

BURNISHED LAW JOURNAL

Sharanya S. Nair

B.A.LL.B (VIII Semester)

ABORTION AS A FUNDAMENTAL HUMAN RIGHT

INDEX

| SR No. | TITLE | PAGE No. |
|--------|--|----------|
| 1. | Objective of Research | 02 |
| 2 | Methodology | 02 |
| 3 | Introduction to Human rights and abortion | 04 |
| 4 | What is abortion and its importance | 06 |
| 5 | Role of international human rights norms on abortion | 07 |
| 6 | Abortion laws in India | 10 |
| 7 | Abortion as a fundamental human right | 12 |
| 8 | Conclusion | 14 |
| 9 | References | 15 |

AIM OF THE STUDY :

1. The author aims to study the abortion laws and policies in India and to understand why there is a need to liberalize abortion laws worldwide.
2. To establish abortion as a fundamental right.

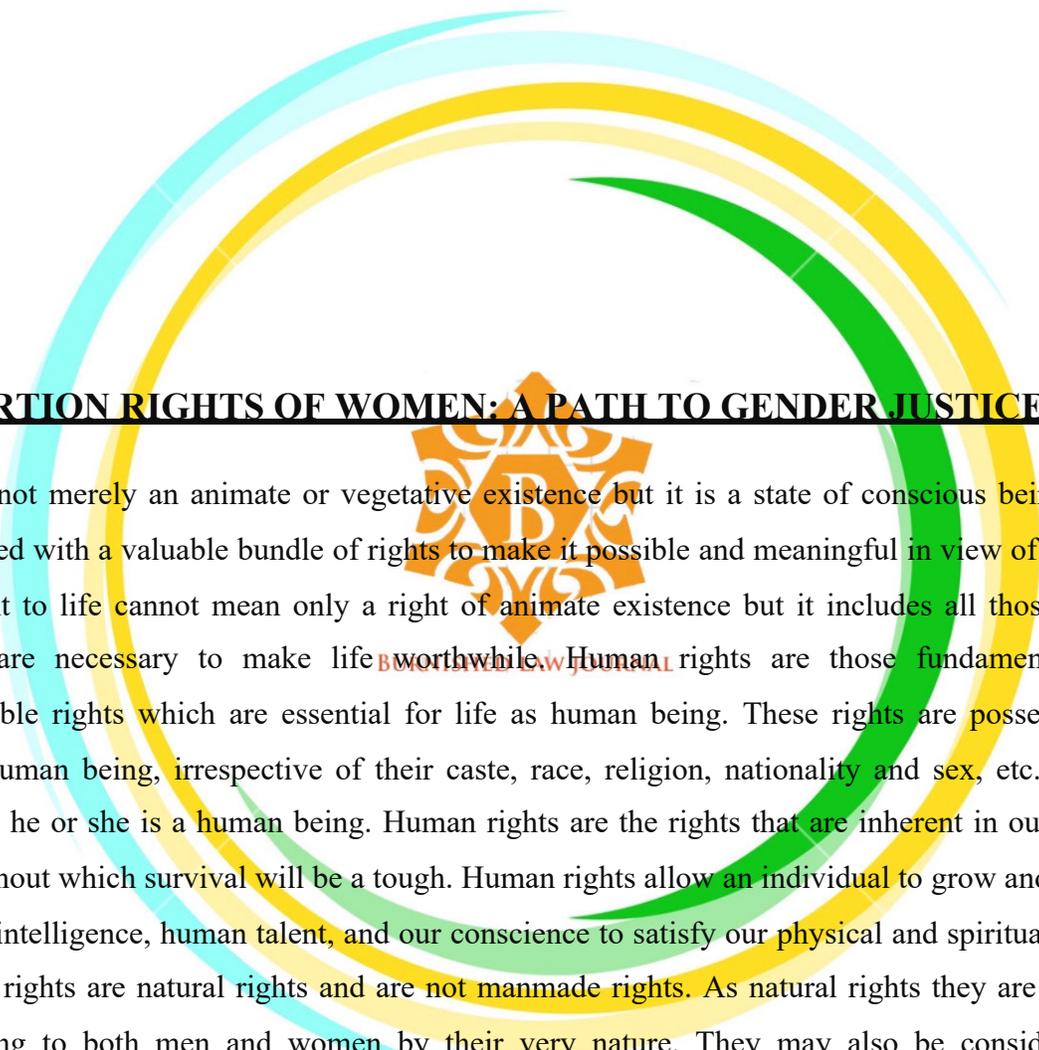
METHODOLOGY:

The present study has adopted the doctrinal method of study. The study has been divided into three parts based on the objectives sought to be achieved by the present study. The study has firstly tried to present the background of the subject matter in brief and then the main part of the study has been dealt with. The study concludes with the analysis of developments in brief.

ABSTRACT

Women have been fighting the struggle for reproductive rights for centuries. Historically, these rights are an especially controversial subject due to the moral, ethical, and religious considerations.

Do reproductive rights merely mean the right to reproduce? Or is the issue inextricably linked to the numerous questions that surround women's reproductive freedom? The ability to reproduce seems to be what sets women apart from men. But do women have control over their own reproduction? Do women have the freedom to choose whether, when, and how many children to have? Do women have access to safe birth control methods? Do women have the right to safe abortion? Can sexuality be separated from reproduction? A big 'NO' in answer to many such questions led to the emergence of the women's health movement in different parts of the world in the early 1970's. It started as small 'consciousness raising' groups, which began by spreading awareness among women about the functioning of their bodies and gradually evolved into multi-faceted campaigns that have significantly influenced health policies in many countries. Earlier the right to abortion was not permitted and it was strongly opposed by the 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 of the nations.



ABORTION RIGHTS OF WOMEN: A PATH TO GENDER JUSTICE

Life is not merely an animate or vegetative existence but it is a state of conscious being. It is supported with a valuable bundle of rights to make it possible and meaningful in view of the fact the right to life cannot mean only a right of animate existence but it includes all those rights which are necessary to make life worthwhile. Human rights are those fundamental and inalienable rights which are essential for life as human being. These rights are possessed by every human being, irrespective of their caste, race, religion, nationality and sex, etc. simply because he or she is a human being. Human rights are the rights that are inherent in our nature and without which survival will be a tough. Human rights allow an individual to grow and use all mental intelligence, human talent, and our conscience to satisfy our physical and spiritual needs. Human rights are natural rights and are not manmade rights. As natural rights they are seen as belonging to both men and women by their very nature. They may also be considered as common rights for they are rights which all men and women in the world would share¹. The Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948 outlines what is considered in this century to be the fundamental consensus on the human rights of all people in relation to such matters as security of person, slavery, torture, protection of

¹ International Law and Human rights, Dr. S.K. Kapoor

the law, freedom of movement & speech, religion, and assembly, and rights to social security, work, health, education, culture, & citizenship. It clearly stipulates that these human rights apply to all equally "without distinction of any kind such as race, color, sex, language... or other status" (Art.2)². Obviously, then, the human rights delineated by the Universal Declaration are to be understood as applying to women. However, tradition, prejudice, social, economic and political interests have combined to exclude women from prevailing definitions of "general" human rights and to relegate women to secondary and/or "special interest" status within human rights considerations. This marginalization of women in the world of human rights has been a reflection of gender inequity in the world at large and has also had a formidable impact on women's lives. It has contributed to the perpetuation, and indeed the condoning, of women's subordinate status. It has limited the scope of what was seen as governmental responsibility, and thus has made the process of seeking redress for human rights violations disproportionately difficult for women and in many cases outright impossible. Though every human is equal in the eyes of law but when questions come about the rights and position of women in society then one can find the clear discrimination between men and women. Women have been fighting the struggle for their rights for centuries. The right to be treated as equals, for education, for equal opportunity and for their reproductive rights. Women have been fighting the struggle for reproductive rights for centuries. Historically, these rights are an especially controversial subject due to the moral, ethical, and religious considerations³. The ability to reproduce seems to be what sets women apart from men. A series of human rights treaties and international conference agreements forged over several decades by governments — increasingly influenced by a growing global movement for women's rights — provides a legal foundation for ending gender discrimination and gender-based rights violations. These agreements affirm that women and men have equal rights, and oblige states to take action against discriminatory practices⁴. But still the reproductive rights remains a dream to many women's. It becomes really important to address the issues that whether reproductive rights only mean right to reproduce? Or is the issue inextricably linked to the numerous questions that surround women's reproductive freedom? Reproductive rights include individual's right to plan a family, terminate a pregnancy, use

