
**ABORTION
LAWS AND
REPRODUCTIVE
RIGHTS OF
WOMEN IN
INDIA**

RESEARCH PAPER

BURNISHED LAW JOURNAL

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BURNISHED LAW JOURNAL

ABSTRACT

Almighty has created this Brahmand (universe) for the people to live, one taking birth in this world possesses an inherent right to live his life with dignity. It's a universal truth and almost every nation has entrenched rights for their citizens which are fundamental for their survival. it's a right-in-rem that is a right against the whole wide world. For centuries there have been debate on the issue of abortion, this paper shows a variance between the mother's right to a healthy life and the unborn child's right to take birth. Looking at various factors that triggered a change in the abortion laws and reproductive rights of women in USA & India; by comparatively analyzing the laws of both the countries, it applies a balanced approach, to answer one pertinent question that has left everyone in dilemma, that is foetal personhood. The paper stresses on the most liberalizing aspect in the administration of gender justice is access to hygienic & safe abortions, it takes a journey of legalization of abortion once opposed legally as well as. Religiously now comes under Article 21 and Right to privacy is one of necessary requirements for guaranteeing gender. Equality and female emancipation focusing that it's a woman's individual right; right to her life, to her liberty & to the pursuit of her happiness that sanctions her right to have an abortion.

The researchers points out opinions of eminent jurist/authors and judgements held in famous cases of England & India; making a humble attempt to pen the picture of the judicial approach & attitude towards abortion in the country and the drawbacks of the MTP Amendment Bill, 2020 which stills feels like long way for India to align with the reproductive rights of women fully supporting the "pro-choice" mandate.

Chapterization:

The paper has been divided into 6 chapters. Chapter 1 deals with defining, what is abortion and what are types of abortions. Chapter 2 examines the role of religion, philosophy, abortion and the debate on morality over the Right of life of unborn. Chapter 3 analyzes Article 21 and the concept of abortion. Chapter 4 deals with the journey of legalization of abortion. Chapter 5 shows comparatively study of the law of abortion in India and USA. Chapter 6 gives a detailed account of the Medical Termination of Pregnancy Act and the various drawbacks in the Medical Termination Of Pregnancy Amendment Bill, 2020.

RESEARCH OBJECTIVE:

Hypothesis:

The hypothesis raised for the purpose of research is:

1. That mother's right should prevail over the right of unborn.
2. That there's still a long way for the reproductive rights of women to be fully recognized by analyzing Medical Termination of Pregnancy Amendment Bill, 2020.

Research question:

In order to achieve the objective of this research and prove the hypothesis questions, attempts have been made to answer the following questions:

- The debate of religion, philosophy and Right of Life of unborn.
- Analyzing the law of abortion in India and USA.
- What are drawbacks to the recent Medical Termination of Pregnancy Amendment Bill, 2020?

Methodology:

The methodology adopted for the purpose of this research is a doctrinal method. The doctrinal research involves the analysis of the statutes, case laws, existing secondary information, e.g. books, articles, journals, websites etc. and a comparative abortion law and its understanding in INDIA and USA. This is also a qualitative research work.

1. INTRODUCTION:

The ability of women to bear new life places her in both advantageous and disadvantageous position. A woman's womb has been a centre of great debate in the background of reproductive rights. Abortion is one among the themes that are discussed extensively in both national and international level, its become a controversial issue every where the planet. Everybody is in the dilemma whether a mother has a right to terminate her pregnancy at any time she wishes or an unborn child has right to life.

1.1 WHAT IS ABORTION:

Abortion has been derived from a Latin word 'abortus' which means an object which has been detached from its proper site. This means that abortion is the act of giving premature birth, especially the expulsion of human foetus prematurely at any time before its viable or competent of nourishing life.¹ Hence abortion is, the expulsion of a fetus from the uterus before it has reached the stage of viability (in human beings, usually about the 20th week of gestation) that is the ending of a pregnancy by removal or expulsion of an embryo or foetus before it can survive outside the uterus.

1.2 TYPES/METHODS OF ABORTION:

Historically, abortions have been attempted using herbal medicines, sharp tools, forceful massage, or through other traditional methods² there is rich history of women helping each other to abort. The State didn't prohibit abortion until the 19th century. But Historically, there have been restrictions imposed on abortion because it was dangerous and had ill effects on the women's health as well as it was considered a sin or a form of transgression of morality, and also abortion was restricted to protect fetal life in some or all circumstances.³

Abortion could also be classified into various categories depending upon nature and circumstances under which it occurs .For instance its going to be either (i) Natural(ii) Accidental (iii) Spontaneous (iv)Artificial or Induced abortion. Abortions falling under

¹ JIASINGH P MODI, MEDICAL JURISPRUDENCE AND TOXICOLOGY 332(1995).

² Paul, M; Lichtenberg, ES Borgotta, L; Grimes, DA; Stubblefield, PG; Creinin, MD; Joffe, Carole(2009); 1. Abortion and medicine: A sociopolitical history. Management of Unintended & abnormal Pregnancy(1st ed.) Oxford: John Wily & Sons.

³1984, 1992, 1998, by Boston Women's Health Book Collective. Published by Touchstone, a division of Simon & Schuster Inc.

the first 3 categories are not punishable ,while induced abortion is criminal unless exempted under the law.

