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# **ABORTION: CRITICAL ANALYSIS OF LEGALITY, MORALITY AND ETHICALITY**

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## **ABSTRACT:**

Abortion has always been one of the most controversial topics and whenever it is discussed immediately its ethicality and morality is brought onto table because always there has been a conflicting opinion on the same. On the other hand, its legality is to be considered as to whether it's a fundamental right or not? Understanding the Indian constitution and comparing the same to the Women's rights is right way to understand the concept. So, the current paper aims to analyse the concept of abortion critically examining its ethicality, morality and legality. It aims to understand how women are deprived the rights over their body by not having the right to abort at certain instances. The paper also aims to understand the concept by comparing the same to other countries. Further the concept is understood by examining the effectiveness of MTP Act in reality. Treating abortion like any other healthcare facility should be available. While the paper focuses on understanding the general aspects of the topic it mainly focuses on the legal aspect of the topic by pointing out reasons for it to be completely decriminalised in India. The paper is completed using doctrinal method of researching which seems to fit the present paper.

## **CHAPTER-I**

### **INTRODUCTION:**

*“It’s not only about the right to safe and legal abortion, it represents all the rights of women (Right to Abortion) also signals to young girls the right to their autonomy and their right to freedom”- Marta Alanis.*

If we look at the national estimate of Abortion in India as of 2015, 15.6 million abortion had taken place in India and the estimate also says that the same number of Abortions continues to happen in India annually. Looking at the data it can be clearly viewed that every year India comes across a huge number of abortion cases due to many reasons like lack of financial assistance for the women, unplanned by the couple, women not mentally prepared or even some socio-economic concerns faced by her. But is it morally acceptable or not to abort or is it ethically acceptable or not? There have been many conflicting opinions on this because people argue as to how kill an unborn child because everyone has a right to live or how to kill even before its born because it has done nothing wrong and also some say that women have the right over her body so it is acceptable. Thus, this research paper will critically analyse whether abortion is ethically or morally acceptable or not considering the various view points on the topic. The paper aims to make abortion a safe alternative for women who face with unwanted pregnancy.

Abortion is defined as the: “removal of pregnancy tissue, products of conception or the foetus and placenta (afterbirth) from the uterus. In general, the terms foetus and placenta are used after eight weeks of pregnancy. Pregnancy tissue and products of conception refer to tissue produced by the union of an egg and sperm before eight weeks”<sup>1</sup>

There are two ways in which abortion can be performed: medical and surgical. The medical abortion is performed through usage of medicines while surgical abortion requires performance of a minor operation<sup>2</sup>. Which is acceptable in India and further reading is done in the paper.

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<sup>1</sup>Abortion – (Termination of pregnancy), Harvard Health publishing-Harvard Medical school, (Nov.23,2020,16:38PM) <https://www.health.harvard.edu/medical-tests-and-procedures/abortion-termination-of-pregnancy-a-to-z>

<sup>2</sup>Abortion, Reproductive System & Sexual Disorders: Current Research, ISSN: 2161-038X.

Understanding about Abortion from ethical or moral point of view is the main objective of the research paper but in order to derive a conclusion understanding the topic in depth is equally important so the paper will further analyse aspects like its types, its position in India, Legal position in India, its position in other countries and Indian judiciaries opinion on Abortion. So, the research paper would also throw light upon the above said topics. The paper would also discuss the reasons for which women opt for Abortion and whether Abortion cases in India have reduced or increased after the provisions of MTP act amended in 2020.

While looking at the legal aspect of the topic, In the Indian Penal Code, 1860, abortion, which is stated as “Causing Miscarriage” is considered as a punitive offence. It pertains to a ‘woman who causes herself to miscarry’<sup>3</sup>. Section 312 to 316 of the Penal code deal with foetus abnormalities. These sections have been placed under the chapter of offences affecting human body. <sup>4</sup>The medical termination of pregnancy act of 1971 is the one which makes Abortion legal in India. But the real questions arise to whether the women seek Abortions as per the act legally in India which is whether all abortions taking place in India are legal and the same will be addressed in the paper.