² Article 2, Universal Declaration of Human Rights

³ <https://poseidon01.ssrn.com/delivery.php>

⁴ <https://ro.uow.edu.au/cgi/viewcontent.cgi?article=1134&context=medpapers>

contraceptives, learn about sex education in public schools, and gain access to reproductive health services⁵. The struggle for the reproductive rights had seen many controversies due to its moral, ethical and religious undertones of birth control, family planning and abortion. Even today the reproductive rights are an emotional and politically charged issue worldwide. The most crucial issue among women today is their liberty to exercise the right to abortion. The history is evident that the abortion laws had gone through a lot of controversies, reforms and development. In today's world the feminist movement are taking the liberalization of abortion and struggling to get this reproductive right as the most basic and essential right for all women irrespective of any other factor such as caste, creed, religion, nationality. While women are able to invoke international human rights machinery when they have found themselves in such situations. The very basic right over her body seems to have been lost into wilderness.



WHAT IS ABORTION AND ITS IMPORTANCE

Abortion in medical terminology is a process of removal or expulsion of an embryo or foetus from the uterus of women. This can occur spontaneously as a miscarriage, or be artificially induced through chemical, surgical or other means. Commonly, "abortion" refers to an induced procedure at any point in the pregnancy; medically, it is defined as a miscarriage or induced termination before twenty weeks gestation, which is considered nonviable⁶. Abortion has always been a controversial topic. Abortion may be either spontaneous or induced. An induced abortion are divided into legal or illegal, a spontaneous abortion is one that occurs naturally as a result of certain pathological condition often beyond the control of the pregnant women and physician⁷. An induced abortion is the deliberate interruption of pregnancy by artificially inducing loss of the foetus. Neither accidental premature birth nor spontaneous expulsion of the foetus due to disease, malfunction, or trauma of mother is normally considered on abortion. The World Health

⁵ <https://family.findlaw.com/reproductive-rights/what-are-reproductive-rights-.html>

⁶ <https://poseidon01.ssrn.com/delivery.php?ID=60406>

⁷ S. Chandrashekhar, Abortion in crowded world 1, (George Allen & Unwin, Ltd. London, 1979)

Organisation places abortion within the category of fertility regulation⁸. Historical evidence shows that women have always obtained abortions using a wide range of methods, passed on from generation to generation, even if their effectiveness was not proven. Today, the method used depends on the legal status of abortion, the duration of pregnancy, the available technology, as well as the woman's financial resources and access to providers⁹. There are different ways in which abortion can be carried out, by the traditional method (use of the traditional pharmacopeia, or use of blunt object to remove the membrane surrounding the foetus or by way of manipulating massage techniques) or Surgical method (based on dilation of the cervix and evacuation of the uterine cavity by either curettage or aspiration) or the Medical method (use of certain medicines inhibiting the growth of the foetus)¹⁰. Access to free legal and safe abortion is the very need of the women worldwide as it helps the women in various ways such as it empowers her to take decision pertaining to her health, family planning, to avoid any sort of emotional trauma etc. Due to the taboo associated with abortion a women is forced to undertake unsafe abortion which ultimately leads to high maternal mortality rate. The association between restrictive abortion laws and unsafe abortion has been well documented. According to an analysis by UN DESA, the average rate of unsafe abortion is estimated to be more than four times higher in countries with more restrictive abortion laws than in countries with less restrictive laws¹¹. According to World Health Organisation around 25 million unsafe abortions were estimated to have been taken place worldwide each year, almost all in developing countries. Around 3 million girls aged 15-19 years undergo unsafe abortions every year. Also 3.2- 4.7% of maternal death can be attributed to unsafe abortions every year¹². Access to safe and legal abortion has been considered to be of immense importance to women, as how reproductive rights are managed and controlled is inseparable from how women are managed and controlled in the nation.

