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# **ABORTION: A CONSTITUTIONAL RIGHT OR A MORAL WRONG?**

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## **ABSTRACT**

Abortion is one of the leading causes of maternity deaths. It has been performed even before the inception of civilisations. Nevertheless, abortion is considered a religious and cultural taboo by many, and these uncertainties have taken many lives. Therefore, the knowledge of abortion is imperative. Abortion has been made legal in India since 1971, yet research shows that more than 80 per cent of women are unaware of its legality.

This research aims to understand the agency of abortion. The current research aims to analyse the importance of protecting a woman's life against religious and cultural barriers. It also seeks to suggest provisions that make abortion a woman's right rather than a privilege. It portrays how a woman's right to life is beyond the religious perception of abortion. Hence, this research is significant in contemporary society to comprehend the Medical Termination of Pregnancy Act and the conflict of interests. The research will aim to highlight the importance of providing safer abortion options for women, especially in cases of rape-related pregnancies and teenage pregnancies. In furtherance, it aims to analyse the hindrances and drawbacks faced by statutory rape victims opting for abortion. In its generality, the paper also examines abortions in the case of teenage pregnancies and their problems. It focuses on the implication of the pandemic on safe abortions. In addition, it also studies the regulations made in the Medical Termination of Pregnancy Bill, 2021, and approaches to formulate setbacks in it.

**Keywords:** abortion, life, liberty, pregnancy, foetus, right

## INTRODUCTION

Human society is ever-evolving, and the law is regulated time and again to keep up with the pace. Legal research provides an avenue to methodologically and systematically analyse, study and understand the ever-changing laws and regulations. It drives humanity towards progress by fuelling curious and inquisitive minds. Therefore, it enhances the problem solving and decision-making processes.

Abortion is the untimely death of the foetus. It has been evident since time immemorial. Though it is a natural process, numerous norms and religious traditions label abortion as a taboo and a social evil. There have been multiple theories that contemplated the beginning of life. Some theories suggest life begins upon conception, while some suggest it begins from the moment of the first foetal motion. It is essential for us to understand abortion on its face value, regardless of when life begins.

In addition, the stigma of abortion in unmarried young girls, as well as few communities, refrains them from seeking an abortion. These factors persuade them to resort to clandestine and unsafe abortion methods. Furthermore, India lacks skilled professionals who provide abortions. Village dwellers and others in rural areas don't have access to hospitals or clinics that provide abortions. They travel kilometers together in search of these centres. In some instances, they succumb to death even before reaching a centre. These poor women may not even be aware of any abnormalities in their pregnancies, nor do they have access to safe abortion services, increasing their probability of abortion delays.

Therefore, many institutions are spreading awareness of the legality and importance of this issue worldwide. They are making an effort to overturn the laws, policies, and traditions across the world that harm a woman's reproductive rights and her right to life and liberty.

## EVOLUTION OF ABORTION LAWS IN INDIA

The institution of induced abortion is older than the Indian civilisation. Reference to this practice is evident from ancient literature like the Rig Veda, Smritis and Dharma Sutras, which condemn abortion as a sin.<sup>1</sup> This ideology has not been static but has evolved with changing times.

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<sup>1</sup> Pal Mohan, R., 1975. Abortion in India. *Social Science*, 50(3), pp.141-143.

In 1964, at the recommendation of the Central Family Planning Board under the government of India, a committee was appointed to make liberalisations in abortions. After a rigorous amendments process, the Lok Sabha passed the bill on August 7, 1971. In furtherance, the abortion act termed the Medical Termination of Pregnancy Act, 1971, became a part of the India Penal Code, 1860.

Following this, there have been several amendments to liberalise this Act, namely- MTP<sup>2</sup>(Amendment) Act, 2002, MTP (Amendment) Act, 2014, and the recent MTP (Amendment) Act, 2021. The main focus of amending this Act is to provide women access to safer abortion options and to respect their Fundamental Right to Life and Liberty under Article 21.

### LEGAL DEFINITION OF ABORTION

Induced abortion is legally defined as the untimely delivery procured voluntarily intending to kill the foetus. It may be acquired any time before the birth of the child.<sup>3</sup> But the medical terminology of abortion refers to the removal of the foetus from the uterus before the stage of viability, which is 20 weeks of gestation period in human beings.