A pregnancy that ends before 37 weeks of gestation leading to a live-born infant may be a "premature birth" or a "preterm birth". When a fetus dies in utero after viability, or during delivery, it is usually termed "stillborn". Premature births and stillbirths are generally not considered to be miscarriages although usage of these terms can sometimes overlap. Abortion can be done using various methods like medical, surgical, labor induction abortion ,folk medicine etc.

Induced:

An induced abortion may be classified as *therapeutic* (done in response to a health condition of the women or fetus) or *elective* (chosen for other reasons) therefore making it the forceful removal of foetus from the womb of the mother. Approximately 205 million pregnancies occur each year worldwide⁴ A third of pregnancies occurring in the world today are unintended and a fifth of these pregnancies end up in induced abortions.

Spontaneous:

Miscarriage, also known as spontaneous abortion, is the unintentional expulsion of an embryo or fetus before the 24th week of gestation.

2. RELIGION ,PHILOSOPHY ,ABORTION AND THE DEBATE OF MORALITY OVER THE RIGHT OF LIFE OF AN UNBORN :

Abortion brings about a lot of debate it's a highly charged emotional subject which involves some highly controversial issues of law ,medicine, morality⁵ .Our society is currently in the midst of a sexual revolution which has cast the problem of abortion into the forefront of religious ,medical and legal thought .

There are 2 terms associated with abortion Pro- choice and Pro -life ⁶ . On the one hand Pro- choice campaigners contend that abortion falls within the constitutional right to privacy deeming that choice to terminate an unborn child lies with the mother of the child and her doctor ,conversely Pro- life campaigners contend that a

⁴SEDGH,G;Singh,S;Shah,I.H,Ahman,E;Henshaw;Bankole,A.(2012)"INDUCED ABORTION :INCIDENCE AND TRENDS WORLDWIDE FROM 1995 TO 2008."

⁵ Ahmad Siddique,Criminology:Problems and Perspectives 465 (Eastern Book Co.Lucknow,2007).

⁶ Tom Head," CIVIL LIBERTIES,PRO-LIFE VS PRO CHOICE", available at <http://www.about.com> Guide.

foetus is a living being at the moment of conception that abortion should be criminalized in a view to guard the life of the unborn child .

Hence the tussle is between a woman who demand a right over her body and foetus who has not taken birth ,there are a lot of controversies relating to this subject involving social ,religious and moral judgments in which the opinions differ strongly also there are a plethora of philosophical and religious opinions underpinning these two divergent views raising the most important ethical and legal issues involving the rights of women and the right of fetus .

2.1 RELIGION AND ABORTION:

Religion and abortion are closely connected in political and social discourse ,all the religions have taken strong positions on abortion ,they believe that the issue encompasses profound issues of life and death ,right and wrong human relationships and the nature of society ,that make it a major religious concern ,people involved in an abortion are usually affected very deeply not just emotionally ,but often spiritually as well, they often turn to their faith for advice and comfort ,for explanation of their feelings and to seek atonement and a way to deal with their feelings of guilt, because abortion affects heart as well as mind also because it involves life and death ,many people find that purely intellectual argument about it is ultimately unsatisfying .For them it's not just a matter that concerns a human being and their conscience but something that concerns a human being and their god ,various religious teachings like in Buddhism there's a belief that "life should not be destroyed", traditional Buddhism rejects abortion because it involves deliberate destroying of life; the Roman Catholic Church says that "deliberately causing an abortion is a grave moral wrong" and bases this doctrine on natural law and the written word of the God; Hindu medical ethics stem from the principle of Ahimsa (non-violence),when considering abortion the Hindu way is to chose the action that involves least harm but generally opposed to abortion; Islam regards abortion as wrong and Haram(forbidden) also its permitted in certain cases but all schools of Muslim law accept that abortion is permitted if continuing the pregnancy would put the mothers life in real danger.

2.2PHILOSIPICAL VIEWS ON ABORTION:

A lot of philosophical views on abortion have been expressed over abortion too like Ronald Dworkin who has comprehensively researched on the problem of abortion in his book "Freedoms laws: the moral reading of the American constitution(1999)" writes that "something that is not alive has no interest and once the foetus can live on its own only then can it have interest". According to Aristotle's Potentiality Principle⁷ which says that

⁷ Lynn M Morgan, The Potentiality Principle from Aristotle to Abortion, 54 supp.7 The University Of Chicago Press Journals(2013).

as fetuses and embryos have all quality that they will have as full persons afterwards in life they should not be killed.

W.N. Hohfeld talks about every right having a correlative duty ,duty being that one must not intervene in others right and in case of a mother and unborn child their right contradicts with each other as mothers right to abortion reduce the unborn child's right to life.⁸Also in India where religion and philosophy is very important it is believed that abortion is equated with immorality.

2.3 GLOBAL RECOGNITION TO THE RIGHT TO ABORT:

Globally both in terms of human rights and concern for women's health reproductive rights is the greatest needed of human society .without reproductive freedom including the right to abortion ,women will never achieve equality with men and will be deprived of benefits regarding their health, employment, education and their roles in family affairs its a woman's individual rights ,right to her life to her liberty and to the pursuit of her happiness that sanctions her the right to have abortion ,reproductive rights are internationally recognized as critical both to advancing women's humans rights and to promoting development ,Since its inception united nations has maintained.

