

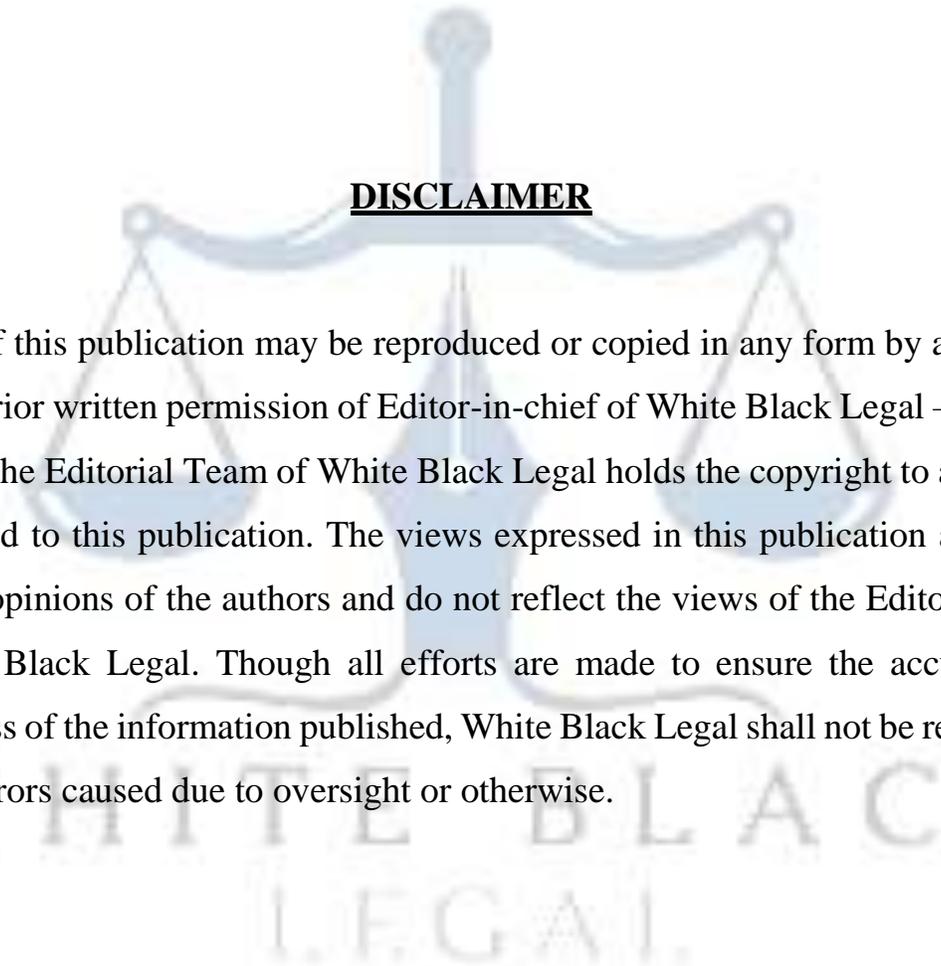
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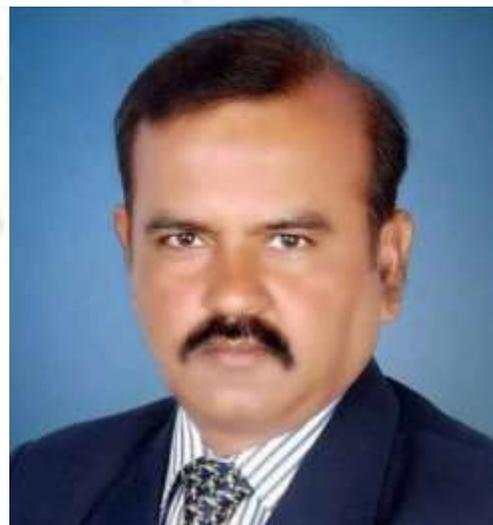


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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

## **WHOSE BODY? WHOSE CHOICE? REPRODUCTIVE RIGHTS ARE HUMAN RIGHTS.**

AUTHORED BY - K. BALAJI & M.MOHANAPRIYA

### **ABSTRACT**

"It's her womb, her body. A woman must first decide if she wants to have children or not.."

