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Comparative Analysis of Abortion Laws through the lens of Human Rights Laws

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ABSTRACT

The topic of abortion has recently been much contested and debated as a result of legal texts introduced and contentious judgments issued in countries such as the United States and India. These laws and judgments tend to obstruct the fundamental human right to healthcare and safe abortion and obstruct women's reproductive choices. Everyone is divided as to whether a mother has the right to terminate a pregnancy at any moment or whether an unborn kid has the right to life.

The purpose of this research paper is to examine the current situation regarding abortion laws in United States and India and how they tend to violate human rights. Furthermore, the question of when life begins and who has the greater claim to life, the foetus or the woman, will be discussed. In addition, judicial rulings on abortion laws and constitutional obligations would be investigated. As a result, the research paper would depict how abortion laws and human rights laws are parallel to one another and one forms the core of the other

Keywords: *Human rights, women's rights, abortion, Texas Heartbeat Act, Medical Termination of Pregnancy, UDHR, ICCPR, CEDAW, ECHR, UNCRC.*

I. INTRODUCTION

Advocates for women's rights and human rights are driving a global trend toward abortion law reform. Women's access to legal abortion services is being recognised as a matter of women's rights and self-determination as a result of these initiatives. While there is a global trend toward relaxing legal limitations on abortion, legal measures have evolved to resist this trend by introducing new sorts of hurdles that block women's access to legal abortion services.³ Abortion access, both safe and legal, is a critical human rights issue. Women's autonomy in terms of career, education, and family life are predicated on their power to choose whether, when, how frequently, and with whom they have children. As a result, reproductive decision-making limits obstruct women's ability to make decisions in practically every other element of

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³ Louise Finer and Johanna B. Fine, *Abortion Law Around the World: Progress and Pushback*, 103(4) PMC, (April 2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3673257/> .

their lives.

Although the majority of human rights treaties and conventions do not specifically mention abortion, women's rights to life, physical integrity, health, non-discrimination, privacy, information, freedom of religion and conscience, equal protection under the law, and the right to make independent decisions about the number and spacing of children are all directly relevant to the issue of abortion. All women should have the right to make their own sexual and reproductive decisions, including the question of abortion, according to interpretations of international human rights law.

(A) Link Between Abortion Rights And Human Rights

A women's right to choose whether to have children or not and to terminate the pregnancy is her individual decision, as supported by international human rights law. On the other hand, criminalising abortion is a clear infringement of a woman's right to privacy, security, and non-discrimination.

Right to life:⁴ Women and girls' right to life, which is a fundamental right in many human rights treaties, is jeopardised when they are refused access to safe, legal abortions. For example, the United Nations Human Rights Committee (HRC) has raised concern about the link between restrictive abortion laws, clandestine abortions, and danger to women's lives.

Therefore, when women are not provided access to safe abortions, they put their lives at risk by opting for other unsafe methods, thereby a clear violation of their right to life.

Right to health: Women have the right to the best possible bodily and mental health under international law. Abortions that aren't done safely endanger women's health. For complications such as incomplete abortion, infection, uterine perforation, pelvic inflammatory disease, haemorrhage, or other internal organ harm, 10–50 percent of women who have unsafe abortions require post-abortion medical care. These conditions can result in death, long-term disability, or infertility. Denial of safe, legal abortion can have serious consequences for one's mental health, including depression.

Freedom from cruel, inhuman or degrading treatment: International customary law, as well as various international and regional human rights accords, defend the right to be free of cruel, inhuman, or degrading treatment. Restrictions on access to safe and legal abortion, according to the UN Human Rights Committee, can lead to situations that are cruel, inhumane, or humiliating. One of these instances is forcing a pregnant woman to carry an unwanted or

⁴UDHR, 1948, Article 3

health-threatening pregnancy to term.⁵

(B) When Does Life Begins?

There is no uniform answer on when life begins across various disciplines, including religion. The orthodox Catholic position is based on a simple logic: because every human being is a gift from God, all forms of life should be protected. The killing of a human being should be considered murder, and thus the killing of a foetus should be considered as the same. The human being is already a live person in the womb, according to the Bible, for whom God may have unique purposes. This would imply that human existence begins at the moment of a foetus' conception, rather than at the moment of birth. It's worth noting that, notably in the Hebrew version of Exodus 21, the mother's life and well-being are prioritised in legislation: this undoubtedly opens the door to negotiating an abortion if the mother's health is seriously jeopardised.⁶

After looking at the religious aspect, it is equally important to shed some light upon the medical and scientific aspect of the beginning of life.