3. ARTICLE 21 AND ABORTION:

The right to life is a very broad concept and is the most fundamental of all, Article 21 being recognized in the constitution says that “no person shall be deprived of his life and personal liberty except according to the procedure established by law” the term ‘person’ includes both man and woman among various rights which are available to a woman the right to abortion is also believed to be one of the most essential and fundamental right .Right to abortion has been recognized under the right to privacy which is a part of right to personal liberty and which emanates from right to life⁹,but as the question arises ***“whether an unborn child should be considered as a human being and be given the status of a person or not”***, studies in the west¹⁰ show that children born when there were refused abortions were most likely to pick up drunkenness, drug abuse, anti social behavior therefore by analytically studying both the ends a balanced approach can be regarded suitable to deal with the issue.

⁸ Swati Bajaj & Vikram Seth, Unborn Right To Life Vis a Vis Women Right To Abortion:Legal Reflection,2 issue 1 JLSR,127(2016).

⁹ Roe vs Wade 410 US 113 (1973)

¹⁰ Everett D. Dyer, Courtship, Marriage, Family :American Style 285(The Dorsey Press, Homewood, Illinois,1983).

The validity of the abortion laws have been questioned on the ground of constitutionality of right to life of an unborn vis- a -vis right of the mother to bear or not to bear a child , the mother therefore has become a subject of debate among advocacy groups belonging to the two camps of pro-life and pro -choice. Pro- life individuals generally believe that human life should be valued either from fertilization or implantation until natural death, and on the other hand Pro- choice believe that individuals have unlimited autonomy with the respect to their reproductive system as long as they do not breach the autonomy of others, making abortion a personal choice of a woman affecting her body, personal health and future.

These are extreme views but after a careful study on the subject of abortion in terms of religion, medical, law, global conferences, acts, treaties, morality, ethics, philosophical views and taking a pragmatic view of the socio- economic and legal problems involved ,it may be argued that a pregnant women should have the personal liberty to destroy any foetus of her own if she finds it intolerant, to force a woman to continue an unwanted pregnancy is to impose a kind of slavery upon her or at least to infringe her sense of self respect and dignity, the foetus may have a right to life ,but not a right to be kept in a woman's body against her will, after all foetus is a parasite and has less claim to life than the host that is the mother ,even if the foetus is a person it might be argued that pregnant woman have the right to use self defence in order to protect them from the physical invasion of unwanted pregnancy¹¹ . Biologically supporting the argument it is stated that a foetus is not a complete person from the moment of conception ,it has no interest before the 3rd trimester, also the scientist have agreed that foetal pain can be felt after the 26th week, hence something that has not taken birth cannot be said to have developed his own interest. Though the mother is next to God who provides the maximum best possible to her child without any reciprocal favour but if she opts for abortion there might be some reason either due to ignorance, carelessness, or acts done willfully, hence abortion is an issue to be left to the decision of the mother ,keeping this view in mind the governments of various countries have made abortion legal and ensured that safe and hygienic abortions take place around the world .

1. THE JOURNEY OF LEGALIZATION OF ABORTION:

In 1803 ,Britain first passed anti abortion laws which then became stricter followed by USA and making abortion legally restricted in almost every country by the end of 19th century, abortion was criminalized and was seen as a sin under common law, civil law and Islamic law in countries like India, New Zealand, Countries of Africa, most part of Europe, Japan, Soviet republic, Malaysia etc. But since abortion methods have become

¹¹Judith Jarvis Thomson “ A Defence of Abortion” 1 Philosophy and Public Affairs 47(1971).

safe ,laws against abortion make sense only for punitive and deterrent purpose or to protect fetal life over the women's life and simultaneously various efforts are being taken to reform abortion laws and practice since 1990. Despite of moral dissension, the 20th century has seen the liberalization of abortion laws. Various efforts have been made to legalize abortion with soviet union the first country to reform its abortion laws spurred by feminist Alexandra Kollantai¹² through a Decree on women's health care in October 1920 after the world war 2 this legalization was followed by Japan and then several East European countries , since then progressive abortion law reform ,the kind that benefits women has been justified on public health and human rights grounds ,United Nations Human Rights bodies including the Human Rights Committee ,Committee on the Elimination of Discrimination Against Women, the Committee on Economic ,Social and Political Rights have played an increasingly visible role in calling for progressive abortion law reform. Also regional bodies like Inter –American Court on Human Rights and the African Commission on Human and Peoples Rights (ACHPR)¹³ in January 2006 called for the decriminalization of abortion in Africa. In line with the Maputo Protocol, and renewed in January 2017 making waves around the region. In UK the 1967 Abortion Act , lists down the legal grounds for abortion , in India a very liberal abortion law for its day was passed in 1971 followed by Ethopia liberalizing its abortion laws in 2005, in recent decades in Latin America a combination of legal reforms, court rulings and public health guidelines have improved the access to safe abortions for women. In Chile, in 1967 the Chilean Health Code legalized abortion, Japans Eugenic Protection Law passed in 1948promoted liberal policies on abortion .In Argentina, Bolivia, Brazil, Columbia and Costa Rica ,higher courts have been instrumental in interpreting the constitutionality and the scope of specific grounds for abortion ,moreover in the past decade feminist groups have set up safe abortion information hotlines in at least 20 countries¹⁴,with an overall trend globally is toward more progressive laws, moreover a growing number of governments in both global north and global south have begun to acknowledge legalization of abortion and prevention of unsafe abortions and being signatories to various human rights conventions. Abortions in one of the safest medical procedure's include following the Who's guidelines listing 6 grounds.

