THE CONCEPT OF 'BODILY AUTONOMY': SEXUAL AND REPRODUCTIVE RIGHTS FOR FEMALE SURVIVORS OF RAPE IN PAKISTAN, INDIA AND MALAYSIA.

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DEDICATIONS

This thesis is dedicated to my parents, Naila Nazir and Lutuf Ali Uqaili, and my brother, Shanyal Uqaili, who have always been my pillars of strength, and believed in me. You inspire and encourage me to pursue my dreams. Thank you for selflessly supporting all my academic endeavors – I dedicate this thesis to you.

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ABSTRACT

Women's bodies have known to be a highly political area of study, and hence, the issue of attaining Reproductive and Sexual Rights for women becomes a relevant debate, under international human rights law. These rights for women originate from the concept of 'bodily autonomy', which has many times been derived from the rights to 'life', 'liberty', and 'dignity' by Courts. The essence of these fundamental rights remains quite pertinent for the women of South and South East Asia, as often, the existence of such rights for women is questionable.

States with restrictive abortion legislation do not only curb women's right to their 'bodily autonomy' but also their right to make a choice. In Pakistan, India and Malaysia, abortion is criminalized, apart from certain exceptions with regards to saving the life the health of the woman. Women requiring abortion services are left at the disposal of the Courts, social and cultural stigma, and third party authorizations, or have to resort to illegal and unsafe abortions. The challenges are more amplified for survivors of rape who require abortions, in each country. Along with the psychological trauma that comes with sexual assault, women have to navigate through a system which only makes it more problematic for them to exercise control over their bodies.

This thesis explores the theme of 'bodily autonomy' within the feminist discourse, while expounding upon the legal frameworks of Pakistan, India and Malaysia. The States' international obligations would also be observed in light of CEDAW, while comparing whether their domestic law and policies comply with the standards as provided within the Convention.

ACRONYMS

CEDAW: Convention on the Elimination of all forms of Discrimination Against Women

ICESCR: International Convention on Economic, Social and Cultural Rights

ICCPR: International Convention on Civil and Political Rights

UNCESCR: United Nations Committee on Economic, Social and Cultural Rights

MTP Act: The Medical Termination of Pregnancy Act, 1971, India.

CII: Council of Islamic Ideology, Pakistan

1. INTRODUCTION

1.1 PRIMARY JURISDICTION: PAKISTAN

The term 'bodily autonomy' is an alien concept for most women of South and South East Asia, as in major parts of India, Pakistan, and Malaysia, women have little knowledge of their own bodies, let alone have the power to exercise autonomy and control over them. The reluctance for a dialogue on sexual and reproductive rights, in this region, stems mostly from political, cultural and religious issues.

For Pakistan, until the 1990s, abortion was regulated by the draconian laws under the Indian Penal Code of 1860, which had initially been drafted for British India, by the British colonial rulers. Under this law, the offense of "causing a miscarriage" had been criminalized under the Pakistan Penal Code, unless it had been carried out strictly to save the pregnant woman's life. The punishment for such a crime was imprisonment which could extend up to 10 years. Later, an amendment to the Pakistan Penal Code came into effect in 1997, following a Supreme Court judgment in 1989[1]. This new law provided a clear distinction between an abortion that is carried before "the unborn child's organs have been formed"[2], or one that is carried out after the formation of the organs. The former can be carried out to save a woman's life, or to "provide necessary treatment"[3]. Under Islamic law, this distinction is generally made by the fourth month of pregnancy. The recent law, although it could be interpreted by Courts liberally, has been criticized as being fairly ambiguous, as no legal threshold has

[1] Abortion Policies and Reproductive Health around the world, United Nations Department of Economic and Social Affairs | Population Division (2014)

[2] Pakistan Penal Code (Act XLV of 1860), Chapter XVI, Section 338(A)-(C)

[3] Ibid

been provided regarding the two stages of pregnancy mentioned in the law, nor is there a strict definition of "necessary treatment", which has been used rather conservatively by legal practioners. However, with such an ambiguous stance on abortions in Pakistan, surprisingly 10% of the total number of children are currently aborted before their birth, which translates into a staggering 890,000 abortions being performed illegally in Pakistan every year[4].

However, unlike the above statistics on the number of abortions being carried out in Pakistan every year, the statistics of women who have been raped, and terminate their pregnancies as a result, are not so clear. Women who have been subjected to sexual assault, particularly rape, find themselves in a doubly complicated situation, with regards to abortion procedures. This is mostly due to the fact that the conviction rate for rape is extremely low in Pakistan, as the evidentiary requirements are quite stringent.[5] Thus, the reluctance of most women to file charges for rape becomes quite obvious. Furthermore, it must be noted that not only is there reluctance to file charges, but also reluctance to ask for assistance in terms of terminating pregnancies, for fear of being exposed and being dragged into a criminal case unnecessarily. Hence, the case for a survivor of rape wishing to terminate her pregnancy in Pakistan becomes quite complicated, specifically due to the fact there is no legislation allowing medical practitioners to carry out abortion procedures, where a woman claims to have been raped.

[4] 'Abortion in Pakistan', Guttmatcher Institute Report, National Committee for Maternal and Neonatal Health, 2009.

[5] Kalanauri, Zafar, 'A Review of Zina Laws in Pakistan', Zafar Kalanauri & Associates.

1.2 FIRST COMPARATIVE JURISDICTION: INDIA

In India, the passage of the Medical Termination of Pregnancy Act of 1971 was a turning point for abortion laws and the significant "liberalization" of reproductive rights[6]. Under this law, the medical practitioner is allowed to terminate the pregnancy of a woman if it involves a risk to her life, physical or mental health. Moreover, the law even allows for an abortion procedure if there is a substantial risk of the child being "physically or mentally abnormal"[7]. The legal practioners in India have, over time, widened the scope of this law to include any pregnancy resulting from rape, or from the failure of usage of any contraceptives, or even a pregnancy that may cause "grave injury to the mental health of a woman". [8] Hence, in this regard, India seems to have gained a much more liberal stance in its jurisprudence for reproductive rights of women than in Pakistan.

