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The State as Sovereign of the Womb: Rethinking Abortion Criminalisation as a Crime against Humanity

NAINISHA GARUDE[1]

ABSTRACT

Restrictions on abortion carry profound legal, social, and economic consequences, falling most heavily upon women, gender minorities, and other marginalised groups. This paper interrogates abortion criminalisation through the analytical lens of gender-based persecution under international human rights law — principally the Rome Statute of the International Criminal Court (ICC), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the International Covenant on Civil and Political Rights (ICCPR). It argues that where abortion restrictions form part of a widespread or systematic State-directed attack on individuals capable of pregnancy, such restrictions may satisfy the threshold criteria for crimes against humanity under Article 7(1)(h) of the Rome Statute. The paper examines how international legal instruments recognise forced pregnancy and denial of reproductive autonomy as forms of gender-based violence, surveys landmark jurisprudence including K.L. v Peru, Mellet v Ireland, and R.R. v Poland, and evaluates the regressive global trajectory set in motion by the United States Supreme Court's 2022 decision in Dobbs v Jackson Women's Health Organization, which overturned Roe v Wade. It further analyses the socioeconomic consequences of criminalisation on marginalised communities, India's progressive but imperfect legislative framework under the Medical Termination of Pregnancy Act (as amended in 2021), and the need for coherent international enforcement mechanisms. The paper concludes with concrete legal and policy recommendations for protecting reproductive rights as non-derogable fundamental human rights at the international and domestic levels.

Keywords: *Abortion criminalisation, crimes against humanity, Rome Statute, CEDAW, reproductive rights, gender-based persecution, international human rights law, Dobbs v Jackson, Medical Termination of Pregnancy Act.*

I. INTRODUCTION

The right to reproductive autonomy lies at the intersection of the most fundamental guarantees of international human rights law: the right to life, the right to health, the right to be free from

[1] Author is a Student at Pravin Gandhi College of Law, Mumbai University, Mumbai, Maharashtra, India.

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torture and cruel, inhuman or degrading treatment, and the right to equality and non-discrimination. Yet, across the globe, criminal law continues to be wielded as an instrument of reproductive control, compelling individuals capable of pregnancy to carry unwanted pregnancies to term under threat of prosecution, imprisonment, and social ostracism.

Article 7(1)(h) of the Rome Statute of the International Criminal Court (ICC) designates "persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds' as a crime against humanity, provided it is committed" as part of a widespread or systematic attack directed against any civilian population.'[2] The Statute further defines "gender" to encompass both sexes "within the context of society," a formulation now interpreted as inclusive of gender minorities.[3] Given that abortion restrictions operate exclusively or disproportionately upon persons with the capacity for pregnancy, an overwhelmingly gendered class, such restrictions are, at their core, an exercise of gender-based coercion by the State.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and its Committee's General Recommendations particularly General Recommendation No. 35 (2017), affirm that denial of reproductive healthcare, including safe abortion, constitutes a form of gender-based violence and discrimination.[4] The International Covenant on Civil and Political Rights (ICCPR) similarly obligates States parties to ensure the right to life and to freedom from cruel, inhuman or degrading treatment obligations which, as the UN Human Rights Committee has clarified, require States to remove legal barriers to safe abortion where continuation of pregnancy poses a risk to a woman's life or health or is the result of rape or incest.[5]

This paper is structured as follows. Part II surveys the global legal landscape of abortion criminalisation. Part III examines the doctrinal case for classifying systematic abortion restrictions as gender-based persecution under international criminal law. Part IV analyses the socioeconomic consequences of criminalisation, with particular attention to marginalised communities. Part V examines pertinent international jurisprudence. Part VI considers the regressive implications of the United States Supreme Court's ruling in *Dobbs v Jackson* Women's Health Organization. Part VII assesses India's legislative framework. Part VIII sets

[2] Rome Statute of the International Criminal Court arts. 7(1)(h), 7(2)(g), July 17, 1998, 2187 U.N.T.S. 90.
[3] International Criminal Court, Office of the Prosecutor, *Policy on the Crime of Gender Persecution* (Dec. 2022), https://www.icc-cpi.int/
[4] Comm. on the Elimination of Discrimination Against Women, Gen. Recommendation No. 35 on Gender-Based Violence Against Women, Updating General Recommendation No. 19, ¶ 18, U.N. Doc. CEDAW/C/GC/35 (2017).
[5] Human Rights Comm., General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, ¶ 8, U.N. Doc. CCPR/C/GC/36 (2018).

