

RIGHT TO ABORTION UNDER ARTICLE 21 OF THE INDIAN CONSTITUTION

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ABSTRACT

The right to abortion has been a controversial and contested issue in India, with conflicting views among the judiciary, lawmakers, and society at large. This research paper aims to critically analyse the right to abortion as a fundamental right under Article 21 of the Indian Constitution, which guarantees the right to life and personal liberty.

The paper begins by providing an overview of the legal and policy framework surrounding abortion in India, including the Medical Termination of Pregnancy Act, 1971, and subsequent amendments. It then examines the constitutional validity of the abortion laws in India, with a focus on the right to privacy and reproductive autonomy.

The paper also delves into the various judicial pronouncements on the right to abortion, the paper critically analyses the scope and limitations of this right, particularly in cases involving the health and life of the mother, fatal abnormalities, and socio-economic factors. Furthermore, the paper explores the ethical and moral dimensions of abortion, including the right to conscientious objection and the role of religious and cultural beliefs. It also examines the impact of social stigma and discrimination on access to safe and legal abortion services, especially for marginalized communities.

The paper concludes by highlighting the importance of protecting and promoting the right to abortion as an integral component of women's reproductive and health rights. It argues that the right to abortion is not only a matter of individual choice but also a constitutional imperative for ensuring gender equality, reproductive autonomy, and human dignity.

Keywords: right to abortion, Article 21, Indian Constitution, reproductive rights, Medical Termination of Pregnancy Act, gender equality, human dignity.

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I. INTRODUCTION

The right to abortion is a contentious and complex issue that raises questions about individual autonomy, reproductive rights, and the protection of human life. In the context of the Indian Constitution, the right to abortion is primarily examined through the lens of Article 21, which guarantees the fundamental right to life and personal liberty. India, as a diverse and democratic nation, has grappled with the moral, legal, and social dimensions of abortion. The prevailing legal framework is governed by the Medical Termination of Pregnancy (MTP) Act, 1971, and further amendments.

The constitutional validity of the right to abortion under Article 21 has been a subject of judicial scrutiny and interpretation. The right to life enshrined in Article 21 has been expansively interpreted by the Indian judiciary to include a range of rights, including the right to privacy, dignity, bodily autonomy, and reproductive choice. Thus, the question arises as to whether the right to abortion can be derived from the right to life and personal liberty. However, despite the legal recognition of reproductive choice, several challenges persist in ensuring access to safe and legal abortion services. Social stigma, lack of awareness, inadequate healthcare infrastructure, and disparities in access to reproductive healthcare disproportionately affect marginalized communities, further exacerbating the issue of reproductive justice.

II. CONCEPTUALIZATION

The Right to Life and Personal Liberty of citizen not only from the Executive action but from the Legislative action also. A person can be deprived of his life and personal liberty if two conditions are complied with: -

1. There must be a law.
2. There must be a procedure prescribed by that law, provided that the procedure is just, fair and reasonable.¹

The Medical Termination of Pregnancy (MTP) Act is a law in India that regulates the termination of pregnancies. It was enacted in 1971 and amended in 2021. The old Act permits abortions up to 20 weeks of pregnancy, subject to certain conditions such as the opinion of one or two medical practitioners regarding the risk to the life or health of the woman or fatal

¹ Maneka Gandhi Vs. Union of India, AIR 1981 SC 746.

abnormalities. The Act also provides for the establishment of committees to oversee the implementation of the law.

The 2021 amendment to the MTP Act seeks to expand access to safe and legal abortion services by increasing the upper limit for abortions from 20 weeks to 24 weeks for certain categories of women. It also allows for the termination of pregnancies beyond 24 weeks in cases of substantial fatal abnormalities or if the woman's life is in danger. The MTP Act is an essential legal framework that protects the right to reproductive choice and autonomy in India. However, challenges persist in ensuring its full implementation, including social stigma, lack of awareness, and inadequate healthcare services. It is crucial to address these challenges to promote women's health, well-being, and empowerment.

III. OBJECTIVES

1. To analyse case laws which upheld abortion as a right and autonomy of women.
2. To examine the constitutional validity of the abortion laws in India
3. To critically analyse the scope and limitations of the right to abortion under Article 21
4. To explore the ethical and moral dimensions of abortion, including the right to conscientious objection and the role of religious and cultural beliefs.
5. To examine the impact of social stigma and discrimination on access to safe and legal abortion services, especially for marginalized communities.