As women have been fighting for their reproductive rights for centuries together It is still one of the most debated topics because of the moral, ethical considerations and a controversial subject in the legal arena because as people debate that Abortion is a fundamental right given to women under the article 21 of the Indian constitution which states “No person shall be deprived of his life or personal liberty except according to procedure established by law”. <sup>5</sup>This gives the women the right to make free choices as far as her body is concerned unless and until it does not interfere with the present law. While others say that it is not a fundamental right guaranteed to women under the Indian constitution. SO, there are two questions raised here one as to whether it is really covered by Article 21 of the Indian constitution and the second question is by people who recognise it as a Fundamental Right ask about whether it failed to meet the criteria by being recognised as a fundamental right which the current paper answers. The paper also would focus on discussing the situations of rape survivors in India as far as abortion is concerned because the domestic law’s in India place a clear legal responsibility on health professionals to offer immediate care and

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<sup>3</sup> Mohanty Sneha, *Paper on Abortion*, ResearchGate, (Nov.23,2020,16:50 PM)  
[https://www.researchgate.net/publication/336170669\\_Paper\\_on\\_Abortion/citation/download](https://www.researchgate.net/publication/336170669_Paper_on_Abortion/citation/download)

<sup>4</sup> Sannaya, *Abortion laws in India*, Legal service India, (Nov.23,2020,16:55 PM)

<sup>5</sup> INDIAN CONST. art 21

treatment to rape survivors, including timely access to abortion<sup>6</sup>. In this research paper the researcher has considered the various factors like the legal and social or economic consequences before deriving the conclusion.

### **BACKGROUND OF STUDY:**

Understanding about the topic is very important because this allows the reader to understand the legal position of Abortion in India as well their legal rights regarding the same. The paper also critically analyses as to how the majority of the people in the society still don't accept the concept of abortion and helps in changing their perspective towards the same in certain circumstances. Finally helps in throwing light upon the conditions of rape survivors in India.

The researcher has reviewed various books, international journals, articles, case laws to understand the same. Thus, the main problem discussed by the researcher through this paper would be to understand the legal, ethical and moral considerations on the concept of Abortion.

### **STATEMENT OF RESEARCH PROBLEM:**

On this background the researcher would like to continue with the paper. Thus, this paper mainly aims on discussing the concept of Abortion in Indian context in depth by comparing it with other countries. Secondly, it aims at looking at the legal aspect of the topic. So, by discussing the above the researcher answers the research problem as to whether Abortion is ethically or morally acceptable? And helps in changing the society's views on the same in certain circumstances when it is absolutely needed. For which the current research is devised.

### **SIGNIFICANCE OF THE STUDY:**

Abortion is a concept which has been extensively debated in India for years especially the legal aspect of it. Safe and legal Abortions at exceptional cases like foetus abnormalities, mother's life at risk if the child is born or even for rape victims is still not available to all women around India where Abortion cases are reported in huge numbers annually. Treating abortion like any other healthcare facility should be available. So, the most important aspect the research paper focuses on is to understand the Ethical , Moral and legal aspect of the topic and also to understand the concept in depth in the Indian context by also understanding how abortion laws in India are

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<sup>6</sup> Padma Bhate-Deosthali and Sangeeta Rege, *Denial of safe Abortion to survivors of Rape in India*, 21 HEALTH & HUM. Rts. J. 189 (2019).

different than other countries in the world. While the paper focuses on understanding the general aspects of the topic it mainly focuses on the legal aspect of the topic by pointing out reasons for it to be completely decriminalised in India and to understand to what extent it is recognised as a fundamental right in India for women by analysing the number of legal Abortions in India so that the legality of the MTP act and its amendment made in 2020 can be understood in a better way.

### **RESEARCH METHODOLOGY:**

There are two ways of conducting a legal research which include Doctrinal and Non-doctrinal. The current research paper is prepared based on the data's collected by the researcher using doctrinal method of research. Doctrinal method of research means presenting the research paper by the data collected by the researcher using secondary sources. The researcher has used the doctrinal approach for a better interpretation of the topic and also to understand the topic in a broader view. The secondary sources the researcher has used include articles, journals, commentaries, books by prominent authors, research papers and newspaper pieces.

### **SOURCES OF DATA:**

For the purpose of the current research the researcher has depended both on primary as well as secondary sources for getting a better understanding of the topic. Primary sources which the researcher has referred include the Constitution, Acts, Statutes, Regulations, Policies and Judicial decisions. In order to understand the topic from the various viewpoints by different researchers and authors the researcher has also further understood the topic from various secondary sources using various legal databases like journal articles, book reviews, books and commentaries/opinion pieces by various prominent authors.

### **SCOPE OF STUDY:**

The researcher has analysed the concept of abortion and its legality, morality, ethicality within Indian scope. The concept is analysed in a detailed manner within Indian context. Thus, the scope is within India.

### **RESEARCH QUESTIONS:**

- Is Abortion Ethically acceptable or not or Morally acceptable or not?

