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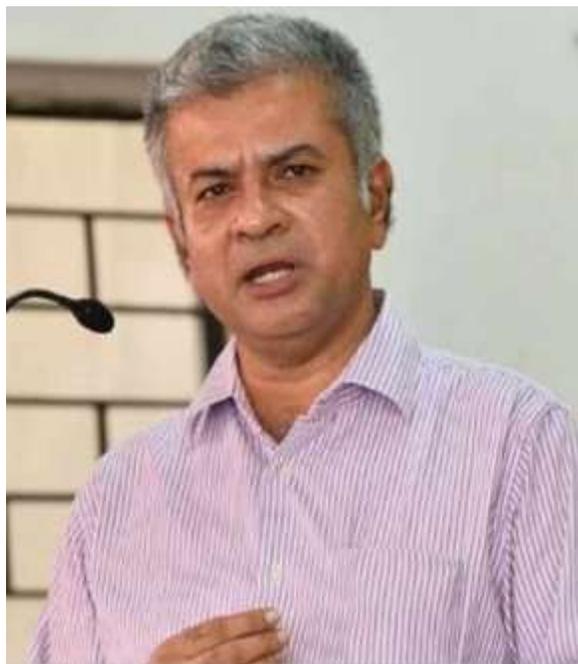
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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire 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

EXPLORING THE EVOLUTION OF ABORTION RIGHTS THROUGH LEGAL DEVELOPMENTS IN INDIA

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ABSTRACT:

Abortion is a controversial topic in many countries and gets a lot of attention internationally. People are concerned about it because of health reasons and also because of ethical and religious beliefs. There are many reasons why women choose to have an abortion. Some of the reasons include for having fewer children. Other reasons can be not having enough money, living in a dangerous area, or the specific customs of a particular place. The MTP Act, 1971 was made when many countries didn't have a similar law. It was a big achievement back then because they made it illegal to choose a baby gender before birth and to have abortions only because the baby is girl. This was important because in India, people often preferred having boys instead of girls. This paper talks about abortion and whether the government should intervene to protect the health and lives of both the mother and the foetus. Despite laws and government efforts, women are still facing challenges. This paper takes a close look at the history of abortion laws and policies that are in effect right now. The medical termination of pregnancy act went through some changes. This paper discusses about the changes involved of adding new sections to the act and the rights of women regarding abortion.

Key words: Abortion, women rights, medical termination of pregnancies act, pregnancies

1. INTRODUCTION:

Abortion is the intentional termination of a pregnancy. It has been practised throughout history for a variety of reasons, including accessibility and health. The debate surrounding abortion rights often involves ethical and moral considerations, including the rights of the unborn child versus the rights of the mother. While some argue that life begins at conception and that the foetus has a right to life, others advocate for a woman's autonomy over her body and her right to make decisions regarding her reproductive health. Cultural and religious beliefs also play a significant role in shaping public opinion on abortion in India, where traditional views often conflict with modern legal perspectives on women's rights and health¹.

Abortion has different meaning in the aspect of law and the field of medicine. Legally, induced abortion means intentionally and prematurely giving birth to the foetus with the intention of ending its life. You can do it anytime before the baby is born. In the medical field, abortion means when a baby is born too early, before the 28th week of pregnancy. Abortion has been a contentious subject on a national and worldwide scale. A variety of causes might cause a change in the type of abortion law in India. One crucial point that has everyone perplexed is whether a mother has the right to terminate her pregnancy at her discretion or whether the rights of an unborn child take precedence.

2. EVOLUTION OF ABORTION RIGHTS IN INDIA:

2.1 DEFINITION OF ABORTION:

Abortion is defined as the termination of a pregnancy through the removal or expulsion of an embryo or fetus from the uterus. This can occur spontaneously, known as a miscarriage or "spontaneous abortion," or it can be induced through medical intervention, referred to as an "induced abortion"².

The World Health Organization (WHO) specifies that abortion typically refers to the termination of a pregnancy before 20 weeks of gestation, emphasizing that it can happen either through medical

¹ Sai Abhipsa Gochhayat, Understanding Of Right To Abortion Under Indian Constitution, available at: <https://manupatra.com/roundup/373/articles/presentation.pdf>

²Merriam Webster Dictionary, Abortion, available at: <https://www.merriam-webster.com/dictionary/abortion#:~:text=%C9%99%2D%CB%88b%C8%AFr%2Dsh%C9%99n-,1,fetus%20to%20terminate%20a%20pregnancy>

procedures or naturally³. Induced abortions are often performed for various reasons, including preserving the health of the mother, cases of rape or incest, or fetal abnormalities.