The medical and scientific communities haven't reached a consensus on when human life begins, but they have agreed on the phrases and expressions below to describe the stages of a woman's pregnancy:

- When a sperm penetrates an ovum, it becomes a zygote; this is referred to as fertilization.
- After fertilization, the zygote travels through the fallopian tube and starts dividing to form several cells, thereby converting into a blastocyst or pre-embryo.
- Then the blastocyst or pre-embryo reaches the uterus roughly after five days of fertilizing the ovum. The implantation of the fertilized egg in the uterine lining defines the onset of pregnancy.
- Approximately three weeks after fertilization, the implanted blastocyst is developed enough to be considered an embryo.
- The embryo develops into a foetus between the end of the eighth and the end of the tenth week of pregnancy.

⁵ Janet Walsh, Marianne Møllmann and Angela Heimbürger, *Abortion and Human Rights: Examples from Latin America*, 39 IDS Bulletin, 28, 29, 30 (2008), https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/8212/IDSB_39_3_10.1111-j.1759-5436.2008.tb00459.x.pdf?sequence=1 .

⁶ Bert Jan Lietaert Peerbolte, *Ending a Life That Has Not Begun- Abortion in the Bible*, The Bible in Political Debate, 46, 49, 56, <https://bibleinterp.arizona.edu/sites/bibleinterp.arizona.edu/files/docs/Ending%20a%20Life.pdf>

Interestingly, a high percentage of zygotes—between half and two-thirds—do not even mature into human beings. According to studies, 25-35% of pre-embryos never even implant into the uterine lining, up to 30% fail shortly after implantation, and around 15% of clinically developed pregnancies end up being miscarriages.

Therefore, pointing towards the fact that the prenatal rights we are trying to provide, does not even come into existence at times because of failure in implantation or miscarriages and on the other hand, we fail to protect the rights of pregnant women.

(C) Whose Life Is Superior?

The concept of when life begins has been described differently across various aspects and there has been no uniform answer, but it can be established that both the foetus and the mother have a life and it is our decision to make what we end up protecting.

In international human rights legislation, international and regional human rights organisations, as well as courts around the world, this fundamental right to life is recognised as accruing at birth. They all state unequivocally that any prenatal safeguards must be compatible with women's human rights. In principle and in practise, a growing push to extend a right to life before delivery, and in particular from conception, poses a substantial danger to women's human rights. These regulations aim to make any method of terminating a pregnancy illegal and to prevent people from making their own fertility decisions.

Therefore, if steps are being taken to provide a right to life to an unborn child, they should be in conformity with the rights of the women, and since the right to life is accruing at birth, if any right given to an unborn violates the right of the living, the woman should be considered superior and her rights should be protected against the unborn.

(D) International And Regional Human Rights Standards

At the international and regional levels, human rights treaties protect the right to life without defining when it begins. Right to life clauses are not meant to defend a prenatal right to life, according to authoritative sources, since protecting an absolute right to life before delivery could conflict with women's human rights safeguards.

1. International Standards

“Universal Declaration of Human Rights”- "All human beings are born free and equal in dignity and rights,"⁷ according to Article 1 of the “Universal Declaration of Human Rights”.

⁷UDHR, 1948, Article 1.

The term "born" was chosen specifically to rule out a prenatal applicability of the Declaration's rights. Therefore, UDHR should not be applicable on an unborn.

“International Covenant on Civil and Political Rights”- It rejects the notion that Article 6(1) of the Covenant protects foetal life. According to the Human Rights Committee, which analyses and evaluates state compliance with the ICCPR, the right to life safeguards of the ICCPR may be violated when women face a danger of death from unsafe abortion as a result of restrictive abortion legislation. In the case of *L.M.R. v. Argentina*,⁸ the Human Rights Committee ruled that the denial of a legal abortion for a rape victim caused physical and mental agony, infringing on the woman's right to be free from torture and cruel, inhuman, or degrading treatment, as well as her right to privacy.

Thereby, pointing towards the fact that ICCPR does not protect foetal life.

“Convention on the Rights of the Child”- Although the Preamble states that "the child, due to his physical and mental immaturity, requires special safeguards and care, including appropriate legal protection, before and after birth,"⁹ the history of negotiations shows that this language was not intended to extend the provisions of the Convention, including the right to life, prenatally. The Committee on the Rights of the Child, which interprets and monitors states' adherence to the CRC, agrees that the CRC does not safeguard a prenatal right to life. It has further expressed concern about maternal mortality rate among adolescent girls as a result of unsafe abortion, which is a violation of their right to life, and has called for revision of punitive abortion legislation.

“Convention on the Elimination of All Forms of Discrimination against Women”- The committee which interprets and monitors state compliance with the CEDAW, makes clear that the fundamental principles of non-discrimination and equality demand that a pregnant woman's rights take precedence over an interest in prenatal life. The CEDAW Committee is concerned that restrictive abortion legislation may jeopardise women's rights to life and health.

