Page 1891 - 1908 **DOI:** *https://doij.org/10.10000/IJLMH.118440*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 7 | Issue 5

2024

An Analysis of Abortion Laws in India from a Human Rights Perspective

GARGY BASU[1]

ABSTRACT

Under the contemporary understanding human rights means and include rights relating to life, liberty, equality, and dignity of the individual which are essential for human existence. The issue around abortion is directly linked with doctrines of life, liberty, equality, and dignity, while in India there are several laws controlling the scope and ambit of abortion. These laws are often challenged as violating various human rights principles. The article is an analysis of abortion laws in India from a human rights perspective.

Keywords*: Abortion, Humar Rights, Legal Analysis, Social Perspective.*

I. INTRODUCTION

Abortion is legally defined as an untimely delivery voluntarily procured with the intent to destroy the foetus. It may be procured at any time before the natural birth of the child. However, in medical terminology, abortion means the untimely delivery of a child before it is viable (i. e. capable of being reared if born at the time of the act of abortion).[2] A child is considered viable from the 24th week of pregnancy.[3] Termination of pregnancy commonly known as abortion is the condition when the human foetus is intentionally dragged out of the uterus of the mother long before the gestation period is over leading to its death and thus preventing the birth of the living child.[4] The concepts of pregnancy and abortion are related to each other, while pregnancy is not a single-gender phenomenon. However, in the past abortion has been viewed as an immoral act striking at the sanctity of life, a view that was embodied in the Indian Penal Code of 1860, and this attitude is widely supported even today in several segments of Indian society. But, it is also true that women have demanded abortions but their opportunity to receive the same has been limited due to various reasons mainly being social and legal. The norms

[1] Author is a Ph. D. Research Scholar at Department of Law, University of Calcutta, Kolkata, India.

[2] K.D. Gaur, "Abortion and the Law in India", 28(3) *Journal of the Indian Law Institute*, 348-363 (1996).

[3] Section 3(2)(b) of the Medical Termination of Pregnancy (Amendment) Act, 2021[MTP (Amendment Act) 2021]. Section 3 of the MTP (Amendment Act) 2021 allows abortion upto 24 weeds of gestation period. Further, Rules 3A of the MTP (Amendment) Rules 2021 authoried the Medical Board to allow or deny termination of pregnancy beyond twenty-four weeks of gestation period.

[4] For general discussion see generally, Savithri Chattopadhyay, "Medical Termination of Pregnancy Act, 1971 : A Study of the Legislative Process," 16(4) *Journal of the Indian Law Institute*, 549-569 (1974); Dinesh C. Pande, "Some Inhibiting Factors in the Implementation of the Medical Termination of Pregnancy Act, 1971—A Study of Acceptability ," 16(4) *Journal of the Indian Law Institute* , 660-674 (1974).

 [ISSN 2581-5369]

governing the ethics of abortion have been modified from time to time and from one social context to the other. However, it is essential to note that despite their restrictions and/ or permissions, of the various abortion norms and/ or laws almost all have been directed towards the fulfillment of outer social needs rather than addressing the issue. The right of a woman to determine her sexuality, fertility, and reproduction is a consideration that has seldom been taken into account. And that it is the people of the medical profession who have played a vital role in the formulation of policies related to abortion and not women's groups or lawyers.[5]

Whether "abortion is a woman's right" is a debatable issue over time.[6] In this debate, it is argued that the media often misrepresents the "abortion rights" movement as "pro-abortion," but this label is not necessarily pro-abortion. Women have historically had abortions when necessary, and they feel entitled to make decisions about their bodies and lives. Anti-abortionists criminalize women and providers, making abortions illegal, and punishing poor women who can afford safe abortions, even if they need to travel.[7] Thus, abortion is a controversial legal subject that's rarely ever spoken or written about without a contradictory view. However, the law and its various enactments and the verdicts of Supreme Courts have not only changed the way abortion is dealt with in the United Kingdom[8] and the United States[9] as well as in India, but have also fueled discussions and shed more light on the protection of human life, women's privacy rights, and constitutional issues regarding state and federal laws on each of these matters. Originally, the Parliament of India enacted a law that used to make abortion legal up to 20 weeks of gestation i.e. less than 5 months in certain circumstances.[10] In this background, the Article examines the legal position of abortion in India from a human rights perspective.

II. RIGHT TO ABORTION UNDER INTERNATIONAL

(A) Human Rights Law

Access to safe and legal abortion is a matter of human rights. Authoritative interpretations of international human rights law establish that denying women, girls, and other pregnant women

[5] Amar Jesani and Aditi Iyer, "Women and Abortion," 28(48) *Economic and Political Weekly*, 2591-2594, 2591 (1993).
[6] On the debatable see Jenny Wild and Jenny Kunst, "Abortion Is a Woman's Right" 27 *Empowering Women for Gender Equity* , 42-47 (1995).
[7] Marge Berer, "Making Abortion a Woman's Right Worldwide," 10(19) *Reproductive Health Matters*, 1-8, 2 (2002).
[8] In UK, a series of court cases had interpreted the law as also allowing for abortion in cases where, for the pregnant woman, "there is a risk of real and serious adverse effect on her physical or mental health, which is either long term or permanent." See *R* v. *Bourne* [1939] 1 KB 687.
[9] *Roe* v. *Wade*, 410 US 113 (1973) is a seminal case in American constitutional law. In this case Supreme Court recognised that the Due Process Clause of the Fourteenth Amendment implicitly protected the right to privacy, which safeguards a woman's right to an abortion. This right was not absolute though, and it had to be balanced against any justifiable state interests in restricting abortion.
[10] Medical Termination of Pregnancy Act, 1971.

