The Right to Choose Vs. The Right to Be Born: Abortion, Autonomy, and the Law in India

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Abstract

The question of whether a woman possesses an unqualified right to terminate her pregnancy, or whether an unborn child holds an independent right to life, constitutes one of the most contested debates in constitutional jurisprudence worldwide. In India, this tension is mediated primarily through the Medical Termination of Pregnancy Act, 1971 (MTP Act), as amended in 2021, along with evolving judicial interpretations of the right to life under Article 21 of the Constitution of India. A transformative development in India's criminal law landscape is the enactment of the Bharatiya Nyaya Sanhita, 2023 (BNS), which came into force on 1 July 2024, replacing the colonial-era Indian Penal Code, 1860 (IPC). The BNS substantially replicates the IPC's provisions on causing miscarriage under Sections 88 to 92, resituated within Chapter V dealing with offences against women and children, yet foregoes any substantive reform of the criminal regulation of abortion. This paper undertakes a comprehensive analysis of the legal, constitutional, and ethical dimensions of abortion rights in India. It examines the statutory framework governing medical termination of pregnancy, analyses landmark judicial precedents including the significant October 2023 ruling in X v. Union of India, and situates the Indian discourse within comparative and international human rights perspectives. Drawing also upon crime statistics compiled by the National Crime Records Bureau (NCRB) in its Crime in India reports, the paper argues that Indian law adopts a nuanced, medically framed approach that privileges maternal health and autonomy while refraining from recognising fetal personhood as a constitutional category. However, significant lacunae remain, including unequal access, stigma, and the absence of explicit statutory

recognition of reproductive autonomy as a fundamental right. The paper concludes with recommendations for law reform to better align the legislative framework with constitutional values of dignity, equality, and personal liberty.

Keywords: abortion law, Bharatiya Nyaya Sanhita, medical termination of pregnancy, reproductive autonomy, Article 21, fetal rights, Indian constitutional law, gender justice, NCRB

1. Introduction

Few legal questions capture the complexity of competing human rights as sharply as the abortion debate. At its core, the controversy pits two legally cognisable interests against each other: the pregnant woman's right to make autonomous decisions about her body, health, and future, against the asserted right of the fetus to be born and to live. These competing claims invoke foundational concepts of personhood, bodily integrity, liberty, equality, and the state's legitimate interest in protecting potential life. In democratic societies governed by constitutional frameworks, the resolution of this tension is inevitably shaped by the text of the constitution, the evolution of judicial interpretation, and the socio-cultural context in which legal norms operate.

India's approach to abortion is markedly different from the ideologically charged framework seen in the United States. Rather than grounding the right to abortion in a constitutional declaration, Indian law has historically approached the matter through the prism of public health, population policy, and medical regulation. The Medical Termination of Pregnancy Act, 1971, originally enacted as a liberalising measure to reduce unsafe illegal abortions, has undergone substantial amendment through the Medical Termination of Pregnancy (Amendment) Act, 2021, which extended gestational limits and broadened the category of eligible women. The replacement of the Indian Penal Code, 1860 by the Bharatiya Nyaya Sanhita, 2023 (BNS) constitutes a significant formal development in India's criminal law, although, as this paper demonstrates, the BNS does not bring any substantive reform to the criminal provisions governing abortion. Despite these developments, Indian law has yet to explicitly recognise reproductive autonomy as a fundamental right, leaving the normative foundations of abortion rights to be developed incrementally through judicial decisions — a process that, as the contested October 2023 Supreme Court ruling in X v. Union of India reveals, remains vulnerable to judicial inconsistency.

This paper proceeds in several stages. Section 2 traces the historical and legislative evolution of abortion law in India, incorporating the transition from the IPC to the BNS. Section 3 analyses the constitutional framework, particularly the right to life and personal liberty under Article 21. Section 4 examines significant judicial pronouncements, including the landmark 2022 ruling and the regressive turn of 2023. Section 5 addresses the contested question of fetal rights and personhood under Indian law. Section 6 situates the Indian framework within a comparative and international human rights context. Section 7 identifies key challenges and gaps, drawing on NCRB crime data, and Section 8 offers conclusions and recommendations.