Therefore, all the above mentioned conventions do not provide the unborn child with any rights or protection, and in cases when they bestow the rights upon the unborn, those rights should not be conflicting with the rights of the pregnant woman, and if they are conflicting, the rights of the woman will take precedence.

2. Regional Standards

“American Declaration on the Rights and Duties of Man” and “American Convention on

⁸*LMR v. Argentina*, (UN Doc. CCPR/C/101/D/1608/2007).

⁹UNCRC, 1989, Preamble.

Human Rights”- Every human being has the right to life, liberty, and the protection of his or her person, according to Article 1.¹⁰ The drafters of the declaration rejected the proposal which stated that every person has the right to life, which begins at conception. They reasoned that such a measure would have contradicted with the majority of member nations' existing abortion regulations. Article 4 of the "American Convention on Human Rights" declares that everyone has the right to have his or her life respected.¹¹ The Inter-American Commission on Human Rights, one of two adjudicatory bodies tasked with interpreting and monitoring compliance with the American Convention, has said that this protection is not absolute in this regard. The Inter-American Commission decided in *Baby Boy v. United States*¹² that a legislation allowing unrestricted abortion was compatible with the Declaration's right to life provisions because of the Declaration's legislative history. The Commission found that the language in the American Convention recognising a right to life from the time of conception is not meant to confer an absolute right to life prior to birth, and hence does not bar a liberal abortion law after analysing the history of the talks.

“European Convention on Human Rights”- Article 2(1) of the "European Convention on Human Rights" states that everyone's right to life shall be safeguarded by law.¹³ In *Paton v. United Kingdom*,¹⁴ the European Commission on Human Rights determined that the Convention wording supported the conclusion that Article 2 does not include the unborn. It was further added that if an absolute right to life prior to birth was recognised, it would be contrary to the purposes and objects of the convention. It was reiterated by the European Court of Human Rights in *Vo v. France*¹⁵ that the unborn child is not considered a person directly protected by Article 2 of the Convention, and that even if the unborn child has a right to life, it is limited by the mother's interests and rights, including her rights to health, privacy, and life. In *A, B, and C v. Ireland*,¹⁶ the Supreme Court reiterated that abortion restrictions must be consistent with women's fundamental rights.¹⁷

Therefore, the international and regional conventions clearly point that right to life of an unborn

¹⁰American Declaration on the Rights and Duties of Man, 1948, Article 1.

¹¹American Convention on Human Rights, 1969, Article 4.

¹²*Baby Boy v. United States*, Resolution 23/81, Case 2141, March 6, 1981.

¹³European Convention on Human Rights, 1950, Article 2(1).

¹⁴*Paton v. United Kingdom*, 8416/78 (1981) 3 EHRR 408.

¹⁵*Vo v. France*, App No 53924/00, ECHR 2004-VIII, [2004] ECHR 326, (2005) 40 EHRR 12, IHRL 3269 (ECHR 2004).

¹⁶*A, B and C v. Ireland*.

¹⁷*WHOSE RIGHT TO LIFE? Women's Rights and Prenatal Protections under Human Rights and Comparative Law*, Centre for Reproductive Rights, 1, 3,5, 6,7 https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/RTL_3%2014%2012.pdf.

child cannot be absolute and they have to be in conformity with the right of the women.

(E) Impact Of A Forced Pregnancy

Abortion bans don't stop it from happening; they merely push it underground. Unsafe abortions are considered to be the cause of 8 to 11% of maternal deaths globally.¹⁸

If quality abortion care is unavailable, various rights such as right to life, right to the highest standard of physical and mental health, right to freely decide the number, spacing and timing of children are all at risk.

Following are some of the health hazards connected with unsafe abortion are:

- incomplete abortion (failure to remove or expel all pregnancy tissue from the uterus);
- haemorrhage (heavy bleeding);
- infection;
- uterine perforation; and
- damage to the genital tract and internal organs as a consequence of inserting dangerous objects into the vagina or anus.

Restrictive abortion regulations can cause anguish and stigma, as well as infringe women's and girls' human rights, such as the right to privacy and non-discrimination and equality, as well as financial hardship.

Abortion laws, according to a group of studies from 2021, can have a direct impact on women's education, labour market participation, and positive contribution to GDP growth. The legal status of abortion can have an impact on a child's academic achievement and future wages in the labour market. Legalizing abortion has been linked to increased parental investments in children, particularly in girls' education, by lowering the rate of unwanted pregnancies and so increasing the likelihood of children being born wanted.¹⁹

What the Science says?