access to abortion is a form of discrimination which jeopardizes a range of human rights. The contemporary international human rights discourse began after the Second World War. The United Nations (UN) brought human rights firmly into the sphere of international law in its constituent document, the UN Charter.[11] The purposes of the UN are included in Article 1(3) of the Charter which dictates the promotion and encouragement of human rights and fundamental freedoms. The two major human rights provisions, in addition to Article 1(3) referred to above, are Articles 55 and 56. The UN aims to promote stability and well-being for peaceful relations among nations by promoting higher living standards, full employment, economic and social progress, international solutions to problems, cultural and educational cooperation, and universal respect for human rights.[12] Members commit to working together with the Organization to achieve the objectives outlined above. [13]Despite their vagueness, however, the human rights provisions of the Charter did prove to have important consequences.[14]

As a step forward to the same the UN adopted the Universal Declaration of Human Rights (UDHR) in 1948[15] proclaimed to protect various human rights declared under Articles 1 to 30.[16] So far as the international human rights law on abortion is concerned Article 5 of the UDHR provides useful insides of the ambit of the right of abortion. It states that no one shall be subjected to "torture or to cruel, inhuman or degrading treatment or punishment." This marked the emergence of a worldwide trend of protection and guarantee of certain basic human rights stipulated in Article 5.[17] Abortion restrictions violate the developing understanding of Article 5 of the UDHR. This is the foundational principle of the right to be free from torture. It has been argued that abortion restrictions and their impermissible impacts on women's health, constitute ill-treatment, discrimination, and in conjunction, a violation of the right to be free from torture.[18] The *jus cogens* nature of the right to be free from torture is a peremptory norm that binds all States to respect Article 5. The prohibition against torture is one of the most firmly rooted principles of international human rights law—torture is widely recognized as contravening *jus*

[11] The Charter was signed at San Francisco on 26 June 1945. Entry into force on 24 October 1945. India ratified on 30 October 1945. Total 193 Members (49 original Members and 144 Members having been admitted in accordance with Article 4).
[12] UN Chater, Article 55.
[13] *Id.,* 56.
[14] Thomas Buergenthal , "The Evolving International Human Rights System ," 100(4) *The American Journal of International Law*, 783-807 , 787 (2006).
[15] GA Res 217(111) of 10 December 1948, UN Doc A/810 at 71 (1948).
[16] For significance of UDHR see Vasily Tatsiy, "The Universal Declaration of Human Rights: The Worldwide Humanism Manifesto," 99(1) *Critical Quarterly for Legislation and Law,* 14-19 (2016); Margaret E. Mcguinness, "Peace v. Justice: The Universal Declaration of Human Rights and the Modern Origins of the Debate," 35(5) *Diplomatic History*, 749- 768 (2011).
[17] See *Dalbir Singh* v. *State of U.P.*, AIR 2009 SC 1674.
[18] See, Notes and Comments, Human Rights Devolution: Integrating International Law into State Abortion Governance, 137 *Harvard Law Review*, 2342-2363, 2346 (2024).

cogens, and all major human rights agreements contain a prohibition against torture.[19] The 1948 UN Convention Against Torture[20] prohibits torture and requires parties to take effective measures to prevent it in any territory under their jurisdiction.[21]The Convention has provided a wide definition of torture which reads as:

> "For the purpose of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him, or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions."[22]

The UN Convention against Torture requires parties to prevent "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1." [23] In particular, abortion policies that prohibit abortion even in cases of incest, rape or fetal impairment violate the right to be free from torture and ill-treatment. Article 6 of the 1966 International Covenant on Civil and Political Rights[24] (ICCPR) recognizes and protects the right to life of all human beings, while Article 7 of the ICCPR prohibits torture. But there are some controversial issues related to this supreme right. One such issue is the question of the "right to abortion". Among other rights of women, it is believed that every mother has a right to abortion for her very own interest or by her choice, it is a universal right. Earlier the right to abortion was not permitted and it was strongly opposed by society. The termination of pregnancy was termed to be a murder of the foetus. But due to the change in time and technology, nowadays this right has been legally sanctioned by most nations. Article 7 of ICCPR reads as follows:

---

[19] Sydney Chong Ju Padgett, "Abortion Rights As (Inter) National Human Rights: Dobbs and the Noncompliance of U.S. Abortion Policies under International Human Rights Law," 27(3) *Lewis and Clark Law Review*, 952-968, 943 (2023).

[20] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature December 10, 1984 and entered into force on 26 June 1987 after it had been ratified by 20 States. India 14 October 1997 (in short UN Convention Against Torture).

[21] *Id.*, Article 2.

[22] *Id.*, Article 1(1).

[23] *Id.*, Article 16.

[24] The Covenant was adopted by the GA Res 2200A (XXI) of 16 December 1966. It entered into force on 23 March 1976. India is a partry of ICCPR since 1979.

> "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

Article 7 of ICCPR postulates the ban as a moral imperative before the law and derives it from the equal dignity of all human beings.[25] This canonical formulation has been reproduced in many treaties which appear first in the 1948 UDHR.[26]Article 7 of ICCPR also prohibits experiments that infringe the integrity of the person by cruel, undignified, or inhuman treatment.[27] When the holders of public and private power find it possible to use torture as a "rational" means of achieving certain policy objectives, human rights in any worthwhile sense of that term disappear. This is so simply because the tormentor expands the torture of the right to be and remain human, and the tormentor also forfeits her humanity. A system that allows or fosters such practices encourages the possibility of converting human beings into non-humans**.**[28] States parties to the ICCPR may not regulate pregnancy or abortion in a manner that runs contrary to their duty to ensure that women do not have to undertake unsafe abortions.[29]

