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**THE RIGHT TO CHOOSE ABORTION FAILS TO AFFIRM WOMEN'S
REPRODUCTIVE RIGHT**- Anjali Singh¹**I. ABSTRACT**

In the case of Justice *K S Putt swamy v Union of India*², a nine-judge bench of India's highest court unanimously ruled that privacy is a fundamental right under articles 14, 19, and 21 of the Indian constitution. The underlying judgement emphasized "privacy" to include personal autonomy relating to the body, mind, and choices. In addition to this, the ambit of personal autonomy also encircles reproductive rights, which covers reproductive and sexual choices as accentuated by the United Nations International Conference on Population and Development (UNICPD). The Medical Termination of Pregnancy (hereinafter referred to as the MTP) Act permits registered medical practitioners to terminate certain pregnancies and address concerns linked with or incidental thereto. Therefore, India's abortion laws make abortion a legal right only when contingent on certain risks, situations, and health crises that partially adhere to women's reproductive rights and are a mandate of prerequisite conditions that need to be adhered to exercise the option of abortion. While the obligation to get consent from a pregnant woman is legally mandated, it does nothing to reinforce the woman's right to choose whether or not to continue the pregnancy. As a result, the argument that the MTP Act "limits the conditions under which women may have access to abortion services supplied by licensed medical practitioners" is valid. Moreover, the choice to have an abortion is not "equitable" in India because unmarried women bear the majority of the burden. As a result, the choice of the option of abortion has been discriminating towards unmarried women, infringing on women's reproductive rights based on

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²Justice K S Puttaswamy v Union of India (2012a): Writ Petition (Civil) No 494 of 2012

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marital status, leading to unwanted pregnancies, teen pregnancies, infant mortality, miscarriages, physiological and mental agony, and physical harm to the mother.

II. INTRODUCTION

A reproductive right is the right of an individual to freely maintain a healthy reproductive life by learning about sex education, using contraceptives, family planning, terminating a pregnancy, or gaining access to reproductive health care facilities. In fact, India was one of the first countries in the world to legislate policies and frameworks that granted women access to abortion and contraception. However, in contemporary times, there is still a hindrance that prevents women from solely exercising their reproductive rights. The choice of motherhood is a constant violation of reproductive rights. Furthermore, it establishes a medical board to expedite the filing of an abortion request in court and to determine whether it is safe to terminate the pregnancy after 24 weeks in the context of any substantial risk or deformity of the foetus that may be life-threatening.

III. CHANGES BROUGHT BY THE MEDICAL TERMINATION OF PREGNANCY AMENDMENT (2021)

As earlier discussed, there is a slight alteration in the gestational limit from 20 to 24 weeks for abortion, annexed by the approval of the termination by two registered medical practitioners. The updated categories of women who are qualified for abortions up to 24 weeks are listed in Rule 3B of the Medical Termination of Pregnancy (Amendment) Rules, 2021:

- Survivors of rape, sexual assault, or incest
- women who are minors and have not reached the age of majority;
- Pregnant women who have had a change in their marital status
- Women with mental illness, including mental impairment,
- Mothers carrying foetuses with significant defects that render the development unsuitable for life or with anomalies that might cause the newborn to be significantly physically or cognitively challenged.

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Before the amendment, the act remained silent on the abortion of unmarried women and women can now terminate their pregnancies irrespective of their marital status and can get rid of unwanted pregnancies caused by contraceptive failure. The Medical Termination of Pregnancy (Amendment) Rules, 2021's Rule 3A, lists the board's duties and authority. Abortion beyond 24 weeks is one of the duties of the medical board, which will be composed of a gynecologist, a pediatrician, a radiologist or sonologist, and additional members as specified by the rules.