- What are the laws governing Abortion in India and the effects of MTP Amendment bill 2020?
- What are the reasons women opting for Abortion in India?
- Is abortion a fundamental right given to a woman under the Indian constitution if so, then to what extent is it helping her?
- What are the Problems relating to abortions in India?
- How are Abortion laws in India different from other countries laws?
- Are rape survivors in India allowed a safe and legal abortion in India?

## **RESEARCH OBJECTIVES:**

- To understand whether Abortion can be considered ethically or morally acceptable or not.
- To understand the various laws governing Abortion in India.
- To examine the various reasons for which Indian women are opting for Abortion.
- To recognise the Abortion as a fundamental right to women in India
- To point out the problems relating to abortions and also to understand the impact of increasing the upper limits of abortion as well as the reasons for doing so by the MTP Amendment bill 2020.
- Abortion laws in India vs other countries: comparative study
- To whether rape survivors in India are allowed for a safe and legal abortion in India.

## **LITERATURE REVIEW:**

### ***1. “India’s New Abortion Law Is Progressive And Has A Human Face”<sup>7</sup>:***

This article clearly states need as well the advantages of the amendment of medical termination of pregnancy Act 1971 and points out what motivated the government to amend the act. The article also points out the opinion of the critics on the latest amendment. As well as answers the reason

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<sup>7</sup>Chitra Subramaniam, India’s new abortion law is progressive and has a human face, ORF, (Nov.24,2020,15:07 PM) <https://www.orfonline.org/expert-speak/india-new-abortion-law-progressive-human-face-62023/>

for the upper limit till which the pregnancy is allowed in India by answering questions like after how many months it can be justified to restrict women's right to abort it further proceeds to explain the need for telling the women the consequences of abortion clearly before performing it then it compares India to other 39 countries around the world that allow abortion in case the mother's life it is at risk on the basis of affordability, safety and many more factors. In order to compare the author has taken the trends in abortion of those countries. The paper helped the researcher in understanding the effects of MTP Amendment 2020 and the legal position of abortion in India.

**2. “Right Over The Womb V. Right Of Unborn Child: A Comparative Study Of Abortion Laws In India And U.S.A”<sup>8</sup>.**

In this paper the authors have done a detailed comparative study on the abortion laws in India and in the USA. They state that USA has contradictory opinions and the laws in USA allows women to have abortions by choosing themselves as it is recognised as a right to privacy. As far India is concerned the paper says that MTP allows women in India to opt for abortion in specific situations which is clearly defined under the act. The paper also puts forward the social, philosophical perspectives and societal expectations from the women undergoing abortion in general. It analyses the concept in general in a society as how it is seen and further compares the abortion laws between both the countries. The paper helped the researcher in understanding the concept from different perspectives and the legal position in both the countries.

**3. “Swati Agarwal & Ors. V. Union Of India”<sup>9</sup>:**

In this pending case before the supreme court, the petitioners filed a PIL. They challenged the validity of sections 3(2), 3(4) and 5 of the MTP which according to them violated the Articles 14 and 21 of Indian constitution. They argued that the sections were against the right to privacy and personal liberty. They challenged the section 5 because it is disproportional to article 21 as termination cannot be denied on the grounds that it has completed the gestation period. And it

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<sup>8</sup> Shristi Talukdar & Jechun Palzer, *RIGHT OVER THE WOMB v. RIGHT OF UNBORN CHILD: A COMPARATIVE STUDY OF ABORTION LAWS IN INDIA AND U.S.A*, JOURNAL OF LEGAL STUDIES AND RESEARCH Volume 4 Issue 1 – January 2018, pp.384- 398.

<sup>9</sup>Swati Agarwal &Ors. (1-7-2019) W.P. (C) 825/2019 Supreme Court

deals only with married women and does not speak about unmarried or widowed women. They also argued that the amendment fails the test of reasonability. The petitioners prayed to provide Indian women with better access to safer abortions and make available greater reproductive choices for them by establishing more abortion clinics so maternal morality can be reduced and argued that it's the states duty to ensure that fundamental rights are not violated. The Rajasthan high court that the above said Sections constitutional validity is not violating the Article 21 or 14 and the case is pending in the Supreme court.

**4. “Moral Force in the Rule of Law: Morality behind Abortion Laws and Right to Life of Foetus — In Context of Savita's case”<sup>10</sup>:**

This article examines the concept of morality of Abortion laws in the context of Savita Halappanavar case wherein she died because upon miscarriage the doctors denied her abortion. The article examines the legal perspective of Miscarriage and why abortion should be made available in that case. In the next section of the article, it considers the arguments behind the Right to life of Foetus. The woman's health is part of that concern as is the life of the foetus after quickening. These concerns justify the State in treating the procedure as medical one<sup>11</sup>. This article helped the researcher in understanding the concept why the Right to life of foetus is equally important when abortion is considered and how this topic is of a conflicting nature. The article further proved the evidence as to support the present paper which the ethicality behind Abortion and also helped the researcher in understanding the concept of Miscarriage.