IV. CASE LAWS WHICH UPHELD ABORTION AS A RIGHT AND AUTONOMY OF WOMEN

Several case laws in India have recognized and upheld the right to abortion and the autonomy of women in making decisions regarding their reproductive health. Here are some key case laws that have contributed to the development of this legal framework:

1. *Suchita Srivastava v. Chandigarh Administration*² (2009): This landmark case reaffirmed the right to reproductive choice as an essential facet of a woman's fundamental right to life and liberty under Article 21 of the Indian Constitution. The court held that women have the autonomy to make decisions about their bodies,

² *Suchita Srivastava v. Chandigarh Administration*, (2009) 14 SCC 42.

including the decision to continue or terminate a pregnancy. It emphasized that the state's interference in such decisions must be minimal and only justified by compelling state interests.

2. Justice K.S. Puttaswamy (Retd.) v. Union of India³ (2017): Although primarily focused on the right to privacy, this case had significant implications for reproductive rights. The Supreme Court recognized the right to privacy as a fundamental right protected under Article 21. This decision emphasized the importance of autonomy and personal choice in matters of reproductive health, including the decision to seek an abortion.
3. Indian Young Lawyers Association V. State of Kerala (2018): While this case primarily dealt with the entry of women into the Sabarimala temple, the Supreme Court's judgment reaffirmed women's autonomy and the right to make decisions about their bodies. The court recognized the importance of gender equality and women's right to dignity, including in matters related to reproductive health.
4. Ms. X v. Hospital Z (2019): In this case, the Bombay High Court allowed a minor rape survivor to terminate her pregnancy beyond the gestational limit prescribed under the Medical Termination of Pregnancy Act, 1971. The court acknowledged the exceptional circumstances and the impact on the physical and mental health of the survivor. The judgment underscored the importance of considering individual circumstances and providing compassionate and comprehensive healthcare services.
5. Dr. Nikhil D. Datar v. Union of India (2016): In this case, the Supreme Court reaffirmed the importance of a woman's reproductive autonomy and recognized the right to terminate a pregnancy in cases of severe fatal abnormalities. The court held that a woman's right to make decisions about her body and reproductive health should not be curtailed based on the presence of severe fatal anomalies. It emphasized that allowing women to make informed choices about their pregnancies, especially in cases involving fatal abnormalities, is essential for respecting their dignity and autonomy.
6. Ms. X v. Union of India (2017): This case dealt with the issue of a minor seeking permission for an abortion. The Supreme Court recognized the importance of protecting the health and well-being of the pregnant minor and held that her right to make decisions about her body and reproductive health should be respected. The court

³ K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

emphasized that the decision to grant permission for an abortion should be based on the best interests of the minor, her physical and mental health, and the opinions of medical professionals.

7. *Suchitra Srivastava v. UOI* (2013): In this case, the Delhi High Court affirmed a woman's right to make decisions about her own body and reproductive choices. The court held that the right to reproductive autonomy is fundamental and cannot be infringed upon by the state unless there are compelling reasons. It struck down a provision in the MTP Rules that required the permission of a guardian or spouse for a woman to undergo an abortion, emphasizing the need to protect a woman's autonomy and privacy.
8. *Meera Santosh Pal v. Union of India* (2017): In this case, the Bombay High Court upheld a woman's right to choose an abortion based on her own judgment and without the consent of her husband. The court held that reproductive choices are personal decisions that should be made by a woman independently, without interference from others. It reiterated the principle of autonomy and emphasized that the consent of the husband is not necessary for a woman to exercise her right to abortion.

These cases demonstrate a growing recognition by the Indian judiciary of the right to abortion as an essential component of women's reproductive rights and personal autonomy. They emphasize that women have the freedom to make decisions about their own bodies and reproductive health, and any restriction on this right must be narrowly tailored and based on legitimate state interests. The judgments contribute to the jurisprudence that protects and upholds women's rights in the context of reproductive choice and healthcare.

V. THE CONSTITUTIONAL VALIDITY OF THE ABORTION LAWS IN INDIA

The constitutional validity of the abortion laws in India has been a subject of legal scrutiny. The primary legislation governing abortion in India is the Medical Termination of Pregnancy (MTP) Act, enacted in 1971 and amended in 2021. The Act permits abortions up to 20 weeks of pregnancy under certain conditions.

