defence was that his right to privacy under Article 21 was being violated. The Supreme Court rejected his plea and held that “the telephonic conversation of an innocent citizen will be protected by courts against wrongful or highhanded interference by tapping the conversation. The protection is not for the guilty citizen against the efforts of the police to vindicate the law and prevent corruption of public servants.” Here, the Supreme Court was against protecting the person involved in corruption on the ground of protecting Right to privacy and the Court affirmed the interpretation of Right to Privacy coming along with the trend.

In **R. Rajgopal v. State of Tamil Nadu**,<sup>42</sup> the Supreme Court said that constitutional importance has been given to the Right to privacy in recent times. The right to life and personal liberty also envisages Right to Privacy under Article 21. A citizen has a right “to safeguard the privacy of his own, his family, marriage, procreation, motherhood, childbearing and education among other matters.”

Right to procreate is yet another aspect of the right to privacy with its multi-pronged dimensions, this right is also called as Right to have Reproductive Autonomy. The women have got Right to Abortion and Right to use contraceptive methods and it comes within the ambit of Right to Privacy. In **B.K. Parthasarathi v. State of Andhra Pradesh**,<sup>43</sup> has observed that: “The right to decide about reproduction is essentially a very personal decision either on the part of the man or woman. Necessarily, such a right includes the right not to reproduce. The intrusion of the state into such a decision-making process of the individual is scrutinized by the constitutional courts both in this country and in America with great care.”

Thus, The Andhra Pradesh High Court has made the categorical observations to widen the right of privacy to cover and is inclusive of the right to procreate, right to abortion, the right not to

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<sup>40</sup> Ibid.

<sup>41</sup> AIR 1973 SC 157 .

<sup>42</sup> AIR 1995 SC 264.

<sup>43</sup> AIR 2000 AP 156, at 159.

procreate and use of contraceptives and to undergo sterilization this has been a tremendous step taken by judiciary and an outstanding job to make the right to privacy as an integral part of the Constitutional jurisprudence.

In **Neera Mathur v. Life Insurance Corporation of India**<sup>44</sup> this case brought shock to the Supreme Court as they got to know that LIC was having a questionnaire to seek information regarding the previous pregnancies and menstrual cycle of the petitioner and she was terminated on the ground of providing incorrect information regarding it to LIC. The Court held that this questionnaire will amount to a violation of the Right to Privacy guaranteed under Article 21 of the Constitution. Such probes can not be made by LIC. In **State of Maharashtra v. Madhalkar Narain**<sup>45</sup> Banubai's house was visited by a police inspector in uniform and he demanded to have sexual intercourse with her. When he was brought to the court he pleaded that evidence of lady with easy virtue cannot be taken and relied upon. The court rejected his argument and said that the Right to Privacy under Article 21 is for every individual and cannot be invaded even if the women is of easy virtue.

Similarly, in **Surjit Singh Thind v. Kanwaljit Kaur**,<sup>46</sup> it was held by the Punjab and Haryana High Court that it is the violation of Article 21 Right to Privacy of women if she is asked to go for a virginity test.

## **7.6. RIGHT TO PRIVACY: A WOMB OF HER OWN**

The Supreme Court's nine judges bench on 24<sup>th</sup> August 2017 gave a unanimous decision as Right to Privacy is the aspect of Fundamental right under Article 21 (*Justice K S Puttaswamy v Union of India 2012*)<sup>47</sup>. It was recognized by the bench that the right to privacy is a basic right which is inalienable as that of all other values to live with dignity under Fundamental Rights. Although all the judges were having a different opinion on the matter of privacy they agreed Right to Privacy as a Fundamental Right and it is inclusive of the right of bodily autonomy, mind, choices, and informational privacy.

This personal autonomy is linked with reproductive rights and includes the right to make decisions on reproduction, as this has been provided recognition by the United Nations

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<sup>44</sup> (1992) 1 SCC 286.

<sup>45</sup> AIR 1991 SC 207.

<sup>46</sup> AIR 2003 P&H 353.

<sup>47</sup> Writ Petition (Civil) No 494 of 2012, Supreme Court judgment dated 24 August 2017.