But still the problem of unsafe abortions haunt us there have been many unsafe abortions taking place around the world leading to devastating effects, today 60%¹⁵ of the world 1.55 billion women of reproductive age (15-24) live in countries where abortion is broadly legal whereas the remaining 40% live where abortion is highly restricted, the fact

¹² Abortion in Russia ,available at https://en.wikipedia.org/wiki/abortion_in_Russia

¹³ International Campaign for women's Right to Safe Abortion: African Commission On Human and Peoples Rights calls for decriminalization of Abortion in Africa(January 22,2016)

¹⁴ Available at <https://safeabortionwomensright.org/safe-abortion-3/safe-abortion-information-hotlines>.

¹⁵ Subash Chandra, 'Right to Abortion: A New Agenda' AIR Journal,129(1997)

is that most of the unsafe abortions occur in developing countries .According to WHO unsafe abortions is the cause of 70,000 maternal deaths each year .women who have unsafe abortions are at a risk of serious medical problems like high maternal mortality rate, bleeding, pelvic inflammatory disease ,severe abdominal pains etc. having devastating effects on a women's health .

2. UNDERSTANDING THE LAW OF ABORTION IN INDIA AND USA:

Abortion has been highly debated in the USA since early seventies. When talking about abortion ,the origin of the abortion law was in the early 1800's in the U.K.,however the acknowledgement of transfiguring of the laws of abortion and acknowledging the right and women's freedom on their bodies can be given credit to USA and particularly its judiciary. In the 18th century ,abortions were allowed in common law and were widely practiced, looking at the history of abortion laws in USA in 1821 the State of Connecticut initially implemented a law on abortion which was similar to that of Ellenborough's Act of England,¹⁶in the intervening time in 1828 the new York passed laws against abortion and treated it as a crime .additionally it included and recognized therapeutic abortion as valid¹⁷. Within the time the whole of USA had completely banned abortion ,apart from the case where the mothers life was at risk, even after abortions became illegal women continued to have them ,the work was done behind the closed doors, in 1950's and 1960's the estimated number of illegal abortions ranged from 200000 to 1.2 million per year¹⁸,there was a time when abortion was a part of life in the United States. But in 1967 the first state to legalize abortion was Colorado, followed by the very famous case **Roe vsWade**,¹⁹ wherein in 1973 abortion laws in united states suddenly changed with the Supreme Courts decision, the constitutional question raised was whether the constitution gives the right to the woman to obtain an abortion nullifying the Texas probation (which criminalizes abortion except to save life of the mother)?but it was held that Texas Criminal Abortion Statute is violative of the due process clause of Fourteenth Amendment ,the court also held the trimester framework on abortion issue and held that the word person in the fourteenth amendment does not include the unborn child thereby eradicating the concept of foetal personhood, also when does the life begin cannot be speculated by it²⁰. Though the constitution of the united states does not explicitly recognize the right to privacy but the same cannot be constructed by the judicial precedents, here in the case an unmarried pregnant women under incognito Jane Roe, on behalf of herself and other women instituted, a federal action against the district attorney

¹⁶Debadyuti Banerjee and Ujwala Uppaluri, from Roe V. Wade to fetal pain legislation: A Reflection of American Jurisprudence on the Indian Milieu of ciberalsed abortion policies. 2NUJS L. Rev. 637(2009).

¹⁷ Rex V Bourne, 3 AUER 615 (1938).

¹⁸ Reported by the Guttmacher Institute.

¹⁹Roe V. Wade, 410 US 113 (1973).

²⁰U.S. Supreme Court reports, 35 The Lawyers Cooperative Publishing Co., at 147 to 199.

of Dallas County, Texas, questioning the constitutionality of the Texas criminal abortion laws, where she expressed to have a legal abortion which would be executed by skilled ,qualified physician under secure conditions²¹and that she wouldn't be able to go to a jurisdiction which permits her to have an abortion.