2. Historical and Legislative Evolution of Abortion Law in India

2.1 Pre-Independence Era, the Indian Penal Code, 1860, and the Transition to the Bharatiya Nyaya Sanhita, 2023

Prior to the enactment of the MTP Act, 1971, abortion in India was governed by Sections 312 to 316 of the Indian Penal Code, 1860 (IPC), which criminalised causing miscarriage except to save the life of the pregnant woman. Section 312 IPC imposed imprisonment of up to three years and a fine for voluntarily causing miscarriage; where the woman was quick with child, the punishment could extend to seven years. These provisions, rooted in Victorian morality and colonial paternalism, made abortion effectively inaccessible, driving millions of women to seek clandestine, unsafe procedures at great personal risk (Banerjee, 2000; Duggal & Ramachandran, 2004).

A landmark transformation in India's criminal law architecture occurred with the enactment of the Bharatiya Nyaya Sanhita, 2023 (BNS), which received Presidential assent on 25 December 2023 and came into force on 1 July 2024, replacing the IPC in its entirety. The provisions relating to causing miscarriage are now located in Sections 88 to 92 of the BNS, under Chapter V dealing with "Offences Against Woman and Child." This relocation is symbolically significant in that it places abortion-related offences explicitly within the gendered context of crimes against women, rather than treating them as general offences against the human body. However, the substantive content of these provisions closely mirrors Sections 312 to 316 of the IPC, with no material reform to the criminal regulation of abortion (Prasad, 2023). Section 88 BNS (corresponding to Section

312 IPC) continues to criminalise voluntarily causing a woman to miscarry, except in good faith to save her life. Section 89 BNS (corresponding to Section 313 IPC) addresses miscarriage caused without the woman's consent and carries enhanced punishment, recognising consent as a fundamental consideration. Sections 90, 91, and 92 BNS respectively address death caused by acts intended to cause miscarriage, acts intended to prevent a child from being born alive, and causing the death of a quick unborn child by an act amounting to culpable homicide.

Scholarly commentary has noted that the BNS represents a missed opportunity to modernise the legal treatment of abortion. By preserving the IPC's language almost verbatim, the BNS perpetuates the legal uncertainty that compels women and healthcare providers to seek judicial authorisation even for otherwise lawful terminations, and fails to draw a meaningful statutory distinction between the criminal act of causing unlawful miscarriage and the medical procedure of lawful termination of pregnancy under the MTP Act (Prasad, 2023). The MTP Act continues to function as an exception to the criminal provisions of the BNS, just as it did in relation to the IPC, and the interplay between the two statutes remains a source of ambiguity for practitioners.

The criminalisation of abortion under the IPC — now replicated in the BNS — historically reflected a legal order that treated the fetus as a passive object of state protection and the pregnant woman as a vessel without independent moral agency. The concept of being "quick with child," derived from English common law, acknowledged fetal movement as a threshold but assigned no constitutional significance to either the woman's autonomy or the fetus's independent interests. The practical consequence of blanket criminalisation was widespread maternal mortality from unsafe abortions, a public health catastrophe that persisted well into the twentieth century (Jesani & Iyer, 1993).

2.2 The Medical Termination of Pregnancy Act, 1971

The Shantilal Shah Committee, appointed in 1964, recommended the liberalisation of abortion law on grounds of maternal health, population control, and the reduction of illegal abortions. Acting on these recommendations, Parliament enacted the Medical Termination of Pregnancy Act, 1971, which came into force on 1 April 1972. The Act decriminalised abortion up to twenty weeks of

gestation under specified conditions, marking a dramatic shift from blanket prohibition to regulated permission (Ministry of Health and Family Welfare, 1971).

The original MTP Act permitted termination of pregnancy up to twelve weeks on the opinion of one registered medical practitioner, and between twelve and twenty weeks on the opinion of two registered medical practitioners. Permissible grounds included risk to the woman's life or physical or mental health, fetal abnormality likely to result in serious handicap, contraceptive failure for married women, and pregnancy resulting from rape. The Act imposed significant procedural requirements, concentrating access in urban and institutional settings and disadvantaging rural and marginalised women (Ganatra et al., 2001).