The patriarchal rigidity on sexual and reproductive rights of women, stems from the 'pro-life' arguments whereby the right to life of every human being should be protected, which does not exclude the unborn.[9] The problem, hence, stems not only from the mere lack of legislation, case law and national policies on legalizing abortions, particularly with regards to rape, but also the lack of national legislation and policies which provide women the right to their bodily autonomy, and to their sexuality, and eventually, the lack of awareness regarding the health hazards that come with illegal abortions.

[6] Abortion Policies and Reproductive Health around the world, United Nations Department of Economic and Social Affairs | Population Division (2014)

[7] Medical Termination of Pregnancy Act, 1971 (Act No. 34 of 1971)

[8] Supra 6.

[9] UN General Assembly, International Covenant on Civil and Political Rights, Article 6, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

Since Pakistan tends to borrow from its neighbor on legislative matters and jurisprudence, despite being on opposite ends politically, India seems to be a forerunner in this regard. While the Indian legislation provides an explicit view in terms of a woman's right to voluntary and informed choice in matters related to contraception and the termination of pregnancy, and the Indian Courts have liberally interpreted their Constitution to include reproductive rights under their provisions of "right to health", "dignity", "equality before the law", and the "protection of life and personal liberty", more particularly with regards to rape as well[10]. In the latter case, the Courts have known to be more lenient, where the latest stance of Courts is that a woman was allowed to terminate her pregnancy even after six months of being pregnant, based on the proven fact that she was raped and that the pregnancy was simply unwanted.[11] However, the implementation of said law is still problematic, as the litigation process is extremely lengthy, and most women in India also do not have access to such facilities due to lack of national policies, and faulty implementation techniques, which fail to support the judgments passed by the Court, in this matter. [12]

1.3 SECOND COMPARATIVE JURISDICTION: MALAYSIA

The second comparative jurisdiction that has been chosen for the purposes of this thesis is Malaysia. Being one of the Muslim majority states in Asia, Malaysia also has a law permitting abortions in the earlier stage of pregnancies, as long as the medical experts deem it a requirement, "in

[10] 'Reproductive Rights in Indian Courts', Center for Reproductive Rights; Parmanand Katara v. Union of India, (1989) 3 S.C.R.997; Paschim Banga Khet Mazdoor Samity v. State of West Bengal, A.I.R 1996 S.C.C. 2426; Chameli Singh v. State of U.P., (1996) 2 S.C.C. 549; Consumer Education and Research Centre v. Union of India (1995) 3 S.C.C. 42; Francis Coralie Mullin v. The Administrator, Union Territory of Delhi, A.I.R

[11] Human Rights Law Network (HRLN), The High Court of Madhya Pradesh allowed a pregnant female prisoner to exercise her reproductive rights under the Medical Termination of Pregnancy Act (2013).

[12] 'Reproductive Rights in Indian Courts', Center for Reproductive Rights.

good faith", to save a woman's physical or mental health, or life, which came into effect in 1989[13]. While comparing it to the Pakistani context, Malaysia would make for a productive comparison, as much like Pakistan, Malaysia also complies with Shariah law quite selectively. In this sense, Malaysia would prove to be useful to this comparative research, as it has also struggled with its laws on abortion recently, in terms of its arbitrary application by the Malaysian Courts, and the Health Ministry, and the lack of awareness of the sexual and reproductive rights, as well as lack of a policy framework regarding the implementation methods. Even though there is an already existing legislation on abortion, albeit quite restrictive, there has been a recent case where a woman was imprisoned and convicted for seeking abortion services in Malaysia, for the first time. At the same time, her medical practitioner was also prosecuted for carrying out the procedure[14]. These cases would be explored in further detail in the remaining part of the thesis.

1.4 METHODOLOGY

All three countries are parties to the CEDAW[15], which lays down minimum standards for protecting rights of women, while India and Pakistan are also parties to ICESCR[16]. The fact remains that all three states have struggled with effective legislative reform and implementation mechanisms of their laws on abortion and sexual and reproductive rights, in different aspects. Hence, the States' obligations to the international bodies need to be evaluated, with a narrower focus on the legal jurisdictions of Pakistan, India and Malaysia. This would eventually define the proximity of each

[13] Malaysian Penal Code (Act 574), Chapter XVI, Section 312

[14] 'Imprisoned in Malaysia after a Legal Abortion', Center for Reproductive Rights.

[15] UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

[16] UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

State to the framework of international human rights laws. Further, the thesis would examine the concept of "bodily autonomy", and a woman's sexual and reproductive rights, through a "gendered" perspective, and approach the research topic through the lens of feminist discourse.

Furthermore, for the purpose of this thesis, the legal instruments concerning the sexual and reproductive rights of women in Pakistan, India and Malaysia would be deeply examined. There would be particular focus on national legislations, with constitutional and statutory law, as well as overall national policies and their implementation mechanisms concerning the issue of "reproductive rights". Furthermore, the states' international obligations under CEDAW[17] and ICESCR[18], would be examined, and analyzed in detail. All government reservations and yearly reports sent in to the relevant Committees of the relevant international bodies, regarding how each state interprets its obligations would also be expounded upon. In turn, the international bodies' responses to such reports, and/or failure to comply with the international obligations would also be scrutinized.