After the MTP Act was enforced, it was included under the Indian Penal Code, 1860.<sup>4</sup> Considering the diverse religious, socio-ethical and moral ideologies in India induces abortion was made a criminal offence under Section 312 to 316 of IPC.<sup>5</sup>

“S. 312- Causing miscarriage. —Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage is not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman is quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. Explanation. —A woman who causes herself to miscarry is within the meaning of this section.”

The term miscarriage is not defined within the code considering the religious sentiments and taboo of the Indian community with reference to termination of pregnancy. But, in its general sense, it is deemed to be unlawful termination of pregnancy. It is evident that there is no

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<sup>2</sup> The Medical Termination of Pregnancy herein referred to as MTP

<sup>3</sup> Glanville Williams, 1952. *The Law of Abortion: Current Law Problems*, 5, pp.128-138.

<sup>4</sup> The India Penal Code herein referred to as IPC

<sup>5</sup> S. 312 to S. 316 of IPC provide penal consequences for induced abortion in severe cases.

loophole in including the mother in the definition of the woman. Cases of attempted abortion which failed or resulted in the birth of a child are also punishable under this section.

### **ABORTION UNDER MEDICAL GROUNDS**

Section 312 of IPC provides abortion only when the pregnant woman's life is endangered or causes a grave injury to the mental and physical health of the woman.

Miscarriage is not considered a criminal offence only when it is caused in 'good faith in the interest of saving the pregnant woman's life. For instance, in *Rex v. Bourne*<sup>6</sup> - a 15-year-old girl who was brutally assaulted was impregnated, had her pregnancy terminated by a qualified surgeon and gynaecologist. Since the matter concerning the life of the pregnant girl, the learned Judge rested the case in her favour, as the question of 'good faith was established. This was the first case that determined the legality of abortion on medical grounds and the legal status of the medical practitioner performing such abortion.

Abortion can also be procured in cases of foetal abnormalities or evident congenital disabilities in the child.

### **WOMAN'S RIGHT TO ABORTION**

Human Rights are the rights awarded to the citizens by the Constitution of India. These rights are common to all without any discrimination. The right to be treated equally and live a dignified life is the bedrock of freedom. The right to life and liberty is defined under Article 21<sup>7</sup> of the Indian Constitution. But the right to life and the right to liberty conflict with each other in the case of abortions.<sup>8</sup> While the foetus/ unborn child has the right to life, the pregnant women too possess the right to life and personal liberty. If the mother is given the right to abort, then the unborn child is deprived of its right to life.

During ancient times, abortion was considered taboo and was not encouraged since it deprives an unborn child of its life by killing it. It was hence considered a criminal act. Therefore, many women either delivered the baby at the cost of their lives, or both of them died. The maternal

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<sup>6</sup> (1938) 3 All E.R. 615 at 612.

<sup>7</sup> Indian Const., art 21-

"No person shall be deprived of his life or personal liberty except according to the procedure established by law."

<sup>8</sup> Iliyas, H., 2015. Reproductive Rights of Women: A Way to Gender Justice. SSRN, [online] Available at: <<https://ssrn.com/abstract=2674819>> [Accessed 15 January 2022].

mortality and morbidity rate was high. The maternal mortality rate was 556 per 100000 live births in 1990 declined by 77% to 130 per 100000 live births in 2016.<sup>9</sup>

The landmark judgement of *Roe v. Wade*<sup>10</sup> given by the US Supreme Court marked the beginning of the legalisation of abortion across the world. The Court held that the laws that oppose abortion are against the individual's right to privacy, thus overruling all the provisions and laws that banned abortion. Subsequently, abortion was legalised in India with the enforcement of the MTP Act, 1971.

The landmark case *K.S. Puttaswamy & Anr. V. Union of India & Ors.*<sup>11</sup>, which held the right to privacy as a fundamental right, further emphasises abortion as a right to privacy. The right to personal privacy includes abortion-related decisions but is balanced against the state's interest in regulating the provisions related to abortion.<sup>12</sup>

In the case of *Suchita Srivastava v. Chandigarh Administration*<sup>13</sup>, the Court held that Article 21 of the Constitution has a broader domain that confers the right to women to make reproductive choices. The case differentiates the 'mentally ill' appellant from the 'mentally regarded' women as defined under s. 2(b) (amended in 2002). Thus, mentally ill women possess the right to consent to terminate the pregnancy. The court held that consent is necessary regardless of being terminated under subsection 3(2)(i) and 3(2)(ii).