- When compared to women who have had access to an abortion, those who have been denied one are more likely to have higher levels of anxiety, lower life satisfaction.

¹⁸Emma Zhu, Fahryn Littleton, Anthony Makhoul, Iszabel Cohen, Edinam Ablordeppey, Marzhan Yeraliyeva and Sana Sethi, *Against Texas: A "Heartbeat" Bill That Is Designed To Infringe Upon Women's Rights and Livelihood*, JTB ConnectEd Women's Movement (Mar 15, 2022, 7:30 pm), <https://jtbconnectedwomensmovement.medium.com/against-texas-a-heartbeat-bill-that-is-designed-to-infringe-upon-womens-rights-and-livelihood-7db07ea8c962>.

¹⁹*Abortion*, WORLD HEALTH ORGANISATION (Mar 15, 2022, 08:00 pm), <https://www.who.int/news-room/fact-sheets/detail/abortion>.

- Unwanted pregnancy has also been linked to deficiencies in the cognitive, emotional, and social processes of the child. The children would be more likely to have unfavourable long-term consequences as adults, such as increased criminal activity, dependency on public assistance, and an unhappy marriage.
- Interpersonal violence and unintended pregnancy have a substantial connection. The inability to seek an abortion, may force women to remain in contact with violent partners, placing themselves and their children in danger.
- Social equality of women hinges on their ability to access safe and legal abortion. Low-income women, women of colour, sexual and gender minorities, as well as those who live in rural or medically underserved areas, are most likely to be harmed by laws restricting access to safe, legal abortion.
- Unwanted pregnancies appear to be substantially linked to worse mental health outcomes in women later in life.²⁰

Therefore, being denied an abortion can hamper both the woman and the child. The woman might suffer through a set of health hazards, high levels of anxiety and worsen the mental health. The child on the other hand, being born unwanted, may have cognitive deficiencies and would suffer long term consequences.

II. USA AND ABORTION LAWS

*“The right to privacy whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action or in the Ninth Amendment’s reservation of the rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”*²¹(Roe v. Wade 1973, 410 U.S. 177)

The Roe v. Wade decision, which recognised the constitutional right to abortion, was met with libulatory language about women's rights and bodily autonomy within the feminist movement. Not only was abortion vital to save women's lives, but it was also central to women's place in society, according to physician proponents for legal abortion.²²

1. Texas Abortion Law

Thirteen states in the United States passed "foetal heartbeat" legislation, which prohibits

²⁰*Abortion and Mental Health*, American Psychological Association (January 2008), <https://www.apa.org/pi/women/programs/abortion#>.

²¹Roe v. Wade, 1973, 410 U.S. 177.

²²Tracy A. Weitz, *Rethinking the Mantra that Abortion Should be “Safe, Legal, and Rare”*, 22, *Journal of Women’s History*, 161, 161, 162 (2010), https://wp.aleteia.org/wp-content/uploads/sites/2/2014/08/weitz_jwh10-2010.pdf.

abortions after embryonic cardiac activity is found.

It was signed by Texas Governor Greg Abbott on May 19th and enforced on the date of September 1st. The legislation specifies that, except in the case of a medical emergency, "a physician may not knowingly perform or induce an abortion on a pregnant woman if the physician discovered a foetal heartbeat for the unborn child."²³ The clinicians must also seek for cardiac activity before aborting the baby. The law forbids abortion after 6 weeks of pregnancy, when most women are not even aware that they are pregnant.

The law also allows private citizens to file civil lawsuits against anyone who "knowingly engages in action that assists or abets the performance or inducement of an abortion."²⁴ The language is so wide that it may apply to anyone who counsels a woman or transports her to an abortion facility, including a friend, pastor, or even a driver. Any citizen can file a civil case, and if successful, violators have to pay \$10,000 or more in damages per abortion, plus costs and attorney's fees. Because of this particular provision, the law enforcement is delegated to private individuals.²⁵

President Biden has opposed this component, stating that it creates a "vigilante system" by putting the enforcement burden on civilians rather than government personnel.

2. Exceptions To The Law

The law makes no exceptions, even in the event of a rape or victims of incest. It has put Texas abortion clinics in jeopardy, and similar legislation is being considered around the country.

3. Human Rights Concern

The Texas legislation violates the right to privacy, health and healthcare, which are codified in the "Universal Declaration of Human Rights", the "Convention on the Elimination of Violence Against Women" and the "International Covenant on Economic, Social, and Cultural Rights". Sections 171.203 and 171.204 of the act prohibit abortions in the complete sense. If a "foetal heartbeat" is detected, no clinician may conduct an abortion, according to these sections. It is defined in the law as any electrical activity that happens among the growing cells of a foetus, rather than in the clinical sense. This process normally begins around the six-week mark of the pregnancy, long before most women are even aware that they are expecting.