Academic and legal literature on this topic, either published online, or in print, from all three countries, has been referred to for the purpose of this thesis. Most of the academic sources used, legally analyze and expound upon the theories behind sexual and reproductive rights, and the issues faced while attaining such rights in the Indian, Pakistani and Malaysian context, as well as the problems encountered while abiding by the States' international obligations. They explain the current situation on the position of women and their reproductive rights in the three chosen jurisdictions, and provide a detailed focus of the legal framework and the position of the Courts in this regard, as well.

[17] UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

[18] Ibid.

1.5 RESEARCH PROBLEM

In light of the aforementioned issues, this thesis would, hence, probe further into the questions of: (i) how Pakistan, India and Malaysia interpret 'reproductive rights', if at all, in their national legislation, (ii) to what extent are these countries in line with their international obligations primarily under CEDAW[19] and then ICESCR[20], (iii) If not, how do they justify their position in this regard, in their reports to the international bodies. The answers to previous questions may possibly lead to a revised understanding of the sexual and reproductive rights of women, particularly survivors of rape, in South and South-East Asia, and the lacunae in the current legal systems of these jurisdictions. The thesis would further provide policy recommendations regarding the enhancement of the implementation mechanisms in the three jurisdictions, as well as a way forward towards providing a more liberal approach in interpreting the term "bodily autonomy" in the region.

1.6 LIMITATIONS OF STUDY

The research for this thesis has not been based on interviews from primary sources and mostly secondary sources have been consulted for this study. Furthermore, in the cases of Pakistan and Malaysia, lack of legal jurisprudence from the Courts, on the topics of sexual and reproductive rights proved to be a major challenge. Secondly, most cases mentioned for the purposes of this thesis, do not provide names of the petitioners, in order to protect the identities of the women, which is necessary within the given cultural context.

[19] Ibid.

[20] UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

2. SEXUAL AND REPRODUCTIVE RIGHTS

2.1 WHAT IS 'BODILY AUTONOMY'?

States are generally known to have exerted a major influence over a woman's 'bodily autonomy', through their laws. Feminist legal theorists have explored 'body politics' and critiqued existing laws and national policies by stating that the bodies of women have been "sexualized, objectified, regulated, and violated by the institutions of patriarchal society", within which the legal system itself takes birth[21]. Abortion and rape laws are two such ambits where the law often fails to support and protect the woman, while disregarding the notion of her 'bodily autonomy'.

The issues surrounding a woman's bodily autonomy are impacted by various social, psychological, sexual, economic and political factors in a particular society, which are often influenced by a struggle of power, authority and control[22]. Most importantly, the concept of 'bodily autonomy' of a woman has been socially constructed to fit societal expectations, and in order to further respect the institution of marriage and family[23]. The social construction of femininity, and the maternal portrait of a woman, while viewing them as either wives, daughters, mothers or objects of sexual pleasure, through a patriarchal lens, has been the major cause of the struggle between a woman's bodily autonomy and paternalism. Oakley argues that the idea of motherhood is very closely

[21] Bridgeman, J & Millns, S eds., "Law & Body Politics Regulating the Female Body", Dartmouth, 1995, p. xix

[22] Newhall, Lynne. "Women in Law - Bodily Autonomy - The Entombed Womb within the Realm of Body Politics" Bracton Law Journal 43 (2011): p. 59-71.

[23] Ibid.

attached to the element of womanhood, and hence, "how reproduction is managed and controlled is inseparable from how women are managed and controlled".[24]

The right to bodily autonomy has been classified as a 'fundamental right', which Thomson argues is attached to the very status of 'being a person', and is rooted in, and also equal to the 'right to self-defense'[25]. She elaborates this further by stating that the ownership of the body is linked to any decisions that may in future be taken with regards to well-being of the body, and thus, also the right to defend one's body from anything that may be happening against its interest. A 'mother', who owns her body, has major stakes and claims with regards to this particular body, before anyone else laid claims, and held an interest in her body[26]. Hence, she has 'prior rights', before a fetus laid claims on it[27]. When a third party is allowed to take a decision as to whether the woman should be provided access to an abortion or not, she is essentially denied that 'status of being a person' by taking away the agency from her. On the other hand, the fetus within her body is, thus, granted the 'status of being a person' instead. This is a highly problematic notion, as only the 'bearer of the body' possesses all the rights connected to the use of it, and only that person should have the power to waive off any rights legitimately connected with regards to the body, in order to allow others to use it in one form or the other. Thomson's position is that under no circumstances does any person waive such rights for another person, rather they allow another person the use of their body merely for a limited period of time[28].

Furthermore, the theory of 'bodily perspective' also comes into play here, which Mackenzie believes is a relevant concept to 'bodily autonomy'. She argues that the 'bodily perspective' is rooted

[24] Oakley, A Subject Woman, Martin Robertson, 1981, p206

[25] Judith Jarvis Thomson, "A Defense of Abortion," Philosophy & Public Affairs1:1 (Autumn 1971): 47–66
[26] Ibid.
[27] Ibid.
[28] Ibid.

in the "liberal and libertarian values found in medical ethics literature". Such values, firstly, include the 'right to non-interference'. This means that no one has the right to intrude one's personal bodily space without the person's consent. Secondly, it also includes the 'right to bodily self-determination'. This right further expands into the right to take decisions with regards to any medical procedures that can be performed in and to one's body. This essentially means that one has a de facto right to determine whatever one decides to do with their own body. This may include sex reassignment surgeries, genetic enhancement, and even abortion.[29]

Often, the right to bodily autonomy may even supersede other fundamental rights, such as the 'right to life'[30]. One such instance may be when the pregnancy resulted from a woman getting raped. In such cases, the woman, did not under any circumstances provide her consent for the fetus to be attached to her body, and hence, her rights override the fetus's right to life. While even considering the conservative stance, Thomson argues that there should technically be no 'moral question' for the right to abortion in the cases of rape, as the woman did not provide anyone with the right to interfere in her body, and hence, in such circumstances it becomes 'morally permissible'[31].