According to General Comment (No. 36) of the UN Human Rights Committee on the right to life in Article 6 of the ICCPR, any legal restrictions on the ability of women to seek abortion must not, inter alia, jeopardize their lives or subject them to physical or mental pain or suffering which violates Article 7. For example, States should not take measures such as criminalizing pregnancies by unmarried women or applying criminal sanctions against women undergoing abortion or against physicians assisting them in doing so, when taking such measures is expected to significantly increase resort to unsafe abortions.[30] In addressing abortion, General Comment 36 focuses entirely on the life and welfare of the mother rather than on the foetus. Hence, no prohibition on abortion or protection for the unborn can be gleaned from it. Instead, the Comment focuses on:

> "[T]he need for states to ensure that women and girls do not have to undertake

[25] J. Mayerfeld, "In Defense of the Absolute Prohibition of Torture," 22(2) *Public Affairs Quarterly*, 109-128, 110 (2008).
[26] Article 7 of ICCPR , Articles 1, 2, 3, 13, 14, 15 and 16 of the UN Convention Against Torture. See also Articles 37 and 39 of the Convention on the Rights of the Child (GA Res 44/25 of 20 November 1989) and Article 15 of the Convention on the Rights of Persons with Disabilities (GA Res A/RES/61/106 of 12 December 2006).
[27] Henning Rosenau , "Legal Prerequisites for Clinical Trials under the Revised Declaration of Helsinki and the European Convention on Human Rights and Biomedicine ," 7(2) *European Journal of Health Law*, 105-121, 109 (2000).
[28] Upendra Baxi , "From Human Rights to the Right to be Human: Some Heresies ," 13(4) *India International Centre Quarterly* , 185-200,1987 (1986).
[29] Human Rights Committee, General Comment No. 28 on the Article 3 of the ICCPR (Equality of Rights Between Men and Women) UN Doc. CCPR/C/21/Rev.1/Add.10.
[30] Human Rights Committee, General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36 (30 October 2018).

> unsafe abortions. In fulfilling this duty, the UNHRC lists a number of desirable measures, though they are all qualified by the use of the word 'should'. For example, states should not . . . apply criminal sanctions against women and girls undergoing abortion or against medical service providers assisting them in doing so, since taking such measures compel[s] women and girls to resort to unsafe abortion."[31]

Article 5 of the UDHR, UN Convention Against Torture, and Article 7 of the ICCPR represent an evolving international consensus on the nature and specific contents of human rights norms. Citing UDHR, UN Convention Against Torture, and ICCPR the Supreme Court of India in *Selvi* v. *State of Karnataka*,[32] observed:

> "The definition of torture indicates that the threshold for the same is the intentional infliction of physical or mental pain and suffering…` Cruel, Inhuman or Degrading Treatment' has been defined as conduct that does not amount to torture but is wide enough to cover all kinds of abuses."

Forcing an individual to undergo certain scientific techniques, namely, narcoanalysis, polygraph examination, and the Brain Electrical Activation Profile test violates the standard of "substantive due process" which restrains personal liberty.[33] In *Supriyo* v. *Union of India*,[34] the Supreme Court further held that in terms of Article 5 of the UDHR and Article 7 of the ICCPR "conversion therapies " and "other treatments" which are aimed at altering sexual orientation amount to cruel, inhuman, and degrading treatment of queer persons. They have the effect of denying their full humanity. The mental well-being suffers to no end because cruel techniques are used in these so-called treatments.

The 1979 Convention on the Elimination of All Forms of Discrimination against Women[35] (CEDAW) refers to women's reproductive rights. Thus, CEDAW provides that States Parties shall take all appropriate measures to eliminate discrimination against women and recognize the "right to protection of health and safety in working conditions, including the safeguarding of the function of reproduction." Reproductive rights of women guaranteed in the CEDAW Convention have a good connection to the right of abortion of women.[36] However, there is no

[31] Sarah Joseph, "Introductory Note to General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life," 54(4) *International Legal Materials*, 849-852, 850 (2019).
[32] AIR 2010 SC 1974.
[33] *Id.*
[34] AIR 2023 SC 5283.
[35] Adopted and opened for signature, ratification and accession by GA Res 34/180 of 18 December 1979. Entry into force on 3 September 1981 and ratified by India in 1993.
[36] See, Marsha A. Freeman, "The Human Rights of Women under the CEDAW Convention: Complexities and

UN treaty containing the word "abortion," nor can a "right" to abortion be inferred from the "ordinary meaning" of the words of any such treaty. However, UN human rights treaty bodies regularly call for governments to decriminalize abortion in all cases and to ensure access to safe, legal abortion in certain circumstances at a minimum. Thus, the criminalization of abortion is violence against women. The 1993 UN General Assembly Declaration on the Elimination of Violence against Women[37] (DEVAW) observed in Article 1 that, "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life. Citing Article 1 of the DEVAW the Supreme Court in *Chairman, Railway Board* v. *Chandrima Das*,[38]held that foreign citizens are also entitled to protection from any violence against women.

Under international human rights law countries have obligations to respect, protect, and fulfill human rights, including those concerning sexual and reproductive health and autonomy.[39] Where safe and legal abortion services are unreasonably restricted or not fully available, many other internationally protected human rights may be at risk, including rights to non-discrimination and equality; [40] to life, health, and information; [41] to freedom from torture and cruel, inhuman, and degrading treatment;[42] to privacy and bodily autonomy and integrity; [43] to decide the number and spacing of children; to liberty; to enjoy the benefits of scientific progress; and to freedom of conscience and religion. [44] Corollary to these human rights are right to access safe and legal abortion. Thus, the UN Human Rights Committee (Comment No. 36, 2018) has remarked that, in terms of Article 6 of the ICCPR, State Parties have the responsibility to provide safe, legal, and effective access to abortion.[45] The UN Human Rights Committee made history in the *K.L.* v. *Peru* [46]case by ruling that a government can violate human rights by prohibiting access to safe and legal abortion services. This case was the first in which an international human rights body held a government responsible for neglecting to guarantee access to legal abortion services. In *Mellet* v. *Ireland*,[47]the UN Human Rights Committee