This study addresses that Abortion can't be considered to be a standard medical treatment. Instead, it should be viewed as giving women back control over their bodies and lives, which has historically been denied to them. Reproductive justice is broad, integrative, and holistic in contrast to the more individualistic and legalistic reproductive rights concept. Indeed, Reproductive rights are human rights.

In 2021, the 50th anniversary of the MTP Act, Parliament comprehensively amended the law to ostensibly "provide dignity, autonomy, confidentiality, and justice, without compromising the safety and quality of Abortion care. It was intended to "ensure women's access to safe and legal abortion." For women who must abort their pregnancies."

India is required to bring the MTP Act into compliance with International human rights legislation (UDHR), under Article 6 of the ICCPR (right to life) and Article 12 of the ICESCR. Despite these changes, the MTP Act does not provide for abortion at the request of all pregnant people. Access to abortion is only available through Registered Physicians (RMPs) (physicians who meet certain qualifications) and is only permitted to protect the life or health of them in such cases of serious fetal abnormalities.

The unequal physical and social burden of pregnancy and childcare as key factors for protecting access to safe abortion. It quibbled that India has targeted these women for coercive mass sterilization and dangerous injectable contraceptives rather than addressing their needs and desires for access to safe contraception. The court concluded that this is an insult to one's dignity because

recognizing a woman's competence and authority to make reproductive decisions, including those involving abortion, surrogacy is a requirement of her right to dignity.

**Keywords:** Reproductive right, Reproductive justice, Abortion, Human rights, Dignity.

## INTRODUCTION

Do women have a right to abortions? Is it a question of choice? Or does it have to do with family planning laws? Does the present legal framework provide women with enough protection for their sexual and reproductive rights? In that case, how? What impact does this deprivation have on single ladies of all ages? What other techniques may be used to improve the situation as it is now? Does society permit a woman to choose abortion if she becomes pregnant unexpectedly? Does the medical system allow such a lady to get an abortion? Women are prohibited from having abortions; they are legally investigated but never permitted; they are extorted via family pressure; and hospitalisation is expensive and scarce.

Women's reproductive rights incorporate the right to bodily autonomy and integrity, to reproductive choice and healthcare, and to legal, safe abortion. Access to safe abortion is fundamental to women's economic and social rights, to women's autonomy, employment, education and access to resources, and therefore to women's equality. Abortion is vital, routine healthcare that around one in three women will experience in her lifetime. It is one of the safest and most frequent medical procedures used by women across the world, but laws and policies do not yet reflect this reality<sup>1</sup>

Three primary factors have historically led to the introduction of abortion restrictions: 1. Abortionists were murdering many women, and abortion was harmful. Since women still sought abortions and risked their lives doing so, as they still do today if they have no other option, the rules were intended to safeguard the public's health. Because abortion was considered a sin or a moral infraction, the prohibitions were intended to punish and serve as a deterrent. 3. In some or all cases, abortion was prohibited to safeguard foetal life.

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<sup>1</sup> World Health Organisation (2003) Safe abortion: technical and policy guidance for health systems

States must make sure that everyone has the freedom to make decisions about their health, body, sexuality, and identity without fear, compulsion, violence, or discrimination.

- Request and receive information on sexual health, contraception, and associated medical services.
- Have access to thorough education on gender equality, human rights, and sexual and reproductive health.
- Choose whether to have children and when to do so.
- Decide whether or not to get married and what kind of family you want to establish.
- Having access to all necessary services for sexual and reproductive health. Live a life free from rape and other forms of violence, such as compelled pregnancy, compelled abortion, compelled sterilisation, female genital mutilation, or forced marriage

**Estimated rate of unsafe abortions per 1000 women between the ages of 15 and 44**

S.no	1990	2008	2016
Latin America and Caribbean	45	31	30/1000
Africa	28	28	26/1000
Asia	14	12	35/1000
Europe	12	2	NA

**WHAT ARE REPRODUCTIVE RIGHTS?**

**Right to Health**

- Universal Declaration

Article 25(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family.... Economic, Social, and Cultural Rights Covenant

Article 10(2) Special protection should be accorded to mothers during a reasonable period before and after childbirth.