ROLE OF INTERNATIONAL HUMAN RIGHTS NORMS ON ABORTION LAWS AND POLICIES.

⁸ https://www.who.int/health-topics/abortion#tab=tab_1

⁹ <file:///C:/Users/sharanya%20nair%20.LAPTOP-FTBEBJP7/Downloads/PDF%20ABORTION.pdf>

¹⁰ <https://www.bpas.org/abortion-care/abortion-treatments/>

¹¹ <https://abortion-policies.srhr.org/documents/reference/A-global-database-of-abortion-laws-policies.pdf>

¹² https://www.who.int/health-topics/abortion#tab=tab_2

International human rights norms have evolved remarkably to recognize that denial of abortion to women is a violation of her fundamental human right. The progressive standards of abortion prescribed by medical professionals and health organizations has played a very crucial role in transforming abortions laws worldwide and it has also contributed a lot in the policy reforms regarding the reproductive rights of women at large. These standards not only influenced the policy makers of the nations but it has also influenced the judicial developments on this issue across the globe. International Conference on Population and Development's (ICPD) 1994 was the first international consensus document which recognized reproductive rights as human rights. Its call to governments to strengthen their commitment to women's health by addressing unsafe abortion, to ensure access to abortion when legal, and to guarantee all women quality post-abortion care established an important entry point to address unsafe abortion and promote abortion access as a human rights imperative¹³. ICPD Programme of Action's directives on abortion are relatively narrow and contradictory, as they do not recognize the need for states to reform their laws and policies to permit abortion despite clear evidence that this is essential for reducing unsafe abortion and resulting maternal mortality and morbidity—or recognize the linkages between lack of access to abortion and gender discrimination¹⁴. One year after the ICPD Programme of Action, the Beijing Platform for Action further called on governments to “[review] laws containing punitive measures against women who have undergone illegal abortions,” ICPD's five-year review, governments recognized that “in circumstances where abortion is not against the law, health systems should train and equip health-service providers and should take other measures to ensure that such abortion is safe and accessible¹⁵. Also UN human rights treaties, have clearly established that when abortion is legal under domestic law, it must be accessible in practice, and that denials of access to legal abortion services can amount to violations of the rights to health, privacy, nondiscrimination, and freedom from cruel, inhuman, and degrading treatment. These treaties facilitate the abortion procedure for women in need or to the women who cannot afford the abortions. According to the treaty States should also guarantee the availability of skilled health care providers who can offer safe abortion services and ensure

¹³<https://www.hhrjournal.org/2017/06/the-role-of-international-human-rights-norms-in-the-liberalization-of-abortion-laws-globally/>

¹⁴ Id

¹⁵ Beijing Declaration and the Platform for Action, Fourth World Conference on Women, Beijing, China, Sept. 4–15, 1995

that provider refusals on the grounds of religion or conscience do not interfere with women's access to services¹⁶. States must also ensure that women receive confidential and adequate post-abortion care, which must not be conditioned upon admissions by women that will be used to prosecute them for undergoing abortions illegally, as this may amount to cruel, inhuman, and degrading treatment. The international and regional human right bodies have condemned the state restricting the women to exercise her reproductive right as a contrary to human rights. Furthermore in the landmark judgment of *LC v. Peru (2009)* on the reproductive rights where the **Center for Reproductive Rights** and the **Center for the Promotion and Defense of Sexual and Reproductive Rights** filed a human rights petition on behalf of L.C. against Peru before the **United Nations Committee on the Elimination of Discrimination against Women**¹⁷ explicitly instructed a state party to decriminalize abortion in cases of rape, marking the first instance in which a human rights body has explicitly directed a state to liberalize its abortion law as a result of an individual communication. Notably, the Committee on the Rights of the Child has urged states to “decriminalize abortion to ensure that girls have access to safe abortion and post-abortion services” and “ensure access to safe abortion and post abortion care services, irrespective of whether abortion itself is legal¹⁸.” Additionally, the CEDAW Committee has directed states to “ensure that sexual and reproductive health care includes access to ... safe abortion services,” without qualification as to the legality of abortion. It has also framed abortion as an aspect of women's autonomy¹⁹. Finally, as further analyzed below, the Human Rights Committee recently issued a groundbreaking decision in the case of *Mellet v. Ireland*²⁰, recognizing that the prohibition and criminalization of abortion contravene international human rights law. The United Nations Human Rights Council (UNHRC) had recognized that criminalizing abortion causes increased number of maternal death which is violation of her Right