A further argument that is extended from this is that the rationality that human beings possess, along with the ability to make decisions for themselves, is the unique factor which distinguishes them from animals or objects, and hence, they are deserving of respect and dignity. Kant explains this best stating that humans are "to be treated as ends in themselves, and never merely as means to an end"[32]. In the case of a survivor of rape, she not only suffers from psychological trauma, but also 'diminished

[29] Catriona Mackenzie, "On Bodily Autonomy," in Handbook of Phenomenology and Medicine, S.K. Toombs (ed.) (The Netherlands: Kluwer Academic Publishers, 2001), 417–439

[30] Judith Jarvis Thomson, "A Defense of Abortion," Philosophy & Public Affairs1:1 (Autumn 1971): 47–66

[31] Ibid.

[32] Immanuel Kant, Grounding for the Metaphysics of Morals, translated by James W. Ellington (Indianapolis: Hackett, 1981 [1785]), 36, AKA 428–429

personal agency'[33]. This is the kind of personal agency that one acquires in their adolescence, and it includes having full control and ownership of one's body[34]. This personal agency involves the "conviction that, well beyond cases of sheer bodily harm, there are things which a person ought not, and so will not, do to or with one's body… without one's consent"[35]. However, after a case of rape or sexual abuse, which is a serious personal attack on one's body, a woman's sense of personal agency is shaken, to the extent that the victim's belief about her body and herself become 'skewed', and results in her suffering from a 'radical diminution of herself'[36].

Meanwhile, looking at abortion and rape from a paternalistic, political lens, there is a constant transfer of power between a handful of institutions that take certain decisions regarding the woman and her body. The law transfers such power to medical practitioners. Eventually, the medical practitioners are the ones who regulate, control, and govern the circumstances and cases under which a woman can have access to an abortion. Hence, with such major constraints, women's bodies end up being "regulated and violated by institutions of the patriarchal society"[37], and the agency with regards to a woman's body is handed over to a third party whose decision-making process becomes crucial in dictating whether or not a woman should be bearing children, at a particular time in her life, and in which particular circumstances. Atkins and Hogget argue that such decisions of the medical practitioners are "more often likely to be moral than purely medical"[38]. They elaborate upon this by

[33] Laurence Thomas, "The Grip of Immorality: Child Abuse and Moral Failure," in *Reason, Ethics, and Society: Themes from Kurt Baier*, edited by J. B. Schneewind (Chicago, IL: Open Court, 1996), 144–167.

[34] Andrea Veltman and Mark Piper, 'Autonomy, Oppression, and Gender' (2014), Oxford Scholarship.
[35] Ibid.
[36] Ibid.
[37] Ibid.

[38] Atkins, S & Hoggett B, Women & The Law, Basil Blackwell, 1984, p87

stating that since the medical practitioners possess complete control of decision-making in such matters, they are often likely to be "swayed by moral reasons rather than medical judgment"[39], where certain opinions of theirs need not be reasonable. Hence, the decision regarding women's bodies and their 'motherhood' is often taken by medical practitioners, who are rarely sympathetic to the woman's needs. Moreover, in cases where speedy action needs to be taken, due to time constraints under the law, medical practitioners are also the reason behind the majority of the delays.

However, throughout the years, the legal system has evolved to make room for allowing women partial agency, with regards to their bodies. The private and public divide also affects a large amount of abortion cases. "Abortions of dubious legality are widely and readily available"[40] only to women who may possess the resources for an abortion at a private hospital, and have the likelihood of being treated much more differently than the woman who has no option but to seek the available services at a government hospital. In the former case, often many procedural requirements and delays are also minimized, which eventually works in favour of the women seeking abortion at a private health care center[41].

[39] Ibid.

[40] Mason, J.K. Medico-Legal Aspects of Reproduction and Parenthood (1990) p.105

[41] S.Sheldon, The Lax of Abortion and the Politics of Medicalisation' eds., J.Bridgeman and S.Millns, law & Body Politic Regulating the Female Body, Dartmouth, 1995

2.2 THE DERIVATION OF THE RIGHT TO 'BODILY AUTONOMY' AND 'REPRODUCTIVE RIGHTS' IN FEMINIST DISCOURSE

Universally, the basic understanding and application of the term 'reproductive rights' has been in relation with the 'right to found a family'. This is even in the case of the European Convention of Human Rights (ECHR), where even now cases of reproductive rights are filed under Article 8, which is the 'right to privacy or family life'[42]. However, the history of the western tradition also highlights the "bodily integrity of the individuals", and 'their right to protection against coercion by others", under the ambit of reproductive rights as well[43]. Moreover, international conferences on the matter are known to have defined 'reproductive rights' as the "rights of individuals to decide freely and responsibly about the number and spacing of their children"[44]. Hence, Cook argues that an individual's ability to exercise his or her reproductive rights freely is completely dependent upon whether they have a free access to their human rights[45].

However, feminists in the West critique the "male-derived notions of autonomy", as they do not take into account the "reality of women's reproductive experience", and the "female patterns of caretaking"[46]. Hence, Cook argues that even though this idea of 'autonomy' is principally a 'positive value', it essentially fails when put into practice[47]. The important element to be taken into account, in this instance, is that the concept of 'autonomy' needs to be reconceived in such a way that the "claim

[42] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950

[43] Rosalind Petchesky, Abortion And Woman's Choice: The State, Sexuality, And Reproductive Freedom (1990)

[44] Carla Makhlour Obermeyer, A Cross Cultural Perspective on Reproductive Rights, Human Rights Quarterly, Volume 17, umber 2, May 1995.

[45] Rebecca Cook, International Human Rights and Women's Reproductive Health, 24 STUD. FAM. PLAN. 73 (1993)

[46] Ibid.