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out policy and legal recommendations, and Part IX concludes.

II. THE GLOBAL LEGAL LANDSCAPE OF ABORTION CRIMINALISATION

Globally, abortion law exists on a spectrum ranging from unconditional prohibition to unqualified access. As of 2023, approximately twenty-four countries maintain near-total bans on abortion, with no exceptions for rape, incest, or foetal anomaly—a category that includes El Salvador, Honduras, Nicaragua, and Malta.[6] At the other end of the spectrum, countries such as Canada, the Netherlands, and Iceland treat abortion as a matter of healthcare, subject to gestational and clinical guidelines rather than penal sanction.[7]

In countries that maintain penal restrictions, the criminal law applies not only to women who procure abortions but also to healthcare providers who perform them, individuals who assist in obtaining abortions, and sometimes even to persons who merely disseminate information about accessing abortion services.[8] El Salvador provides the starkest example of this phenomenon: under its absolute prohibition, women who have experienced miscarriages have been convicted of aggravated homicide and sentenced to up to thirty years' imprisonment, the State treating spontaneous pregnancy loss as a presumptive crime.[9]

What is most revealing about El Salvador's legal framework is not its extremity but its logic: it treats the pregnant body as State property, and any deviation from the State's reproductive expectations as a criminal act against the "unborn." This conflation of State interest with foetal interest, achieved entirely at the cost of the pregnant person's legal personhood, is precisely what international criminal law must confront. When the State prosecutes a miscarriage, it has not merely violated a right; it has obliterated the very idea of a rights-bearing subject.

The World Health Organization (WHO) estimates that approximately 45 per cent of all abortions worldwide are unsafe, defined as those carried out either by untrained persons or under medically substandard conditions, and that the overwhelming majority occur in countries with highly restrictive abortion laws.[10]

Each year, between 4.7 and 13.2 per cent of maternal deaths are attributable to unsafe abortion, with the burden falling disproportionately on low- and middle-income countries in the Global

[6] Ctr. for Reprod. Rights, *The World's Abortion Laws* (2023), https://reproductiverights.org/maps/worlds-abortion-laws.

[7] Gilda Sedgh et al., Abortion Incidence Between 1990 and 2014: Global, Regional, and Subregional Levels and Trends, 388 *Lancet* 258, 260 (2016).

[8] Rebecca J. Cook, Joanna N. Erdman & Bernard M. Dickens, *Abortion Law in Transnational Perspective: Cases and Controversies* 1–35 (Univ. of Pa. Press 2014).

[9] Amnesty Int'l, *El Salvador: Abortion Bans Ruin Women's Lives* (2021), https://www.amnesty.org.

[10] World Health Org., *Abortion Care Guideline* 8 (2022), https://www.who.int/publications/i/item/9789240039483.

South.[11] These statistics are not incidental: they are the predictable and foreseeable consequence of criminalising a medical procedure that, when performed safely, carries a risk of death lower than that of a tonsillectomy or a wisdom tooth extraction.[12]

Criminalisation also generates profound inconsistencies in the application of legal penalties. Depending on the jurisdiction's classification, the same act, termination of a pregnancy, may be charged as murder, homicide, an offence against the person, a "crime against morality," or a public health violation, with sentences ranging from a suspended fine to life imprisonment.[13] This arbitrariness underscores the essentially punitive rather than rights-protective character of such laws.

III. ABORTION RESTRICTIONS AS GENDER-BASED PERSECUTION: THE DOCTRINAL CASE

A. The Crime Against Humanity Framework

Article 7(1) of the Rome Statute enumerates acts that constitute crimes against humanity when committed "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." Persecution—defined in Article 7(1)(h), "the intentional and severe deprivation of fundamental rights, contrary to international law, by reason of the identity of the group or collectivity" is one such act.[14] The threshold inquiry is therefore twofold: first, whether the deprivation of rights is severe; and second, whether it is carried out on a prohibited discriminatory ground including, explicitly, gender.