Hence while giving the judgement in the Roe case the Supreme Court looked into the decision of **Griswold vs Coonecticut**²²,where it was held that although its not explicitly stated anywhere in the US constitution but the right to privacy exists and its sheltered by the fourteenth amendment due process clause. It was therefore held that right to privacy was a fundamental rights and was advanced to let the women choose whether to abort or not to abort but it is also allowed the state intervention where the state has “legitimate “interest that is where the life of the mother and unborn child is concerned. The court held that the state intervention is justified in the second trimester where the purpose is to protect maternal health specially where the foetal viability is reached, the Judgment invited a lot of criticism too , questioning its origin and the cost of its indistinct disputation²³. In 1992 the Supreme Court in **Planned Parenthood Southeastern Pennsylvania vs Cassey**,²⁴ this case law tried to give new variables to abortions right to women ,in this case the court did not over rule Roes case but reaffirmed and tried to give a new dimension to the abortion right proving the novel facet of the right to abortion, in this case the Supreme Court formed a novel criterion to examine the constitutionality of state abortion control which was called the “*undue burden test*” instead of trimester test ,was adopted to determine whether state regulations has some purpose of placing substantial obstacles in the path of a women seeking abortion before validity. Even while giving a judgement in this case the courts outlook was that the constitutional defence of women's choice to terminate her own pregnancy Is derived from due process of the Fourteenth Amendment,²⁵in comparison to the earlier situation in which the state had to convince for imposing the restrictions ,the burden is now on the woman to show that the law places undue burden on her reproductive choices ,stating that state regulations have some purpose of placing substantial obstacles in the path of the women for seeking abortion before viability.

5.1 PRESENT SCENARIO IN USA:

The court finally held that the constitutional protection of women's decision to terminate her pregnancy derives from the due process clause, it declares that no state shall deprive

²¹ See Justice Blackmun's opinion in Roe V. Wade, 410 U.S. 479(1956)

²²381 U.S. 479 (1965).

²³John Hart Ely, The Wages of Crying Wolf: A comment on Roe V. Wade, 82 YALE L.J. 920(1973) and Ruth Bader Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe V. Wade, 63 N.C.L. REV. 375(1985).

²⁴ 505 U.S. 833(1992).

²⁵Kshitij Asthana MTP Act & the right of women over their own body, blog.ipleaders (DEC 11, 2017, 11:00 AM)https://blog.ipleaders.in/medical-termination-of-pregnancy/#_ftnref28

any person of life ,liberty or property without due process of law, hence applying to both substantial and procedural matters supporting it in the case **WOMANS HEALTH VS ELLERSTED**²⁶ the Supreme Court ruled that state cannot place restrictions on the delivery of abortion services that create an undue burden²⁷ or women seeking abortion. The present condition stands as in 2005 the UNBORN CHILD PAIN AWARENESS ACT was introduced by the US Senator, the act intends to penalize the physicians if they are unable to inform women of the possibility of foetal pain past 20 weeks gestation, also there came an UNBORN VICTIMS OF VIOLENCE ACT in 2006 which makes it an offence to kill pre-natal human beings²⁸ and where the state intervention is allowed where the state has a legitimate interest.

Therefore by analyzing the abovementioned cases it has been observed that USA has recognized the facet of right to privacy ,the interest of the unborn child can be protected by the state only after the stage of viability, the right of the woman takes precedence, as well the woman can get her child aborted on her sole discretion upto 12 weeks of pregnancy and as per the fundamental right of life and liberty, the mothers health is prioritized over the unborn child.

The state cannot interfere without having the compelling the legitimate interest of the state in protecting and preserving the health of the pregnant woman hence USA courts have upheld the interest of pregnant woman and her rights over her body thereby allowing her to make decisions, hence the courts have given priority to 'liberty' which means the autonomous control over the development and expression of ones intellect ,interests ,taste ,choices and personality, making them ambivalent concerning the matter of abortion.

2.2 ABORTIONS LEGAL SCENARIO IN INDIA:

Owing to its colonial legacy and Great Britain's Act of outlawing abortions between 1869 and 1967, with the model of the Abortion Act 1967 of England, the Medical Termination of Pregnancy Bill,1969 was passed in Parliament of India followed by the assent of the President in 1971 the MTP Act was enforced from 1STApril 1972. Prior to 1971 abortions were criminalized under the IPC 1860²⁹,the INDIAN PENAL CODE which is the basic criminal law of the country keeping in view the religious ,moral, social and ethical background of the Indian community has made induced abortions a criminal offence under sec 312 to 316, playing a significant role in prevention of illegal abortions and notwithstanding the 1971 Act, continue to be criminalized as of date.

²⁶ 579U.S. (2016)

²⁷“Undue burden” is defined as having effect of placing substantial obstacles in the path of woman's choice.

²⁸Unborn Victims of Violence Act, 18, U.S.C. (2006).

²⁹ “Abortion Law: In 24 week pregnancy case, Supreme Court failed to address women's right to their bodies- firstpost.” www.firstpost.com

In 1964 a committee led by Justice Shantilal Shah³⁰ to address the alarming increase in the number of abortions taking place ,had put the Ministry of Health and Family Welfare on alert, the committee carrying out a comprehensive review of socio cultural,legal,and medical concept of abortion recommended legalizing abortion to prevent wastage of women's health and lives of both compassionate beings, the report called for a deletion of sec 312 and the need to bring a special law to deal with the termination of pregnancies ,as a result an exclusive abortion related legalization –the MEDICAL TERMINATION OF PREGNANCY ACT ,1971 came into being.³¹

Now, In India abortion laws come under section 312 to 316 of the IPC 1860 and the MTP Act 1971.