Overall, the term "abortion" is most commonly associated with the deliberate medical procedure to end a pregnancy, distinguishing it from natural pregnancy loss.

2.2 BEFORE 1971 ACT:

Before 1971, it was against the law to have an abortion in India according to the Indian Penal Code, 1860. Even though the 1971 act exists, they are still considered criminals up to this day. Actually, if a pregnant woman ends her own pregnancy, she can be considered responsible for doing something wrong. This position was thought to be not good enough, so in 1966, the Abortion Study Committee recommended and introduced the MTP Act in parliament, which was then passed. As said illegal abortions in India are dealt under Indian Penal Code, 1860 and they were considered to be offence under this act.

Section 312 to 316 deals with illegal abortion. Section 312 of the Indian Penal Code, 1860⁴ talks about the illegal ending of a pregnancy, but instead of using the word "abortion", the makers of the law used the term "miscarriage". The IPC does not have a clear definition for miscarriage and unborn child. Miscarriage is when a pregnancy ends on its own before the baby can be born. If someone purposely ends a pregnancy illegally, this is known as criminal abortion. It is against the law to intentionally cause a miscarriage in two situations: when a woman is pregnant (as soon as the pregnancy begins) and when she can feel the baby moving inside of her. In simple words, termination of pregnancy is allowed only in certain cases when it is necessary to protect the mother's life.

2.3 SHANTI LAL SHAH COMMITTEE:

The process of making abortion easier and more accessible in India started in 1964 after the Ministry of Health and Family Welfare (MoHFW) noticed many women were dying while pregnant. Doctors often dealt with situations where women had chosen to use unsafe methods to end their pregnancies. In this situation, the government created the Shanthi Lal Shah Committee.

³ John P. Cunha, What Is Abortion According to WHO?, available at: https://www.emedicinehealth.com/what_is_abortion_according_to_who/article_em.htm

⁴ "Whoever voluntarily tries to cause the miscarriage to a woman except in the good faith or where the woman's life in danger shall be liable for imprisonment which may extend to three years and shall also be liable to fine."

Its job was to study the social, cultural and legal parts of abortion legalized in certain circumstances. The report stated that women should have the right to choose whether or not to have an abortion if her physical or mental health is at risk, or if there is a risk of foetal abnormalities. On December 4, 1966, the committee submitted a report with detailed observations about the existing conditions at the time. A law to allow abortions was suggested in Indian Parliament in 1969 and it was approved in 1971. The committee recommended that abortion should be performed by qualified healthcare professionals in approved facilities. This report helped pave the way for legalizing abortion in India. To prevent the deaths of women, it is important to make something legal.

2.4 AFTER 1971 ACT:

The medical termination of pregnancy act was passed in 1971 and put into effect in 1972. This act allows women to have an abortion for various reasons such as saving their life, preserving their physical and mental health, ending a pregnancy from rape or incest, or in cases where the foetus is not healthy. Even for contraceptive failure a woman can have a legal abortion. A doctor must do the abortion within 12 weeks of pregnancy. If the abortion is done between 12 to 20 weeks, two doctors (ie) two registered medical practitioner must agree. Based on the rules of this law, abortion is not allowed to end a pregnancy after 20 weeks unless there are special reasons for it to be considered only by medical practitioners. In India, abortion was seen as a stigma, and the ethics of women were challenged. Abortion was justified only in a few cases, such as

1. Physical or mental ailment on the part of the mother carrying the child.
2. In case of any sexual assault or rape.
3. In case of a stillborn child or any functional disorder on the part of the child.

2.5 EVOLUTION OF ABORTION RIGHTS IN US:

In 1973, abortion law in the US suddenly changed with the Supreme Court ruling **in Roe V Wade**⁵ In this case, the U.S. Supreme Court ruled that Texa's criminal abortion law, which criminalizes abortion except to save the mother's life, violates the Due Process Clause of fourteenth amendment. In 1973, abortion law in the United States changed dramatically with the Supreme Court of the United States Supreme Court recognizing that "the right to privacy and certain areas

⁵ 410 US 113 (1973)

of privacy" exists constitutionally. The right to privacy, to some extent, includes activities such as freedom of choice in making basic decisions about marriage, childbirth, contraception, family relationships, education and nurture children⁶. The word "person" does not include 'unborn child' under 14th amendment.