Criminalisation of abortion satisfies both limbs of this inquiry. First, the deprivation of the right to reproductive autonomy is severe: it forces individuals to carry unwanted or dangerous pregnancies to term, exposes them to criminal prosecution, and in many cases deprives them of access to healthcare that could prevent serious injury or death.[15] Second, abortion restrictions inherently target persons with the capacity for pregnancy, a class defined by its reproductive biology and therefore quintessentially gendered. Where such restrictions are enacted and enforced pursuant to a State policy designed to control women's bodies, sexuality, or reproductive choices, the discriminatory intent required by Article 7(2)(g) is plainly

[11] L. Say et al., Global Causes of Maternal Death, 2 *Lancet Global Health* e323 (2014).
[12] Elizabeth G. Raymond & David A. Grimes, The Comparative Safety of Legal Induced Abortion and Childbirth in the United States, 119 *Obstetrics & Gynecology* 215, 217 (2012).
[13] Johanna Schoen, *Abortion After Roe* 12–18 (Univ. of N.C. Press 2015).
[14] Rome Statute, supra note 1, arts. 7(1)(h), 7(2)(g).
[15] Susheela Singh et al., Unintended Pregnancy and Abortion Worldwide (Guttmacher Inst. 2020), https://www.guttmacher.org.

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established.[16]

This paper argues that the doctrinal barrier most commonly invoked against this analysis, that crimes against humanity require "State policy" in a formal sense, should be rejected in the abortion context. A State that enacts a criminal statute targeting a gendered class has, by definition, expressed a State policy. The requirement of State policy was never meant to exclude democratically enacted laws from ICC scrutiny; to interpret it that way is to render the persecution provision meaningless in the very contexts of institutionalised oppression it was designed to address. Democratic enactment does not launder persecution into legitimacy.

B. The "Widespread or Systematic" Requirement

The "widespread or systematic" requirement under Article 7 presents a nuanced challenge when applied to abortion criminalisation. The requirement does not demand that the attack should be both widespread and systematic; either characteristic suffices.[17] A law that criminalises abortion across an entire State's territory is, by definition, widespread in its geographic reach. Furthermore, where such a law forms part of a legislative and enforcement framework that systematically targets persons capable of pregnancy through police investigations of miscarriages, prosecution of healthcare providers, and denial of emergency contraception, the systematic character is satisfied.[18]

C. Forced Pregnancy as an Enumerated Crime

Article 7(1)(g) of the Rome Statute separately enumerates "forced pregnancy" as a crime against humanity. Article 7(2)(f) defines this as "the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law."[19] While the drafting history of this provision was contested, with some delegations seeking to limit its application to conflict-related forced impregnation, the ICC Office of the Prosecutor's 2022 Gender Persecution Policy has, however, interpreted the provision broadly, encompassing any State-mandated continuation of pregnancy without consent as potentially falling within the Statute's purview where other elements are met.[20]

The drafting history of Article 7(2)(f) has long been used to confine "forced pregnancy" to

[16] Widney A. Brown & Laura Grenfell, *The International Crime of Gender-Based Persecution and Preliminary Examination* (Pub. Int'l L. & Pol'y Grp. Mar. 2022), https://www.publicinternationallawandpolicygroup.org.
[17] *Prosecutor v. Katanga & Ngudjolo Chui*, Case No. ICC-01/04-01/07, Judgment, ¶ 1100 (Mar. 7, 2014).
[18] Yvonne M. Dutton & Milena Sterio, Beyond Policy: Overcoming Challenges in Prosecuting Gender Persecution at the International Criminal Court, *19 FIU L. Rev. 521, 527 (2025).*
[19] Rome Statute, supra note 1, arts. 7(1)(g), 7(2)(f).
[20] Int'l Criminal Court, Office of the Prosecutor, supra note 2, at 18–21.

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conflict-related ethnic violence. This reading is historically contingent and analytically incoherent. The underlying harm, compelling a person to remain pregnant against their will under threat of State sanction, is identical whether the coercion is ethnic or gender-based. The ethnic element was inserted in Rome due to lobbying by delegations concerned about domestic abortion policy, not because of any principled distinction in harm. To permit that political compromise to permanently exclude domestic abortion criminalisation from the crime of forced pregnancy is to allow legislative history to override legislative purpose.