**5. Legal aspect of pregnancy, Delivery and Abortion<sup>12</sup>:**

The author explains the concept of abortion by starting to explaining the concept of pregnancy and different types of delivery. Then he introduces the reader to the concept of Abortion in general. Then he explains the concept of Medical termination of pregnancy and the various restrictions on termination on pregnancy, criminal negligence under MTP, places where termination of pregnancy is acceptable. He then explains hoe expert evidence holds importance and why it is needed in case of abortion. Then he explains the procedural law that needs to followed during the process of

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<sup>10</sup>Om Prakash Gautam\* and Amit Kumar Pathak, *Moral Force in the Rule of Law: Morality behind Abortion Laws and Right to Life of Foetus — In Context of Savita's case*, (2013) PL March 80.

<sup>11</sup> *Roe v. Wade*, 410 US 113 (1973); D.D. Basu, *Commentary on Constitution of India*, Vol. III (8th Edn., 2008) 3142.

<sup>12</sup> J.V.N. JAISWAL, *Legal aspect of pregnancy, Delivery and Abortion*, (EBC, 2016)

abortion. Then he explains MTP act starting from its introduction in 1971, and its consecutive amendments in 2002 and 2003. The book helped the researcher in understanding the concept of abortion in detail from a legal point of view.

## **CHAPTER-II**

### **BRIEF UNDERSTANDING:**

As already mentioned, abortion is the process of removal of the foetus from the uterus. It can take place on its own also which is called miscarriage but in this situation the baby dies inside the mother's womb and it needs to be removed through the process of abortion which needs to be performed by the doctors. In case of Induced abortion, it is done on need mainly for the reasons which are mentioned below:

1. “In order to preserve the mental or physical wellbeing or even life of the mother which might be at risk in case abortion is not performed.
2. In order to prevent an unwanted pregnancy which has occurred as a result of rape or incest.
3. In order to prevent the child from being born as on birth it might suffer from serious deformity, mental deficiency or genetic abnormality.
4. Prevent pregnancies for social or economic reasons (which is allowed only at extreme circumstances) like teen pregnancy
5. Failure of contraception (only applicable to married women)”<sup>13</sup>.

### ***Types Of Abortion Procedures:***

The types of abortion procedures are:

1. Medical abortion: based on medication(non-surgical)
2. Vacuum aspiration: done using insertion of a speculum into the women's vagina
3. Dilation and evacuation: surgical abortion
4. Labor induction abortion: again, medication based but used for late-terms

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<sup>13</sup>Abortion, Encyclopedialike Britannica, December 27, 2019(Jan 17, 2021, 19:31 PM)<https://www.britannica.com/science/abortion-pregnancy>

5. Induction abortion: suction curettage is performed
6. Hysterotomy: similar c-section.

All the above said types of abortion procedures are available in India and they are also legal but needs to be performed only when required under the certain circumstances.

There are also many side effects of Abortion procedures like development of infections, excessive bleeding, damaging to organs. There are also many reasons due to which women opt for induced abortion which are as follows<sup>14</sup>:

***Reasons For Abortion:***

- Majority of them say that they are not financially ready
- Unplanned by the couple
- Not mentally or emotionally prepared
- Health related issues when it is really necessary
- Too young
- Rape survivors/ sexually abused
- Foetus related issues
- Contraception failure

***General Position Of Abortion In India:***

In India the term abortion is not used anywhere in law. It is called as medical termination of pregnancy. The reason behind that being to ensure that the abortion laws in India aren't framed for granting a woman the right over her body, or even right to safe abortions but to protect the doctors performing the same against prosecution. The MTP act does not allow the women to choose whether she wants abortion or not it denies the agency in her hand to decide on her own body as only the doctor decides at the end. Even though abortion is legal in India up to some periods still the women is not allowed to decide. Even though India's position as far abortion is concerned is progressive in nature in reality women in India are not guaranteed with reproductive rights as the laws are not amended even after landmark judgements.

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<sup>14</sup>Biggs MA, Gould H, Foster DG. Understanding why women seek abortions in the US. *BMC Women's Health*. 2013; 13:29. Published 2013 Jul 5.