In 1992 Supreme Court decided **Planned Parenthood Southeastern Pennsylvania V. Casey**⁷ In this case the Roe's case was not over ruled but reaffirmed and tried to give a new dimension to abortion right. The court created a new standard to test the constitutionality of State abortion restriction. The Court held that the 'undue burden test' instead of trimester framework is to be adopted for determining whether State regulations has some purpose of placing substantial obstacles in the path of a woman for seeking abortion before viability. The court held that 'the constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of Fourteenth Amendment⁸. Due process clause of fourteenth amendment is applied to both substantive law and procedural matters.

Whole Woman's Health v. Hellerstedt,⁹ it has also recognized that without access to abortion, the right is meaningless. In **Griswold v. Connecticut**,¹⁰ the Court struck down a ban on the use or sale of contraceptives to married couples because it violated the constitutional right to privacy. Woman's right to abortion fall within the right to privacy.

The use and sale of contraceptives extended not only to married women but also to single and unmarried woman as there should no government intrusion in deciding woman should bear a child or not as it affects right to privacy¹¹.

3. MEDICAL TERMINATION OF PREGNANCIES ACT, 1971:

In India, not all women are allowed to have medical abortions. Under the Medical Termination of Pregnancy Act 1971, only married women and rape victims can have abortions. Unmarried women, widows and divorced women are denied the right to have an abortion. These women therefore have two options: continue the pregnancy or choose an illegal abortion method. Even

⁶ US Supreme Court Reports, Vol 35, The lawyers cooperative publishing co., New York p.147 to199

⁷ (1992) 120 L.Ed 2d 67

⁸ Article 14 of US constitution –“ no State shall deprive any person of life, liberty, or property, without due process of law.”

⁹ 136 S. Ct. 2292 (2016)

¹⁰ 381 U.S. 479 (1965),

¹¹ Eisenstadt v. Baird, 405 U.S. 438 (1972)

married women do not have an unconditional right to an abortion, as they must prove contraceptive failure to be eligible for a medical abortion. This violates the fundamental right to privacy. The objective of the act includes, “An Act to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto”¹² The primary objective of the act is also to reduce female mortality from unsafe and illegal abortions and to improve the maternal health of Indian women.

The shortcomings of the Act includes,

1. The law does not provide for a limited right to terminate a pregnancy after 20 weeks. It also has many legal obstacles. Therefore, it is necessary to introduce legislation to increase the term of pregnancy termination from 20 weeks to 24 weeks.
2. The Medical Termination of Pregnancy Act of 1971 failed in one of its basic purposes of keeping pregnant women safe and empowering by giving them the right to qualify for termination of pregnancy under their free will.
3. The Medical Pregnancy Termination Act has been criticized for not keeping up with modern technologies. It needed to be modified as it was introduced in 1971 and the technology at the time was not very advanced. Therefore, the introduction of new terms is an urgent need.
4. As required by law, written consent from a guardian is required if the girl is a minor or less than 18 and over 18 if the girl is insane or insane.
5. The Medical Termination of Pregnancy Act of 1971 was also accused of adding complexity to already complicated legal procedures. There should be more practical and simple terms.

3.1 MEDICAL TERMINATION OF PREGNANCY AMENDMENT ACT, 2002

This statute focuses on the majority of the women employed in the private health sector. The word “lunatic” was amended to “mentally ill”

3.2 MEDICAL TERMINATION OF PREGNANCY RULES, 2003

These rules laid down numerous provisions protecting the maternal health of the women and decreasing the numbers of mortality rates of both mother and the infant. Despite these strict laws,

¹² Preamble of MTP Act, 1971

the condition of the foetus and the mother remains the same. The practice of illegal abortion is still widespread. The number of babies being thrown in the trash and the number of mothers dying is increasing, which leads to need of new law.

3.3 MEDICAL TERMINATION OF PREGNANCY (AMENDMENT) ACT, 2021:

With the rise of technology and innovation in healthcare, there is a need for better legislation, which has been met by the Medical Termination of Pregnancy (Amendment) Act of 2021. From privacy issues to illegal sex assessments that lead to the killing of pregnant women, all of these issues have been addressed in the Medical Termination of Pregnancy (Amendment) Act of 2021. Under the Medical Termination of Pregnancy (Amendment) Act, the government set up seven categories of women eligible for termination of pregnancies between 20 and 24 weeks, under Section 3B of Rules.