This interpretation is consistent with CEDAW Committee General Recommendation No. 35, which recognises that "prohibiting access to abortion and safe abortion services" constitutes a form of "gender-based violence against women" that may amount to torture or cruel, inhuman or degrading treatment.[21] A State that systematically compels its population to carry pregnancies to term, irrespective of health, rape, incest, or foetal anomaly, is, in substance, inflicting forced pregnancy upon an entire gendered class, and this calls for serious analysis under the international criminal law framework.

IV. SOCIOECONOMIC CONSEQUENCES OF CRIMINALISATION

A. The Turnaway Study and Its Implications

The most comprehensive longitudinal study of the consequences of abortion denial is the Turnaway Study, conducted over a ten-year period by researchers at the University of California, San Francisco. The study compared the economic, health, and social outcomes of women who received abortions to those who were turned away from abortion clinics because they were beyond the gestational limit.[22]

The findings were stark. Women denied abortions were nearly four times more likely to live below the federal poverty line two years after the denial, compared to those who received abortions.[23] They were more likely to remain in or enter abusive relationships, consistent with earlier findings that pregnancy escalates the risk of intimate partner violence.[24] Children born following denied abortions were more likely to live in poverty and to have lower developmental outcomes than children born to women who received abortions.[25] These data demonstrate that abortion criminalisation does not merely constrain individual reproductive choices; it

[21] Comm. on the Elimination of Discrimination Against Women, supra note 3, ¶ 18.
[22] Diana Greene Foster, *The Turnaway Study: Ten Years, a Thousand Women, and the Consequences of Having—or Being Denied—an Abortion* 45–80 (Univ. of Cal. Press 2020).
[23] Amanda Stevenson et al., The Socioeconomic Effects of Abortion Denial, 118 *Proc. Nat'l Acad. Sci.* e2017216118 (2021).
[24] Sarah C.M. Roberts et al., Risk of Violence from the Man Involved in the Pregnancy After Receiving or Being Denied an Abortion, 12 *BMC Med.* 144 (2014).
[25] Foster, supra note 21, at 95–120.

perpetuates intergenerational cycles of poverty and disadvantage.

What the Turnaway Study ultimately demonstrates is that the decision to criminalise abortion is not merely a legal choice; it is an economic sentence. When a State forces a woman to continue an unwanted pregnancy, it does not simply constrain one decision; it restructures her entire life trajectory. The evidence shows that this restructuring almost invariably runs downward: toward poverty, toward violence, toward diminished opportunity. This analysis highlights that abortion criminalisation may also have the effect of functioning as a form of State-imposed economic deprivation, particularly for those who already have the least.

B. Disproportionate Impact on Marginalised Communities

The consequences of criminalisation fall with particular severity upon low-income individuals, racial and ethnic minorities, persons with disabilities, and persons living in rural or geographically remote areas. When abortion is legally available but practically inaccessible, due to lack of providers, prohibitive travel costs, mandatory waiting periods, or onerous licensing requirements, the practical effect for those without financial or social resources is equivalent to an outright ban.[26]

In the United States, following the Dobbs decision, it has been documented that abortion access has become effectively contingent on economic means: those with the financial resources to travel to other States can obtain legal abortions, while those without are compelled to carry pregnancies to term or resort to unsafe alternatives.[27] This stratification of reproductive rights along class, racial, and geographical lines is precisely the kind of systemic disadvantaging of already-marginalised groups that international human rights law exists to prevent.

C. Reinforcement of Structural Gender Inequality

At a structural level, the criminalisation of abortion reinforces gender inequality by treating women and persons capable of pregnancy as vessels for foetal life rather than as rights-bearing individuals with full legal personhood. The subordination of an individual's rights to bodily integrity, health, and life to the interest of a potential person is a uniquely gendered imposition; no equivalent obligation is placed upon persons who are not capable of pregnancy.[28] This disparity in legal treatment constitutes, at its core, sex discrimination within the meaning of CEDAW Article 1 and the ICCPR Article 26.[29]

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[26] Kate Grindlay et al., Women's and Health Care Providers' Experiences with Medical Abortion Provided Through Pharmacies in Nepal, 87 *Contraception* 81, 85 (2013).
[27] Guttmacher Inst., *Abortion Worldwide Report* (2021), https://www.guttmacher.org.
[28] Singh et al., supra note 14, at 7–12.
[29] Human Rights Comm., supra note 4, ¶ 62.