***Safety And Technology:***

Safe abortions are still a long way in India as the various places in the rural areas do not have even proper clinics or even specialised doctors to treat the patient. Even in the urban areas India still lacks the modern technology which is available in foreign countries for making abortions available without any upper limit. The main reason India still has upper limit for abortions is because it lacks in the latest technology which is required for aborting the foetus till the end. As India lacks in proper clinics, specialised doctors, latest upgraded technology abortion in India is still not very safe and the government needs to take immediate steps regarding the same<sup>15</sup>.

**CHAPTER - III**

**LEGAL POSITION IN INDIA:**

***Legal history:***

The term abortion, in criminal law, is ordinarily used to describe an intentional termination of pregnancy. The term Abortion in common usage means premature expulsion of foetus during the time of pregnancy. Abortion is the intentional termination of gestation by any means and at any time during pregnancy from conception to full term<sup>16</sup>.

During the late 1960s the government of India set up “Shantilal Shah committee” on the recommendation made by the central family planning board in 1964 in order to examine whether abortion laws was really needed in India. At that point of time causing intentional miscarriage was a crime which was punishable. Back then sections 312 to 316 of the IPC, made induced abortions a criminal offence except for cases when the life of the mother was at risk. Due to the recommendations made by the committee The Medical termination of pregnancy act 1971 was passed which allowed only medical termination of pregnancies. Even upon introduction of the MTP causing miscarriages was still a crime it was not nullified. The abortion was justifiable only when the induced abortion was done with the aim of saving the pregnant women. Contradicting what the committee suggested the act did not have much provisions to protect the pregnant women

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<sup>15</sup>Arpita Sengupta, *Clinical Trials in India: A Way towards Impoverishment*, 11 NALSAR Stud. L. REV. 1 (2017).

<sup>16</sup> Mohr, J. C. (1978). *Abortion in America: The Origins and Evolution of National Policy*. P-VIII

instead aimed at protecting the doctor performing the abortion procedure. According to the section 3 of the act the termination of pregnancies decision is solely based on the doctor's decision and again lacks autonomy for women. Upon introduction of MTP ACT 1971, the Indian parliament made abortion legal in India as per the section 3(2) of the act there were some limitations and specified time periods when abortions can be performed. The act was first amended in 2002 wherein the Section 2 was amended changing the term lunatic to mentally ill. Section 3 in sub-section (4), in clause (a), the same to be done. Section 4 was amended as to other than the specified the places the abortion should be legally performed. Section 5 was amended as to punishment for not abiding the laws. The act was again amended in 2003, 2014, 2017, 2018 and finally in 2020<sup>17</sup>.

### ***Are Rape Survivors Given With Safe Abortion Options?***

Indian domestic laws are not providing rape survivors both within and outside marriage with safe abortion options. As per abortion laws availability of services for rape survivors is extremely low. Due to the misinterpretation of abortion laws many rape survivors in India are not given with the option of safe abortion. The new MTP amendment also does not allow the access to abortion for rape survivors after a particular upper limit of time making it really difficult for them. The medical board again has a major hand in deciding cases regarding abortion relating to rape survivors and the interest as well as mental health of the rape survivors are not taken into consideration by them and they don't allow for abortion in many cases. Till date there is a lack of understanding of the serious damage that rape and sexual abuse causes on the women and the laws also don't clearly state the same making it difficult for the victims to opt for abortion<sup>18</sup>.

### ***Laws Governing Abortion In India:***

The Medical termination of pregnancy was the first act which liberalized abortion in India it has eight sections which deals with the time, place and circumstances wherein termination of pregnancy can be carried by a registered medical practitioner<sup>19</sup>. The MTP Rules and regulations act 1975, tells the various criteria as well as the procedure for giving approval for abortion and how the records need to be maintained. The protection of children from sexual offences act 2012,

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<sup>17</sup>NOZER SHERIAR , *Abortion a right not privilege. On Safe Abortion Day, govt must consider amending MTP Act*, The Print, 28 Sep, 2019.

<sup>18</sup>Padma Bhate-Deosthali & Sangeeta Rege, *Denial of Safe Abortion to Survivors of Rape in India*, 21 HEALTH & HUM. Rts. J. 189 (2019).

<sup>19</sup> Medical Termination of Pregnancy Act, 1972

this act treats the women under the age of 18 who got pregnant as rape survivors and they need to report the same which goes against the basic idea of privacy which needs to be maintained as per the MTP act. As per the latest amendment of MTP the upper limit for abortion for rape survivors is 20 weeks and after which only when foetus abnormality is deducted abortion can be performed and the same applies to the minor also making the abortion impossible post upper limit<sup>20</sup>. The Pre-conception Pre- Natal Diagnostic Techniques act 1994, amended in 2002 prohibits sex determination and abortion relating to sex selection is strictly prohibited in India as per this act.