2.3 The Medical Termination of Pregnancy (Amendment) Act, 2021

The MTP Amendment Act, 2021 introduced several significant reforms. It extended the gestational limit from twenty to twenty-four weeks for special categories of women including survivors of sexual assault, rape, and incest; minors; women whose marital status changed during pregnancy; women with physical disabilities; women in humanitarian settings; and women with fetal abnormalities detected during pregnancy. It also established Medical Boards at the state level to assess cases involving fetal abnormalities beyond twenty-four weeks, extended the contraceptive failure provision to unmarried women, and strengthened confidentiality protections (Medical Termination of Pregnancy (Amendment) Act, 2021).

The 2021 Amendment represents a meaningful liberalisation of the statutory framework, yet it retains a fundamentally medico-legal model: abortion remains a conditional permission granted by the state through medical gatekeeping rather than an unconditional exercise of a woman's autonomous right. The requirement of medical opinion, the limitation to approved facilities, and the tiered system of gestational limits continue to subordinate the woman's decision to external authorisation. Critics argue that this paternalistic structure fails to honour the full implications of reproductive autonomy as a fundamental right (Ghosh, 2022; Saxena, 2021).

3. Constitutional Framework: Article 21 and Reproductive Autonomy

3.1 The Right to Life and Personal Liberty

Article 21 of the Constitution of India provides that no person shall be deprived of life or personal liberty except according to procedure established by law. Through a series of landmark decisions beginning with *Maneka Gandhi v. Union of India* (1978), the Supreme Court has interpreted this provision expansively to encompass a wide range of rights including privacy, dignity, health, and personal autonomy. The Court in *Maneka Gandhi* held that the procedure established by law must be fair, just, and reasonable, thereby subjecting deprivations of life and liberty to substantive constitutional scrutiny (Maneka Gandhi v. Union of India, 1978).

The progressive expansion of Article 21 provides a constitutional basis for reproductive rights. If personal liberty includes the right to make intimate decisions about one's own body and life, then the decision whether to continue or terminate a pregnancy falls squarely within this protected zone. A pregnant woman who is denied access to abortion — whether through criminalisation, procedural barriers, or arbitrary gatekeeping — is arguably deprived of her liberty in a constitutionally cognisable sense. The question that Indian courts have not definitively resolved is whether this liberty interest is strong enough to override the state's asserted interest in protecting the potential life of the fetus.

3.2 The Right to Privacy and Bodily Autonomy

The nine-judge bench decision in *Justice K.S. Puttaswamy (Retd.) v. Union of India* (2017) constituted a watershed moment for the constitutional law of privacy in India. The Supreme Court unanimously held that the right to privacy is a fundamental right protected under Article 21. Justice D.Y. Chandrachud, in his concurring opinion, explicitly connected privacy to reproductive autonomy, observing that a woman's right to make reproductive choices is a dimension of personal liberty under Article 21 (Justice K.S. Puttaswamy v. Union of India, 2017).

The *Puttaswamy* judgment's recognition of informational privacy, decisional autonomy, and bodily integrity as components of the constitutional right to privacy has significant implications for abortion rights. If the state cannot compel disclosure of intimate personal information and if

individuals possess a constitutionally protected sphere of decisional autonomy in intimate matters, then compelled continuation of pregnancy represents a potential infringement of the fundamental right to privacy. The judgment thus provides the doctrinal foundation for arguing that the right to abortion is not merely a statutory entitlement but a constitutionally grounded right (Bhatia, 2017).

3.3 Equality, Non-Discrimination, and Reproductive Rights

Articles 14 and 15 of the Constitution guarantee equality before the law and prohibit discrimination on grounds of sex. The burden of unwanted pregnancy and its legal consequences falls disproportionately on women, raising equality concerns that have received insufficient attention in Indian abortion jurisprudence. Feminist legal scholars have argued that laws restricting abortion access constitute a form of sex discrimination because they impose burdens on women that men cannot experience, and because they reflect and reinforce patriarchal assumptions about women's social role as mothers (Kapur & Cossman, 1996; Menon, 2004).

The transformative equality framework, which goes beyond formal non-discrimination to address structural disadvantage and social subordination, provides a powerful lens through which to analyse abortion restrictions. Denying women control over their reproductive lives perpetuates economic dependence, constrains educational and professional opportunities, and reproduces gendered hierarchies. From this perspective, the right to abortion is not merely a negative liberty but a positive entitlement to the conditions necessary for substantive equality and full citizenship (Jaising, 2009).