Opportunities of Compliance," 91 *Proceedings of the Annual Meeting* , 378-383, 380 (1997).
[37] GA Res 48/104 of 20 December 1993.
[38] AIR 2000 SC 988.
[39] CEDAW.
[40] ICCPR, Articles 2, 3, 14 and 26; UDHR Article 7; Constitution of India, Articles 14 to 18.
[41] ICCPR, Articles 6 and 9(1); UDHR Articles 3 and 7; Constitution of India, Article 21.
[42] ICCPR, Article 7; UDHR Article 5; UN Convention Against Torture, Articles 1-16; Constitution of India, Article 21.
[43] ICCPR, Article 12; UDHR Article 12.
[44] ICCPR, Article 18; UDHR Article 18; Constitution of India, Articles 19(1)(a) 25 to 28.
[45] Human Rights Committee, General Comment (No. 36), CCPR/C/GC/36 (3 September 2019).
[46] *K.L.* v. *Peru*, UN Doc. CCPR/C/85/D/1153/2003 (2003), Communication Number: *1153/2003*.
[47] *Amanda* Jane *Mellet v. Ireland*, UN Doc. CCPR/C/116/D/2324/2013 (2016), Communication Number:

further ruled that the Republic of Ireland's abortion laws violated human rights and the International Covenant on Civil and Political Rights by prohibiting abortion in cases of fatal fetal abnormality and forcing her to travel to the United Kingdom for an abortion.

III. REALIZATION OF THE RIGHT TO ABORTION UNDER INDIAN

(A) Human Rights Laws

In India, the Protection of Human Rights Act 1993[48] provides for better protection of human rights. The Act defines "human rights'' to mean the rights relating to life, liberty, equality, and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants [49]and enforceable by courts in India.[50] The Act also provides provisions for study treaties and other international instruments on human rights and appropriate recommendations for their effective implementation.[51] Furthermore, the Parliament of India is empowered to make laws for implementing international agreements and conventions under Articles 51 and 253 of the Constitution of India. Treaties, agreements, and decisions taken at international conferences, organizations, or other entities fall under this category. So far as the realization of the right to abortion in India is concerned it is essential to understand the Indian practice of abortion since the ancient period.

(B) Right to Abortion and Pre-Constitutional Period in India

Abortion in Indian ancient society was often controlled and regulated in various cultures and social systems through moral codes, mores, religious taboos, and government, despite being as old as the Indian civilization itself. In ancient Indian scriptures like *Rig Veda*, *Dharma Sutras*, and *Smritis*, induced abortion is condemned as a sin. Later epics like Mahabharata and Ramayana also mention abortion. The dominant Hindu view about women is that they are the object of honor and respect. For example, Manu in his Dharmashastra believes that where women are honored, the Gods are pleased, but where they are not honored, no sacred rites can yield rewards.[52]

In ancient India, socially sanctioned female infanticide and daughter killing were increasingly emphasized in the privatizing of property at the cost of the general community. Infanticide was

2324/2013.

[48] Protection of Human Rights Act 1993 came into force on the September 28, 1993.

[49] *Id.*, Section 2(f) reads: "International Covenants'' means the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on the 16th December, 1966 and such other Covenant or Convention adopted by the General Assembly of the United Nations as the Central Government may, by notification, specify.

[50] *Id.*, Section 2(d).

[51] *Id.*, Section 12(f).

[52] Raj Pal Mohan , "Abortion in India *,"* 50(3) *Social Science* ,141-143, 141 (1975).

 [ISSN 2581-5369]

known in ancient India as well as it is mentioned in the religious scripture written by Aapastambha whose period was probably 500 BC.[53] Axiomatic, as it was also evidence of the prevalence of the custom in ancient India despite its being an act of sin. The religious sanction behind the customary belief, in preference for a male child over a female child, has remained instrumental for female infanticides since time immemorial in India. Many Hindu scriptures declared infanticide as one of the serious sins to be stringently punishable. A scripture by Aapastambha, provided sometime between 400 and 600 BC, considered it a grave sin.[54] The distinction between infanticide and female infanticide is altogether lacking in Hindu religious texts. However, at the same time, daughters were deprived of their share in their father's property during ancient India. [55]

In medieval India, the practice of female infanticide did not arise from any religious motive rather it was influenced by prevailing peculiar economic and political conditions. It arose out of social institutions and customs of people, caste, and marriage.[56] Female infanticide was resorted to for the preservation of family honor, pride, and dignity.[57]Guru Gobind Singh, the tenth Guru of Sikhs, in his writings in "Nasihat Nama" condemns the person who kills his daughter.[58]It shows that female infanticide was in practice at that time in the medieval period. During the medieval period, female infanticide was in practice among the majority of wealthy and powerful tribes of North and Northwest India. For example, these included the Gakkers in Punjab. Rajkumar or Rajvanshi tribes of Banaras district, Jats and Rathore Rajputs of Jaipur and Jodhpur district. The practice was also prevalent in the Northwest Province of Oudh, Cutch, and west of Indus in Baluchistan. Female infanticide was also prevalent in some distant and isolated pockets of the south like Todas of Nilgiri and in the northeast by Nagas of Assam.[59] Female infanticide was also prevalent in Gujarat.[60]

The victims of female infanticide during ancient India were the aborted female foetus, the girl child, the birthing mother, and the survivors of infanticide who grew up with the knowledge that they and their female siblings survived attempts to murder. History belies this assumption

[53] Pandurang Vaman Kane, *History of Religious Scriptures: Ancient and Medieval Indian Religion and Customs,* 15 (Uttar Pradesh Hindi Sansthan, Lucknow, 1992).
[54] *Id.*, at p. 17.
[55] *Id.*, at p. 20.
[56] Lalita Panigrahi, *British Social Policy and Female Infanticide in India,* 12 (Munshiram Manoharlal, New Delhi, 1972).
[57] Barbara D. Miller, *The Endangered Sex: Neglect of Female Children in Rural North India*, 35 (Cornell University Press, Ithaca, 1981).
[58] K. B. Pakrasi, *Female Infanticide in India,* 22 (Editions Indian, Calcutta, 1971).
[59] *Id.*
[60] Aravind Ganachari, "Infanticide in Colonial Western India: The Vijia Lakshmi Case," 38(9) *Economic and Political Weekly,* 902-906, 905 (2003).