²³S.B. No. 8, Sec. 171.204. (b).

²⁴S.B. No. 8, Sec. 171. 208. (2).

²⁵Glenn Cohen, Eli Y. Adashi and Lawrence O. Gostin, *The Supreme Court, the Texas Abortion Law (SB8), and the Beginning of the End of Roe v Wade?*, The Journal of the American Medical Association Health Forum, 2, 2, (2021), <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3431&context=facpub> .

Individuals who discover of another's abortion are encouraged to report it to state authorities so that legal action can be taken against those responsible. Therefore, hampering medical privacy.

Furthermore, under Sections 171.206 and 171.208, if a person is caught assisting an individual in receiving abortion they can be sued. These restrictions take away a person's right to access sexual and reproductive health services discreetly and turn abortion into a public issue.

Various agreements have been formulated in the field of international human rights that in turn tend to establish the concept of right to an abortion. Article 12 of the UDHR guarantees an individual the right to privacy without being subjected to any arbitrary interference.²⁶ Therefore, the article protects a person's freedom to choose whether or not to have an abortion in the privacy of their own home. In addition, CEDAW Article 16.e defines a woman's right to choose "the number and spacing of her children freely and responsibly."²⁷ This freedom of choice is necessary for access to health services such as abortion. Finally, Article 12 of the ICESCR states that everyone has the right to the best physical and mental health possible, including the right to sexual and reproductive health services.²⁸ ICESCR General Comment 22 recommends that states should repeal or remove laws, policies, and practises that criminalise, hinder, or undermine individuals' access to sexual and reproductive services, goods, and information. It is obvious from these three texts that international standards exist in the areas of privacy and health; but, the Texas state legislature has failed to protect the human rights of its citizens'.²⁹

4. Challenges To Reproductive Justice

Abortion groups have slammed the Texas Heartbeat Act, claiming that it effectively prohibits abortion in the state. The law prohibits abortion "only two weeks following a missed menstruation," according to Planned Parenthood. With such a short time frame between learning of a pregnancy and opting to get a legal abortion under the time limits imposed by the Act, many people might end up making rash and last –minute decisions about their bodies. Furthermore, the existing hurdles with reference to abortion in Texas shorten the time frame. The law requires at least two trips to an abortion facility before an abortion can be performed. The first appointment is for an ultrasound 24 hours before to the procedure, and the second

²⁶UDHR, 1948, Article 12.

²⁷CEDAW, 1979, Article 16.

²⁸ICESCR, 1966, Article 12.

²⁹Madeleine Henry, *Human Rights Under Threat: The Texas Heartbeat Act and Related Restrictions*, (Mar 18, 2022, 8:50 pm), <https://www.madeleinehenry.com/blog/human-rights-under-threat-the-texas-heartbeat-act-and-related-restrictions> .

appointment is for the procedure itself. A woman now has less than two weeks after realising she is pregnant to decide whether to have an abortion or not and to make the appropriate arrangements to schedule an appointment with an abortion provider under the new Heartbeat Act. People from marginalised populations, particularly low income workers and unable to arrange time off on short notice, will be the most affected by this rule. Furthermore, as of 2019, there were only 22 open abortion facilities in Texas, therefore significantly restricting abortion access. If the nearest clinic is many hours away, transportation may make it even more difficult to stick to the two-week deadline.³⁰

(A) Abortion In India

The “Indian Penal Code” 1862 and the “Code of Criminal Procedure”, 1898, which originated from the “British Offences against the Person Act”, 1861, made abortion a crime punishable for both the woman and the abortionist, unless the woman's life was in danger. In 1964, India's abortion laws were liberalised in response to high maternal mortality from unsafe abortions.³¹

1. “The Medical Termination Of Pregnancy Act”, 1971

The act was adopted in 1971 to give specific exceptions to the IPC's restriction on abortion. Termination of pregnancy is particularly justified in the Statement of Objects and Reasons on mental and physical health, humanitarian, and eugenic grounds. The act permits women to have abortions up to twenty weeks of pregnancy if extending the pregnancy would put the physical or mental health at risk, or if there is a significant possibility of foetal abnormalities. However, this clause does come with some caveats. Under section 3(2) (b) of the act, it is specified that "the pain produced by such pregnancy" should cause grave harm to mental health, where the pregnancy is alleged to have been caused by rape. The second explanation further mentions that if a pregnancy occurs as a result of a married woman's failure to utilise any contraceptive technique or device, the agony caused by such pregnancy is deemed to be grave harm.³² Furthermore, section 3(4) (a) of the Act specifies that if a woman under the age of eighteen is pregnant, her pregnancy cannot be terminated without the written agreement of her guardian.³³ Section 5 of the Act permits abortion after twenty weeks of pregnancy so as to preserve the

³⁰Kodie McGinley, *Texas Heartbeat Poses Threat to the Future of Abortion Access*, GGU Law Review Blog, (March 18, 2022, 09:00 pm), https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1094&context=ggu_law_review_blog.