The consent of pregnant women is of utmost priority for termination except under subsection 3(4)(a), which states that the pregnancy of a minor (below 18 years) or of a lunatic shall not be terminated except with the written consent from their guardian. However, Forceful sterilisation or abortion of mentally retarded patients of mentally retarded patients or minors who are incapable of independently giving consent is violative under art 14<sup>14</sup> and against the democratic fabric of the nation. The doctrine of 'parens patriae'<sup>15</sup> is applied in such cases where the state makes a decision to protect the persons who are incapable of making decisions independently.

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<sup>9</sup> Khetrpal Singh, P., 2018. *India has achieved groundbreaking success in reducing maternal mortality*. [online] WHO. Available at: <<https://www.who.int/southeastasia/news/detail/10-06-2018-india-has-achieved-groundbreaking-success-in-reducing-maternal-mortality>> [Accessed 15 January 2022].

<sup>10</sup> 410 U.S. 113 (1973)

<sup>11</sup> *K.S. Puttaswamy (Privacy-9J.) v. Union of India*, (2017) 10 SCC 1

<sup>12</sup> *Ibid.*

<sup>13</sup> *Suchita Srivastava v. Chandigarh Admn.*, (2009) 9 SCC 1

<sup>14</sup> Indian Const., art 14,

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

<sup>15</sup> 'parens patriae' translates to 'parent of the nation'

While exercising the doctrine of ‘parens patriae’ in making reproductive decisions, the state must stand the test of ‘best interest of the person’ and ‘substituted judgement’. The ‘best interest’ test requires the state to prove that their decision is in the interest of the pregnant woman by medical inquiry to assess the feasibility of the foetus. Their decision should incline towards the interest of the pregnant woman alone rather than the stakeholders or the guardians. At the same time, the ‘substituted judgement’ test requires the judge to stand in the shoes of the pregnant woman and make the appropriate decision which she would have made if she was competent.

The notion of patriarchal control over the woman’s body, such as forcing her to satisfy his insatiable desires or to undergo sterilisation, has made the freedom of a woman’s body and sexuality a significant obstacle in granting her reproductive freedom. Thus, the women’s rights movement defended her right and played a crucial role in reclaiming her autonomy and independence in decision making.<sup>16</sup> This further led to the right to contraceptives, although the majority of the women do not have access to safe contraceptives. Nonetheless, every woman possesses the right over her body, and it is her right to make reproductive choices in accordance with her right to life and liberty and her right to privacy.

### **MINOR’S RIGHT TO ABORT**

Pregnancy during the period of adolescence (11-19 years) is called teenage pregnancy. Teenage pregnancy is a crucial social and public health problem, especially in India. As per reports from UNICEF, an estimated 1.5 million girls under the age of 18 get married each year. Although child marriages have declined from 47% to 27% in the last decade, it is still high. This indicates that the instances of teenage pregnancies are also high. In addition, a report from Guttmacher Institute shows that nearly 3.4 million want to avoid teenage pregnancy and more than 2 million do not use modern contraceptives.<sup>17</sup> The majority of the two million pregnancies are unintended. Therefore, the majority of them approach the court for permission to terminate beyond 20 weeks since they figure out their pregnancy in the eleventh hour. In some instances, the doctors are hesitant to perform abortions on minors due to the POCSO Act. However, no provision under this Act forbids abortions.

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<sup>16</sup> Iliyas, *supra* note 16.

<sup>17</sup> Murro, R., Chawla, R., Pyne, S., Venkatesh, S. and Sully, E., 2021. *Adding it up: Investing in Sexual and Reproductive Health of Adolescents in India*. [online] New York: Guttmacher Institute. Available at: <<https://www.guttmacher.org/report/adding-it-up-investing-in-sexual-reproductive-health-adolescents-india>> [Accessed 15 January 2022].