Article 12(1) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

Article 12(2) The steps to be taken by the States Parties to... achieve the full realization of this right shall include those necessary for:

- (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;...
- (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

International law protects women the right to achieve the highest standard of their physical and mental health. Governments are obligated under the right to health to provide healthcare and to seek to improve the environment so that people can live long, healthy lives. The right to regulate one's health and body, including sexual and reproductive freedom, as well as the right to be uninhibited, were both acknowledged by the Committee on Economic, Social, and Cultural Rights in 2000. In addition, *the right to health mandates the elimination of any obstacles preventing access to health services, information, and education, especially in the area of sexual and reproductive health*. Women's right to health is safeguarded by safe abortion options. The right to health can be interpreted as requiring governments to take appropriate steps to ensure that women have the information and capacity to make significant decisions about their reproductive lives, such as deciding whether or not to continue a pregnancy. These actions include eliminating obstacles, including legislative prohibitions on abortion, that prevent women from accessing health care, as well as making sure everyone has access to high-quality abortion information and services.

### **Women's Right to Equality and Non-Discrimination**

#### Universal Declaration

Article 2 Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

#### Civil and Political Rights Covenant

Article 2(1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals... the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In accordance with human rights legislation, everyone has the right to gender equality. Freedom

from discrimination is a requirement of all significant human rights documents for exercising protected human rights. The Convention on the Elimination of All Forms of Discrimination Against Women.

*The Committee on the Elimination of Discrimination Against Women (CEDAW Committee)* acknowledged in 1999 that a barrier to women's access to quality healthcare is 'rules that prohibit medical treatments solely needed by women and that penalise women who undertake those operations.'

**"Gender discrimination takes the form of denying women access to abortion care."**

Abortion restrictions have the effect of prohibiting a woman from practising any of her fundamental freedoms or human rights on an equal level with males. Limiting access to abortion has the impact of depriving women of a procedure that may be required for them to equally enjoy their right to health. Only women are forced to deal with the physical effects of an unintended pregnancy. Some women have birth-related ailments, including hemorrhage or obstructed labor.

The CEDAW Committee has often voiced its concern over repressive policies that make abortion illegal. Additionally, the Human Rights Committee has acknowledged that making abortion illegal, especially in rape instances, conflicts with the States' duty to guarantee that men and women have equal access to the civil and political rights outlined in the **ICCPR**.

**Women's Right to Reproductive Self-Determination**

Women's freedom to make decisions about their own bodies is guaranteed by human rights legislation. They demand the freedom to make decisions about personal affairs. These guarantees cover the rights to privacy, bodily integrity, and the freedom to choose how many children to have and how far apart to space them out. The choice of whether to carry a pregnancy to term belongs to the woman.

The physical and mental health of a woman can suffer greatly when a pregnancy is unintended. The choices one takes about their bodies, especially their ability to procreate, are clearly under the purview of private choice.

Although a pregnant woman may ask for counsel from others, only *she can decide if she is ready to become a mother*, and governments shouldn't become involved in that process. According to the Human Rights Committee, it is an arbitrary intrusion into women's privacy to prevent them from using legal abortion services.

### **Woman's Right to be Free from Cruel, Inhuman, or Degrading Treatment**

Universal Declaration

Article 5 No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Civil and Political Rights Covenant

Article 7 No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

The Human Rights Committee determined in the case of *L.M.R. v. Argentina* that the State's inability to guarantee a woman's access to abortion services to which she was legally entitled resulted in her bodily and emotional suffering, which was considered cruel, inhuman, or degrading treatment.

The Human Rights Committee found in the famous case of *K.L. v. Peru* that a 17-year-old girl's depression and emotional distress were predictable results of the State's refusal to allow her to benefit from a therapeutic abortion and that this was a violation of her fundamental right to be free from cruel, inhuman, or degrading treatment.

### **The Right of Women to Benefit from Scientific Advancement**

Universal Declaration

Article 27(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

Civil and Political Rights Covenant

Article 7 [N]o one shall be subjected without his [sic] free consent to medical or scientific experimentation.