Law under the Indian penal code:

The provisions regarding the termination of pregnancy in the IPC which were enacted about a century ago were drawn keeping with the then British law on the subject. Section 312,313,314 of IPC deals with the law of abortion and miscarriage, the IPC doesn't explicitly use the term abortion but it can be seen that voluntarily causing miscarriage is criminal abortion and which is considered to be a crime under the code, according to the code induced abortion is a crime under sections 312-316.Section 312 provides that if any person causes miscarriage of woman he shall be punished with the imprisonment of 3years and fine or with both. Though the framers of the code have not used the word abortion instead they have used the word miscarriage,³²hence carrying miscarriage stands for criminal abortion ,voluntarily causing miscarriage is an offence in 2 circumstances when a women is with the child (as soon as the gestation begins) and when she is quick with the child(motion of the foetus is felt by the mother),it provides that if any person causes miscarriage of woman he shall be punished with imprisonment upto 3-7 years and fine or both, although this section makes an exception.³³

5.3 COMPARATIVE ANALYSIS OF USA AND INDIA ABORTION LAWS :

The Comparative analysis made between USA and India, is to the fact that Indian courts often look towards the American constitutional Jurisprudence for Inspiration legitimizes such a comparison,³⁴also the past 50 years have been characterized by unmistakable trend towards the liberalization of abortion laws; particularly in the industrialized world brings us to comparatively analyzing the abortion laws, of both the countries Reproductive

³⁰K.D. Gaur (1991) "Abortion and the law in India" dspace.cusat.ac.in

³¹ Lawyerslaw.org, The MTP Act, 1971, Feb 25, 2015.

³²Upendra Baxi Abortion and the Laws in India, 28-29 JILI (1986-87)

³³<http://www.writinglaw.com/causing-of-miscarriage-injuries-to-unborn-children-312-316-chapter-xvi-of-ipc/>.

³⁴Banerjee and Uppaluri, supra note 13.

rights of women amongst two countries where such laws have been taking progressive forms and evolving over an era.

In the US though abortion has been legalized at present, it was not met with open arms since the beginning. During the beginning of the civil war, there were many anti-abortion campaigns which mainly had Christian lobbyist at the forefront believing life begins at conception, this resulted in the state banning all the abortion laws. Thus, it can be observed how the religious beliefs of the community/interest of the community, prevailed over individual interests. However, abortion was gradually legalized with feminists movements and was judicially acknowledged by the Supreme Court in 1973 in the landmark case of *Roe vs Wade*. In contrast in India through women's reproducing rights are a major legal issue however, In IPC the word "abortion" has been avoided in order to prevent offending the sentiments of the Indian community which shows how abortion is condemned in Indian societies since ages. Before the enactment of MTP Act, the laws were very strict and even though the provisions under IPC existed, it was rarely implemented, perhaps due to the fear of the revolt from the fanatics and conservative societies, though MTP was enacted in order to liberalize the stringent laws India, which if observed can be seen to be enacted as a tool for family planning and not as a protection of woes of an unmarried pregnant women, also, justifying the argument that how abortion laws in India do not exist to protect the rights of privacy where abortion can be permitted on the satisfaction of a medical practitioner.

The attitude of the Indian judiciary reveals a complete disregard of the pregnant women's right to privacy and her right to make independent reproductive choices. The issue surrounding abortion in the Indian courts is usually that if it would amount to cruelty towards the spouse; hence it seems that religion and paternalistic attitude has been a traditional bound towards abortion and a conservative society which has a important influence in the social growth and value orientation of the population.³⁵ The US judiciary, conversely has been sensitive to the fact that pregnancy has a strong impact on a women's health and lifestyle and that the effects of pregnancy are borne by the women alone³⁶, such a discretion is entirely missing from Indian decisions that touch upon the issue of reproductive autonomy. Hence, there is a sharp contrast between the judicial attitudes towards the reproductive right of the women in India and US. In India, however though the laws regarding abortion have been made legal, the stringent rules still act, as an obstacle in fully protecting the rights of women and protecting her health. These statutes infringe a women's right to dignity, health, privacy by thereby placing

³⁵K.D. Gaur, *Abortion and the law in India*, XV Cochin University L.R., 123-143(1991).

³⁶*Roe V. Wade*, 410 U.S. 113, 148-150(1973). And *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 912 (1992).

community interest over individual interest; hence women restricting to illegal and unsafe abortion assuming it to be the last abort.

1. PROVISIONS UNDER THE MTP ACT AND THE RECENT AMENDMENTS:

The abortion was made liberal in 1971 by the coming of the MTP Act, this act intended to make certain exceptions to the stringent provisions of the IPC which assert that every miscarriage, abortion is criminal except when they are assumed to save a woman's life. The MTP act approved in India in 1971 and enacted in 1972 permits abortion (or MTP) for a broad range of social or Medical reasons including to save the life of women, to preserve physical health, to preserve mental health and to terminate a pregnancy resulting from rape or incest and in cases of foetal impairment and contraceptive failure.³⁷This empowers the women to decide whether to continue her pregnancy or to terminate and thus sparing many women from forced motherhood and inflicted pregnancy. The act authorizes a registered medical practitioner to terminate the pregnancy of a woman on the prescribed grounds when pregnancy does not exceed a period of 12 weeks, however in case of pregnancy exceeding 12 weeks but not exceeding 20 weeks the concurring opinion of at least 2 registered medical practitioners who are of opinion formed in good faith the word good faith means discretion in the hands of medical practitioners.³⁸