4. Judicial Pronouncements on Abortion and Reproductive Rights

4.1 Early Judicial Deference to the Legislature

In the initial decades following the enactment of the MTP Act, Indian courts were primarily concerned with interpreting and applying the statutory conditions rather than with the broader constitutional dimensions of abortion. Courts generally deferred to the legislature's medically framed framework and declined to recognise abortion as a fundamental right independent of the statute. The focus was on whether the procedural requirements had been met, whether the requisite

medical opinion had been obtained, whether the facility was approved, and whether the gestational limit had been observed (Banerjee, 2000).

4.2 Suchita Srivastava v. Chandigarh Administration (2009)

The case of *Suchita Srivastava v. Chandigarh Administration* (2009) represents the first occasion on which the Supreme Court directly addressed the constitutional dimensions of reproductive autonomy in an abortion context. The case concerned a woman with intellectual disabilities who had become pregnant as a result of rape at a state-run institution. The Punjab and Haryana High Court had ordered termination of the pregnancy, concluding it was in the woman's best interests. The Supreme Court reversed this order, holding that a woman's right to make reproductive choices is a dimension of personal liberty under Article 21 of the Constitution (Suchita Srivastava v. Chandigarh Administration, 2009).

The Court emphasised that reproductive choices encompass both the decision to procreate and the decision not to procreate, and that compelling a woman to continue or terminate a pregnancy against her wishes violates her fundamental rights. The judgment marked a significant advance in the constitutional recognition of reproductive autonomy, though its implications for broader abortion access have been unevenly developed by subsequent courts.

4.3 High Court Decisions on Late-Term Abortion Petitions

A significant body of jurisprudence has developed in the context of petitions by women seeking judicial permission for late-term abortions beyond the statutory gestational limit on grounds of fetal abnormality or changed circumstances. In a series of decisions, various High Courts and the Supreme Court have grappled with the tension between statutory gestational limits and the woman's constitutional right to health, dignity, and personal liberty.

In *X v. Union of India* (2016) and related cases, the Supreme Court held that fetal abnormalities incompatible with life outside the womb could justify termination beyond the statutory limit on the basis of the woman's right to health under Article 21 (X v. Union of India, 2016). Courts established a practice of constituting expert medical committees to advise on fetal viability and the risk to the woman's health. While these decisions represent a pragmatic judicial response to

genuine hardship, they have also been criticised for creating an unpredictable, discretionary, and litigation-dependent system that imposes disproportionate burdens on those with the least resources (Ghosh, 2022).

4.4 X v. Principal Secretary, Health & Family Welfare Department, Government of NCT of Delhi (2022)

The most transformative judicial contribution to the constitutional law of abortion in India is the Supreme Court's decision in *X v. Principal Secretary, Health and Family Welfare Department, Government of NCT of Delhi* (2022). The case concerned a twenty-five-year-old unmarried woman who sought termination of a twenty-two-week pregnancy resulting from a consensual relationship that had broken down. She argued that Rule 3B of the MTP Rules, which listed categories of women eligible for termination between twenty and twenty-four weeks, discriminated against unmarried women by not including them.

The Supreme Court, in a landmark judgment authored by Justice D.Y. Chandrachud, held that the exclusion of unmarried women from Rule 3B was unconstitutional as it violated the right to equality under Article 14 and the right to reproductive autonomy under Article 21. The Court reasoned that a woman's marital status has no bearing on her constitutional right to make reproductive choices, and that distinguishing between married and unmarried women perpetuates stereotypes and reinforces discrimination. The judgment also addressed the concept of "mental health" expansively, holding that the distress caused by an unwanted pregnancy constitutes a cognisable ground for termination under the MTP Act's health exception (X v. Principal Secretary, Health & Family Welfare Department, 2022).