Economic, Social, and Cultural Rights Covenant

Article 15(1) The States Parties to the present Covenant recognize the right of everyone:...

(b) To enjoy the benefits of scientific progress and its applications....

The right to profit from scientific advancement is protected by the **Universal Declaration of Human Rights** and the **International Covenant on Economic, Social, and Cultural Rights**.

Women have the right to use all available abortion methods. This right entitles women to access the entire spectrum of technologies for the safest abortion treatment as the medical and scientific community progress abortion methods.

The right to benefit from scientific advancement is especially relevant in the context of abortion because numerous safe, efficient, and affordable health interventions, such as medical abortions, can significantly increase women's access to safe abortion services, thereby reducing the incidence of unsafe abortion and the associated maternal and infant mortality.

Allowing medical abortion can greatly increase women's overall access to life – saving abortion since it can be performed in a variety of locations, such as doctor's offices, and by non-physicians, expanding the pool of professionals available to perform safe abortions. Additionally, eliminating the need for medical intervention can save money and increase women's access to and availability of abortion. Governments may guarantee that women have access to medical abortion in a safe environment, enabling them to exercise their right to the advantages of scientific advancement, by legalising medical abortion protocols, educating clinicians, and removing obstacles to the regimen.

## **HUMAN RIGHTS STANDARDS**

International human rights standards provide the framework for a change in the law that would allow for self-managed medical abortion (SMMA). Human rights organisations have been advancing standards that include the different aspects of SMMA for many years, from the right to sexual and reproductive health—including the right to abortion—to the right to profit from scientific advancement. Here, we refer to the most recent three general observations made by UN treaty monitoring authorities. "General Comment 22 on the right to sexual and reproductive health was approved by the Committee on Economic, Social, and Cultural Rights in March 2016<sup>2</sup>. Its

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<sup>2</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 22: Right to Sexual and Reproductive Health, UN Doc. E/C.12/GC/22 (2016)

purpose is to help states comply with their international commitments with regard to this issue. General Comment 22 declares, among other things, that governments must embrace "the right to full fulfilment of sexual and reproductive health and rights by appropriate legal measures." This general statement acknowledges that abortion services are a component part of the right to health and that the right to sexual and reproductive health is an important part of the right to health.

It declares that *"states must abolish or end laws, regulations, and practises that restrict, impede, or jeopardise a person's or a specific group's access to healthcare facilities, services, products, and information, including abortion."*

It is said that laws that criminalise or limit access to abortions must be abolished. The general remark also outlines fundamental duties, such as

1. The need to provide medications that are on the WHO Model List of Essential Medicines, which includes misoprostol and mifepristone
2. The right to receive in-depth education and information on sexual and reproductive health.

This basic interpretation of Article 6 of the **International Covenant on Civil and Political Rights**, one of the most significant and generally approved international human rights treaties of the United Nations, asserts that nations "shall offer... legal and effective access to abortion" in expansive terms. Furthermore, it argues that governments "may not restrict" abortion in a way that forces the use of "unsafe abortion" and that states should change their abortion laws appropriately. In addition, nations must take a gender-sensitive approach to the right to benefit from scientific advancements in accordance with the Committee on Economic, Social, and Cultural Rights' newly adopted General Comment 25 on science and economic, social, and cultural rights. This strategy calls for governments to provide access to modern scientific methods, including medicines for abortion. It is particularly relevant to the right to sexual and reproductive health. These international human rights standards lay the foundation for the development of an environment that is supportive of SMMA and includes the elimination of all legal and regulatory restrictions on abortion, access to necessary abortion-inducing medications, and access to objective, fact-based information. The basic direction is pretty obvious, suggesting that these standards may and should be used to compel nations, even if international bodies are limited in the punishments they can

impose and considerable work remains to further enhance international standards.<sup>3</sup>

## THE GLOBAL LEGAL LANDSCAPE

The landmark rulings across the world about safe and healthy reproductive rights are mentioned below;