International Conference on Population and Development in 1994.<sup>48</sup> These rights further are inclusive of many other rights that are right to decide on one's reproduction free from discrimination, right to have a safe and legal abortion, right to choice of having a child or not, right against forced pregnancy, the equal entitlement of all the rights to the LGBTQ community persons an all the other groups of individuals.<sup>49</sup>

### **7.7. ABORTION AND REPRODUCTIVE AUTONOMY:**

In the case of **Justice K S Puttaswamy v Union of India**, the women's right to reproductive choices was recognized as part of Article 21 of the Constitution. The position adopted by the three-judge bench was also reiterated in *Suchita Srivastava v Chandigarh Administration (2009)*,<sup>50</sup> it was held that to keep the child in a womb, give birth, then take care of them and want to bear a child or not is the part of women's right of bodily integrity which cannot be interfered with. The case of Suchitra was in the context of Medical Termination of Pregnancy Act, 1971 (MTP Act), it is the Act which governs abortions in India. This Act was enacted just before the US Supreme Court pronounced their landmark judgment in the case of *Roe v. Wade*,<sup>51</sup> the abortion was allowed under this Act only if certain conditions were fulfilled. Like the Section. 3 of the Act says only the registered medical practitioner could terminate the pregnancy that also if they believe in good faith that the pregnancy if continued, would risk the health and life of the mother. It will be injurious to the health whether physical and mental or the child will be born with a deformity or he is abnormal or handicapped or is having some serious deformity. If the pregnancy to be terminated is within 12 weeks then the opinion of one medical practitioner is required but if it exceeds 12 weeks and not 20 weeks then the opinion of two medical practitioners is mandatory for termination. The Section 5 of the Act is about pregnancy when exceeding 20 weeks then only if the situation is such that women's life is at risk if the pregnancy is not terminated then only will be allowed.

In *Suchita Srivastava v Chandigarh Administration (2009)*, it was said that the balance is to be maintained between the women's rights and the state's interest to protect the health of women and Human life, that is why the restrictions have been imposed.<sup>52</sup> One more

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<sup>48</sup>UNPIN (1994): Report of the International Conference on Population and Development, United Nations Population Information Network, 18 October,

<https://www.un.org/popin/icpd/conference/offeng/poa.html.%C2%A0>

<sup>49</sup> <http://www.ohchr.org/Documents/Publications/NHRIHandbook.pdf>.

<sup>50</sup> (2009) 9 SCC 1.

<sup>51</sup> Supra note 25.

<sup>52</sup> Supra note 44.

justification given to this restriction is to prevent sex selection in abortion. But it is believed that this Act does not align with the technology and the advancements in medicine as it so restrictive and is 46 years old Act. The judgment of privacy calls out for the reform in such old school law that is Section 3 and 5 of the Act especially needs change.

It can be analyzed from the overview of Section 3 and 5 of the Act that is violating the women's Right to choice, bodily autonomy, her right to reproduction and it has been accepted by the court by upholding the Right to privacy. There is no such situation where women will be allowed to decide about her pregnancy it will be a physician and this is interference in her right to choose about her abortion as she has right on her body. At all the stages of pregnancy, the law prevails the same that only doctors can decide but not the women about her pregnancy. Moreover, the only ground on which the termination of pregnancy is allowed is on the medical risk condition and there are no other reasons given to allow her termination of pregnancy. Then further even after all this the limitation of 20 weeks which is not even relaxed if there are chances of the child being born with deformities or has got some serious disease, other than these conditions women are forced to carry the child and bear all the consequences and the risk. It is only relaxed when there is a danger to the life of the mother.

There is no condition that does not relate to medical such as no money for raising a child, or career will be effected or any other personal reasons. Also, the married women are most of the time forced to carry the baby till delivery without her will, this has been neglected in the present Act. The reason is very obvious that this pregnancy is the result of the marital rape of women who is older than the age required that is 15 years which is not rape in our country.

The limitations can, of course, be placed by the state on fundamental rights, but they should pass a test before that. The bench said that the limitation on fundamental rights can be imposed only according to the jurisprudence of these rights, as privacy is to be understood with any of the fundamental rights. In **Maneka Gandhi v Union of India** (1978),<sup>53</sup> it was highlighted by the bench that the Article 21 which has given fundamental right to life and personal liberty can only be restricted only if it qualifies the test of “just, reasonable, and fair”. This test is to be passed by the Section 3 and 5 of the Act. Justice Chandrachud has explained this test comprises of three parts: “the privacy restriction should exist as a valid law; there must be a ‘legitimate state interest’ behind it, and the restriction should be ‘proportional’ to its

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<sup>53</sup> Supra note 16.

aim”. Here, the judgment has been left open to interpret the last term ‘proportionality’. Here the state should be asked to prove nexus between the privacy limitation and the methods by the state to limit it or the SC should be strict and the state should explain the same.