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This paper advances what we call the "asymmetry of sacrifice" argument: no legal system in the world requires any person to donate their organs, blood, or bodily tissue to sustain another life even a post-birth life without consent. Yet abortion criminalisation demands exactly this of persons capable of pregnancy, and backs that demand with criminal sanction. This asymmetry does not appear to be incidental. The law has historically shown a greater willingness to regulate the bodies of persons capable of pregnancy than others. Until legal theory more fully recognises this as a form of sex discrimination, such asymmetry is likely to persist.

V. INTERNATIONAL JURISPRUDENCE ON REPRODUCTIVE RIGHTS

A. K.L. v. Peru (2005)

In *K.L. v. Peru*, the UN Human Rights Committee adjudicated the case of a seventeen-year-old girl who was denied a therapeutic abortion despite carrying an anencephalic foetus, a condition incompatible with sustained life, thereby being compelled to carry the pregnancy to term and to breastfeed the foetus for four days until it died.[30] The Committee found violations of ICCPR Articles 7 (freedom from cruel, inhuman or degrading treatment), 17 (privacy), and 24 (children's rights), holding that the State's refusal to authorise the abortion caused the applicant "profound physical and moral suffering" constituting inhuman treatment. This decision established the foundational principle that denial of medically necessary abortion may constitute a human rights violation of the highest order.

K.L. v. Peru is not merely a case about therapeutic abortion; it is a case about the State's capacity for significant harm when it treats foetal continuity as an absolute value. A seventeen-year-old was forced to gestate and then nurse a child she knew would die. That the State of Peru could construct a legal framework in which this was the required outcome reveals how completely the logic of abortion prohibition, taken to its conclusion, dehumanises the pregnant person. The Human Rights Committee's findings were legally correct, but from a normative perspective, the judgment may be seen as insufficiently responsive to the gravity of the harm. What was done to K.L. was not merely degrading treatment; it was institutional torture.

B. Mellet v. Ireland (2016)

In Mellet v. Ireland, the Human Rights Committee addressed Ireland's near-total abortion ban as applied to a woman who had been diagnosed with a fatal foetal anomaly. Unable to access a legal abortion in Ireland, she was compelled to travel to the United Kingdom at significant financial and psychological cost. The Committee found violations of ICCPR Articles 7 and 17,

[30] *K.L. v. Peru*, Communication No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (Human Rights Comm. Nov. 22, 2005).

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characterising Ireland's legal framework as subjecting the applicant to "cruel, inhuman or degrading treatment."[31] The decision further held that Ireland's abortion law constituted discrimination on the ground of economic means, since women who could afford to travel could access services unavailable domestically. This intersectional analysis—connecting reproductive restrictions to economic inequality—remains highly relevant to contemporary debates on abortion access.

C. R.R. v. Poland (2011) and P. and S. v. Poland (2012)

The European Court of Human Rights (ECtHR) has repeatedly found Poland in violation of the European Convention on Human Rights (ECHR) over its restrictive abortion law. *In R.R. v. Poland*, the Court held that the State's failure to provide timely access to prenatal diagnostic testing and, consequently, to a lawful abortion, constituted a violation of Article 3 ECHR (prohibition of degrading treatment) and Article 8 ECHR (right to private life).[32] In *P. and S. v. Poland*, the Court found that Poland had failed to provide effective access to legal abortion for a rape survivor, resulting in violations of Articles 3, 5 (liberty), and 8. These decisions collectively establish that State-imposed barriers to accessing even lawful abortions may constitute violations of fundamental rights.[33]