### ***R v. Morgentaler***<sup>4</sup>

In 1988, Dr. Morgentaler filed an appeal with the Canadian Supreme Court, and in a landmark decision known as *R v. Morgentaler*, the court completely repealed the abortion statute in effect. According to Section 7 of the 1982 Charter of Rights and Freedom, the actual abortion legislation was found to be illegal and to have infringed a woman's right to "life, liberty, and security of person." The court ruled that depriving a woman of her freedom to govern her own body unless she complies with a "criteria" set out by others that is unrelated to her priorities and ambitions is a grave interference with her body and a breach of her "security of the person." It was a landmark judgement for women in Canada since it gave them the freedom to make their own decisions and made abortion as easy to get as any other medical procedure.

### ***R.R. v. Poland (2011)***<sup>5</sup>

The denial of legal reproductive care in Poland is unlawful, according to the European Court of Human Rights. It was determined that Poland's refusal to guarantee prompt access to medical information and prenatal testing impaired the ability of expectant mothers to make informed decisions and caused severe suffering, which amounted to cruel and humiliating treatment. The Court ruled that Poland must establish an efficient legislative and administrative framework to ensure that women have access to pertinent, comprehensive, and trustworthy information so they may make educated decisions about their pregnancies.

The Court further ruled that Poland must make sure that the "conscience clause" in Polish legislation does not cause medical professionals to refuse to treat patients, endangering women's access to lawful reproductive health treatments.

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<sup>3</sup> F. Bloomer and C. Pierson, *Reimagining global abortion politics: A social justice perspective* (Bristol: Policy Press, 2018)

<sup>4</sup> [1988] 1 SCR 30

<sup>5</sup> [2011] ECHR 828

***Tysiac v. Poland***<sup>6</sup>

A visually impaired Polish woman, Ms. Tysiac was refused access to an abortion that was required to preserve her physical health. When the pregnancy poses a risk to the woman's health, abortion is lawful in Poland. Several doctors concluded that the pregnancy and delivery would endanger Ms. Tysiac's eyesight further and posed a serious health risk for her, but they all refused to issue a certificate for the pregnancy to be terminated. The applicant went to a public hospital to get the treatment after finally receiving a medical certificate approving it, only to have her request denied once more. Ms. Tysiac was forced to take the pregnancy to term because she was unable to have an abortion. She experienced a major decline in her eyesight after giving birth, and the competent Polish authorities deemed her to be profoundly impaired. The court held that the Polish government had failed to fulfill its positive obligation, under Article 8 of the European Convention on Human Rights, to ensure the applicant's right to respect for her private life. It also acknowledged that 'the time factor is of critical importance' in choices regarding abortion; hence, the process should guarantee that such judgments are made in a timely manner. The applicant received EUR 14,000 in legal expenses and EUR 25,000 for pain and suffering from the court.

***Brüggemann v. Germany***<sup>7</sup>

Brüggemann and Scheuten, two German women, claim that the European Convention on Human Rights infringes on their right to respect for their private life. They specifically claim that they do not have the right to terminate an undesired pregnancy. A 1974 law that permitted abortions within the first twelve weeks of pregnancy without a specific cause was overturned by the German constitutional court in 1975; as a result, abortions in Germany are still illegal unless they are performed to save the mother's life or health. Next that ruling, a new legislation was approved the following year, in 1976, maintaining the illegal status of abortion yet allowing a doctor to carry out an abortion with the woman's consent under dire circumstances. The European Commission on Human Rights determined that German abortion law did not violate a woman's right to respect for her privacy because Article 8(1) of the European Convention on Human Rights cannot be interpreted to mean that pregnancy and its termination are, in general, solely a matter of the mother's private life. Pregnancy, according to the Commission, cannot be stated to be a condition

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<sup>6</sup> Appl. No. 5410/03

<sup>7</sup> (1977) 3 EHRR 244

that only affects private life. According to earlier legal precedent, the right to respect for one's privacy is immediately diminished to the degree that the individual puts that privacy into close contact with other protected interests or the public at large.