But the validity of the MTP Act was disputed along with Article 21 in *NAND KISHORE SHARMA VS UOI*,³⁹ leaving the court indecisive, when the question of MTP Act violating Article 21 came up, hence leading to the court articulating that it was hard to establish precisely when a foetus comes to life, stating that they were simply concerned with the legality of the pertinent provisions of the act. ARTICLE 21 of the Indian constitution recognizes the right to life and liberty, The supreme court has interpreted the term "personal liberty" in different cases to include the right to Privacy in *KHARAK SINGH VS STATE OF PUNJAB*⁴⁰ hence the Supreme court repudiated to interpret article 21 to include the right to privacy but later on in *GOBIND VS STATE OF MP*⁴¹ AND *K PUTTASWAMY VS UOI*⁴² it was held that right to privacy and dignity is a fundamental right and included under the broad fundamental right of right to life also, in the recent case *JAVED VS STATE OF HARYANA*⁴³ the court did not deny that that Article 21 incorporates the right to reproductive choice.

Women are blessed by the God, they have been given the dispensation to bring out a life in this world. Since the right to life includes the right to enjoy with all the limits and facilities, it implies that the right to procreation and right to have control over reproductive organ are included in the broader concept right to life. Right to procreate a

³⁷United Nations 1993.

³⁸Upendra Baxi, Abortion and the Laws in India, Journal of the Indian Law Institute, 1986, 87, volume 28-29.

³⁹AIR 2006 Raj. 166.

⁴⁰ Kharak Singh v. State of Punjab AIR 1963 SC 1295.

⁴¹ Govind v. State of MP, AIR 1975 SC 1378

⁴² Writ petition(civil) no 494 of 2012.

⁴³ AIR 2003 SC 3057.

child also gives the right to abortion, to give birth to a child requires the good health of mother, a woman cannot be forced to procure a child on account of her own life and hence, this right to abortion is very much lies with the women as a part of the fundamental and human rights. Many people believe that abortion is a moral issue, but it is also constitutional issue, it's a woman's right to choose what she does with her body and the recent amendments in the MTP gives her this freedom, not claiming to be an absolute freedom as there are certain limitations imposed, where MTP act has left this freedom as a discretion of women, but still there is a long way to achieve because there are some other laws in India giving importance to child in the womb like transfer of property act, 1882 which defines an unborn child as legal person. By fiction, also the Hindu undivided family the unborn child has given the right over property but lately women's right of abortion has been given priority, over the right to life of child.

In India, NIKITA MEHTA'S CASE⁴⁴ has given rise to an abortion debate relating to statutory time limits to abortion from 20 to 24 weeks. In 2008, Haresh & Nikita Mehta petitioned Bombay High court to allow them to abort their 26 week old fetes who had been diagnosed with a heart defect. The issue in this suit was whether the limit of abortion must be increased beyond the given time. The court stated that even if the petition was made beyond 20 weeks, the court wouldn't still have been in favour of the petitioners as the provisions of law under section 3 (2) (ii) & with section 3(2)(b) would not have been satisfied.⁴⁵ Hence, the MTP act does not permit the termination of pregnancy after the gestation period of 20 weeks & even abortion on demand is not allowed leading to women going for illegal and unsafe abortions.⁴⁶ Also In 2015, a 14-year old rape victim from Gujarat sought & received permission from the Supreme Court to abort the 20 weeks deadline had passed. Her petition was treated as a special case meaning it could not be used a precedent to grant permission in another case.

After 45 years since the enactment of the law has seen technology break new grounds, the rising incidence of sex crimes & the urgent need to empower women with sexual rights & choices both in their own interests & for the sake of reducing the fertility rate as a whole had made it imperative that the law be changed. Legal & medical experts always felt that a revision of the legal limit for abortion was long overdue and finally this lead to In 2002 and 2003 the Indian parliament passing the MTP Amendment act and amending the rules and regulations to strengthen the MTP act and to improve the availability of abortion services most significantly the amended MTP rules sanctioned medical abortions. It also lead to preparing of the draft MTP amendment bill, 2014 which

⁴⁴ Dr. Nikhil Dattar & ors. V. Union of India (2008)110 BOM. L.R. 3293

⁴⁵ Banerjee and Uppaluri, supra note 13.

⁴⁶ Paige Panano, Manushi: Legal but Not Available, The Paradox of Abortion in India, INDIA TOGETHER (NOV 4, 2017, 10:00 AM), <http://www.indiatogether.org/manushi/issue126/abortion.htm>

provides for abortion beyond 20 weeks under defined conditions. As per the draft law, a healthcare provider may, “in good faith”, decide to allow Abortion between 20 & 24 weeks which came as a very welcoming and turning point in the field of abortion laws.⁴⁷