¹⁶ CESCR, para. 13, 21, 28; CEDAW Committee, Concluding Observations on Slovakia

¹⁷ <https://reproductiverights.org/case/lc-v-peru-un-committee-on-the-elimination-of-discrimination-against-women>

¹⁸ Committee on the Rights of the Child, General Comment No. 20, Implementation of the Rights of the Child during Adolescence,

¹⁹ CEDAW Committee (2013, see note 13), Para. 52(c). See, for example, CEDAW Committee, Concluding Observations on New Zealand, UN Doc. CEDAW/C/NZL/CO/7 (2012), para. 35(a) (urging a state permitting abortion where pregnancy poses a risk to the woman's physical or mental health and in instances of rape or incest to amend its abortion law “to ensure women's autonomy to choose”); CEDAW Committee, Concluding

²⁰ *Mellet v. Ireland*, UN Doc. CCPR/C/116/D/2324/2013 (2016).

to life and to live with dignity. The human rights norm not only influenced the policy maker but has also influenced the judiciary to interpret that criminalizing and restricting a women from making decisions pertaining to body and sexuality is clear violation of fundamental principles of human rights. The Supreme Court in the historic judgment of *Roe v. Wade*²¹ established that most laws against abortion violate a constitutional right to privacy, thus overturning all state laws outlawing or restricting abortion that were inconsistent with the decision. The Supreme Court struck down several state restrictions on abortions. In the Supreme Court of Canada, interpreting Article 7 of the Canadian Charter which guarantees an individual's right to life, liberty and freedom and security of a person. In the leading case of *Morgentaler Smoling and Scott vs. R2*²², the Court focused on the bodily security of the pregnant women. The Criminal Code of the country required a pregnant woman who wanted an abortion to submit an application to a therapeutic committee, which resulted in delays. The Supreme Court found that this procedure infringed the guarantee of security of a person. This subjected the pregnant woman to psychological stress²³. By such reforms it not only ensured but reformed the patriarchal mindset of the society to some extent.



ABORTION LAW AND POLICIES IN INDIA

BURNISHED LAW JOURNAL

India being a country where women are equated to goddess it is believed that the women in India enjoys better social status compared to other women of other nations not only in terms of education, opportunities but also in case of reproductive rights. The satire is they are not vested with the freedom to take any sort of decisions pertaining to their body as India didn't had a liberal approach towards abortion. The abortion law in India has witnessed a series of evolution. Before MTP Act any kind of abortion was illegal and punishable under Indian Penal Code, 1860. Section 312 -316 deals with it. Abortion which was done in good faith for saving the life of the mother was only the ground for legal abortion. Also abortion was allowed in the cases of rape victim. But due to the strict abortion laws many women has to choose illegal ways because of which women has to undergo punishment if caught in the hand of law or sometime they lost their