 [ISSN 2581-5369]

because various scholars have shown that there were female infanticides in the indigenous cultures in India. In these indigenous cultures, infanticide was only one of many methods to eliminate female members.[61]Female infanticide was prevalent in the early Islamic era in India. *Islam abolished it* and strictly condemned it through its various teachings. It is important to note that female infanticide was unknown among Indian Muslims while continued to be practiced in secret by Hindus during the ancient and medieval periods in India.[62] The Muslims constitute an important minority group whose religious attitude towards a legal instrumentality validating miscarriage must have significance in evaluating the efficacy of the legislation.[63] However, female infanticides were never uniformly or universally practiced in these periods in India.

Pre-colonial India was characterized by a pluralistic and fragmented cultural, religious, and political structure in which there was no monolithic Hindu, Muslim, or Christian authority.[64] Multiple tribes, castes, sects, and family groupings crossed religious and political lines, creating a heterogeneous population that may have had a definite notion of authority but no corresponding notion of legality.[65]Much of the law of the period was customary, with adjudication within segregated communities, which gave rise to a common interpretation by outsiders that pre-colonial India lacked law altogether. When the East India Company acquired the right to collect revenue in Bengal, Bihar, and Orissa in 1765, the company had to devise a new political and legal structure for the newly acquired dominions. British colonial rule in India began primarily as a political expedient through this quasi-private entity, the East India Company, to reap the benefits of imperialism without setting up a fully functioning sovereign state. [66]

During the British period in India, abortion was controlled under the Indian Penal Code 1960 under Sections 312 to 318. Thus, natural abortion is a common occurrence due to various factors such as poor health, mother's organ defects, shocks, fear, and joy. Accidental abortions often occur due to trauma from accidents, which forcefully dislodge the ovum, embryo, or placenta

[61] Renu Dube, Reena Dube and Rashmi Bhatnagar, "Women Without Choice: Female Infanticide and the Rhetoric of Overpopulation in Postcolonial India," 27(1/2) *Women's Studies Quarterly*, 73-86, 74 (1999).
[62] Daniel J.R. Grey, "Gender, Religion, and Infanticide in Colonial India, 1870—1906," 37(2) *Victorian Review*, 107-120, 113 (2011).
[63] Dinesh C. Pande, "Some Inhibiting Factors in the Implementation of the Medical Termination of Pregnancy Act, 1971—A Study of Acceptability," 16(4) *Journal of the Indian Law Institute*, 660-674, 664 (1974).
[64] Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India*, 12 (Oxford University Press, New Delhi, 1999).
[65] Janaki Nair, Women and Law in Colonial India: A Social History (National Law School of India University, Bangalore, 1996).
[66] W.H. Rattigan, "Customary Law in India", 10 *The Law Magazine and Law Review*, 1-4, 3 (1884-1885) describing the unwritten customary law of Indian villages.

 [ISSN 2581-5369]

from the natural attachment. Spontaneous abortions may occur due to pathological reasons, metabolic circumstances, or poison accumulation, where pregnancy cannot be completed and the uterus mates before the foetus maturity.[67] The British justified and rationalized their arrival in India "reforming" Indian society from such traditional behaviors and practices as female infanticide. [68] The British first discovered female infanticide in India in 1789. Jonathan Duncan, then the resident in Benares province was asked by the Bengal Council to settle the revenues in the province acquired by the British from the Raja of Benares. Duncan found during his tour to settle the revenues, that the Rajkumar Rajputs in the Jaunpur district destroyed their female children. Duncan immediately informed Lord Cornwallis the then governor general of British India about his discovery.[69] Female infanticide was not an isolated phenomenon that the British discovered. The authorities also found that both in rural North and West India, the castes who practiced female infanticide were propertied (they owned substantial land), had the hypergamous marriage norm, and paid large dowries. In the context of female infanticide in India it was observed: [70]

> "A perusal of the historical records on female infanticide shows quite clearly that female infanticide was not an isolated phenomenon which the British disc and tried to suppress. The practice had wide ramifications in terms of its relationship to marriage norms and preferences, the political system in colonial India, internal stratification and maintenance of dominance by the cast resorted to female infanticide, British revenue, and judicial policy, the ideology or ethos of the infanticidal castes and so on."

It was reported that during the British period, the actual increase in rates of female infanticide in Punjab had much more to do with the changes in landholding legislation pushed through by the colonial government.[71] During the British period in India, female infanticide was controlled under criminal law through two legislations namely (i) the Indian Penal Code of 1860,[72] and (ii) the Female Infanticide Act of 1870. These two legislations were enforced under the Code

[67] K. D. Gaur , "Abortion and the Law in Countries of Indian Subcontinent, Asean Region, United Kingdom, Ireland and United States of America ," 37(3) *Journal of the Indian Law Institute* 293-323, 293 (1995).
[68] Steven C. Dinero, "Female Infanticide in India: A Feminist Cultural History," 23(2) *Journal of Third World Studies*, 221-223, 222 (2006).
[69] L. S. Vishwanath, "Efforts of Colonial State to Suppress Female Infanticide: Use of Sacred Texts, Generation of Knowledge," 33(19) *Economic and Political Weekly*, 1104-1112, 1104 (1998).
[70] S. Vishwanath, "Towards A Conceptual Understanding of Female Infanticide and Neglect in Colonial India," 55 *Proceedings of the Indian History Congress*, 606-613, 606 (194).
[71] *Id.*, at p. 115.
[72] Sections 312 to 318 of the India Penal Code 1860 dealt with the matter relating to "causing of miscarriage, of injuries to unborn children, of the exposure of infants, and of the concealment of births."