By applying these standards the challenges for Section 3 and 5 of the Act will increase. And if these provisions are highlighted to meet standards then the state will have to show the nexus of their interest protecting women and human life and the women having their right to privacy and it is not being violated.<sup>54</sup> Also, the privacy right is such that it extends to make marital rape as a criminal offence so it will extend to Section. 3 in future.

It is not the first time but earlier before the Right to privacy judgment also the amendment proposal for the MTP Act was there, the people have gathered their voice against this Act year ago. The motive of Bill that is Medical Termination of Pregnancy was always to provide women with their reproductive rights. To be analysed crucially, this bill only allows abortion only on the request of the mother that for pregnancy not exceeding 12 weeks.

The bill has also proposed under Section 2(d) that the access to abortion shall be improved if the list of persons is increased under “registered healthcare providers” and include homoeopathy and Ayurveda practitioners to do abortions, they also include midwives and nurses in the list. Further, there must be a provision called “informational privacy” under Section 5A which will restrict the healthcare providers from revealing the name and other details about the women who came for abortion and got pregnancy terminated.<sup>55</sup>

But the Amendments proposed are not still up to the mark as it does not protect the privacy matter because of the restrictions. Even if the women are allowed to request for abortion up to the 12 weeks of pregnancy, but still other things come within the way of liberty that they have to provide proof of the failed contraceptives or planning and their choice is again restricted except the condition of mother or foetus life being in danger or at risk.

Thus, this Bill is still in the pipeline and is yet to be passed so it becomes the duty of the legislature to make necessary Amendments. As rightly observed by Justice Chandrachud observed, that the state has got some positive duties to be done as that of to protect the right of privacy, and not only have the negative duty to do so.<sup>56</sup> Other than this privacy judgment, the

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<sup>54</sup> <https://www.ohchr.org/Documents/Publications/NHRIHandbook.pdf>

<sup>55</sup> <https://www.prsindia.org/uploads/media/draft/Draft%20Medical%20Termination%20of%20Pregnancy%20Amendment%20Bill%202014.pdf>

<sup>56</sup> Supra note 43.

Guidance for making reforms has also been provided by the Bombay High Court in 2016.<sup>57</sup> In a PIL suo motu that related to the vulnerable condition of the women in prison, the High Court stated that “woman alone should have the right to control her body, fertility and motherhood choices.” Also, the High Court said that it is the legitimate interest of the state to protect the ‘potential life’. They also emphasised on the fact that the child is to be nurtured in mother’s womb so it should be completely her right to decide whether to keep the child or not as it affects her mental and physical well being and the unborn child cannot be put on the higher footing than that of a women’s life.

Therefore, it has been upheld by both the High Court Bombay and the Supreme Court that it is women’s right and they have bodily autonomy, freedom to choose reproduction, and fertility. The courts have at many instances allowed abortion beyond 20 weeks, but for that purpose, women have to approach courts and they further decide the fate of the abortion and safety.<sup>58</sup> India is a country where the percentage of maternal deaths is 9-20% due to unsafe abortions,<sup>59</sup> it is the need of an hour to make the provisions that are women-friendly and help to reduce maternal death due to abortion. This is not only the Bill which will allow abortion and the right to choose to women but will also benefit women’s right of self-determination regarding abortion. This will also reduce the social stigma of abortion and will pave a path for women’s right to privacy and liberty.

### **7.5. Women's Right to Choose and Bodily Autonomy:**

Reproductive choice is the decision that exclusive exerts an impact and has a bearing on the individual alone having a little or limited impact on the society. Similarly, marital and family life is the area that is left to the exclusive domain of the individual discretion since these areas belong to the private and personal life of the individuals and families. The “right to reproductive choice” is a dimension of the right to privacy emerging from the conjoint constitutional scheme of Article 19 and 21 of the Indian Constitution. The Constitution of our country explicitly does not recognize the reproductive right or even the right to privacy. However, the right to privacy or its smaller component-reproductive right has been carved out from the judicial interpretation of “right to life and personal liberty” by the constitutional courts.

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<sup>57</sup> Bhatia, Gautam (2016): “The Bombay High Court’s Abortion Judgment: Some Unanswered Questions,” *Live Law*, 22 September, <https://www.livelaw.in/bombay-high-courts-abortion-judgment-unanswered-questions/.%C2%A0>

<sup>58</sup> <https://indianexpress.com/article/india/sc-allows-woman-to-abort-26-weeks-pregnancy-4733035/>

<sup>59</sup> [https://www.popcouncil.org/uploads/pdfs/2014STEPUP\\_IndiaCountryProfile.pdf](https://www.popcouncil.org/uploads/pdfs/2014STEPUP_IndiaCountryProfile.pdf)

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