IV. ABORTION AND REPRODUCTIVE AUTONOMY

As the Puttaswamy judgement upheld women's fundamental freedom to make reproductive choices as a component of personal liberty under Article 21 of the Indian Constitution. The bench also outlined the position ruled by the three-judge bench in *Suchita Srivastava v Chandigarh administration*³, which recognized that reproductive rights entail a woman's right to continue her pregnancy to its full term, to deliver the child, and subsequently upbringing the child, and all these rights constitute an integral part of a woman's right to dignity, privacy, and bodily integrity. India is a member of a number of international conventions, some of which are the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), all of which recognize reproductive rights. The state has a constitutional obligation, according to Article 51(c) of the Indian constitution. Now, with the US overturning the landmark judgment,

*Roe vs. Wade*⁴ It is quite evident that women's bodily autonomy is a global crisis, reflecting a callous disregard for women's reproductive health and well-being. The Indian Constitution recognizes the reproductive right to be included in fundamental rights along with article 14: right to equality, article 15: right to non-discrimination, and article 21: right to life as defined by the law, including the right to health, dignity, freedom, and privacy. When viewed in the context of the MTP, 1971 made abortion legal only if certain conditions were met.

V. GREY AREAS IN THE ABORTION LAWS

³Suchita Srivastava v Chandigarh Administration (2009): SCC, SC, 9,

⁴Roe v Wade (1973): 410 US 113.

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DOCTOR CENRIC IN NATURE

when compared with the Medical Pregnancy Termination Amendment Act 2021, which has widened the ambit of the conditions; however, after 50 years of abortion being successfully decriminalized, the MTP Amendment Act 2021 largely favors registered medical practitioners by laying down certain conditions that empower the medical practitioners to terminate pregnancies. Also, one can rightly infer that *section 3 of the (MTP Act 2021)*⁵ is largely in the interest of the doctor rather than women's reproductive autonomy. As a result, privacy clashes with other laws, as in Justice K S Puttaswamy v Union of India, i.e., the privacy judgement contradicts the MTP Act as it gives the doctor more say; additionally, under the Drugs and Cosmetics Act, a pharmacist must keep a record of sales of Schedule H drugs, such as medical abortion pills. As a result, MTP Act 2021 violates abortion confidentiality. As a result, there is a lot of ambiguity when provisions of other laws conflict with the MPT act and infringe on a woman's rights and privacy

ABORTION ONLY A LEGAL COMPLIANCE

The Medical Pregnancy Termination Amendment Act 2021 enlists a condition deemed for a legal abortion with the increment in the gestational period. This results in making it merely a legal adherence, which is strictly needed to be followed when a woman seeks an abortion. Such an adherence followed by a set of conditions to be fulfilled makes it a matter of right to be exercised by a woman. In addition to this, the ambit of conditions for abortions is confined to the medical risks alone, making all other grounds a crime as to why women may seek to terminate their pregnancy. The medical risks are considered to be of significance only after 20 weeks of pregnancy, leading a woman to carry a pregnancy to term as a burden as long as it gives rise to a serious risk to her life. So, for a woman in India, abortion is still not reaffirmed with the reproductive autonomy of a woman completely.

ABORTION LAWS LACK NON-MEDICAL BACKING

⁵Section 3 asserts that no pregnancy can be aborted without the prior approval of one doctor (from 0–12 weeks gestation period) and two doctors (from 12–20 weeks gestation period). Even beyond the 20 weeks period, the prior approval of doctors is a mandate.

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The law clearly emphasizes on medical grounds for abortion, which are satisfied as per section 3 of the MPT amendment ac 2021. The law fails to recognize non-medical grounds for termination of pregnancy that may differ from the financial capacity of raising a child, including basic needs and facilities like health, education, and other such conditions that are required in rearing a child. Another significant factor which the law tends to skip is the mental competency of a woman. If the woman is not meeting up with any medical risk and suffers from depression or any psychological issues, in such a scenario, women helplessly end up carrying a forceful pregnancy to term against their will. Moreover, the law is ignorant towards the plight of married women who are forced to conceive and carry a pregnancy to term regardless of their will. Apparently, the reason behind this is that the rape of a woman under 15 years of age is yet to be criminalized. This is a blatant infringement of the reproductive rights of a woman, and there is a majority of women who conceive forcefully and continue to carry the pregnancy to term, resulting in the abortion laws failing to protect women's bodily autonomy and reproductive choice.

VI. ABORTION RIGHTS: DISCRIMINATORY TO AN EXTENT

Is abortion a right only for a rape survivor, an incest minor, a woman with an amended marital status, or women with physical disabilities?