- a) survivors of sexual assault or rape or incest;
- b) minors;
- c) change of marital status during the ongoing pregnancy (widowhood and divorce);
- d) women with physical disabilities (major disability as per criteria laid down under the Rights of Persons with Disabilities Act, 2016)
- e) mentally ill women including mental retardation
- f) the foetal malformation that has substantial risk of being incompatible with life or if the child is born it may suffer from such physical or mental abnormalities to be seriously handicapped; and
- g) women with pregnancy in humanitarian settings or disaster or emergency situations as may be declared by the Government. The Medical Termination of Pregnancy (Amendment) Act 2021 seeks to expand the scope of the Medical Termination of Pregnancy Act, 1971.

The Sustainable Development Goals(SDG) concerned with the Medical Termination of Pregnancy (Amendment) Act, 2021 include a [reduction in maternal mortality rate](#) as well as [universal access to sexual and reproductive health and rights](#)

3.4 MTP and PCPNDT:

The Pre-Conception and Pre-Natal Diagnostic Techniques (PCPNDT) Act was made in 1994 to

stop using technology to find out the sex of a baby before it is born and to stop choosing the sex of a baby. The goal of the Act was to decrease the number of abortions carried out specifically because the baby is girl. But, the act was not perfect and it did not have any ways to make sure it was done well. It did not specify the sex selection. So, it couldn't include all the techniques used. The PIL was filed by CEHAT filed a case in the Supreme Court because they think that the act has not been put into action quickly enough. It was discovered that even though the Act started in 1994, the state and central government did not taken effective action and its implementation, which leads to some amendments in the PCPNDT Act, 2003.

3.5 MTP and POCSO:

The parent or legal guardian must give permission for a minor to have an abortion under the POCSO Act. If someone does any sexual activity before they turn 18 years old, it is against the law and will be looked at by the legal system. If a pregnant girl who is under 18 years needs medical assistance, the doctor must inform the concerned authorities. This rule in the POCSO act goes against the MTP Act. According to the MTP Act, the doctor must keep the abortion seeker's identity a secret. The result of this conflict is that if a pregnant young person is scared to reveal who they are, they have no other choice but to search for unsafe abortions that are not recorded or regulated, because the safe places won't help them.

The MTP Act says that guardian is someone who takes care of a young person. This definition includes anyone who takes care of a young girl. So basically, if an adult who is over 18 years old goes with a young girl to a clinic, they can act like the girl's guardian and give permission for her to have an abortion. "No medical practitioner, hospital or other medical facility centre rendering emergency medical care to a child shall demand any legal or magisterial requisition or other documentation as a pre-requisite to rendering such care."¹³ The ministry of Health and Family Welfare Guidelines in 2013 also state that medical care should be given without any need for legal requirements. People who have experienced sexual violence say that the doctor who examines them should focus on giving them the right medical care and tests, rather than worrying about getting them admitted to the hospital, collecting evidence, or filing a police complaint.

Under the MTP Act, a woman can choose to terminate her pregnancy if it is a result of rape within the first 20 weeks. After 20 weeks of pregnancy, abortion can be done under section 5 of the MTP

¹³ Rule 5(3) of the POCSO Rules

Act if the doctor believes it is necessary to end the pregnancy in order to save the woman's life. So, it is important to get medical care as soon as possible while legal stuff is still going on. You don't need to ask the authorities about it. Permission to terminate the pregnancy of an adult or young sexual assault survivor within the first 20 weeks of pregnancy is allowed by the MTP Act. After such period termination is permissible if it is necessary to save the survivor's life¹⁴.

4. JUDICIAL DECISIONS REGARDING ABORTION RIGHTS:

Abortion after the limit set forth in the MTP Act, which is after 20 weeks is subject to judicial review in accordance with the law. The Hon'ble Apex Court and High Court have sole discretion to grant or deny the plea of seeking abortion. Since every individual is different, the courts have made their own judgments by considering different risk factors in each case. The courts should offer an interpretation, as the MTP is a welfare act and should look into legislative intent behind formulation of the act.