***MTP Amendment Bill 2020 And Its Effect:***

MTP amendment bill 2020, has brought major changes to the MTP ACT 1971. Earlier as per the law, opinion of one doctor was required in order to abort the foetus within 12 weeks of pregnancy and two were required in case of abortions taking place between 12-24 weeks of pregnancy. Abortions were not allowed above the 20 weeks. The same has been changed in the new amendment, advice of only one doctor is required in case of termination of pregnancy between the period up to 20 weeks of becoming pregnant. The new bill allows termination between the period of 20 to 24 weeks of conceiving up on receiving the advice of two doctors. More than 24 weeks of conceiving now the pregnancy can be terminated up on getting permission from medical board only in case of substantial foetal abnormalities. The main issue with the bill is that it does not specify the category of women who can opt for abortion between the weeks of 20-24. This should be clearly specified by the parliament rather than delegating it to the government. Another issue with the bill is that after 24 weeks of conceiving termination can be performed only in case of foetus abnormalities which means in case of rape survivors the only way to get it done is through writ petition. The other aspect the bill does not discuss till date is shortage of gynaecologist which is the main reason many women cannot get safe abortions. In the bill, a new category of termination has been added. “A separate category of women has been created who can opt for an abortion at 24 weeks and beyond if:

- 1.They are rape survivors
- 2.The pregnancy is a result of incest

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<sup>20</sup> JUSTICE J.S. VERMA COMMITTEE, Report of the Committee on Amendments to Criminal Law, 443-444 (January 23, 2013).

- 3.The woman is differently-abled
- 4.The woman is a minor as per the Indian Majority Act of 1875
- 5.Abnormalities in the foetus have been detected during the 24-week period”<sup>21</sup>

Thus, the latest bill amends the upper limit for termination of pregnancy, aims at constituting medical boards at state level and also removes the limit in case of foetus abnormalities<sup>22</sup>. The bill also aims to allow women whether married or unmarried to terminate pregnancy in case of contraceptive failure up to 20 weeks of getting conceived. It also aims to maintain the personal details in a very private manner as the registered medical practitioner cannot reveal the details of the women opting for abortion. While many countries in the world allow termination without any upper limit, as World Health Organisation does not specify the same. Even though abortion is no longer crime in India despite the fact that technology has improved abortion has been legalised in India but still only at certain cases that too after getting approval from a doctor who holds the deciding power and not the women who wishes to opt. The upper limit is not needed but still Indian laws specify the same without proper reasoning and the time frame for the medical board to decide has not been specified, and the condition of transgender is still unclear. Even after so many years of the acts introduction and technological developments abortion is not completely legal in India because of the above said reasons and many problems relating to it still remains unanswered by the parliament as discussed above in the paper and due to this ambiguity, many women are not able to get legal abortion in India. Other than the above mentioned the issues with the bill are that, a woman with disabilities who wishes to opt for abortion post 20 weeks need opinion from medical practitioners and again it is a problem for them. Another issue which is still ambiguous because of the upper limit which is existing in India is that what happens in case a abnormality if found at later stage what happens in that case again not answered by parliament. The new amendment again only has resulted in increasing the gap between the marginalised and the privileged as major steps haven't been taken by parliament through the latest amendment and also all the questions raised still lie unanswered. The latest amendment can be called as a step in the right direction as it has brought in new amendments as discussed above but does not completely legalise abortion or clears

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<sup>21</sup>*id*

<sup>22</sup>Statement of Objects and Reasons, Medication Termination of Pregnancy (Amendment) Bill, 2020

the ambiguity that surrounded the concept for years and still abortion in India is a concept which needs more governmental support and more clarification.

***Legal Comparison:***

In United Kingdom, Abortion can be carried out only in certain specified cases but can be done anytime there is no upper limit. In the United States of America, the law differs from state to state, even though the USA supreme court ruled in 1973 that abortion is legal New York allows till 24 weeks of getting conceived, States like California allows till foetus can survive outside the womb. But the majority of the countries across the world specify the cases in which abortion is legal but not the upper limit. This is because the World health organisation does not specify any upper limit relating to abortion. India is one among few countries which still restricts abortion with upper limit making it difficult for the pregnant women to abort after the specified period and the upper limit in India is still a problem relating to abortion.