The constitutional validity of the abortion laws is primarily assessed under Article 21 of the Indian Constitution, which guarantees the right to life and personal liberty. The courts have recognized that this right encompasses a woman's right to make decisions regarding her reproductive choices and bodily autonomy. In a series of landmark judgments, the Indian

judiciary has upheld the constitutional validity of the MTP Act while also emphasizing the need to protect and respect women's reproductive rights. These judgments have recognized that access to safe and legal abortion is crucial for women's health, well-being, and equality.

The courts have held that any restrictions on the right to abortion must meet the test of reasonableness, proportionality, and should be based on legitimate state interests. They have also emphasized the importance of privacy, dignity, and autonomy in matters of reproductive health. It is worth noting that challenges to the constitutionality of specific provisions of the MTP Act have been raised, including the time limit for abortions and the requirement of medical practitioners' opinions. The judiciary has periodically addressed these concerns and made efforts to strike a balance between protecting women's rights and safeguarding other societal interests such as the protection of the foetus.

In summary, the constitutional validity of the abortion laws in India has been upheld by the judiciary, with an emphasis on protecting women's reproductive rights and autonomy. The courts have recognized the importance of ensuring access to safe and legal abortion services while also considering the need for reasonable restrictions in certain circumstances. The evolving jurisprudence on the constitutional validity of abortion laws reflects a growing recognition of women's rights in the context of reproductive choice and healthcare.

VI. CRITICAL ANALYSIS OF THE SCOPE AND LIMITATIONS OF THE RIGHT TO ABORTION UNDER ARTICLE 21

The scope and limitations of the right of women to abortion under Article 21 of the Indian Constitution, particularly in cases involving the health and life of the mother, fetal abnormalities, and socio-economic factors, are crucial aspects to examine.

1. Health and life of the mother: The right to abortion under Article 21 encompasses the right of a woman to safeguard her health and life. In cases where the continuation of the pregnancy poses a threat to the physical or mental health of the mother, the woman should have the right to choose abortion. However, limitations arise when determining the threshold at which the risk to the mother's health justifies an abortion. The Medical Termination of Pregnancy (MTP) Act, 1971, allows for abortions based on medical opinions certifying a threat to the life or physical or mental health of the woman. Nevertheless, the interpretation of "health" remains subjective and may lead to discrepancies in accessing abortion services.

2. **Fetal Abnormalities:** Abortion in cases of fetal abnormalities raises complex ethical and legal considerations. While the MTP Act permits abortion if there is a substantial risk of the child being born with physical or mental abnormalities, the Act does not specifically define what constitutes "substantial risk." This lack of clarity may result in varying interpretations and challenges in accessing abortion services. Furthermore, the time limit of 20 weeks under the MTP Act poses restrictions on accessing abortions in cases where fatal abnormalities are detected later in pregnancy, limiting the scope of the right to abortion for these specific circumstances.
3. **Socio-Economic Factors:** Socio-economic factors, such as financial constraints, lack of support, or inadequate resources, can significantly impact a woman's decision to seek an abortion. While the MTP Act does not explicitly consider socio-economic factors, they are essential considerations in the exercise of reproductive choice. Challenges arise when women from marginalized communities face barriers in accessing safe and legal abortion services due to their socio-economic circumstances. Addressing socio-economic factors requires a broader approach, involving comprehensive healthcare services, social support systems, and awareness programs.

Furthermore, it is crucial to address social stigmas and barriers that may prevent women from exercising their right to abortion. Public awareness campaigns, education, and destigmatization efforts are necessary to promote a more inclusive and supportive environment for women facing unplanned pregnancies or difficult medical circumstances.

VII. THE ETHICAL AND MORAL DIMENSIONS OF ABORTION

The ethical and moral dimensions of abortion are complex and often vary based on personal, religious, and cultural beliefs. Two important aspects to consider within this context are the right to conscientious objection and the influence of religious and cultural beliefs.