***A, B & C v. Ireland***<sup>8</sup>

The stringent abortion regulations in Ireland have lately come under fire from three women, identified only as A, B, and C, before the European Court of Human Rights. This case was filed with the European Court of Human Rights in July 2005, and on December 9, 2009, the Grand Chamber of its 17 justices considered the challenge in a full hearing. The petitioners, who had the assistance of the Irish Family Planning Association, claimed that Ireland's criminalization of abortion and restrictions on accessing it violated their rights under the European Convention on Human Rights by endangering their health, well-being, and lives. On December 16, 2010, the Grand Chamber of the Court unanimously decided that Ireland had violated the Convention by not passing abortion-related laws.

***P. and S. v. Poland***<sup>9</sup>

P became pregnant at the age of 14 after being raped. She and her mother S made the decision to end the pregnancy. P and S claimed to the European Court of Human Rights that P's physical and moral integrity, as well as their right to respect for their private and family lives, had been violated by the lack of timely access to abortion.

The court ruled that P's right to family life and S's right to be free from cruel or inhumane treatment as well as P's right to liberty had both been violated. Despite the fact that the phrase "right to life" has been linked to anti-abortion movements, it has never been said in a global context that abortion must be restricted.

In the most recent case, *Vo v. France*,<sup>10</sup> the European Court of Human Rights ruled that "it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention. As a result, the court

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<sup>8</sup> Eur. Ct. H.R. 2032 (2010)

<sup>9</sup> Application no. 57375/08

<sup>10</sup> [2004] ECHR 326

declined to issue a decision that would have called into doubt the legality of abortion legislation in 39 Council of Europe member countries.

## INDIAN COURTS' APPROACH

### *Suchita Srivastava vs. Chandigarh Administration*<sup>11</sup>

Because of rape, a mentally disabled lady became pregnant. The main issues put before us were whether the victim's pregnancy may be terminated despite her having indicated a desire to become a mother and whether doing so would be in her «best interests.» Without the victim's permission, the pregnancy cannot be ended.

There is no question that a woman's freedom to choose her reproductive options falls under the definition of «personal liberty» as stated in Article 21 of the Indian Constitution. Recognizing that reproductive decisions may be made to either have children or not to have children is crucial. The most important thing is to respect a woman's right to privacy, dignity, and bodily integrity.

This implies that there shouldn't be any limitations on a woman's ability to exercise her reproductive choices, such as her right to decline sexual engagement or, conversely, her insistence on using contraceptives.

### *Sandesh Bansal v. Chandigarh Administration*<sup>12</sup>

The petitioner, a Madhya Pradesh-based health activist, claimed that the state's initiatives to lower maternal mortality in the state had not been carried out correctly and successfully.

The Indian Constitution's Article 21 guarantees the right to life, and the court acknowledged that this right includes the right to maternal health care and the right to survive delivery. The court determined that the state was required to provide sufficient maternal healthcare as a result of this entitlement. The ruling is «a tremendous stride forward for women's health in India,» according to advocate Jayshree Satpute, who argued the case during the final hearings. «A rising number of High Courts... have begun to recognise reproductive rights as basic rights and award life-saving

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<sup>11</sup> (2009) 9 SCC 1

<sup>12</sup> W.P. (C) 9061/2008.

reliefs.»

***Devika Biswas v. UOI***<sup>13</sup>

A health rights activist challenged the State Governments' practise of sterilising women (and occasionally males) in unsafe and filthy sterilisation camps where informed permission is frequently not acquired from patients before undergoing the operations in this public interest lawsuit.

The Court determined that the respondents had breached the respondents' rights to health and reproductive freedom, two provisions of Article 21 of the Constitution (Protection of Life and Personal Liberty). The Supreme Court ruled that the freedom to exercise reproductive rights includes the right to decide whether to get sterilised with full knowledge and without being subjected to any compulsion.

Recently, In **X v. The Principal Secretary, Health and Family Welfare Department, Govt. Of NCT of Delhi & Anr.**<sup>14</sup>

The court observed that '[t]he decision to have or not have an abortion is borne out of difficult life circumstances, which only the woman may select on her own terms'. and that the right to reproductive autonomy involves a *constellation of freedoms* and that the state would be robbing individuals of the right to select the immediate and long-term route their lives would follow» if women are made to carry on with their unintended pregnancies.