³¹Siddhivinayak S Hirve, *Abortion Law, Policy and Services in India: A Critical Review*, 12, An international journal on sexual and reproductive health and rights, (April 27, 2005), <https://www.tandfonline.com/doi/full/10.1016/S0968-8080%2804%2924017-4>.

³²MTP Act, 1971, Section 3(2) (b).

³³MTP Act, 1971, Sec 3(4) (a).

pregnant woman's life.³⁴ Courts have interpreted this premise broadly, and it might be considered to include the pregnant woman's mental state.

Although Section 3 of the 1971 Act does not prohibit unmarried or separated women or widows from having abortions, the phrase "if the pregnancy occurs because of the failure of any contraceptive device used by a married woman or her husband"³⁵ could be misinterpreted to deny abortion services to unmarried women or to require the consent of a married woman's husband. Activists have urged to replace "married woman" with "all women," but the government has yet to adopt this advice.

Gaps in MTP Act- To safeguard the rights of women and girls under the ICCPR, the state must urgently modify the MTP Act and decriminalise abortion. A medical provider, who is registered, may perform an abortion on a woman less than 12 weeks pregnant if she has "a good faith opinion" that continuing the pregnancy would endanger the woman's life, mental or physical health (including contraceptive failure or rape for married women), or if the child would be born with "physical or mental abnormalities," according to the MTP Act. At least two physicians are required to form this opinion when the woman's pregnancy is more than 12 weeks but less than 20 weeks so as to provide an abortion. When a pregnancy has progressed beyond 20 weeks, an abortion may be performed only if the provider has formed the "good faith" belief that it is "urgently essential" to save the pregnant woman's life. Unless the exceptions set forth in the MTP Act are met, abortion remains illegal under the "Indian Penal Code" (IPC).

The act has a number of flaws and inadequacies that make abortion difficult to obtain. Firstly, it prohibits abortion on the woman's request without prior clearance from a registered medical physician at any stage of the pregnancy. This means that for abortion, women have to rely upon the discretion of registered medical providers.

Another limitation is the discriminatory exclusion of unmarried women and girls from the provision of contraceptive failure as a basis for abortion, which is exclusively permissible only for married women. The law further seeks for parental/guardian agreement for anyone under the age of 18, which makes it difficult for adolescent girls to get abortions. After 20 weeks of pregnancy, the law significantly restricts abortion availability. Abortion is only permissible at this stage if the practitioner believes it is "urgently required" to save the pregnant woman's life.

³⁴MTP Act, 1971, Sec 5.

³⁵MTP Act, 1971, Sec 3(2).

2. “Medical Termination Of Pregnancy (Amendment) Bill”, 2020

Highlights of the Bill-

- The Act establishes the conditions in which a pregnancy can be terminated. The bill expands the time limit for performing abortions.
- If the abortion is to be performed within 12 weeks of conception, the opinion of one doctor is required; if it is to be performed between 12 and 20 weeks, two doctors' opinions are required. The bill enables abortion on the advice of one doctor up to 20 weeks, and two doctors between 20 and 24 weeks for specific categories of women.
- The bill also establishes state-level Medical Boards to determine whether a pregnancy can be aborted after 24 weeks if significant foetal abnormalities are found.³⁶

3. “The Protection Of Children From Sexual Offences Act”, 2012

The 2012 "Protection of Children from Sexual Offences (POCSO) Act" aims to protect children under the age of 18 from sexual assault, harassment, and pornography. It assumes and treats all pregnant adolescent girls as rape survivors, and it mandates that anyone with knowledge of a sexual offence against a child, including healthcare staff, report the crime. The MTP Regulations' Section 4 privacy and confidentiality requirements are in direct conflict with this reporting requirement. The required reporting requirement can act as a disincentive for young girls seeking safe abortion choices in situations where the pregnancy resulted from consensual married or non-marital sex, as well as non-consensual cases where the perpetrator is a family member. When adolescent sexuality is criminalised, the law becomes a barrier to abortion access and adolescents are less likely to seek qualified healthcare experts for their reproductive health needs.

Unintended consequences of the inconsistencies

The contradictions in the law have major ramifications for adolescent access to legal and safe abortion. Indian females may refuse to obtain a legal abortion or resort to unsafe abortions to avoid the laws' mandatory reporting requirement or if they are unable to gain their guardian's agreement.