Under section (4) of the MTP, 1971, a pregnant woman under the age of 18 can only terminate her pregnancy provided consent in writing of her guardian. In this case, the minor has little or no rights over her body and her privacy. Considering the diverse cultural beliefs among society, India is likely to stigmatise teen pregnancy. If the teen is impregnated out of wedlock, it will be regarded as a matter of shame for her family. In cases of child marriages, the parents want the child, regardless of the needs and capability of a minor, to nurture a child. In addition, an unmarried minor cannot cite contraceptive failure as a ground for abortion and in cases of child marriage, the consensual age is 18 years.

A study revealed that children born to teenaged mothers are at a high risk of malnutrition due to the under nutritional status of the mother, lesser education and health care accessibility, poor alternative feeding practices and below par living conditions.<sup>18</sup>

The book “Whose choice is it? Abortion Medical and the Law” talks about the minor’s right to confidential abortions. The author is of the opinion that- 1. Mature minors capable of understanding their pregnancy and the concept of abortion have the constitutional right to obtain a confidential abortion without their parent’s involvement. 2. Immature minors have the constitutional right to abortion services if it is in their best interest, and involving parents would deter them. 3. To protect immature minors state may require parental consent. Still, it should contain an administrative or judicial bypass to safeguard the best interest of the minors regardless of parental consent. 4. When State laws interfere with a woman’s right to abortion, courts will examine them under the “significant state interest” test rather than the “compelling state interest” test.<sup>19</sup>

But these provisions are far beyond being implemented in India due to the rigidity of the law for termination of pregnancy. The MTP Act allows termination only when the mother’s life is endangered.

### **ABORTION FOR RAPE-RELATED PREGNANCIES**

Under sub-section (4) of the MTP Act, 1971, provides provision to terminate the pregnancy caused by rape since the anguish caused by such pregnancy shall be presumed to constitute a

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<sup>18</sup> Hong, P., Scott, S., Neupane, S., Mai Tran, L. and Menon, P., 2019. Social, biological, and programmatic factors linking adolescent pregnancy and early childhood undernutrition: a path analysis of India’s 2016 National Family and Health Survey. *Lancet Child Adolesc Health*, 3, pp.463-473.

<sup>19</sup> J Butler, D. and E Walbert, D. ed., 1986. Minor's Rights to Confidential abortions: The Evolving Legal Scene. In: *Whose choice is it? Abortion Medicine and Law*. New York: Facts and file, p.137.

grave injury to the physical and mental health of the victim. Though the provision is in place, yet it is not implemented efficiently. Furthermore, the POCSO 2012 requires the provision of contraception and safe abortion care in cases of rape-related pregnancies.

The various barriers and procedural gaps to abort in such cases either delay the abortion or deny the abortion. Abortion is refused on the grounds of first pregnancy, which might lead to infertility. In instances when the woman has already birthed a child, she was persuaded to sterilise.<sup>20</sup> In cases of abortion due to domestic violence, a necessity of the spouse's consent further restricts access to abortions. The deep-rooted patriarchy is evident when a victim is asked to obtain the consent of her abuser. It is highly probable that a child who is a victim of rape is unaware of its nature or that it might lead to pregnancy. Moreover, even if they realise the prevalence of victim-blaming in society bars them from informing their guardians or any authorised persons. Subsequently, they resort to unsafe methods of abortions which will further increase the risk of endangering their life or subject them to medical conditions such as infertility, infections etc.

In rape-related pregnancies, the treating doctors often deny the necessary healthcare facilities. They resort to the medical board's decision even when they have the authority to take action in certain cases. This rigorous procedure will delay the abortions time period. The erroneous approach of the courts and the medical practitioners could potentially anguish the physical and mental health of the pregnant woman. In *Z v. State of Bihar and others*<sup>21</sup>, the court denied granting her abortion rights despite being within the statutory limit of 20 weeks and impleaded her guardians resulting in delay on the grounds of her being mildly mentally retarded. When the petitioner appealed in the SC, termination of pregnancy was denied due to the delay. This case highlights that the women's right to reproductive choices is curtailed by requiring the consent of her guardian regardless of her being a major. It is such a tragedy when such instances worsen the agony of being raped.