***Judiciaries Opinion:***

Being a constitutional issue as well there has been various opinion on the topic by Indian judiciaries. In the case of Mrs. X vs. Union of India<sup>23</sup> in this case the Supreme court allowed for pregnancy after 22 weeks of conceiving after consulting a medical board for the same. In the case of Tapasya Umesha Pisal vs UOI<sup>24</sup> it allowed abortion on 24 weeks of conceiving and after consulting the medical board it gave the judgement. In the Murugan Nayakkar vs Union of India<sup>25</sup> case it allowed termination on 32 months of conceiving as it was a case of a rape victim. But whereas, in the case of *Savita Sachin Patil vs. Union of India*<sup>26</sup> case it did not allow abortion of a 27-week pregnancy considering that there was not threat to the mother but the foetus was suffering from severe abnormalities but still didn't allow because the medical board did not find the present situation to be of a nature where abortion was needed. Again, the case of Alok Srivastava vs UOI<sup>27</sup> even though it dealt with a minor rape survivor the Supreme court did not allow for abortion as the medical board said that the continuation is less harmful than aborting the child. Thus, we can see that the Judiciaries opinion on abortion in India has been mainly based on the decision taken by the Medical board. It is acceptable that the medical consequences need to

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<sup>23</sup>Mrs. X vs. Union of India, Writ petition (civil) No.81 of 2017

<sup>24</sup>Tapasya Umesha Pisal vs UOI, (2018) 12 SCC 57

<sup>25</sup>Murugan Nayakkar vs Union of India, W.P. (Cr.) No. 257 of 2019

<sup>26</sup>Savita Sachin Patil vs. Union of India, W.P.(c) No.121(2017)

<sup>27</sup>Alok Srivastava vs UOI, Writ Petition(s)(Civil) No(s).468/2020

understood and taken into consideration before granting the judgement but the views and the decision of the pregnant is completely ignored. Thus, the interests of the pregnant women also need to be considered before granting the judgement because the Medical boards will also not consider the mental wellness of the women before deciding and a joint decision considering the women's interest and the opinion of the Medical board should be taken.<sup>28</sup>

### ***Is Abortion Given As A Fundamental Right?***

As known by everybody article 21 is the most precious, sacrosanct and fundamental of all articles<sup>29</sup> and this article deals with the Right to privacy as well as right personal liberty and life. The Supreme court in the Meera Santosh Pal v. Union of India<sup>30</sup> case held that women's reproductive right is included in the right to personal liberty making abortion a fundamental right for women. Again, in the case of Kharak Singh vs. State of U.P. and others<sup>31</sup> the supreme court held that according to Article 21 a person has complete rights over his body, and thus Right to procreation and to have control over one's reproductive organs gives birth to another right i.e., the right to abortion. Though abortion is not exclusively mentioned as a fundamental right, yes, it is included under Article 21. The courts also in the above said cases observed that the right to abortion is also part of Right to privacy under Article 21 and the right of the mother should be given more preference while considering the right to live of the foetus. It held that "Something that is not alive does not have interests". Thus, it is recognised as a fundamental right in India but fails to satisfy the requirements of being a fundamental right as in many cases many women are not given the option of abortion even though it is necessary. While a fundamental right guaranteed to the Indian citizens cannot be violated, this right had been regularly violated and the state needs to make necessary steps to make the right to fulfil its requirements being a fundamental right.

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<sup>28</sup>Shradha Thapliyal, ABORTION JURISPRUDENCE IN THE SUPREME COURT OF INDIA: IS IT THE WOMAN'S CHOICE AT ALL? CENTRE FOR LAW AND POLICY RESEARCH, FEB 28 2019, [HTTPS://CLPR.ORG.IN/BLOG/ABORTION-JURISPRUDENCE-IN-THE-SUPREME-COURT-OF-INDIA-IS-IT-THE-WOMANS-CHOICE-AT-ALL](https://CLPR.ORG.IN/BLOG/ABORTION-JURISPRUDENCE-IN-THE-SUPREME-COURT-OF-INDIA-IS-IT-THE-WOMANS-CHOICE-AT-ALL).

<sup>29</sup> Sunil Deshta and Kiran Deshta, Fundamental Human Right - The Right to Life and Personal Liberty, Deep & Deep, New Delhi, 2003, p. 1