[47] Rebecca Cook, Feminism and the Four Principles, *in* Principles Of Health Care Ethics (R. Gillon ed., 1993)

of constitutiveness of social relations" is seen in conjunction with "the value of self-determination"[48], in order to take into consideration the female nature nurturance and care, and the different way of involvement in daily relationships. Moving away from the universality of human rights, the feminist discourse provides a separate methodology that is more pertinent to the reality of women's daily lives, and while doing so, the approach also takes into account the cultural difference and intersectionalities that play a pivotal role in bringing women closer to their aim of gender equality, and access to reproductive rights and their right to bodily autonomy[49]. The idea that cultural relativism is merely used as a defense to suppress the human rights of individuals in more oppressive states around the world, is widely considered by feminists as a male-dominated argument that has been often over-used to bring about the universality of human rights at an international level, while ignoring cultural diversity entirely. The framework of reproductive rights, however, cannot stem from the universal human rights formula, as the diversity of various cultural and traditional contexts needs to be taken into account for the reproductive rights and the right to bodily autonomy, in order for them to be implemented[50].

In order to assess the availability of reproductive rights in a particular society, one must first understand the status of women in that particular society. Obermeyer argues that even though "complete equality between the sexes" is an essential ingredient for the complete attainment of a woman's reproductive rights, however, the social reality is that "complete gender equality" has not been achieved by any society in the world as of now[51]. This is the reason why international

[48] Jennifer Nedelsky, Reconceiving Autonomy: Sources, Thoughts and Possibilities, 1 Yale J.L. & Feminism 7, 9 (1989).

[49] Carla Makhlour Obermeyer, A Cross Cultural Perspective on Reproductive Rights, Human Rights Quarterly, Volume 17, Number 2, May 1995.

[50] Sonia Correa & Rosalind Petchesky, Reproductive and Sexual Rights: Feminist Perspectives, in *Population* Reconsidered (G. Sen *et al.* eds., 1994)

[51] Carla Makhlour Obermeyer, A Cross Cultural Perspective on Reproductive Rights, Human Rights Quarterly, Volume 17, umber 2, May 1995.

instruments such as the Convention for the Elimination of All Forms Discrimination Against Women (CEDAW)[52] play such a pivotal role in encouraging states to bring their laws as close to the attainment of these ideal goals of gender equality as possible. However, the cultural differences among the states make the achievement of this goal slightly challenging. States like Pakistan, and India, which are bound by their shared history of centuries-old cultures and traditions, struggle with incorporating the international instruments into their domestic laws, and implementing effective policies in order to achieve the essence of the Convention on the whole. Whereas, Muslim States, like both Pakistan and Malaysia, which are bound by their religious constraints usually object to any provisions which are incompatible with Islamic values[53]. Their reservations to international documents as well as their selective application of the Conventions often make it difficult to achieve the global attainment of gender equality. Thus, the important question arises: whether human rights and gender equality as defined in international instruments can be compromised upon in various cultural and religious contexts, while struggling to protect the reproductive rights of women and restore their bodily autonomy[54].

[52] Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, G.A. Res. 34/100, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979).

[53] Ann Mayer, Islam And Human Rights: Tradition And Politics (1991); Abdullahi An-Na'im, The Rights of Women and International Law in the Muslim Context, 9 WHITTIER L. REV. 491 (1987)

[54] Carla Makhlour Obermeyer, A Cross Cultural Perspective on Reproductive Rights, Human Rights Quarterly, Volume 17, umber 2, May 1995.

2.3 SOCIO-CULTURAL AND RELIGIOUS CONSTRAINTS: REPRODUCTIVE RIGHTS AND SOCIETAL VULNERABILITIES

United Nations Population Fund (UNFPA), in its 2005 report of 'Cultural Programming' explores the cultural and religious dogmas and traditions of various community groups in Asia, which essentially lead to a violation of their reproductive rights, such as unwanted pregnancies and higher maternal mortality rates[55]. This particular report highlights the fact that given certain gender issues which may be culturally relative, such as the issue of women's reproductive rights, do require wide-spread awareness campaigns, however, it is important to note that they demand "more political than cultural sensitivity". This may be due to the fact that several politicians are reluctant to initiate this particular discourse, as they do not wish to provoke opposition within their constituencies, due to fear of losing out on votes[56]. Mostly, politicians do not prefer to deviate from the populist narrative, which is often created by certain religious bodies in the country, such as the Council of Islamic Ideology (CII) in Pakistan.

Furthermore, the 'culture of silence', whereby any form of dialogue surrounding the topics of abortion and rape are stigmatized, is another important reason which results in undesirable reproductive health outcomes in women. The patriarchal views on women's sexuality that have been 'culturally' imposed on women over the years, which assume that a woman is sexually "passive, devoid of desire, and subordinate to male needs"[57], including the glorification of the 'virginity' and 'chastity' of a woman, further contribute to such cultural constraints. In the case of India, where Vedic

[55] Kisekka, Mere N. "Cultural Programming: Reproductive Health Challenges and Strategies in East and South-East Asia." United Nations Population Fund, 2005.

[56] Ibid.

[57] Ibid.

texts, such as the *'Kamasutra',* point towards the historical sexual liberalism of Indian women, it was actually the 'Victorian values' imposed by the British rulers, before independence, which reversed the pre-existing sexually liberal values, and introduced a "puritanical attitude to sex even within marriage and the home"[58]. It is no surprise that, post-1947, both India and Pakistan also inherited the British-era laws, in the form of the Indian Penal Code 1862, and the Indian Code of Criminal Procedure 1898, which criminalized abortion providing punishment for the woman[59]. Malaysia, also being a common law country, criminalized abortion completely, where initially, Sections 312-315 of the Malaysian Penal Code were influenced completely by the Indian Penal Code of 1871.