²¹ 410 U.S.113. 1972

²² (1988) 44 DLR (4th) 385

²³ <https://poseidon01.ssrn.com/delivery.php?ID=604064031098125098>

life due to the unhygienic methods which she used for abortion²⁴. Abortion policy in India is consistent with safeguarding reproductive rights as envisaged by International Conference on Population and Development (ICPD). It was in the year 1971 when India made the abortion law liberal by enacting the Medical Termination of Pregnancy Act 1971, In India, the Central Family Planning Board on August 25, 1964 recommended the Ministry of Health to constitute a committee to study the need of legislation on abortion. The recommendation was adopted in the latter half of 1964 constituting a committee which consisted of members from various Indian public and private agencies. The committee called **Shantilal Shah Committee** was constituted. After analysing a vast expanse of statistical data available at that time, this committee issued its report on December 30, 1966. On the basis of this report, the government passed the Medical Termination of Pregnancy Act, 1971 (MTP Act of 1971) and liberalized abortion laws in India in order to curb high mortality rate of women. The Act, consisting of just 8 sections, deals with the various aspects like the time, place and circumstances in which a pregnancy may be terminated by a registered medical practitioner. It legalizes abortion in case where there is a failure of contraceptives or where the pregnancy will adversely affect the physical or mental health of the pregnant women, consent of the pregnant woman is a must unless she is a minor or lunatic when her guardian's consent is required. Broadly, the Act provides for the termination of pregnancy on medical, social, humanitarian and eugenic grounds, up to 24 weeks of gestation in a safe environment by a recognized registered and adequately qualified medical practitioner. The Medical Termination of Pregnancy Rules and Regulations 1975, define the criteria and procedures for approval of an abortion facility, procedures for consent, keeping records and reports, and ensuring confidentiality. Any termination of pregnancy done at a hospital or other facility without prior approval of the Government is deemed illegal and the onus is on the hospital to obtain prior approval prior to the amendment of the MTP Act 2018, the period for abortion was 20 weeks. The Indian judiciary has given various interpretations on abortion as fundamental right of women. The Supreme Court and the High Court of Madras have respectively affirmed women's rights to choose in the context of continuing a pregnancy. In

²⁴https://www.researchgate.net/profile/Pyali_Chatterjee/publication/317400249_RIGHT_TO_ABORTION_IS_A_BASIC_HUMAN_RIGHT_SPECIAL_REFERENCE_TO_INDIA/links/5938f4e5a6fdcc58ae6494a3/RIGHT-TO-ABORTION-IS-A-BASIC-HUMAN-RIGHT-SPECIAL-REFERENCE-TO-INDIA?origin=publication_detail

*Suchita Srivastava v. Krishnan*²⁵, the Supreme Court clearly held that the state has an obligation to ensure a woman's reproductive rights as a component of her Article 21 rights to personal liberty, dignity, and privacy.

In *Dr. Mangla Dogra & Others v. Anil Kumar Malhotra & Others, 2011*²⁶, it was held - Section 3(4) (b) of the MTP Act requires consent from just one person: the woman undergoing a medical termination of pregnancy. A husband cannot force his wife to continue a pregnancy. *“Courts in India have confirmed that providers only require consent from an adult woman for an abortion. Husbands, boyfriends, brothers, parents, and in-laws, have no right to consent to termination or to refuse to consent to an abortion.”*

“It is the right of a woman to give birth to a child, but it is not the right of a husband to compel his wife to give birth to a child for the husband. A woman is not a machine in which raw material is put and a finished product comes out. She should be mentally prepared to conceive, continue the same and give birth to a child. The unwanted pregnancy would naturally affect the mental health of the pregnant women.”

It took 49 years to bring some changes in the abortion law in India. When a Public Interest Litigation was filed in the Supreme Court of India seeking advancement in the women's right. The Medical Termination of Pregnancy Amendment Act 2020, brought certain required and progressive changes in the existing law enabling women to access new medical technologies and facilities. The amendment has raised the gestation period from 20 weeks to 24 weeks, for women including rape survivors, victims of incest, differently able women and minors, conception failures is acknowledged. MTP amendment act 2020 is available to any “woman” irrespective of her marital status. Amendment sets no gestational limit in case of foetus abnormalities. Though this amendment act 2020 seems right but falls short in many ways as it lags at third party involvement moreover doesn't help the women seeking abortion the amendment will make no difference. It is unlikely to make a big difference in terms of maternal mortality rate due to unsafe abortions.