This largely makes the same right extinct for a woman who may have suffered sexual violence, may be suffering from physical issues, or may have definite reasons to terminate her pregnancy during a stipulated gestational period. Such a rigid category as provided by the law discriminates against such a woman from exercising her reproductive rights intrinsically. Because the law itself denies her the right to choose, this is a clear disregard for the women who do not fall into this category and are equally in need of an abortion.

VII. PREVLANCE OF UNSAFE ABORTIONS

India allows abortion Despite its legal status, there is still a prevalence of unsafe abortions. Women tend to have unsafe abortions, and this is a clear indication that the MTP Act fails to safeguard women's right to safe abortion. The proclivity for unsafe abortions is consistent with deeply ingrained social, cultural, and patriarchal norms that envision marriage as a sacred relationship and, within that, motherhood as an accomplishment, the ultimate contribution that a

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woman can make. Women who choose not to have children are not welcome in such an environment, and abortion is stigmatized. Although abortion has been legal in India since 1971, there is a lack of public information available at the ground level, which may lead a woman to believe that abortion is a crime or a sin. Apart from certain loopholes in the abortion laws, this is a significant barrier for women, specifically in rural areas, as the law fails to reach out to women at ground level. Moreover, a major obstacle to obtaining a safe abortion is delays caused by the judiciary. There is a case where a doctor refers a woman to the courts when diagnosed with foetal abnormalities, a pregnancy caused by rape. Even though abortion is legal in such a circumstance, it just creates layers of approval which a woman has to seek for a legal abortion, as the process itself involves a layer of permission accompanied by the delay caused by the judiciary. This makes it difficult for the woman, and therefore, a woman tends to seek an unsafe abortion as it is easily available when compared to a safe abortion as a woman has to undergo layers of approval.

In addition to this, the law speaks for "pregnant women" and not for "pregnant people", and thus the rights of these sexual minorities are a point of contention, which therefore is another factor that contributes to the preference of unsafe abortions. The sexual minorities are basically the pregnant people who constitute sex workers, young girls in the remand house or people who are compelled because of poverty, caste, disability etc. There is no provision in the Medical Termination Act (MTP Act) specifically addressing any abortion law for sexual minorities, therefore making the abortion laws silent on the rights of sexual minorities.

VIII. INADEQUATE HEALTHCARE SYSTEM

In addition to the weak legal framework available for abortion, is the inadequate healthcare system, which is ill-equipped and lacks medical specialists. According to a 2018 *Lancet study*⁶, Approximately 78% of 2015's abortions occurred outside of a health facility, making them illegal in accordance with MTP. (73%) of these abortions are done through abortion pills that can be acquired without a prescription. The MTP Act only allows abortion in hospitals or only in settings approved by the government, making an abortion legal. However, a

⁶The incidence of abortion and unintended pregnancy in India, 2015

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woman's sociocultural biases, poor legal framework, and inadequate health care system force her to have an illegal as well as unsafe abortion. This is more evidently seen in rural areas. An abortion is considered to be safe only when the procedure is undertaken in compliance with the method recommended by the World Health Organization (WHO). Furthermore, based on the *National Family Health Survey (NFHS), 2015-16*⁷, only 20% of abortions take place in public facilities and 52% in private facilities. According to the NFHS 2015-16, only 53% of abortions are performed by registered medical doctors.

IX. THE STATE OF ABORTION RIGHT AROUND THE GLOBE

However, India's legal system is not in competition with other countries; however, it is an indication of women's rights, especially when women's rights are concerned. Currently, there are 24 countries in the world where abortion is completely prohibited. Recently, in Poland in the year 2021, a total ban on abortion was introduced. In addition to this, the ban also removed the exception for abortion in the case of irreversible foetal disorders. This resulted in a mass protest following the death of a woman at 22 weeks pregnant from sepsis. The underlying cause in western countries unsheathed from conservative Catholic ideology that scapegoated women for miscarriages. Furthermore, abortions were portrayed as homicide and termed as a sin. On the other hand, there are countries where abortion is conditional on the health risk that a woman may face during pregnancy, such as Libya, Iran, Indonesia, Nigeria, and Venezuela (some consider it a health risk while others may include mental health). Countries like Japan, Canada, and most European countries allow women to access abortions based on health risk and broad social and economic grounds. These countries have a broader approach as far as the reproductive rights of women are concerned. The overturning of the landmark *Roe v. Wade* judgement led nearly thirteen states to enact bans on abortions based on the report by the *Center for Reproductive Rights*⁸. The impact may likely soon trigger abortion laws around the world.