However, both in Pakistan and Malaysia, religion is also a strong driving force, in terms of the socio-cultural constraints for reproductive rights of women. While considering Islamic jurisprudence, the concept of abortion is not exactly supported in the text, except for within the first trimester, and when the woman's life may be in danger. The main sources of Shariah law are supposed to be derived from the Quran and Sunnah, however, neither of these explicitly mention 'intentional abortion'[60]. Instead, terms such as 'forced miscarriage' have been used in the text[61]. The idea of killing a life, specifically children, has been strictly condemned in the Quran[62]. However, there is no consensus on whether it is actually unborn children that the Quran refers to. Furthermore, the stages of foetal

[58] Chakraborty, Kaustav and Rajarshi Guha Thakurata. "Indian concepts on sexuality" Indian journal of psychiatry vol. 55,Suppl 2 (2013): S250-5.

[59] Siddhivinayak S Hirve (2004) Abortion Law, Policy and Services in India: A Critical Review, Reproductive Health Matters, 12:sup24, 114-121, DOI: 10.1016/ S0968-8080(04)24017-4

[60] Katz MH. Brockopp. The problem of abortion in classical Sunni fiqh, Islamic Ethics of Life: Abortion, War and Euthanasia , 2003Columbia University of South Carolina Press

[61] Gilla K Shapiro; Abortion law in Muslim-majority countries: an overview of the Islamic discourse with policy implications, Health Policy and Planning, Volume 29, Issue 4, 1 July 2014, Pages 483–494.

[62] *The Qur'an*. Al-An'am, 6:140, 6:151; *The Qur'an*. Al-Isra, 17:31

development are also vastly debated among the various schools of thought, and hence, they lead to a highly varied interpretation of Shariah law, with regards to termination of pregnancy[63]. However, there is unanimous consensus across all schools of thought within Islam, that after 120 days of pregnancy, the 'ensoulment occurs' within the womb, and the 'foetus possesses a spirit', thus, termination of pregnancy after this point is strictly prohibited under Muslim law[64].

This stance indoctrinated in religion evidently carries with itself a 'moral' judgment on the right to abortion. However, the so-called 'morality' often becomes more restrictive than the scope of the law itself, which has essentially been derived from Shariah law. A large gap between the legislative measures taken for providing abortion until the first four months, and the reality of available medical procedures, suggests the reluctance of medical practitioners to provide such medical facilities due to the stigmatization that heavily surrounds this issue within the religion[65]. In Pakistan, 67% of the medical practitioners have been recorded to have an 'unfavorable attitude' towards abortion, while 81% of these practitioners "called for stricter laws to be introduced", due to their own moral indictments[66]. It is due to these reasons, that it is no surprise both Malaysia and Pakistan fall in the top four morally conservative countries in Asia according to a report in 2014. Both countries were

[63] Musallam BF., Sex and Society in Islam: Birth Control before the Nineteenth Century, 1983, Cambridge. Cambridge University Press

[64] Musallam BF., Sex and Society in Islam: Birth Control before the Nineteenth Century, 1983, Cambridge. Cambridge University Press; Bowen DL. Abortion, Islam, and the 1994 Cairo Population Conference, International Journal of Middle East Studies, 1997, vol. 29 (pg. 161-84); Bowen DL. Brockopp JE. Contemporary Muslim ethics of abortion, Islamic Ethics of Life: Abortion, War and Euthanasia, 2003 Columbia University of South Carolina Press; Atighetchi D., Islamic Bioethics: Problems and Perspectives, 2007 Dordrecht The Netherlands: Springer; Al-Hibri AY. Family planning and Islamic jurisprudence, KARAMAH: Muslim Women Lawyers for Human Rights, 2011.

[65] Farooq, Uzma. "Abortion in Pakistan: Morality Becomes More Restrictive Than the Law." Asia Safe Abortion Partnership, 15 Mar. 2013.

[66] Ibid.

evidently most opposed to "contraceptives…extramarital affairs…and abortion", among other issues[67]. However, it is important to consider whether these trends of conservative behavior stem mainly from centuries old religious texts, and practices ingrained in tradition, or whether it is the notion trickling down from the State's de facto interest in protecting fetal life.

2.4 CHOICE: 'STATE'S INTEREST IN PROTECTING LIFE' AND THE 'WOMAN'S INTEREST IN HER BODILY AUTONOMY'?

The idea behind 'personal autonomy' is essentially that a woman is free to make a decision governing her own body, and is not limited by any "controlling interference", as well as "limitations that prevent a meaningful choice"[68]. However, the conflict comes in with the State's interest in the 'potential life' of the foetus, along with the apparent moral responsibility of protecting a life "cannot adequately protect itself"[69]. Weighing and balancing the conflicting rights of the foetus and that of the woman, hence, become a challenging aspect in legal jurisprudence.

The arguments weighing in favor of the State are that the foetus has the potential of growing into a valuable and productive member of the society in the future, with social and political rights. Such arguments initiate from the Aristotelian theory of all living things having "a good or an end proper to their species toward which they naturally tend to develop from a formless or potential state."[70] And hence, killing such 'potential' becomes a moral dilemma. This idea of competing is rejected by Tooley who states that the foetus does not possess a 'right to life'. He argues that "an

[67] Zurairi, A.R. "Malaysia among World's Most Morally Conservative Countries, Poll Finds |Malay Mail, 18 Apr. 2014.
[68] Beauchamp, T. L. and Childress, J. F. 2013. Principles of biomedical ethics. 7th ed. New York: Oxford University Press.

[69] Scott, Rosamond. "Rights, Duties and the Body: Law and Ethics of the Maternal-Fetal Conflict", Bloomsbury. 2002.