In its ruling on physical autonomy, the Supreme Court elaborated, saying that "*women have the right to decisional autonomy, which implies they may choose the path of their life.*" Unwanted pregnancies that women are compelled to take to term can have negative impacts on their physical and emotional health as well as have long-lasting cascade implications on their lives.

The **right to dignity includes the freedom to make decisions for oneself**, whether they are

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<sup>13</sup> 2016 (10) SCC 726

<sup>14</sup> SLP (C) No 12612 of 2022

important decisions like selecting one's life's path or everyday tasks. If women were made to persevere with undesired pregnancies, this right would be attacked. The SCI also said that "*The concept of human dignity is based on the belief that every woman has the right to make reproductive decisions free from excessive government intrusion.*"

The Court also mandated that the State 'ensure the spread of knowledge on reproduction and safe sexual practices', as they were necessary for the full realisation of the right to bodily autonomy and dignity.

## CONCLUSION

*"Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person."*-- Justice Dickson

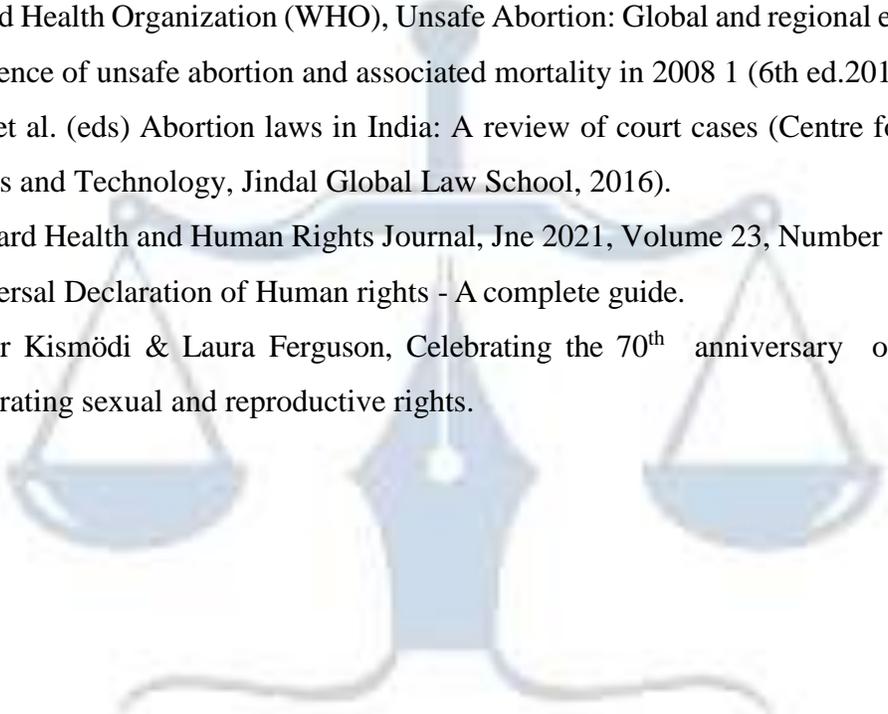
There hasn't been a "Roe moment" in India; no case at the Indian SC has had the same lasting influence on Indian abortion law as Roe had in the US. However, this does not imply that Indian courts do not address the abortion issue since there hasn't been a significant constitutional case on the subject. Over time, more and more Indian women seeking abortions outside the legal parameters have appealed to the courts, particularly the High Courts and the Supreme Court, asking for permission to end undesirable pregnancies.

This is so that abortions might be carried out during 20 weeks of pregnancy if prolonging the pregnancy would cause a grave damage to the mother or the unborn child prior to the 2021 Amendment to the Medical Termination of Pregnancy Act, 1971 (MTP Act).

This is so that abortions might be carried out during 20 weeks of pregnancy if prolonging the pregnancy would seriously harm the mother's bodily or mental health prior to the 2021 Amendment to the Medical Termination of Pregnancy Act, 1971 (MTP Act). This restriction was changed to 24 weeks by the 2021 Amendment since it did not apply when the pregnant woman's life was in risk.

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