Crucially, the Court extended the right to reproductive decisional autonomy to all pregnant persons in India, including transgender and gender-variant individuals. It also harmoniously read the MTP Act with the Protection of Children from Sexual Offences Act, 2012 (POCSO), holding that registered medical practitioners need not disclose the identity and personal details of a minor seeking an abortion when filing their report under Section 19 of the POCSO Act, thereby removing a significant barrier to adolescent access to safe termination services (Jain & Sengupta, 2023). The

judgment represented a watershed moment in establishing that the decision to terminate an unwanted pregnancy vests primarily with the pregnant person.

4.5 X v. Union of India (2023): A Contested Retreat

The progressive momentum of the 2022 ruling encountered a significant reversal in October 2023, in a case that drew widespread attention to the structural limitations of India's litigation-dependent abortion access framework. In *X v. Union of India* (2023), a twenty-seven-year-old married woman, a mother of two children, approached the Supreme Court seeking termination of a pregnancy that had exceeded twenty-four weeks. The petitioner had been unaware of her pregnancy until an advanced stage due to a condition known as lactational amenorrhea, and she raised concerns regarding the effect of antidepressant medication on fetal development, alongside postpartum depression and serious economic and emotional hardship (Supreme Court Observer, 2023).

A Division Bench of Justices Hima Kohli and B.V. Nagarathna initially constituted a Medical Board at the All India Institute of Medical Sciences (AIIMS), New Delhi, to assess the petitioner's physical and mental condition and the viability of the fetus. When the Board's initial report indicated a reasonable probability of fetal survival outside the womb, the bench on 9 October 2023 allowed termination, affirming the right of the woman over her own body. However, a subsequent communication from a member of the medical board raised concerns about the risks of premature delivery to the potential child, prompting the Union government to intervene. This intervention itself attracted criticism from Justice Nagarathna, who noted that the executive's approach of bypassing the established bench amounted to an improper practice.

The bench thereafter delivered a split verdict on 11 October 2023. Justice Nagarathna, applying the rights-based framework established in the 2022 decision, held that the woman's clear and voluntary determination to terminate her pregnancy must be respected, and that her socio-economic circumstances and fragile mental health were constitutionally relevant considerations. Justice Kohli, however, declined to authorise the termination on the basis of the fetus's viability, holding that her judicial conscience did not permit the procedure. The matter was referred to a three-judge bench led by Chief Justice Chandrachud, which, in its final order of 16 October 2023,

rejected the petitioner's plea on the ground that neither a risk to the mother's life nor substantial fetal abnormality had been established (Supreme Court Observer, 2023).

The October 2023 ruling has attracted serious academic and civil society criticism. Commentators have noted that the judgment effectively placed a hard ceiling on reproductive autonomy at the twenty-four-week statutory limit, subordinating the woman's clear and repeatedly expressed autonomous decision to a judicially managed assessment of fetal viability and the views of medical professionals (Supreme Court Observer, 2023). The case starkly illustrated the tension inherent in a framework where access to abortion beyond the statutory limit depends on the subjective moral judgments of judges and doctors rather than on the constitutional right of the pregnant person. In this respect, the 2023 ruling represents a step back from the rights-centred position articulated in the 2022 judgment, and underscores the urgent need for legislative reform that genuinely centres the pregnant person's decisional authority.

5. The Question of Fetal Rights and Personhood Under Indian Law

5.1 Does the Fetus Have a Right to Life?

The most fundamental question in the abortion debate is whether the fetus possesses a legally cognisable right to life that the state is constitutionally obligated to protect. In India, neither the Constitution, the MTP Act, nor any authoritative judicial decision has recognised the fetus as a legal person possessing independent rights under Article 21 (Rao, 2004; Subramanian, 2019). Indian law does recognise certain interests of the unborn child in specific statutory contexts: Section 13 of the Transfer of Property Act, 1882 and Section 20 of the Hindu Succession Act, 1956 protect the property rights of children conceived but not yet born, contingent on their live birth. However, these provisions extend conditional property rights rather than constitutional personhood.

The BNS provisions on causing miscarriage — Sections 88 to 92 — implicitly treat the fetus as an object of legal protection but, like their IPC predecessors, do not confer constitutional personhood upon the unborn. The absence of any explicit constitutional or statutory provision recognising fetal personhood reflects a legislative and judicial consensus in India that the fetus does not possess an independent right to life that categorically overrides the pregnant woman's fundamental rights

(Jesani & Iyer, 1993). That said, the October 2023 ruling suggests that notions of fetal viability are increasingly entering judicial reasoning at the margin of permissible termination, even if they have not been formally elevated to the status of constitutional doctrine.