D. Whelan v. Ireland (2017)

In *Whelan v. Ireland*, the Human Rights Committee extended its *Mellet v. Ireland* reasoning to a case involving a woman who had received a diagnosis of trisomy 18 in her unborn child. Ireland was found to have violated ICCPR Articles 7 and 17. The Committee's articulation in this case was particularly forceful: the legal prohibition on abortion "oblige[d] her to endure intense physical and mental suffering" and forced her to continue "a non-viable pregnancy" contrary to her wishes, a formulation that echoes the language of torture jurisprudence.[34]

VI. THE DOBBS DECISION AND ITS GLOBAL IMPLICATIONS

The United States Supreme Court's 5-4 decision in *Dobbs v. Jackson* Women's Health Organization, overturning *Roe v. Wade* (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), marks the most significant single retrenchment of reproductive rights in a major democratic State in half a century.[35] By holding that the United States

[31] *Mellet v. Ireland,* Communication No. 2324/2013, U.N. Doc. CCPR/C/116/D/2324/2013 (Human Rights Comm. Mar. 31, 2016).
[32] *R.R. v. Poland, App*. No. 27617/04, ¶¶ 158–167 (Eur. Ct. H.R. May 26, 2011).
[33] *P. & S. v. Poland*, App. No. 57375/08, ¶¶ 88–110 (Eur. Ct. H.R. Oct. 30, 2012).
[34] *Whelan v. Ireland,* Communication No. 2425/2014, U.N. Doc. CCPR/C/119/D/2425/2014, ¶ 7.8 (Human Rights Comm. Mar. 17, 2017).
[35] *Dobbs v. Jackson Women's Health Org*., 597 U.S. 215 (2022); Roe v. Wade, 410 U.S. 113 (1973); Planned

Constitution confers no right to abortion, the majority opinion in Dobbs returned the question entirely to State legislatures, resulting in trigger laws that immediately criminalised abortion across thirteen States and a wave of restrictive legislation in others.

The majority opinion in Dobbs is a jurisprudential regression that deserves to be named precisely: it represents a significant departure from prior constitutional protections. Justice Alito's reasoning, that rights must be "deeply rooted in history and tradition" to receive constitutional protection, is, at bottom, an argument that the Constitution protects what existed before women were recognised as full legal persons. By that logic, the legal system is forever anchored to the prejudices of a past that excluded women from its drafting. This analysis suggests that the "history and tradition" test, as applied in Dobbs, is not neutral constitutional interpretation; it may be understood as reflecting underlying gender bias within an originalist framework.

The global implications of Dobbs extend beyond American borders. The United States has long projected itself as a standard-bearer of human rights and democratic governance; its retraction of reproductive rights provides rhetorical and political cover to governments worldwide that seek to restrict or criminalise abortion in the face of international criticism.[36] Poland, Hungary, Brazil under Bolsonaro, and several sub-Saharan African States have all cited domestic conservative values as a basis for resisting international pressure to liberalise abortion law—a position now reinforced by the Dobbs majority's reasoning that abortion regulation is a matter of democratic self-determination rather than constitutional or international obligation.

The Dobbs decision also has structural implications for international law. Article 60 of the Vienna Convention on the Law of Treaties permits a State party injured by another State's breach of a multilateral treaty to suspend performance of treaty obligations. While this provision has not been invoked in the human rights context, the United States' repudiation of reproductive rights as a constitutional matter may weaken the normative authority of its representations before UN treaty bodies and regional human rights mechanisms. The ICC's heightened attention to gender persecution, articulated in the 2022 Gender Persecution Policy, should be understood in part as a response to this deteriorating international landscape.[37]

This phenomenon may be described as "normative infection": when a powerful State like the United States dismantles a rights protection, it does not merely affect its own population; it

Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

[36] Human Rights Watch, Why Abortion Rights Are Human Rights (June 24, 2022), https://www.hrw.org/news/2022/06/24/why-abortion-rights-are-human-rights.

[37] Int'l Criminal Court, Office of the Prosecutor, supra note 2, at 4.

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degrades the normative environment for rights globally. Governments with repressive inclinations gain a high-profile precedent to cite; international bodies lose a powerful voice; civil society movements in other countries are weakened by association. The effects of Dobbs extend beyond the United States, its jurisprudential shockwave is still travelling, and the international community's absence of strong international response may have contributed to its broader normative impact.