<sup>30</sup>Meera Santosh Pal v. Union of India, 3 SCC 462,2017

<sup>31</sup>Kharak Singh vs. State of U.P., 1964 SCR (1) 332

## **CHAPTER-IV**

### **ETHICALITY AND MORALITY:**

#### ***Ethical perspective:***

Ethicality is what the society feels as right or wrong. Ethical means relating to beliefs about right and wrong<sup>32</sup>. When we look at the society's views on abortion it is still contradictory but majority of the people in the society feel abortion should not be allowed making it ethically incorrect or unacceptable. The society doesn't agree with abortion because they feel it is wrong to kill a innocent human being who has not even seen the world yet. Some feel foetuses are innocent human beings are suffering because of no fault on their part and their rights should be equally valued like that of the mothers. Many others also place their arguments on philosophy which says that killing a human is wrong whatsoever and say the same is happening in case of abortion and thus it is unacceptable. They also argue that allowing abortion is like legalising killing. It is also wrong to kill a potential human life. Not allowing the foetus to have a future like ours is wrong and the same cannot be deprived. While looking at the ethical perspective it is clear that the majority of the people in the society do not accept the concept of abortion. They place their arguments of not accepting on their religion like the church doesn't allow killing a human without even giving him/her a choice, or on philosophy or on basic human rights that everyone deserves making it ethically wrong.

#### ***Moral perspective:***

Morality is what the individual feels as right or wrong. A set of personal or social standards for good or bad behaviour and character<sup>33</sup>. Abortion from a personal perspective which is morally it is acceptable. The women carrying the child is the one who personally undergoes the trauma and experiences all the problems like physical harm, mental disorders while carrying the child because of which it is ethically accepted if abortion is carried in necessary situations like rape survivors especially. And as mentioned in the paper the individual has complete right over his or her own body. "Mary Ann Warren has argued that foetuses are not persons; they do not have the right to

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<sup>32</sup>Ethical, [www.collinsdictionary.com](http://www.collinsdictionary.com).

<sup>33</sup>morality, [dictionary.cambridge.org](http://dictionary.cambridge.org)

life. Therefore, abortion is morally permissible throughout the entire pregnancy. To see why, Warren argues that persons have the following traits:

- Consciousness: awareness of oneself, the external world, the ability to feel pain.
- Reasoning: a developed ability to solve fairly complex problems.
- Ability to communicate: on a variety of topics, with some depth.
- Self-motivated activity: ability to choose what to do (or not to do) in a way that is not determined by genetics or the environment.
- Self-concept: see themselves as; e.g. Kenyan, female, athlete, Muslim, Christian, atheist, etc<sup>34</sup>.”

He emphasises that the foetuses do not have any of the above said trait, thus they do not have the right to live. While the mother has all the above said traits making her to enjoy right to live. It is believed that existence of heart beat is simply not enough for having right to live.

Based on the above arguments it can be concluded that abortion is still ethically wrong and morally correct. While this is an everlasting debate the researcher has placed the statements based on the majority's opinions.

It is also to be noted that abortion is something which cannot be justified as such but whenever it is really needed it needs to be performed. The society is changing and everything around us is changing thus it is important for the society to understand the changing needs and how abortion is justifiable when it is performed under extreme circumstances when it is actually needed and legally performed.

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<sup>34</sup>Mary Ann Warren, "On the Moral and Legal Status of Abortion," originally in *Monist* 57:1 (1973), pp. 43-61.

## **CHAPTER-V**

### **SUGGESTIONS:**

There have been many problems regarding abortion in India and there are also many questions relating to the same which have been left unanswered by the judiciary which marked the concept very ambiguous. Thus, answering these questions which were discussed in the paper by the researcher and solving the problems which were discussed in the paper by finding appropriate solutions will definitely help in ensuring a more accessible and safe abortion in India. Along with it, removing the upper limit for abortions by developing the technologies which will be really helpful in case of rape victims or when the abnormalities are found in the later stage. Making the process available at remote places by opening more clinics and making more doctors available and reducing the cost will also be useful. The final step the government can take is to regulate the process in a better way and easing the process as well as educating the women regarding their abortion rights will help in order to make it safer.

### **CONCLUSION:**

Even after so many years of decriminalising abortion in India, still it is failing to satisfy its main requirements. “All-India Rural Health Statistics (2018-19) indicates there are 1,351 gynaecologists and obstetricians in community health clinics in rural areas across India, and the shortfall is 4,002, i.e., there is a 75% shortage of qualified doctors. The shortage of qualified medical professionals may continue to limit the access of women to safe abortion services<sup>35</sup>. Note that as per the National Health and Family Survey (2015-16), only 53% of abortions are performed by a registered medical doctor and the balance are conducted by a nurse, auxiliary nurse midwife, family member, or self<sup>36</sup>. The data itself shows the urgent need from the side of the government to take steps to make abortion for all the people in the society and in a safer way.

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<sup>35</sup>Section V, Rural Health Statistics (2018-19), Ministry of Health and Family Welfare.

<sup>36</sup> Unstarred Question No. 599, Ministry of Health and Family Welfare, Lok Sabha, July 20, 2018.

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