### **THE MEDICAL TERMINATION OF PREGNANCY (AMENDMENT) ACT, 2021**

The recent amendment to the MTP ACT, 1971, is considered to be progressive in promoting safe abortion options among women. It expands the accessibility of abortion services on therapeutic, eugenic, humanitarian and social grounds in order to ensure universal access to

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<sup>20</sup> Bhate-Deosthali, P. and Rege, S., 2019. Denial of Safe Abortion to Survivors of Rape in India. *Health and Human Rights Journal*, 21(2), pp.189-198.

<sup>21</sup> *Z v. State of Bihar*, (2018) 11 SCC 572



comprehensive care facilities.<sup>22</sup> The amendment aims to ensure pregnancy termination by women without having to compromise their dignity, privacy, and autonomy in the light of justice.<sup>23</sup>

#### **REGULATIONS:**

Section 3(4)(a) allows women to procure termination of pregnancy up to 20 weeks performed by a registered medical practitioner instead of the 12 weeks limit.

Section 3(4)(b) provides women to procure termination of pregnancy when the length of pregnancy is between twenty to twenty-four weeks, provided it is prescribed at least by two registered medical practitioners in good faith. The increase in the upper gestation period mainly includes sexual assault, rape victims, minors, victims of domestic violence, mentally or physically disabled persons, foetal abnormalities, etc.

Furthermore, the Act has excluded the marital status of women as a ground to grant abortion due to the failure of any contraceptive methods or devices.

The Act provides for the constitution of a medical board in every state and union territory, whose powers and functions are ensured under the Act. The medical board must comprise a Gynaecologist, a Paediatrician, a Radiologist or Sonologist, and any person authorised by the official gazette.

Under section 5, the Act provides a confidentiality clause to protect the right to privacy of pregnant women. The provision stated that no medical practitioner should reveal the name or any other details of the pregnant woman undergoing termination except to any person authorised by the law at that time. Any person who contravenes this provision will be punished with imprisonment extending up to 1 year and/or fine.

#### **SETBACKS:**

Although the amendments are made to liberalise the abortion laws, yet there are certain inconsistencies in its practical application.

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<sup>22</sup> WHO, 2021. India's amended law makes abortion safer and more accessible. [online] Available at: <<https://www.who.int/india/news/detail/13-04-2021-india-s-amended-law-makes-abortion-safer-and-more-accessible>> [Accessed 15 January 2022].

<sup>23</sup> Ibid.

‘The amendments fail to address the crucial problem faced by these women of not getting the doctor’s consent within the time since it takes from 2 weeks to a month to acquire the consent’ - Sonali Kusum, assistant professor of law at TISS. The growing burden of pending cases in the SC adds to the women not getting sanctions on time, thus delaying their access to safe abortions.<sup>24</sup>

The Act provides for constituting a medical board in every state but is silent if each state will have only one medical board or if the districts will have them too. If the former is true, then the accessibility of the medical board will become a significant problem, especially for rural women.<sup>25</sup> For a densely populated country like India, the ratio of the number of doctors to citizens is low. A report submitted by Finance Commission states that India had merely one doctor per 1521 people. Therefore, the constitution of the medical board poses a tough challenge, especially since the rural areas have little or no access to specialised doctors.

Despite liberalising the abortion law, the amendment fails to provide women with the autonomy to make their reproductive decisions. The woman can terminate her pregnancy only at the discretion of the medical board and has no say in matters relating to her own body. The approach of the medical board in certain cases can be arbitrary and problematic, as they can drift into issues relating to the viability of the foetus, alternative surgeries for abortion requests.<sup>26</sup>

When cases concerning ethical and moral dilemmas end up in court, it is likely that the Judge’s personal beliefs interfere with fair judgements. The perpetual detrimental stigma regarding motherhood and abortion curbs women of their right to life and individual liberty.

The actual realisation of women’s rights is when women are given the right to abort with full knowledgeable consent, with their gynaecologist, rather than any third person intervention.

### **IMPACT OF THE PANDEMIC ON ACCESS TO SAFE ABORTIONS**

The right to access safe abortion is critical for every woman, even at desperate times. The lockdown announced in 2020 to curb the spread of COVID-19 imposed restrictions on mobility

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<sup>24</sup> Sharma, V., 2021. *Medical Termination of Pregnancy Act 2021: Progressive yet Problematic*. [online] Media India Group. Available at: <<https://mediaindia.eu/society/medical-termination-of-pregnancy-act-2021/>> [Accessed 16 January 2022].