[70] Morgan "The Potentiality Principal", 16

organism possess a serious right to life only if it possesses the concept of a self as a continuing subject of experiences and other mental states."[71]

Furthermore, while assessing these competing rights of the woman and the foetus, Rand provides that in his opinion, "to equate a potential with an actual is vicious: to advocate the sacrifice of the latter to the former, is unspeakable." Moreover, the lack of "rationality, self-awareness, and emotional recognition" in a foetus also adds towards the argument. To be human, one needs to have formed human relationships, and have physical and social experiences[72]. None of these qualities can be recognized in a foetus. Considering the fact that it does not become a legal debate every time a man ejaculates, for fear of 'killing' the sperm, in order to take into account the 'potential life' of the egg, similar is the redundancy of the pro-life argument[73].

Moreover, there are certain legal jurisdictions where there is a prescribed 'waiting period' before the abortion procedure can be carried out, are also another way of asserting State control. This statutory requirement, added to the mandatory counseling implies that women are not capable of making rational decisions on their own, and are likely to act impulsively[74].

Thomas has argued that the interest of women in their bodies can be equated to that of having 'property interests', whereby the foetus can be claimed to be a 'trespasser', and the State perpetuating such rights to trespass on private property[75]. The woman, hence, should possess all control and

[71] Tooley, Michael (1972) "Abortion and Infanticide", in Philosophy and Public Affairs, Vol. 2, No. 1, 44
[72] Jaggar, Alison (1974) "On Sexual Equality", in Ethics, Vol. 84, No. 4, 279-283

[73] Roxburg, Nina. "Whose rights are the most right? The Dilemma of Autonomy in a Society: On Abortion, Women, and Human Life. " Australian Institute of International Affairs, 2016.

[74] Allen, "Tribe's Judicious Feminism", 191

[75] Judith Jarvis Thomson, "A Defense of Abortion," Philosophy & Public Affairs1:1 (Autumn 1971): 47–66; Allen, "Tribe's Judicious Feminism", 193; Roxburg, Nina. "Whose rights are the most right? The Dilemma of Autonomy in a Society: On Abortion, Women, and Human Life. " Australian Institute of International Affairs, 2016.

freedom to prevent any such 'trespassing' or intrusion in her body, at her will, and without being subjected to any waiting periods or mandatory counselling sessions.

3. ABORTION IN A COMPARATIVE PERSPECTIVE – A LEGAL OVERVIEW OF PAKISTAN, INDIA AND MALAYSIA

3.1 INDIA

According to a recent study in India, a massive 15.6 million abortions are carried out annually. However, only 3.4 million out of these are actually carried out in legal healthcare facilities[76]. Media reports indicate that an Indian woman expires every two hours, due to unsafe abortion facilities[77]. Despite having an almost fifty year old law that allows the termination of pregnancy to women at any point between 12 and 20 weeks of pregnancy[78], these statistics seem alarming.

In August 2017, the Supreme Court of India declared 'privacy as a fundamental right', and further stated that this right is ingrained in values such as the 'right to dignity' as provided under the Constitution[79]. The judgment of *Justice K S Puttaswamy v Union of India*[80] unanimously held that the 'right to privacy' includes "personal autonomy relating to the body, mind, and… making choices"[81]

[76] Giddu, Bhavani. "National Estimate of Abortion in India Released." *Guttmacher Institute*, 20 Dec. 2017.

[77] Unsafe Abortions Killing Thousands in India, BBC NEWS, April 17, 2013.

[78] The Medical Termination of Pregnancy Act, 1971, Section 3, 5

[79] *Justice K S Puttaswamy v Union of India* (2012a): Writ Petition (Civil) No 494 of 2012 (majority opinion), Supreme Court judgment

[80] Ibid.

[81] Ghosh, Arijit, and Nitika Khaitan. "A Womb of One's Own: Privacy and Reproductive Rights." *Economic and Political Weekly*, 6 Aug. 2018.

with regards to reproductive rights, which may be covered by Article 21 of the Constitution of India[82]. However, another relevant case, in this context, is *Suchita Srivastava v Chandigarh Administration*[83], where certain provisions from the Medical Termination of Pregnancy Act (*Hereinafter referred to as MTP Act*), 1971, were brought to question. The MTP Act legalized abortion in India until a maximum of twenty weeks of pregnancy, in cases where woman's physical or mental health are at risk- a legislation that was enacted even two years prior to the historic judgment of *Roe v. Wade*[84] passed by the US Supreme Court. The MTP Act requires a pregnant woman to attain authorization from one medical professional if the foetus is under 12 weeks, however, she requires approval of two medical professionals if the foetus is between 12 to 20 weeks[85]. After this point, the pregnancy can only be terminated if the medical practitioners are of the opinion that it may endanger the pregnant woman's life[86]. This absolute power that is transferred to the medical practitioners, to make a choice about the woman's body, at any stage of the pregnancy, is the fact that has been questioned in *Suchita Srivastava v Chandigarh Administration*[87]. However, the Court justified this contention by stating that such constraints need to be placed to balance the "state's legitimate interest in protecting the woman's health, as well as the potentiality of human life"[88].

[82] Article 21, *The Constitution of India*, 26 January 1950

[83] *Suchita Srivastava v Chandigarh Administration* (2009): SCC, SC, 9

[84] *Roe v Wade* (1973): 410 US 113

[85] The Medical Termination of Pregnancy Act, 1971, Section 3

[86] The Medical Termination of Pregnancy Act, 1971, Section 5

[87] *Suchita Srivastava v Chandigarh Administration* (2009): SCC, SC, 9

[88] Ghosh, Arijit, and Nitika Khaitan. "A Womb of One's Own: Privacy and Reproductive Rights." *Economic and Political Weekly*, 6 Aug. 2018.