6.1 THE MTP AMENDMENT BILL AND DRAWBACKS:

Finally the Lok Sabha on March 22, 2020 introduced the Medical Termination of Pregnancy (Amendment) bill 2020, which aims to strengthen women’s reproductive rights and prevent unsafe abortions in India. It proposes to raise upper limit of pregnancy termination from 20 weeks to 24 weeks⁴⁸. The MTP act intends to provide legal, affordable and safe access to abortion, it proposes the requirement of the opinion of the registered medical practitioners instead of (two or more) , it has also enhanced the gestation limit for special categories of women; also states that the name and other particulars of women whose pregnancy has been terminated shall not be revealed but though activities in India have been speaking legal reforms on abortion for over a decade, and such an amendment seeks to be progressive in nature and surely has step in the right direction has made the law more liberal, but it does come with certain caveats; First, even up till the increased 20 weeks lower limit the decision to continue or terminate pregnancy is still not at the discretion of the pregnant women, additionally if the pregnant women alleges that pregnancy is the result of rape and has crossed the 24 weeks threshold then the termination is impermissible, the amendment bill misses the chance to address such a kind of situation that arouse MS. Z VS STATE OF BIHAR(2017)⁴⁹ also what would have been desirable was an interpretation of the word “substantial” not leaving it just to untrammelled interpretative discretion of code, where the courts may be able to apply ejusdem generis while determining whether a case falls in the “substantial” category forms a drawback too.

The bill also misses out on the opportunity to make termination of pregnancies more accessible by not replacing “registered medical practitioners with trained and qualified registered health care providers” as was envisaged by the MTP (Amendment)Bill 2014. Also in India oral contraceptive (OCP) condoms, Intra uterine devices(IUD), and male and female sterilization are provided through public sector, while highly priced injectible contraceptives are available in private sectors forms a major drawback too.⁵⁰ There is also a high unmet-need for the safe abortions. Some couples with various factors such as the absence of competent health professionals and unaffordable cost; force

⁴⁷ Drafts of Medical Bill on Abortion.

⁴⁸ Chandna, Himanshi and Debayan Roy (Jan 29, 2020) ‘Indian Women set to get right to abort pregnancy in 6th month, instead of 5th’. The print. <https://theprint.n/health/Indian-women-set-to-get-right-to-abort-pregnancy-in-6th-month-istead-5th/356109/>

⁴⁹ C.A. 10463 of 2017, 11 SCC 572.

⁵⁰Ministry of Health and Family Welfare (March 10,2017) ‘Initiatives under Family Planning Programme’ Press Information Bureau, Government of India.

women to opt for abortion outside accredited abortion centre. Inconsistencies in law for example- The Protection of Children from sexual offense(POCSO) Act of 2012 criminalizes all sexual contact for persons less than 18 years of age runs contradictory to government scheme of Rashtriya Kishore Swasthya Karyakram(RKSK) and Adolescent reproductive and sexual health programme (ARSH) which attempts to spread awareness about sexual health and services to adolescence⁵¹. Similarly, while the MTP Act makes it mandatory for Doctors to keep patients record confidential POCSO makes it compulsory to report any sexual activity.

Finally the proposed amendment uses the word 'Women'. Therefore, any legislative framework on abortion must ensure that all individuals irrespective of gender have access to abortion. Such conditionality, however can risk alienating many women especially those from marginalized sections and rural communities with limited resources and poor access to basic services. In India, where factors such as severe social stigma and high prices of contraceptives and reluctance of medical practitioners to perform abortions , had a significant impact on women's reproductive right. It becomes imperative to analyze such policies within the context to determine. Whether they can truly deliver on their safety promises. Also this law seems to be a patriarchal imposition of motherhood on all women and still restricts abortions to a "Heteronormative framework"; It is still considered to be a violation of confidentiality and privacy. In spite of progressive and broader decision taken in regard to reproductive rights in PUTTUASWAMY⁵² AND NAVTEJ JOHAR CASES⁵³, the proposed amendment maintains the paternalistic doctorcentric framework of MTP Act. To sum up, the new amendment bill demonstrate the pro- live and pro-choice debate is still not on the horizon in India and the state Interest(in preserving foetal life)though diluted to some extend still supersedes the reproductive autonomy of the women; though the bill is a welcome step form, but still sustained efforts are required by government to help internalize and propagate the importance of a women's agency .Her choice and her right over her body . Only then can we hope to call ourselves a progressive, a pro-choice society.

⁵¹PLD & SAMA (April 2018) 'Status of Human Rights in the Context of Sexual Health and Reproductive Health Rights in India', National Human Rights.

⁵²Writ petition(civil) No 494 of 2012.

⁵³W.P.(crl) No. 76 of 2016 No 14961/2016.

Conclusion:

A tree can bestow tasty and healthy fruits only if its own roots are healthy. Once the root captures uninvited external organisms then its internal strength reduces and it becomes weak enough. It is fair to bestow eatables fruits, though life is most precious thing, but when does life begin has not been recognized under any statute, hence by comparatively analyzing the law of USA and India, the researcher has witnessed that the woman's right to choose abortion and her interest of foetus which is still an unborn person; hence a child when develops in women's womb is only an organism inside the women's body. It becomes a living organism when it comes out of the body. Biologically supporting the right to abortion, the researcher strongly believes in liberalizing India's abortion laws pointing that the concept of women's "choice" has not been focused yet. Thus, a woman's right to her body is still missing in India's laws. The aim of this paper by analyzing and doing a detailed study on the convoluted laws and restrictions on abortion, is to look at the laws and improve the drawbacks still existing in the recent amendment, making it on par with laws from progressive and developed countries.

Anything short of this, therefore is only a half hearted effort at legal reforms. It's the time that women's right to her body is recognized and protected.