5.2 The Concept of Fetal Viability

While Indian law does not recognise fetal personhood, the MTP Act's gestational limits implicitly acknowledge that the state's interest in protecting potential life increases as pregnancy advances. The tiered system — one medical opinion up to twenty weeks, two opinions between twenty and twenty-four weeks for special categories, and a Medical Board for cases involving fetal abnormalities beyond twenty-four weeks — reflects a pragmatic calibration of competing interests at different stages of pregnancy. This approach resonates with the viability framework developed in *Roe v. Wade*, though the specific thresholds differ and the Indian framework is not explicitly grounded in constitutional doctrine (Saxena, 2021).

The concept of fetal viability — the capacity of the fetus to survive outside the womb with appropriate medical support — has gained increasing significance as neonatal technology has advanced. The MTP Amendment Act 2021's extension of the upper limit to twenty-four weeks for special categories and the establishment of Medical Boards for cases beyond this limit represent a legislative response to both medical advances and the recognised inadequacy of the prior framework. The AIIMS medical board's assessment in the October 2023 case, in which fetal viability was treated as a decisive consideration by at least one member of the bench, signals a judicial tendency to import viability reasoning beyond the explicit terms of the statute (Supreme Court Observer, 2023).

5.3 Balancing Fetal Interests and Maternal Rights

Even in the absence of recognised fetal personhood, Indian courts have acknowledged that the state has a legitimate interest in protecting potential human life and ensuring that abortion decisions are made with appropriate medical oversight. The question is whether the regulatory measures in place are proportionate to the state's legitimate interests or whether they impose undue burdens on the exercise of constitutional rights.

The proportionality framework, imported into Indian constitutional law from European and international sources, provides a useful analytical tool. A regulation is proportionate if it pursues a legitimate aim through means rationally connected to that aim, is no more restrictive than necessary, and does not impose burdens that outweigh the benefits achieved. Applying this framework, critics argue that requirements such as two-physician certification, mandatory use of approved facilities, and the continued limitation of the MTP framework to approved institutional settings impose disproportionate burdens on abortion access (Bhatia, 2017; Ghosh, 2022).

6. Comparative and International Perspectives

6.1 International Human Rights Framework

The international human rights framework has increasingly converged on the recognition of reproductive autonomy, including the right to safe abortion, as a component of women's fundamental rights. The Committee on the Elimination of Discrimination against Women, in its General Recommendation No. 24 on women and health and subsequent jurisprudence, has held that states must remove barriers to women's access to reproductive health services, including abortion, and that criminalisation of abortion violates women's rights to life, health, and non-discrimination under CEDAW (Committee on the Elimination of Discrimination Against Women, 1999).

The UN Human Rights Committee, in its General Comment No. 36 on the right to life (2018), stated that states must provide safe, legal, and effective access to abortion where the life and health of the pregnant woman is at risk, and where carrying a pregnancy to term would cause substantial pain or suffering. The Committee has consistently held that restrictive abortion laws violate the right to life under the International Covenant on Civil and Political Rights when they prevent women from accessing safe abortion (United Nations Human Rights Committee, 2018). India, as a state party to both CEDAW and the ICCPR, is bound by these international obligations.

6.2 Comparative Perspectives: United States, United Kingdom, and Nepal

The comparative study of abortion law illuminates the diversity of approaches to balancing maternal rights and fetal interests. In the United States, the constitutional history of abortion rights

has been turbulent: from the recognition of a constitutional right to abortion in *Roe v. Wade* (1973), to the modified undue burden standard of *Planned Parenthood v. Casey* (1992), and finally to the complete withdrawal of federal constitutional protection in *Dobbs v. Jackson Women's Health Organization* (2022), which returned the matter entirely to state legislatures (Dobbs v. Jackson Women's Health Organization, 2022). The American experience illustrates both the fragility of judicially created abortion rights and the profound human consequences of their withdrawal — and carries a cautionary lesson for India, where reproductive rights similarly depend on judicial construction rather than explicit legislative guarantee.