VII. INDIA'S LEGISLATIVE FRAMEWORK ON ABORTION RIGHTS

A. The Medical Termination of Pregnancy Act, 1971 and its 2021 Amendment

India's primary legislation governing abortion is the Medical Termination of Pregnancy Act, 1971 (MTP Act), which decriminalised abortion within specified gestational and clinical limits.[38] The Medical Termination of Pregnancy (Amendment) Act, 2021 made significant progressive revisions: it extended the permissible gestational limit for certain categories, including survivors of rape and incest, minors, persons with disabilities, and women whose pregnancies result from contraceptive failure—from 20 to 24 weeks, subject to the opinion of two registered medical practitioners.[39] The 2021 amendment also provides for abortion beyond 24 weeks in cases of foetal anomaly, subject to authorisation by a State-level Medical Board.

B. Constitutional Underpinnings

Indian constitutional jurisprudence has progressively affirmed reproductive rights as an aspect of personal liberty under Article 21 of the Constitution. In *Suchita Srivastava v. Chandigarh Administration* (2009), the Supreme Court held that a woman's right to make reproductive choices is a dimension of personal liberty under Article 21 of the Constitution.[40] More recently, in *X v. Principal Secretary, Health and Family Welfare Department, Government of NCT of Delhi* (2022), the Supreme Court unanimously held that the MTP Act must be read broadly to include unmarried women and women in live-in relationships within the category of those eligible for abortion up to 24 weeks, finding that a discriminatory reading would violate Articles 14 and 21 of the Constitution.[41]

C. Remaining Challenges

Notwithstanding its relatively liberal legislative framework, India faces substantial barriers to

[38] Medical Termination of Pregnancy Act, No. 34 of 1971 (India), as amended by Medical Termination of Pregnancy (Amendment) Act, No. 8 of 2021 (India).

[39] Medical Termination of Pregnancy (Amendment) Act, No. 8 of 2021, § 3(2)(b) (India).

[40] *Suchita Srivastava v. Chandigarh Admin.,* (2009) 9 S.C.C. 1, ¶ 10 (India).

[41] *X v. Principal Sec'y, Health & Family Welfare Dep't, Gov't of NCT of Delhi*, (2022) SCC OnLine SC 1321, ¶ 38 (India).

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the practical realisation of abortion rights. Access is constrained by a severe shortage of trained providers, particularly in rural and peri-urban areas; by the conscientious objection of individual practitioners; and by pervasive social stigma that deters women from seeking care.[42] The Medical Board requirement for post-24-week abortions has been criticised as introducing bureaucratic delay that may be medically harmful in time-sensitive situations.[43] Furthermore, trans and non-binary persons capable of pregnancy are effectively invisible in the Act's binary gendered framework, highlighting the need for a more inclusive legislative language consistent with evolving constitutional jurisprudence on gender identity.

India's MTP framework is often cited internationally as a model of progressive legislation, and in text, it largely is. However, the gap between the text of the law and the lived experience of millions of women, particularly Dalit women, tribal women, and women in Tier-3 cities and rural belts, highlights an important gap: progressive law without equitable infrastructure is not access; it risks remaining largely aspirational. India has chosen to liberalise through legislation rather than through rights, which means that its effectiveness may be significantly limited. It may be argued that India should consider constitutionally entrenching the right to abortion, not merely as a component of personal liberty, but as a standalone fundamental right, in order to insulate it from political reversal and to create judicially enforceable obligations of access, not just non-prohibition.

VIII. LEGAL AND POLICY RECOMMENDATIONS

A. International Level

First, the ICC Office of the Prosecutor should proactively apply the 2022 Gender Persecution Policy to preliminary examinations involving States where the systematic enforcement of abortion bans results in documented deaths, prosecutions, and severe deprivations of reproductive autonomy. The ICC should consider issuing a thematic report on gender-based persecution and reproductive rights to provide interpretive guidance to national courts and civil society.[44]

Second, the UN treaty bodies, particularly the CEDAW Committee, the Human Rights Committee, and the Committee against Torture—should strengthen the practice of Concluding Observations and Lists of Issues specifically addressing abortion criminalisation as a potential

[42] Ipas, *Barriers to Safe Abortion Access in India* (2021), https://www.ipas.org.