 [ISSN 2581-5369]

of Criminal Procedure which was amended from time to time.

(C) Right to Abortion and Post-Constitutional Period in India

The Constitution of India has provided fundamental rights to equality and non-discrimination,[73] the right to freedom,[74] the right to life, and personal liberty. [75] Article 15(3) of the Constitution of India is an affirmative action provision intended to remedy the disadvantage faced by women.[76] In *Suchita Srivastava* v. *Chandigarh Administration*,[77] the Supreme Court has expressed the view that the right of a woman to have the reproductive choice is an inseparable part of her "personal liberty", as envisaged under Article 21 of the Constitution. She has a sacrosanct right to have her bodily integrity. The Court found that unless the pregnancy is allowed to be terminated, the life of the mother as well as that of the baby to be born will be in great danger. In *Justice K.S. Puttaswamy* v. *Union of India*,[78] the Supreme Court held that the decision of a woman to procreate or abstain from procreating has been recognized as a facet of her right to lead a life with dignity and the right to privacy under Article 21 of the Constitution. Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. To elaborate on the Constitutional right of women under Articles 14, 15(3), 19, and 21 *inter-alia* and to realize the right to abortion two important legislations have been enacted: (i) the Medical Termination of Pregnancy Act, 1971 (MTP Act), (ii) the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (PCPNDT Act), besides criminal penal laws.[79] The MTP Act imposes limitations on the right to abortion while the PCPNDT Act prohibits sex-selective abortions. These two legislations are analyzed as follows.

a. Limited Right to Abortion and Medical Termination of Pregnancy Act

The Medical Termination of Pregnancy Act of 1971[80] was enacted by the Parliament[81] "to provide for the termination of certain pregnancies by registered medical practitioners and

[73] Constitution of India, Articles 14-15.
[74] *Id*., Article 19.
[75] *Id*., Article 21.
[76] Article 15(3) stated that "[n]othing in this article shall prevent the State from making any special provision for women and children," while Article 15(1) states that there shall be no discrimination against any citizen of India on the basis of religion, race, caste, gender, or place of birth and Article 15 (2) is targeted at specific forms of discrimination. See Unnati Ghia, "Affirmative Action under Article 15(3): Reassessing the Meaning of 'Special Provisions' for Women," 32(2) *National Law School of India Review*, 2026-261 (2020).
[77] AIR 2010 SC 235.
[78] AIR 2017 SC 4161.
[79] Sections 88 to 92 of the Bharatiya Nyaya Sanhita, 2023 (came into force on and from July 1, 2024) deal with "Of causing miscarriage, etc." These provisions are similar to Sections 312 to 318 of the India Penal Code 1860.
[80] For commentaries of the Medical Termination of Pregnancy Act, 1971 see Savithri Chattopadhyay, "Medical Termination of Pregnancy Act, 1971: A Study of the Legislative Process," 16(4) *Journal of the Indian Law Institute*, 549-569, 561(1974).
[81] The Medical Termination of Pregnancy Act, 1971 come into force on 1st April, 1972, vide notification No. G.S.R. 285, dated 19th February, 1972, see Gazette of India, Part II, Section 3 (i).

matters connected therewith or incidental thereto."[82] The said Act recognized the importance of safe, affordable, accessible abortion services to women who need to terminate pregnancy under certain specified conditions. This Act was enacted to reduce illegal abortions, slow down the growth of the population, and emancipate women was a bold step by the government. Its implementation will be a challenging task demanding a concerted effort from doctors, sociologists, educators, priests, lawmakers, and the public in general.

The Act contains 8 Sections. Section 1 deals with the short title, extent, and commencement, while Section 2 defines *inter-alia* as "termination of pregnancy" which means a procedure to terminate a pregnancy by using medical or surgical methods[83] and "registered medical practitioner".[84] Section 3 provides the circumstances when pregnancies may be terminated by registered medical practitioners, while Section 4 states the place where pregnancy may be terminated. Section 3(2) clarifies further that a registered medical practitioner can terminate a pregnancy if the pregnancy's length is less than 12 weeks, or if the pregnancy's length is greater than 12 but not 20 weeks, and at least two registered medical practitioners are in good faith. Sections 3 and 4 when will not be applied have been clarified in Section 5, while Section 5A provides certain protection of privacy of a woman.[85] The power to make rules has been provided in Section 6 and the power to make regulations has been provided in Section 7, while protection of action taken in good faith has been provided in Section 8. In *Sheetal Shankar Salvi* v. *Union of India*,[86] the Supreme Court has declined the termination of 20 weeks of pregnancy. The Supreme Court However in *Sarmistha Chakraborty* v. *Union of India*,[87] has granted permission to terminate the pregnancy of 25 weeks.