In 2008, Haresh and Niketa Mehta petitioned the Bombay High Court to abort a 26-week-old fetus diagnosed with a heart defect. With the advent of medical technology, prenatal diagnosis of defects has made great strides, and for the first time the national medical narrative has recognized the fact that some defects can only be detected after 20 weeks. Mehta's application was rejected on expert advice. But a court ruling that only the legislature can respond to calls to change legal restrictions has prompted India to begin a reassessment of its provisions in the Medical termination of pregnancies Act, 1971. Incidentally, Niketa had a miscarriage shortly after the ruling¹⁵.

In **Anusha Ravindra v. UOI**¹⁶, the Court issued notice to the centre for frame suitable medico-legal guidelines for urgent and safe medicinal facilities including abortion past 20 weeks in unusual cases.

In the case of **Swati Agarwal and others v. UOI**, The Apex Court has issued notice to the centre

¹⁴ Ms. Kerry McBroom & Et.al, THE POCSO ACT AND MTP ACT, available at: <https://pratigyacampaign.org/wp-content/uploads/2019/09/the-pocso-and-the-mtp-act-key-information-for-medical-providers-ipas-development-foundation.pdf>

¹⁵ Jessica Ravitz , the surprising history of abortion in the US, The Indian express, (june 27 2016)

¹⁶ Writ Petition (Civil) No. 934/2017.

for decriminalization of abortion and affirmation of the right of absolute independence of women to make decision related to reproductive right¹⁷.

On 26, May, 2019 PIL was filed by Amit Sahni in Delhi High Court asking the Court for extension of termination of pregnancy limit from present 20 weeks to 24 weeks. Scrutinizing that it required scientific reflection, Delhi High Court issued notice to the centre and National Commission for Women looking for their response to PIL seeking extension of time limit for abortion on a women's will to 24 or 26 weeks from current 12 week.¹⁸

4.1 RIGHT TO ABORTION AS A FUNDAMENTAL RIGHT:

Not only in India but even internationally, Medical Termination of Pregnancy is considered an important human right. Even the United Nations International Conference on Population and Development (UNICPD) has recognized reproductive rights. The rights regarding the rights to reproduce under international standards include,

- Access to contraceptive methods
- The right to a sterile and legitimate abortion
- The freedom to choose one's reproductive options without fear of brutality, coercion, or unequal treatment
- The freedom from harmful practices like forced childbirth
- The equal opportunity to the people from the LGBTQIA+ community to the same sexual and procreative care services as heterosexual people.

“No person shall be deprived of his life or personal liberty except according to procedure established by law, nor shall any person be denied equality before the law or the equal protection of the laws within the territory of India”¹⁹.

Article 21 of the Indian Constitution has been interpreted by many eminent jurists and scholars and lawyers. They say the scope of Article 21 is wide enough to include the right of abortion. This was also upheld in the case of [K S Puttaswamy v. Union of India](#),(2018) where the Supreme Court explicitly recognized a woman's fundamental right to make decisions on the birth of her

¹⁷ Writ Petition (Civil) No. 825 of 2019.

¹⁸ Amit sahani v. UOI, Writ Petition (CRL) No. 1612 of 2019.

¹⁹ Indian constitution,1950, Art 21.

children under Article 21 of the Indian Constitution. Abortion therefore falls within the scope of “individual liberty” enshrined in Article 21 of the Indian Constitution. Similarly, the Medical Abortion Act 1971 recognizes abortion as a legitimate right²⁰.

Suchita Shrivastava v. Chandigarh Administration (2009)

In this case, the Supreme Court ruled that all women have certain reproductive rights, including the right of women to give birth, raise child, and continue or to terminate pregnancies. All these rights form a fundamental part of the privacy, integrity and dignity of women enshrined in the Indian Constitution²¹.

In interpreting the law, the Supreme Court ruled that abortion is not possible later in pregnancy or after the 24th week of pregnancy because it threatens the lives of both mother and child. However, in exceptional cases, an aggrieved party may choose to have an abortion by court order. Such decisions must be based not only on the judge's discretion, but also on the mother's medical report and the recommendations of the medical board on the issue of abortion authorization. The court also found that a woman has rights over her own body and cannot delegate these rights to her family or the government.

In **Laxmi Mandal v. Deen Dayal Hari Nagar Hospital**,²² the Delhi High Court ruled that preventable maternal death represents a violation of Article 21 of the Constitution.