²⁵ AIR 2009 S.L.P(C) 17985

²⁶ (Civil) No. 4705 OF 2013

ABORTION AS A FUNDAMENTAL HUMAN RIGHT

International human rights guarantees equal rights to both men and women. Various conventions establish that each and every individual is equal in the eyes of law that is the supremacy of law. But the gender inequality exists in real. Women's are subjected to patriarchal stereotypes not only in terms of education, representation, opportunities but also in the case of reproductive rights. Abortion still remains a controversial issue. Access of safe abortion remains a dream to many, the traditional argument relating to abortion is that it is equivalent to murder, specifically infanticide – and in this way it is immoral and unjustifiable. One of the best known philosophical arguments to this effect is that of Don Marquis, who claimed that murder is illegal because it deprives the murdered person of their potential future. Consequently, abortion is murder as it deprives the fetus of its potential future, and therefore abortion is morally wrong and should not be allowed from the moment of conception. However, this does not take into consideration that the zygote formed at conception is a very different entity from that which will ultimately be born and go on to experience a future. Therefore, it could be reasoned that Marquis's argument rather endorses a policy of abortion up to the point of viability, as once a fetus has reached this stage it will be highly similar to a newborn child that can go on to experience a future. The statistics of World Health Organisation clearly explains that restricting women from undertaking abortion is the major cause of increased maternal deaths. Access to safe abortion is not only a human right; it is a measure of a society's development with regard to women. Numerous cases are the evidence that restricting women from exercising their reproductive right has led to the violation of basic fundamentals of human rights. The Indian Constitution guarantees every citizen of the nation as equal in the eyes of law but lacks to restrict the legislature from making laws that lays illogical restriction of exercising the right of abortion. According to family aborting a pregnancy without the spousal consent amounts to cruelty which clearly means that women have no right over their own body this is the harsh reality of women's position in the society. Abortion if carried in accordance with the guidelines according to WHO then it safe for all the women who wish to have an abortion because the access to legal and safe abortion has been considered to be of immense importance to women, as how reproductive rights are managed and controlled is inseparable from how women are managed and controlled. The International Bill of rights

assures that every individual has the right to live with at most freedom and dignity as the state imposing restriction on the women is an indication of regressive mindset. As no development can take place without equal participation of women. Taking into account about the latest Medical Termination of Pregnancy Amendment Act 2020, it is a great opportunity for India to take a lead and set a global agenda for provision of healthier and safer abortion and assure reproductive rights to women. Just like any other rights, reproductive rights plays integral part in the development of the nation.

CONCLUSION

Equality before law and equal protection before law is the right of every one. Any biasness in law is the violation of the Article 14 of the Indian Constitution. It should be clear that the plethora of convoluted laws and restrictions on abortion do not make any legal or public health sense. What makes abortion safe is simple and irrefutable—when it is available on the woman's request and universally affordable and accessible. The idea of abortion is not murdering the foetus but considering every possible myriad responsibility that come not just with birth but also with nurturing a human being. The law has to take care of the liberty of the mother as well as the

unborn. As a hospitable community we should seek ways of providing support for lonely and frightened mothers, and for lonely and abandoned babies. We need to offer women with unplanned pregnancies as much love and support as they require and to assist them in finding compassionate alternatives to abortion. Because access to equal reproductive rights to women is an indication of a strong nation.

REFERENCES

STATUTES REFERD

- 1. MEDICAL TERMINATION OF PREGNANCY ACT 1971**
- 2. THE INTERNATIONAL BILL OF HUMAN RIGHTS**
- 3. INDIAN PENAL CODE, 1860**

CASES REFERED

1. *LC v. Peru (2009)*
2. *Mellet v. Ireland , CCPR/C/116/D/2324/2013*
3. *Roe v. Wade, 410 US 113, 1972*
4. *Morgentator Smoling and Scott v. R(1988) 44 DLR(4th) 385*
5. *Suchitra Srivastava v. Krishnan AIR 2009 SLP(C) 17185*
6. *Dr. Mangala Dogra & ors v. Anil Kumar Malhotra & ors (civil) No.4705 (2013)*

WEBSITES REFERED

1. www.legalservicesindia.com
2. www.legitquest.com
3. www.who.int