The Medical Termination of Pregnancy (Amendment) Act, 2021[88] introduced a major change in Section 3 of the principal Act by extending the upper limit for permissible termination of pregnancy from 12 weeks to 24 weeks. The amendment outlines the procedure for terminating a pregnancy by a registered medical practitioner, subject to certain conditions. The termination can occur if the pregnancy's length does not exceed 12 weeks, or if the pregnancy's length exceeds 20 weeks but does not exceed 24 weeks for a specific category of woman. If at least

[82] *Id.*, Preamble.
[83] *Id.*, Section 2(e).
[84] *Id.*, Section 2 (d). According to Section 2(d) "registered medical practitioner" means a medical practitioner who possesses any recognized medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956, whose name has been entered in a State Medical Register and who has such experience or training in gynaecology and obstetrics as may be prescribed by rules made under this Act.
[85] Substituted by Act 64 of 2002, Section 5, for sub-section (2) and the Explanation (w. e. f. 18-6-2003).
[86] (2018) 11 SCC 606.
[87] (2018) 13 SCC 339.
[88] The Act received the assent of the President on the March 25, 2021.

 [ISSN 2581-5369]

two registered medical practitioners believe that the pregnancy would pose a risk to the woman's life or serious physical or mental health, or if the child would suffer from any serious abnormality, the pregnancy can be terminated. The amendment also mentions that the anguish caused by pregnancy due to the failure of any device or method used to limit the number of children or prevent pregnancy can be considered a grave injury to the woman's mental health. The text also mentions that the anguish caused by a pregnancy alleged to have been caused by rape is also considered a grave injury to the woman's mental health. The amendment also mentions that the provisions of sub-section (2) regarding pregnancy length do not apply to terminations due to the diagnosis of substantial foetal abnormalities by a Medical Board. The Medical Board, consisting of a Gynaecologist, Paediatrician, Radiologist or Sonologist, and other members, is constituted by every State Government or Union territory by notification in the Official Gazette.[89] The Statement of Objects and Reasons of the MTP (Amendment) Act 2021 locates the purpose within the framework of reproductive rights:

> "With the passage of time and advancement of medical technology for safe abortion, there is a scope for increasing the upper gestational limit for terminating pregnancies especially for vulnerable women and for pregnancies with substantial foetal anomalies detected late in pregnancy. Further, there is also a need for increasing access of women to legal and safe abortion services in order to reduce maternal mortality and morbidity caused by unsafe abortion and its complications. Considering the need and demand for increased gestational limit under certain specified conditions and to ensure safety and well-being of women, it is proposed to amend the said Act. The proposed Bill is a step towards safety and well-being of women and will enlarge the ambit and access of women to safe and legal abortion without compromising on safety and quality of care. The proposal will also ensure dignity, autonomy, confidentiality and justice for women who need to terminate pregnancy."

In *X* v. *The Principal Secretary*,[90] the Supreme Court held that the statement of objects and reasons indicates that the MTP (Amendment) Act 2021 is primarily concerned with increasing access to safe and legal abortions to reduce maternal mortality and morbidity. The increase in the upper gestational limit for terminating pregnancies under "certain specified conditions" was considered necessary to fulfill the goal of ensuring "dignity, autonomy, confidentiality and justice for women who need to terminate pregnancy." Explanation I of Section 3(2) of the 2021

[89] *Id.*, Section 3.
[90] AIR 2022 SC 4917.

 [ISSN 2581-5369]

MTP (Amendment) Act 2021 intended to include unmarried women and single women within the ambit of the Act. Explanation I of Section 3(2) of the Act is as follows:

> "Explanation 1.—For the purposes of clause (a), where any pregnancy occurs as a result of failure of any device or method used by any woman or her partner for the purpose of limiting the number of children or preventing pregnancy, the anguish caused by such pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman."

The 2021 amendment through Explanation I of Section 3(2) replaced the word "husband" with the word "partner". Thus, unmarried women and single women are also entitled to abortion. In *X* v. *The Principal Secretary,*[91] the Supreme Court held that the fundamental principle of statutory interpretation is that the words of a statute must be read in their entire context and their grammatical and ordinary sense harmoniously with the scheme of the Act and the intent of the legislature. Parliament by amending the MTP Act through MTP (Amendment) Act 2021 intended to include unmarried women and single women within the ambit of the Act. This is evident from the replacement of the word "husband" with "partner" in Explanation I of Section 3(2) of the Act. The Court observed:

> "The expression 'any woman or her partner' would indicate that a broad meaning and intent has been intended to be ascribed by Parliament. The statute has recognized the reproductive choice of a woman and her bodily integrity and autonomy. Both these rights embody the notion that a choice must inhere in a woman on whether or not to bear a child. In recognizing the right the legislature has not intended to make a distinction between a married and unmarried woman, in her ability to make a decision on whether or not to bear the child. These rights, it must be underscored, are in consonance with the provisions of Article 21 of the Constitution."[92]

The issue is whether pre-marital sex has any social and legal status. In *S. Khusboo* v. *Kanniammal,*[93]the Supreme Court observed that in the societal mainstream, there are a significant number of people who see nothing wrong in engaging in premarital sex. Notions of social morality are inherently subjective and the criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy. Morality and criminality are not co-extensive. As a result of pre-marital sex with or without consent, a woman may be pregnant. In

[91] AIR 2022 SC 4917/ 2022 LawSuit (SC) 860.
[92] *Id.*, para. 16.
[93] AIR 2010 SC 3196.

such a situation abortion may be an issue. The Bombay High Court in High Court in *Own Motion* v. *State of Maharashtra*,[94] observed :

> "If a woman does not want to continue with the pregnancy, then forcing her to do so represents a violation of the woman's bodily integrity and aggravates her mental trauma which would be deleterious to her mental health."