The United Kingdom adopts a pragmatic, health-based approach under the Abortion Act, 1967, which permits termination up to twenty-four weeks where two medical practitioners certify that continuing the pregnancy would involve greater risk to the physical or mental health of the woman than termination. Nepal, following a 2002 constitutional amendment and subsequent legislation, permits abortion on request up to twelve weeks and up to eighteen weeks in cases of rape or incest, representing one of the most liberal frameworks in South Asia (Abortion Law Reform Association, 2004). These comparative examples suggest that a health-based, medically regulated approach to abortion need not preclude the explicit recognition of reproductive autonomy as a constitutional right.

7. Challenges, Gaps, and the Path Forward

7.1 Access, Equity, and Evidence from NCRB Data

Despite the progressive statutory framework, access to safe and legal abortion services remains deeply unequal in India. The National Crime Records Bureau (NCRB) compiles annual crime statistics in its Crime in India reports, which track reported offences under the miscarriage and foeticide provisions — a data set that, while limited by the principal offence rule (under which only the most serious charge per FIR is recorded), provides a partial but significant window into the scale of criminalised abortion practices. The Crime in India 2022 report, the most recent report published as of the time of writing, recorded a total of 4,45,256 crimes against women, reflecting a four per cent increase over the preceding year, at an average of fifty-one complaints every hour (NCRB, 2022). Within this data, offences categorised under miscarriage and foeticide — including

unlawful termination and sex-selective abortion — are tracked separately, though they are likely to be substantially undercounted given the prevalent practice of out-of-facility terminations and social stigma that discourages reporting.

Independent research findings contextualise the NCRB figures. Approximately sixty per cent of abortions carried out in India continue to occur outside approved facilities, often involving untrained providers and unsafe methods (Shankariasparliament, 2022). Unsafe abortions remain the third leading cause of maternal mortality in India. Research by the International Institute for Population Sciences found that a significant proportion of abortions in India take place outside approved facilities (Banerjee et al., 2012). The requirement of a registered medical practitioner and an approved facility for all abortions, even in the first trimester where medical abortion with mifepristone and misoprostol can be safely self-administered, constitutes a systemic barrier to equitable access.

It is also important to note that the BNS's retention of broad criminalisation provisions, without clearly demarcating the boundary between unlawful miscarriage and lawful termination under the MTP Act, contributes to the documented reluctance of healthcare providers to perform terminations even within the statutory limits (Prasad, 2023). This legal uncertainty has practical public health consequences: when practitioners fear criminal liability, women are effectively deterred from lawful abortion care.

The 2021 Amendment's extension of the gestational limit and expansion of eligible categories represent meaningful progress, but access barriers rooted in geography, cost, stigma, and lack of awareness continue to undermine the statute's protective purpose. A rights-based approach to abortion access requires not merely decriminalisation within statutory limits, but active state intervention to ensure that legal entitlements can be exercised in practice, including investment in public health infrastructure, training of healthcare providers, and community education (Saxena, 2021).

7.2 Marginalised Communities and Structural Barriers

Prior to the 2022 Supreme Court decision in *X v. Principal Secretary*, the MTP Act's contraceptive failure provision applied only to married women, implicitly erasing the reproductive experiences

of unmarried women. While the Supreme Court's ruling has remedied this specific inequity, the broader framework continues to reflect assumptions that may disadvantage other marginalised groups, including transgender and non-binary persons whose reproductive health needs are not addressed in the gender-binary language of the statute.

Survivors of sexual violence face particular challenges in navigating the abortion access system. The requirement to provide proof of rape, navigate police and medical bureaucracies, and comply with procedural timelines imposes additional burdens on already traumatised individuals. The 2021 Amendment's inclusion of rape survivors as a special category eligible for termination up to twenty-four weeks is a positive step, but practical implementation requires sensitive and trauma-informed healthcare systems that remain underdeveloped in much of India (Ghosh, 2022). The NCRB Crime in India 2022 report recorded 31,516 rape cases across the country, each of which represents a potential scenario in which a survivor may require access to timely abortion services — an access that the current framework, despite formal liberalisation, cannot reliably guarantee (NCRB, 2022).