In India, abortion laws are yet to be progressive in nature as they lack a holistic approach in conformation with women's reproductive rights, making them restricted followed by rigid terms

⁷ National Family Health Survey (NFHS-4), 2015-16

⁸The World Abortion Laws report by Center for Reproductive Right

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and conditions to be complied with for the procedure. As a result, not every woman in India can access abortion easily. Therefore, even today, despite the MPT Amendment rule, the trend towards unsafe abortion is greater when compared with safe abortion.

X. WAY FORWARD

Although MTP has widened its scope through the MPT amendment 2021, it is evident that how it is yet to be progressive in a sense that the law still remains discriminatory, irrational, and restrictive in a sense that it makes a woman's reproductive choice contingent on external factors such as the decision of the judges and the doctors, who indeed have zero stake in pregnancy.

XI. WOMEN SHOULD HAVE A FINAL SAY

India on *the gender parity parameter of 'health and survival'*, ranked 146th position⁹. This is a reflection of those disadvantaged women who have no access to maternity health facilities. Instead of requiring layers of approval and lengthy legal proceeding to obtain abortion the goal of the abortion laws should be making safe abortion available to every woman in the country. In India, unsafe abortions are the *third leading cause of maternal mortality*¹⁰, and nearly eight women die each year from unsafe abortions, as the UN Population Fund (UNFPA)'s State of the World Population Report 2022. In order to prevent societal or state control over women's bodies, it is essential to recognize and meet the evolving reproductive needs of every woman in the country. Reproductive health should be a woman's rightful choice solely, and no woman should risk her life pursuing this right.

XII. PREGNANCY AWARENESS

There is a paucity of information available for a woman with regards to pregnancy and it is extended to a larger degree to women from rural areas. In such cases, they are frequently unaware of their pregnancy until a long week after conception, resulting in unwanted pregnancies as well as financial and emotional distress. If a woman chooses an abortion, the stigma and all the considerable hurdles set forth by law stifle a woman's right to exercise her bodily autonomy and compel her to carry the pregnancy to term. Therefore, there is an exigency

⁹Global Gender Gap Index 2022

¹⁰UN Population Fund (UNFPA)'s State of the World Population Report 2022.

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of pregnancy awareness at a root level which can empower women's reproductive rights and can make safe abortions accessible to a larger extent. The state, through various programs, schemes, and awareness campaigns for child and maternity health services, can improve a woman's condition in a holistic manner and lead to a reduction in maternal as well as infant mortality, which is a significant cause of unwanted pregnancy.

XIII. GAPS IN ACCESSIBILITY STILL PERSISTS

Despite making the abortion laws progressive, it remains accessible for all. The law fails to recognize abortion as a fundamental right, resulting in quashing women's bodily autonomy. As a result of the MTP Act, only certain categories of women are permitted to obtain abortions, including those who have survived sexual assault, rape, or incest; minors; women whose marital status has changed during pregnancy; people with disabilities; and people with mental illnesses. Thus, the approach to abortion laws should be right-centric rather than merely legislation that negates a woman's reproductive rights and forces her to carry her pregnancy to term.

XIV. CONCLUSION

As a developing nation, India has a lot to progress as far as the condition of women is concerned. In a country where abortion continues to be regulated by moral policing and patriarchy, the Medical Termination of Pregnancy Act (MTP) fails to recognize those hurdles. If we see it from the end of the spectrum, the laws are absolutely invisible for women in rural areas, mainly because of lack of awareness regarding their reproductive rights, about pregnancy due to failure to avail basic health facilities and because society abandons the idea of abortion and portrays it as a sin which results in unwanted pregnancies. The need for the abortion law is fundamental not only for a woman's right but also for her own reproductive health and mental wellbeing. Although the amendment has made certain improvements, the option of abortion is still out of sight for the majority of women in India. The Abortion Act has yet to shed its "ambiguity" label as it continues to clash with other prominent laws and is silent on significant other factors, which makes abortion unquestionably lawful in India if the conditions outlined in this article are met.

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