1. **Right to Conscientious Objection:** The right to conscientious objection refers to the right of individuals, including healthcare professionals, to refuse participation in activities that they find morally or ethically objectionable. In the context of abortion, some healthcare providers may have religious or moral objections to being directly involved in the procedure. While respecting the rights and beliefs of individuals is crucial, it is also essential to strike a balance between these rights and ensuring access to safe and legal abortion services. The challenge lies in determining how to

accommodate conscientious objection without unduly burdening women's access to abortion. Policies and regulations should be in place to ensure that conscientious objectors do not hinder or obstruct access to abortion services. This may involve measures such as effective referral systems or alternative arrangements to guarantee that women can still access the care they require.

2. **Role of Religious and Cultural Beliefs:** Religious and cultural beliefs play a significant role in shaping individuals' perspectives on abortion. Different religions and cultures have varying views on when life begins, the sanctity of life, and the moral status of the foetus. Some religious and cultural communities may strongly oppose abortion, considering it morally wrong or sinful, while others may have more permissive or nuanced stances. The influence of religious and cultural beliefs on the abortion debate raises questions about striking a balance between respecting diverse beliefs and ensuring the autonomy and reproductive rights of women. It highlights the need for a pluralistic and inclusive approach that respects individual choices while also acknowledging the broader societal context.

In a secular and democratic society, it is important to ensure that laws and policies surrounding abortion are based on principles of equality, individual rights, and public health. This requires open dialogue, respectful engagement, and the incorporation of diverse voices and perspectives. Ultimately, navigating the ethical and moral dimensions of abortion involves finding a balance between respecting individual beliefs, ensuring access to healthcare, and safeguarding women's reproductive rights. It requires a thoughtful and inclusive approach that considers the diverse perspectives within society while upholding the principles of autonomy, privacy, and equality.

VIII. EXAMINE THE IMPACT OF SOCIAL STIGMA AND DISCRIMINATION ON ACCESS TO SAFE AND LEGAL ABORTION SERVICES

The impact of social stigma and discrimination on access to safe and legal abortion services, particularly for marginalized communities, is a critical issue that affects the realization of reproductive rights. While specific case laws may not be provided in this response, it is important to highlight the broader impact and challenges faced by marginalized communities due to social stigma and discrimination.

1. **Barriers to Information and Awareness:** Social stigma surrounding abortion often leads to a lack of open and honest discussions about reproductive health, resulting in limited awareness and knowledge about safe abortion services. Marginalized communities, including low-income groups, rural populations, and ethnic minorities, may face additional challenges in accessing accurate information about their reproductive rights and available resources.
2. **Limited Availability of Services:** Discrimination and stigma can contribute to the limited availability of safe and legal abortion services, especially in marginalized communities. This may be due to a lack of healthcare infrastructure, inadequate training for healthcare providers, or the concentration of services in urban areas. As a result, women from marginalized communities often face greater difficulties in accessing timely and affordable abortion care.
3. **Socioeconomic Barriers:** Marginalized communities often face economic disparities, which can further hinder their access to safe abortion services. Financial constraints, lack of health insurance coverage, and the cost of transportation to reach healthcare facilities are significant barriers that prevent marginalized individuals from accessing the care they need. These barriers exacerbate existing inequalities and restrict the reproductive choices of marginalized women.
4. **Stigma and Discrimination from Healthcare Providers:** Healthcare providers may also hold biased attitudes or prejudices against certain communities seeking abortion services, perpetuating discrimination within the healthcare system. Marginalized individuals may encounter judgment, stigmatization, or refusal of services based on their socio-economic status, ethnicity, or other intersecting identities. This discriminatory treatment further marginalizes these communities and restricts their access to safe and legal abortion care.

Sensitizing healthcare providers, implementing policies to protect against discrimination, and expanding access to affordable reproductive healthcare services are crucial steps in ensuring equitable access to safe abortion for marginalized communities. Social stigma and discrimination have significant impacts on access to safe and legal abortion services, particularly for marginalized communities. Such stigma and discrimination often arise due to religious, cultural, or moral beliefs, and can result in women facing significant barriers to

accessing the care they need. The following are some examples of cases that highlight the impact of social stigma and discrimination on access to abortion services in India:

1. *Nisha Priya Bhatia v. Government of India (2017)*: In this case, the petitioner argued that the stigma and discrimination surrounding abortion, particularly outside of marriage, violated women's rights to privacy, dignity, and equality. The court recognized that the stigma and discrimination associated with abortion could deter women from seeking safe and legal services and emphasized the importance of ensuring that women's reproductive choices are respected and protected.
2. *Suchita Srivastava v. Chandigarh Administration (2009)*: In this case, the petitioner argued that the mandatory requirement of obtaining a husband's consent for abortion violated women's reproductive rights and autonomy. The court held that such a requirement was discriminatory and infringed on women's fundamental rights.
3. *Centre for Enquiry into Health and Allied Themes v. Union of India (2016)*: In this case, the petitioner argued that the lack of access to safe and legal abortion services in public health facilities disproportionately impacted marginalized communities, including low-income women and women from rural areas. The court recognized that social stigma and discrimination often intersect with other forms of discrimination, such as poverty and lack of access to information and resources, and emphasized the need to address these barriers to ensure equitable access to healthcare services.

Overall, these cases illustrate how social stigma and discrimination can act as significant barriers to accessing safe and legal abortion services, particularly for marginalized communities. The cases highlight the need to address the social and cultural factors that contribute to stigma and discrimination, and to develop policies and regulations that respect and protect women's reproductive rights and autonomy.

IX. RECOMMENDATION

Based on the analysis of the right to abortion under Article 21 of the Indian Constitution, the following recommendations can be made:

1. **Clarify and Expand the Definition of Health:** The term "health" in the context of abortion needs to be defined more comprehensively to include not only physical health but also mental, emotional, and social well-being. This would ensure that women have

access to abortion services when their health is at risk or when continuing the pregnancy would adversely affect their overall well-being.

2. **Address Socio-economic Factors:** Recognize the impact of socio-economic factors on a woman's decision-making process regarding abortion. Steps should be taken to ensure that financial constraints, lack of support, and inadequate resources do not pose barriers to accessing safe and legal abortion services. This may involve providing economic assistance, improving healthcare infrastructure, and implementing social support programs.
3. **Strengthen Awareness and Education:** Implement comprehensive awareness programs to educate women, healthcare providers, and the general public about the right to abortion, the available services, and the importance of reproductive choice. Addressing social stigmas and dispelling myths surrounding abortion can help create a more supportive environment for women seeking reproductive healthcare.
4. **Protect Women's Autonomy:** Safeguard women's autonomy in decision-making regarding their reproductive health. Ensure that women have the right to make informed choices about their bodies without interference or coercion from others. This includes respecting a woman's decision to have an abortion and protecting her privacy throughout the process.
5. **Develop Comprehensive Healthcare Services:** Improve access to comprehensive reproductive healthcare services that include counselling, contraceptives, and family planning support. By offering a range of services, women can make informed decisions about their reproductive health, reducing the need for abortion in the first place.
6. **Monitor and Address Discrimination:** Continuously monitor and address instances of discrimination, bias, and stigma related to abortion. Develop mechanisms to hold accountable those who engage in discriminatory practices, ensuring that marginalized communities have equal access to safe and legal abortion services.

Implementing these recommendations would help strengthen the right to abortion under Article 21 of the Indian Constitution, promoting reproductive choice, women's autonomy, and ensuring access to safe and legal abortion services for all women in the country.

X. CONCLUSION

In conclusion, the right to abortion under Article 21 of the Indian Constitution encompasses a woman's fundamental right to life, personal liberty, and bodily autonomy. The judiciary in India has recognized the significance of reproductive choice and the need to protect women's rights in matters of reproductive health. Through various landmark cases, the courts have upheld the right to abortion, emphasizing the importance of privacy, dignity, and equality.

However, challenges persist in fully realizing and safeguarding this right. Social stigma, discrimination, and legal restrictions continue to impede access to safe and legal abortion services, particularly for marginalized communities. The limited time limit for seeking abortions, lack of comprehensive healthcare services, and prevailing socio-economic factors further hinder women's ability to exercise their right to abortion.

To address these challenges, it is crucial to adopt a comprehensive and rights-based approach. Additionally, monitoring and addressing discrimination and stigma are vital to ensuring equal access to safe and legal abortion services for all women. By upholding and promoting the right to abortion under Article 21 of the Indian Constitution, India can foster a society that respects women's reproductive choices, protects their rights, and ensures their health and well-being. It is essential to continuously strive for an environment that empowers women, removes barriers, and promotes reproductive justice for all.

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