[43] Pratigya Campaign for Gender Equality & Safe Abortion, *Understanding the Medical Termination of Pregnancy (Amendment) Act 2021* 3 (2021).

[44] Int'l Crim. Ct., Office of the Prosecutor, supra note 2, at 30–35.

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violation of treaty obligations. Periodic reports should include disaggregated data on maternal mortality attributable to unsafe abortion, the incidence of criminal prosecutions, and the geographic and socioeconomic determinants of abortion access.

Third, regional human rights courts, including the ECtHR, the Inter-American Court of Human Rights, and the African Court on Human and Peoples' Rights—should develop coherent regional jurisprudence on States' positive obligations to ensure access to safe abortion, drawing on and harmonising the principles established in the UN human rights committee cases surveyed in Part V.

B. Domestic Level

At the domestic level, States should decriminalise abortion entirely, removing it from their penal codes and regulating it exclusively through health legislation as a medical procedure. Legislative frameworks should incorporate the right to abortion access as a statutory right, with accessible, low-cost services integrated into primary healthcare systems. India should consider codifying the Supreme Court's evolving jurisprudence on reproductive rights by amending the MTP Act to include gender-neutral language, streamline Medical Board authorisation processes, and expressly guarantee conscientious objection refusal does not result in denial of access.[45]

These recommendations conclude with a structural proposal that goes beyond existing scholarship: the creation of a UN Special Rapporteur on Reproductive Rights and Criminalisation. The current mandate of the Special Rapporteur on Violence against Women and Girls covers some of this terrain, but it does not have the institutional specificity, the monitoring mandate, or the political salience to hold States accountable specifically for abortion criminalisation. A dedicated Special Rapporteur, armed with the authority to conduct country visits, receive individual communications, and submit thematic reports to the General Assembly, would constitute the most meaningful institutional innovation available to the international community short of ICC prosecution. It may be considered long overdue.

IX. Conclusion

The criminalisation of abortion is not merely a neutral regulatory choice. It is a gender-specific exercise of State coercive power over the bodies and lives of individuals capable of pregnancy, with significant and foreseeable consequences for health, economic security, and human dignity. Viewed through the lens of international human rights law, it constitutes, particularly

[45] World Health Org., supra note 10, at 22–28.

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where systematic and widespread, a form of gender-based persecution within the meaning of Article 7(1)(h) of the Rome Statute, a violation of the right to be free from cruel, inhuman or degrading treatment under the ICCPR, and a form of gender-based violence and discrimination under CEDAW.

The decisions of the Human Rights Committee in *K.L. v Peru, Mellet v. Ireland,* and *Whelan v. Ireland*, and of the ECtHR *in R.R. v. Poland* and *P. and S. v. Poland*, demonstrate that the international community has already begun to recognise this reality. The 2022 Dobbs decision represents a serious setback to this normative progress, but it is the exception rather than the rule: across Latin America, sub-Saharan Africa, and Asia, courts and legislatures are moving albeit unevenly towards the recognition of reproductive rights as non-derogable human rights.

India's progressive but incomplete framework provides a useful model: a rights-affirming constitutional jurisprudence backed by a permissive legislative structure, yet constrained by structural barriers of access and awareness. The lessons of the Indian experience, that legislative liberalisation alone is insufficient without investment in healthcare infrastructure, provider training, public education, and the destigmatisation of reproductive healthcare, are universally applicable.

The fight for reproductive autonomy is inseparable from the broader project of achieving substantive gender equality. International law has the tools to address the gravest abuses. What is required is the political will to deploy them.

This analysis began with a proposition that may appear provocative: that a State which criminalises abortion asserts sovereignty over the womb. A related conclusion follows. Sovereignty over the womb may, in effect, translate into sovereignty over women. A State that exercises such control does not merely regulate life; it risks entrenching the subordination of a class of persons whose dignity, autonomy, and equality are not fully recognised as inviolable.

International law was developed, in part, to identify and respond to precisely such forms of systemic inequality. The legal and institutional tools to address these concerns already exist. What remains is their careful and consistent application, alongside the willingness, within both scholarship and advocacy to accurately characterise the nature and consequences of such legal regimes.

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