<sup>25</sup> Kakalia, M., 2021. *Abortion in India – still not a right but a privilege*. [online] The Leaflet. Available at: <<https://www.theleaflet.in/abortion-in-india-still-not-a-right-but-a-privilege/>> [Accessed 16 January 2022].

<sup>26</sup> Ibid.

and access to hospitals or clinics. Though the Indian Medical council issued telemedicine practice guidelines, access to abortion services was not clearly stated.<sup>27</sup> This created discrepancies among people and led to potentially reduced abortions. The challenges are further compounded with limited access to public services, fear of contracting the virus and limited access to hospitals and clinics.

The pandemic witnessed a splurge in domestic violence cases<sup>28</sup>, which is likely to result in unintended pregnancies. Furthermore, family planning decisions have changed due to the pandemic. People's financial and economic conditions deteriorated due to the lockdown, which influenced their family planning decisions. In addition, the usage of contraceptives drastically declined due to restricted mobility.<sup>29</sup> However, home delivery functioned but the stigma of sex and condoms in our community barred people from accessing the contraceptives. The above factors resulted in several unintended and unplanned pregnancies.

In addition, several hospitals and clinics were converted into COVID care centres, and a significant number of medical practitioners were diverted to attend the pandemic crisis. Furthermore, the barriers in procuring termination add to their misery. The court has adopted a virtual setting which might create certain inconsistencies in delivering the judgment on time. Since the medical fraternity has been diverted towards COVID care, the access to the medical board also becomes inconvenient. Therefore, it narrowed the access to safe abortions. Ergo people resort to unsafe abortion practices, disproportionately affecting the lives of the mother and the child. The government should not neglect this crisis and provide better access to safe abortion and contraceptives that could potentially reduce mortalities or other complications, especially in such desperate times.

## CONCLUSION

Motherhood is bliss to humanity. A mother has got a natural instinct when it comes to her child. The purity of love and care a mother possesses for her child is unmatched. Her duties and

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<sup>27</sup> Chandrasekaran, S., Diamond-Smith, N., Srinivasan, K. and Dalvie, S., 2020. Preparing for an Increased Need for Abortion Access in India during and after COVID-19: Challenges and Strategies. *Studies In Family Planning*, [online] 51(4), pp.377-383. Available at: <<https://onlinelibrary.wiley.com/doi/full/10.1111/sifp.12139>> [Accessed 16 January 2022].

<sup>28</sup> Chandra, J., 2020. Covid-19 lockdown | Rise in domestic violence, police apathy: NCW. *The Hindu*, [online] Available at: <<https://www.thehindu.com/news/national/covid-19-lockdown-spike-in-domestic-violence-says-ncw/article31238659.ece>> [Accessed 16 January 2022].

<sup>29</sup> Chandna, H. and Chakrabarti, A., 2020. *Lockdown condom sales dip after early surge but that doesn't mean Indians aren't having sex*. [online] The Print. Available at: <<https://theprint.in/health/lockdown-condom-sales-dip-after-early-surge-but-that-doesnt-mean-indians-arent-having-sex/418126/>> [Accessed 16 January 2022].

responsibilities are always for the betterment of her offspring.

Although there arise situations wherein, she wants to abort her unborn child for multiple factors, generally which causes her mental and physical trauma. In some desperate times, the women would instead abort the baby than not provide it with a quality life after its born. Abortion is purely the right and choice of the women. The woman should possess reproductive autonomy in accordance with her right to life and liberty. Abortion must solely and wholly be a woman's decision without any external influence unless she is incompetent to do so. Ergo equitable access to safe abortion care is an imperative human right.

However, necessary legal protection should be provided to the unborn child, and its right to life should not be infringed. The stigma around abortion must be obliterated from society. Abortion laws are not instituted to deprive a child of its right to life. Instead, it is to provide equitable and comprehensive care in order to mitigate maternal mortalities and prevent women from physical and mental torment.

Therefore, there should be a balance between the right to life of the mother and the child, but the reproductive choices must be absolutely in the hands of the pregnant woman since she is the owner of her body.

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