4.2 X V. PRINCIPAL SECRETARY, HEALTH AND FAMILY WELFARE, GOVT OF NCT DELHI

On 2022, Supreme Court of India brought a revolutionary decision in the abortion right granted to women. The categories of women who denied abortion rights in MTP Act were given abortion rights by this decision in a case of **X v. Principal Secretary, Health and Family Welfare, Govt of NCT Delhi**,²³ The Supreme Court, in its judgment, has said that unmarried and single women whose pregnancy is between 20 to 24 weeks will also have the right to abortion like married women. The Court said that not allowing unmarried women the right to abortion between 20 to 24 weeks is a violation of the right to equality before law under Article 14 of the Constitution.

²⁰ (2017)10 SCC1, AIR 2017 SC 4161

²¹ (2009) 9 SCC 1

²² W.P.(C) No. 8853 of 2008

²³ Special Leave Petition (Civil) No 12612 of 2022

According to Section 3(2) (a) of the MTP Act, the Medical Practitioner may terminate the pregnancy as long as it is under 20 weeks old. The Act's Section 3(2) (b) allows for termination in situations where the pregnancy is longer than 20 weeks but not longer than 24 weeks. The issues raised in this case includes,

- Does Section 3(2) clause (b) of MTP Rules, 2003 violate the article 14 of The Indian Constitution?
- Should the victims of marital rape be allowed to do abortion without their husbands' consent?
- Under Indian Constitution Article 21 of the Right to Life, are unmarried women entitled to terminate a pregnancy?
- Does Rule 3B of the MTP RULES and section 3(2)(b) of the MTP ACT cover unmarried women when it comes to abortions?

If a woman wants to terminate her pregnancy beyond 24 weeks on the ground of foetus abnormalities, a four-member board has to be consulted. It is ruled that under the Medical Termination of Pregnancy Act or MTP Act, rape²⁴ would include marital rape as well. This means, if a woman has non consensual sex with her husband, she has the right to undergo abortion. But there are certain exceptions where it is permitted if backed by medical opinion for reasons such as:

- The pregnant woman would be at risk if she continues the pregnancy.
- If it causes grave injury to the medical or physical health of the woman.
- If the child born would suffer from a serious ailment.

It allows pregnancy to be terminated up to 24 weeks after permission from 2 medical practitioners for reasons such as:

- If the woman is a victim of sexual assault or rape.
- If the woman is a minor.
- If the woman is in an emergency situation that is declared by the Government.
- If the woman is mentally unwell or has some major physical disability.

It was concluded by the SC that the purpose of MTP Act Section 3(2)(b) read with Rule 3B is to

²⁴ Indian Penal code,1860, S. 375

permit abortions between 20 and 24 weeks that are no longer desired due to a change in the women's material circumstances. Given the objective, there is no reason to limit the application of Rule 3B to single or unmarried women who undergo a change in their material circumstances. If Rule 3B were to be interpreted strictly to apply to married women alone, this would constitute discrimination against unmarried women and would be a violation of Article 14 of the Constitution.

5. CONCLUSION:

India's position and legal framework on this controversial abortion issue is progressive in many respects one such example is Supreme Court's decision in extending abortion rights to single and unmarried women in the year 2022. The Indian parliament should continue to consider public policy requirements regarding the liberalization of these laws. The law must allow abortion of women's choice to combat illegal abortions and their health risks as People with disabilities are vulnerable as many barriers exist in India. The state must ensure to protect a woman's maternal health at all times. The basis for abortion should be equally accessible to all women and greater importance should be given to the autonomy of the body rather than an abstract idea of the potential life of the fetus. To give women more reproductive rights, it is important to make abortion widely available and free. Basic sex education should be provided to every woman to know her reproductive rights. The state should force schools to supplement sex education subjects because women's lack of understanding is one of the causes leading to unsafe abortions.

5.1 RECOMMENDATIONS:

- Supportive policies for abortion should be framed within a gender justice context to address challenges faced by women, particularly marginalized groups, and consider socio-economic factors affecting access.
- Mental health support must be provided for women undergoing abortions.
- Improving healthcare infrastructure involves making abortion services available in rural areas, establishing clinics, and training professionals.
- Legal reforms should ensure clear guidelines and consistent application of laws, prioritizing women's autonomy and promoting public awareness to reduce stigma and misinformation.