Denying an unmarried woman the right to a safe abortion violates her "personal autonomy and freedom".[95]

b. Control of Sex-Selective Abortion and Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act

The process of legislative development to eradicate female foeticide began in the early 1990s when ultrasound techniques gained widespread use in India. Even before the 1990s the use of amniocentesis in medical technology was developed a few decades ago to detect genetic abnormalities in the foetus. This technology, incidentally, could also reveal the sex of the foetus. Unfortunately, this advancement in medicine is being misused for the selective elimination of the female child. Sex determination was a lucrative business for many doctors and clinics for over a decade.[96] The Maharashtra Regulation of Use of Pre-Natal Diagnostic Techniques Act, 1988[97] is one of the responses against female foeticide. This was the first legislation in the Country prohibiting the use of new scientific techniques for sex determination and sex selection treating it as totally insulting to the dignity of womanhood and against the spirit of the Constitution of India in which the right to equality is embedded.[98]In this background at the national level, the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 1994 was enacted by the Parliament of India.[99]

The Act prohibits sex selection before or after conception and regulates prenatal diagnostic techniques for detecting genetic abnormalities, metabolic disorders, chromosomal abnormalities, congenital malformations, and sex-linked disorders. It also prohibits misuse of these techniques for sex determination, which can lead to female foeticide. The Act had two

---

[94] 2017 Cri LJ 218.
[95] *X* v. *The Principal Secretary*, AIR 2022 SC 4917.
[96] Kusum, "The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Bill 1991: A Critique," 33(3) *Journal of the Indian Law Institute*, 413- 417, 413 (1991).
[97] Maharashtra Act No. XV of 1988. The Act received the assent of the Governor on April 22, 1998 and published in the Maharashtra Government Gazette, Part IV, Extraordinary, on April 28, 1998.
[98] Shalini Phansalkar Joshi, *Compilation and Analysis of Case Law on Pre-Conception and Pre-Natal Diagnostics Techniques (Prohibition of Sex Selection) Act, 1994,* vii (Maharashtra Judicial Academy, 2013).
[99] Act No. 57 of 1994. For the commentaries of the Act see S. V. Subramanian and S. Selvaraj, "Social Analysis of Sex Imbalance in India: Before and after the Implementation of the Pre-Natal Diagnostic Techniques (PNDT) Act," 63(3) *Journal of Epidemiology and Community Health*, 245-252 (2009).

 [ISSN 2581-5369]

aspects, viz, regulatory and preventive. It seeks to regulate prenatal diagnostic techniques for legal or medical purposes and prevent misuse for illegal purposes of female foeticide [100] To look into various policy and implementation matters the Act provides for the setting up of various bodies along with their composition, powers, and functions. These are the Central Supervisory Board, Appropriate Authorities, and Advisory Committees. Under the Act, registration is mandatory for every genetic clinic. Without registration, it cannot be conducted nor even associated with any activities relating to pre-natal diagnostic techniques. Also, no person can be employed in these centers unless he possesses the prescribed qualifications. It is also prescribed that no pre-natal diagnostic techniques will be performed at any place other than a place registered under this Act. A very important and significant provision of the Act is that these techniques can be conducted only for a specified purpose, viz, certain abnormalities in the foetus. These are (i) Chromosomal abnormalities; (ii) genetic metabolic diseases; (iii) hemoglobinopathies; (iv) sex-linked genetic diseases; (v) congenital abnormalities ; (vi) any other abnormalities or diseases as may be specified by the Central Supervisory Board. This Act was amended in 2002 for further reform.[101]

IV. CONCLUSION

The right to life is a recognized human right while the right to abortion is one of the facets of the right to life. The right to abortion is regulated under several laws in India that resulted a confusion about the status of women. Pregnancy of women is a hetero-gender phenomenon while abortion is not. Hence, the attitudes and stigma toward women—particularly young, unmarried women—seeking abortion also contribute to the number of unsafe abortions. Access to safe abortion services needs to be recognized and advocated in light of the reproductive rights of women, ensuring that no woman is subjected to the morbidity and mortality arising out of unsafe abortion practices. The MTP Act initially allowed for pregnancy termination up to 20 weeks(gestation period), which was increased to 24 weeks in 2021 by an amendment. However, the court frequently crosses the limit of the maximum term. Still, there is a conflict between the MTP (Amendment) Act 2021 and the MTP (Amendment) Rules 2021. In *XYZ* v. *The State of Maharashtra*,[102] the petitioner was a minor. She is in her 26 weeks of pregnancy and is a victim of child abuse. The Bombay High Court permitted the petitioner to medically terminate the pregnancy. In *Victim X* v. *The Superintendent of Police Department*,[103]the prayer of the

[100] Kusum, "The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Bill 1991: A Critique," 33(3) *Journal of the Indian Law Institute*, 413- 417 (1991).
[101] The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002.
[102] MANU/MH/4975/2024. Writ Petition No. 11057 of 2024 and decided on Aught 8, 2024.
[103] MANU/MP/2650/2024. Writ Appeal No. 1078 of 2024 and decided on May 5, 2005.

petitioner for termination of her pregnancy exceeded 24 weeks. Allowing the prayer the Madhya Pradesh High Court directed that the petitioner may appear before the doctors on the day of direction and a specialized team of doctors to make a decision when to terminate the pregnancy of that day or by the earliest next day. All necessary care and caution be taken by the doctors while carrying out the procedure for termination of pregnancy. In India, the issue of abortion is a matter of penal law,[104] MTP Act, PCPNDT Act, and law and child but the right to life is a Constitutional right. Therefore the law of abortion became a controversial issue. There is an urgent need to address this situation to make sure that these women—whose well-being is central to their families, their communities, and the nation's health and stability—are not forgotten. The real problem lies in the implementation of the laws and existing frameworks. We can safely conclude that enactment of umbrella legislation on the issue of abortion may help to a certain extent, but government aid, different social organizations, and local support systems may also help and fulfill needy people.

*****

[104] Sections 88 to 92 of the Bharatiya Nyaya Sanhita, 2023 deal with of causing miscarriage, etc.

 [ISSN 2581-5369]