For Adolescents: According to WHO, the worry that anonymity would not be respected deters women from obtaining safe, legal abortion services and they are in turn driven to unsafe abortion providers.

³⁶PRS Legislative Search, *The Medical Termination of Pregnancy (Amendment) Bill, 2020*, (Mar 19, 2022, 5:20 pm), <https://prsindia.org/billtrack/the-medical-termination-of-pregnancy-amendment-bill-2020> .

Requiring medical doctors to report adolescent girls seeking abortions to the authorities may force some girls to seek care from unqualified practitioners, in addition to infringing on their fundamental right to privacy. If the pregnancy was the result of consensual sex, the girl will be unwilling to report it to the police for fear of her boyfriend being arrested, convicted, and facing a lengthy prison sentence.

According to WHO, adolescents might be reluctant in seeking medical health services, such as abortion if they would be required to obtain permission from their parents or guardians. This would in turn increase the possibility of them accessing clandestine abortion providers.

Gaining a guardian's consent for all adolescent girls may also be difficult—in some situations, obtaining a guardian's consent for an adolescent may not be feasible or safe. For example, gaining the guardian's approval for an abortion may be difficult if the girl has been raped by the guardian or one of the guardian's relatives. In conservative areas where premarital sex is prohibited, a girl who informs her parents or guardians that she is pregnant may be shunned, subjected to violence, or even killed. As a result, some young women may seek abortions from unqualified practitioners who do not require parental consent.

As a result, adolescent girls must be recognised as capable of making educated decisions, particularly when it comes to their own health. In any judicial proceeding, states should make sure that the best interests of teenagers are prioritised. The right to reproductive healthcare, including the right to abortion, is a basic human right, and the inability of adolescent girls to exercise this right freely is a critical concern.

To summarise, India's abortion legislative framework is riddled with contradictions, making adolescent access to abortion services nearly impossible. Adolescent pregnant women are terrified of having medically safe abortions because they are worried that their partners would be reported as rapists or that their privacy will be compromised, putting their families in danger. The human rights of adolescent girls, as well as their lives, are in grave threat. Maternal mortality is high in India, thanks in part to the prevalent practise of medically risky and illegal abortions. These unintended consequences are unsustainable and constitute a violation of the right to health (guaranteed by the Indian Constitution as well as international law). India's laws, particularly the MTP Act and the POCSO Act, create uncertainties that obstruct necessary healthcare treatments (i.e., abortion).³⁷

³⁷Dipika Jain and Brian Tronic, *Conflicting abortion laws in India: Unintended barriers to safe abortion for adolescent girls*, 4 Indian Journal of Medical Ethics 310, 310,311, 312, 315 (2019), <http://dspace.jgu.edu.in:8080/xmlui/bitstream/handle/10739/3134/Conflicting%20abortion%20laws%20in%20India.pdf?sequence=1&isAllowed=n>.

Millions of Indian women and girls seeking abortion services face a host of legal and practical barriers, resulting in a bevy of human rights violations. Despite the fact that India's Medical Termination of Pregnancy Act of 1971 (MTP Act) allows abortion for a number of reasons, gaps and shortcomings in the legal framework, as well as practical obstacles, mean that over half of all abortions are considered unsafe in India.

Because many public health facilities do not conduct abortions, poorer women, especially those from rural areas, are forced to seek abortions from unskilled practitioners or unregistered clinics, which may be less expensive. Due to a lack of awareness about their legal rights, misunderstandings about the law, and societal stigma around abortion, women encounter delays in accessing abortion services early in pregnancy. Providers also have misunderstandings about the legislation, such as whether or not spousal consent is required, which is incorrect.

Legal and practical barriers to safe abortion services violate a variety of ICCPR-guaranteed human rights, including the rights to life, privacy, equality, freedom from gender discrimination or stereotyping, and freedom from ill-treatment. Denial of abortion access causes physical and mental suffering, and is therefore considered cruel, inhumane, or humiliating treatment.³⁸

Judicial recognition:

The Supreme Court of India and several state high courts have taken important steps toward recognising the denial of reproductive rights as a violation of women's and girls' basic and human rights.