7.3 The Significance of BNS and the Need for Statutory Reform

The enactment of the BNS presented a historic opportunity to address the longstanding criticism that India's criminal law does not clearly distinguish between the unlawful act of causing miscarriage and the lawful medical procedure of termination of pregnancy under the MTP Act. That opportunity has been foregone. The BNS, by substantially replicating Sections 312 to 316 of the IPC in Sections 88 to 92 without any contextualising amendment to reflect the statutory protections of the MTP Act, perpetuates the environment of legal ambiguity and fear that is documented to suppress abortion access. A forward-looking approach would insert a clear exception in the BNS explicitly recognising that no act performed in accordance with the MTP Act shall constitute an offence under Sections 88 to 92, thereby removing any residual uncertainty about the criminal liability of practitioners who perform lawful terminations.

7.4 The Need for Explicit Legislative Recognition of Reproductive Autonomy

Indian abortion law's most significant structural limitation is its failure to explicitly recognise reproductive autonomy as a right. The MTP Act is framed as a public health and population

measure, not as a rights-enabling statute. The grounds for permissible abortion are defined in terms of medical risk, social circumstances, and fetal condition rather than in terms of the woman's right to decide. While the Supreme Court has made progress in reading reproductive autonomy into Article 21 through constitutional interpretation, the 2023 ruling in *X v. Union of India* demonstrates that this approach operates case by case, is subject to judicial variability, and does not create systemic entitlements.

A genuinely rights-based abortion law would explicitly acknowledge that the decision to continue or terminate a pregnancy belongs primarily to the pregnant person, subject only to proportionate and evidence-based limitations justified by compelling state interests. It would decriminalise self-managed abortion using approved medications, remove mandatory physician certification requirements for first-trimester terminations, extend coverage to all public health facilities, and establish clear confidentiality protections and non-discrimination obligations for healthcare providers. Such legislation would align the Indian legal framework more fully with the constitutional values articulated in *Puttaswamy* and *X v. Principal Secretary*, and with India's international human rights obligations (Bhatia, 2017; Jaising, 2009).

8. Conclusion

The tension between the right to choose and the right to be born is not merely a legal abstraction; it shapes the lived experiences of millions of women in India who navigate pregnancy under conditions of economic hardship, social pressure, domestic violence, and healthcare deprivation. Indian law has made significant progress in recognising reproductive autonomy as a constitutional value, most notably through the landmark decisions in *Puttaswamy* (2017) and *X v. Principal Secretary* (2022). The Medical Termination of Pregnancy (Amendment) Act, 2021 has expanded access for more categories of women, reflecting growing legislative sensitivity to the diversity of women's reproductive experiences.

However, the October 2023 ruling in *X v. Union of India* constitutes a sobering reminder that judicial recognition of reproductive rights in India remains fragile, inconsistent, and subject to the personal moral convictions of individual judges. The formal replacement of the IPC by the BNS has not improved this landscape; if anything, the BNS's replication of the IPC's provisions without

reform has perpetuated conditions of legal uncertainty that suppress lawful abortion access. NCRB crime data, read alongside public health research, confirms that the gap between formal legal entitlement and practical access remains wide — with unsafe abortions continuing to cause maternal deaths at an alarming rate.

The path forward requires a convergence of constitutional adjudication and legislative reform. Courts must develop the constitutional doctrine of reproductive autonomy with clarity and consistency, resisting the tendency to import extra-statutory moral considerations about fetal viability into the judicial reasoning process. Parliament must enact comprehensive legislation that explicitly recognises reproductive autonomy, removes unnecessary procedural barriers, and ensures equitable access across geographies and social groups. The BNS must be amended to create an unambiguous exception for MTP Act-compliant procedures, ending the legal uncertainty that deters practitioners from providing lawful care. The state must also invest in the public health infrastructure, healthcare provider training, and social support systems necessary to make the right to safe abortion a reality for every pregnant person in India, regardless of where they live, how much they earn, or what their marital status may be.

The right to choose and the right to be born will remain in tension as long as human reproduction involves the intersection of individual autonomy, social relationships, medical technology, and state power. What law can and must do is ensure that this tension is resolved in a manner consistent with the constitutional values of dignity, equality, and personal liberty — and that the resolution does not systematically disadvantage those who are already most vulnerable.

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