The Supreme Court declared reproductive autonomy a fundamental right for women in 2009, saying, "There is no doubt that a woman's freedom to make reproductive choices is likewise a feature of 'personal liberty,' as conceived under Article 21."³⁹ The High Court of Punjab and Haryana reaffirmed women's reproductive autonomy in 2011 when it dismissed a complaint brought by a husband against a doctor who had conducted an abortion without his consent, stating that "it is a personal right of a woman to give birth to a child... No one can interfere with the wife's personal decision to continue or terminate her pregnancy... Unwanted pregnancy will inevitably have a negative impact on the pregnant woman's mental health."⁴⁰

³⁸Final HRC Submission, 1, 2, 3, 4, https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/Ind/INT_CCPR_ICJ_Ind_34896_E.pdf (last visited Mar 19, 2022)

³⁹Suchita Srivastava & Anr v. Chandigarh Administration, (2009) 11 S.C.C. 409

⁴⁰Dr. Mangla Dogra & Others v. Anil Kumar Malhotra & Others, C.R. 6337/2011; Ajay Kumar Pasricha & Others v. Anil Kumar Mahotra & Others, C.R. 6017/2011; H.C. Punjab and Haryana at Chandigarh (2011).

Since 2015, the Supreme Court has allowed abortion in three cases when it was determined by the medical panel that forcing women to carry the pregnancy over 20 weeks would endanger their mental and physical health.⁴¹

Despite inconsistent state high court decisions, two recent cases in Gujarat and Chhattisgarh have gradually interpreted the MTP Act to allow abortions beyond 20 weeks in cases of sexual abuse.⁴² The relevance of second-trimester abortions for women's emotional and physical wellbeing is also acknowledged in these judgements.

The Bombay High Court ruled in 2016 in *High Court on its Own Motion v. State of Maharashtra* to increase the access to abortion of women inmates, therefore reaffirming women's rights to abortion as part of their fundamental right to live with dignity under Article 21. It acknowledges that undesired pregnancies disproportionately affect women, and forcing a woman to carry on with a pregnancy would breach her bodily integrity and push her in emotional anguish, both of which would be detrimental to her mental health. The verdict acknowledges that an unborn foetus is not a human being. Since pregnancy occurs within a woman's body and has significant implications for her health, mental well-being, and life, she must decide how she wants to deal with this pregnancy on her own. Women should be able to make their own decisions about their bodies, fertility, and motherhood. Let us not forget that a woman's fundamental right to autonomy and the freedom to decide what to do with her own body, including whether or not to become and stay pregnant, is unalienable.⁴³

The previous examples show how the Indian judiciary can play a pivotal and evolving role in resolving the legal and practical barriers that prohibit women and girls from exercising their reproductive rights.⁴⁴

III. CONCLUSION & SUGGESTIONS

No legal definition of when life begins has been established. So, after analysing and comparing the clauses of US and Indian legislation, I discovered that a woman's right to an abortion is

⁴¹Ms. X v. Union of India and Others (2016) C.W.P. 593 (IND); Chandrakant Jayantilal Suthar v. State of Gujarat, (2015) 8 SCC 721; Mrs. X and Mrs.Y v. Union of India & Others (2016) C.W.P. 308; Nikhil D. Datar v. Union of India (2014) C.A. No. 7702

⁴²HRLN, High Court of Chhattisgarh will frame MLC guidelines; Court decision dated Aug. 4, 2008, Dr. Nikhil D. Datar, Gynaecologist, Mr. X and Mrs. X being wife of Mr. X v. Union of India (UOI) through its Govt. Pleader and Advocate General, W.P. (L) No. 1816 of 2008 (Bombay High Court); Madhuben Arvindbhai Nimavat v. State of Gujarat High Court, (2016) 1 S.C.R. 662; Ms. X v. State of Kerala, W.P. (C). No. 35034 (2016) (High Court of Kerala).

⁴³High Court on its own Motion v. The State of Maharashtra, W.P. (CRL) No. 1/2016, Maharashtra H.C.; Court on Its Own Motion Lajja Devi v. State, W.P. (CRL) No. 338 (2008) (High Court of Delhi).

⁴⁴*Reproductive Rights in Indian Courts*, Centre for Reproductive Rights, 1, 2, 3 <https://reproductiverights.org/sites/default/files/documents/Reproductive-Rights-In-Indian-Courts.pdf>.

being violated under US legislations as compared to Indian legislation. India has a comparatively flexible abortion system, although there is the urgent need to decriminalise abortion and fix the gaps in the MTP and POCSO Act. In US legislation the unborn is considered superior. However, the right of a woman to undergo an abortion should take precedence over the right of an unborn child. Any law prohibiting abortion is an obvious infringement of a woman's freedom to choose. It infringes on people's right to health, dignity, liberty, and privacy. Abortion must be legalised in order to defend the basic right of women.

Legal abortion services must be available, accessible, affordable, acceptable, and of high quality, according to state parties. Abortion services must be affordable, and states should reduce abortion fees or give other financial assistance when necessary. States must also ensure that women and girls do not face barriers to access abortions legally as a result of restrictive legal interpretations, the imposition of extra-legal criteria such as spousal permission by providers, or discrimination against vulnerable populations such as rape victims or adolescents.

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