This, however, is not the only point of concern in the MTP Act. Another major issue is the fact that, under Section 3, in cases where there may be a 'failure of contraceptives', the MTP Act only refers to "married women", while disregarding that such a problem can also occur with a sexually active unmarried woman. Hence, for unmarried women, the "anguish caused by an unwanted pregnancy" cannot be "presumed to constitute a grave injury to her mental health"[89]. Furthermore, other limitations, such as the financial constraints, professional choices, and other social concerns have been completely left out of the ambit of the law. This leaves greater room for arbitrary interpretation of the law by the Courts.

Hence, it is no surprise that such arbitrary interpretation of the law on abortions have made recurring highlights on the Indian news in the recent years, as Courts fail to provide justice, particularly to victims of rape, who require the Court's permission to terminate their pregnancies. This is mainly due to the provision under the MTP Act, which after 20 weeks, only permits abortions if there may be a grave risk to the life of the pregnant woman, and if the medical practitioner provides the abortion in "good faith". However, even so, as a considerable margin has been provided to the medical practitioners, they refuse to provide authorization for fear of legal penalties, and require women to seek legal recourse. Thus, the authorization of the abortion falls into the Court's jurisdiction, rather than that of the medical practitioner. Considering the fact that the Courts are not equipped to make any informed decision on such issues, a medical board is employed for this purpose. In numerous cases, such delays caused by the medical boards result eventually in a denial of authorization for abortions by the Court[90].

[89] The Medical Termination of Pregnancy Act, 1971, Section 3 (2) (b)(ii)

[90] *Ms. Chanchala Kumari v. Union of India & Anr*. 871 of 2017, at 1- 2, S.C.C. 21 Sept. 2017; *Savita Sachin Patil v. Union of India*, W.P.(C) 121 of 2017, S.C.C., 28 Feb. 2017

The influx of Court petitions in the recent years, suggest that this is a highly problematic provision, as not only do the Courts tend to delay the abortion procedures, which may eventually risk the woman or girl's life and health, but also that this provision is essentially disempowering women, and leaving them at the disposal of the Courts and the law each time they seek medical facilities, rather than the expertise of the medical practitioners. Examples of cases such as, 'Y', the ten year old survivor of rape from Chandigarh being denied abortion by the Supreme Court of India in August 2017, as she had passed the 20 week mark, are far from setting a liberal precedent in the Indian jurisprudence[91]. Similar is the case of a 12 year old survivor of rape in Madhya Pradesh, who had to undergo a Caesarean-section after the High Court of Madhya Pradesh denied her plea for abortion in September 2017[92]. Moreover, *R. v the State of Haryana* was another such case, where a 14 year old survivor of rape was denied abortion, even after undergoing various medical examinations under the state medical boards, who recognized the risks to her physical and mental health[93]. In many cases, the Courts fail to recognize the harmful consequences of their decisions, when they deny abortions, especially to young survivors of rape. One such example was a 14 year old survivor of rape from Uttar Pradesh who was forced by society to marry her rapist, after the Court rejected her petition for an abortion[94]. Many times, even after admitting that the woman may have been suffering severe psychological trauma, the Courts have not managed to provide legal recourse to those in need. In May 2017, a 35 year old woman from Bihar was denied an abortion by the Supreme Court of India, even though she was living with HIV, and even after Justice Dipak Misra accepted that this may have been

[91] *Alakh Alok Srivastava v. Union of India & Ors*., W.P. (C) 565 of 2017, S.C.C. 28 July 2017; Nipun Saxena v. Union of India, Ministry of Home Affairs No. 42374 of 2012, S.C.C. 2012

[92] Rathi, Nandini. "What's Wrong with India's Abortion Laws?" *The Indian Express*, 6 Dec. 2017.

[93] *R v. State of Haryana*, W.P.(C), 6733 of 2016, H.C. P.& H., at 74, 30 May 2016

[94] Kokra, Sonali. "14-Year-Old Rape Victim Forced To Marry Alleged Rapist To Support The Baby Born Out Of Rape." *HuffPost India*, 31 July 2017.

a "traumatic experience" for the victim[95]. In many cases, the Courts have realized that forcing a woman to continue an unwanted pregnancy may have caused "incalculable harm and irreversible injury giving rise to emotional trauma", and hence, in an attempt to sympathize, they have issued compensation to the women, while denying them abortion at the same time[96].

A record of over 30 such petitions have been filed with the State High Courts and the Supreme Court of India, since 2009, as the law requires the woman to acquire judicial authorization after the 20 week mark[97]. This is highly problematic, as the rulings in each of these cases have been fairly arbitrary and the interpretation of the law have varied with each State High Court. What is even more problematic about these cases, is that, especially in cases of minors, or with women in rural areas, who may not become aware of their pregnancy until a few months later. This is also due to the lack of 'registered health care providers trained to provide abortion services' in rural parts of India[98]. Furthermore, a lack of societal awareness about abortions, as well as the stigmatization of the issue, has also contributed to causing delays in timely provision of abortion facilities. For instance, a study from the State of Bihar in India shows that about 75 percent of women are not aware of the fact that abortion is legal[99]. Additionally, various other misconceptions about the law, among the medical practitioners, also lead to a delay in the procedure. There have been several cases where medical practitioners have demanded spousal consent, or even requiring rape victims to first 'prove their

[95] *Ms. Z v. The State of Bihar and Others*, C.A. 10463 of 2017, S.C.C. 17 Aug. 2017

[96] *Ms. Z v. The State of Bihar and Others,* C.A. 10463 of 2017, S.C.C. 17 Aug. 2017; *Nipun Saxena v. Union of India Ministry of Home Affairs and Others.* No. 76158 of 2017, S.C.C. 1 Aug. 2017.

[97] Shah, Payal. "Ensuring Reproductive Rights: Reform to Address Women's and Girls' Need for Abortion after 20 Weeks in India." Center of Reproductive Rights, 2018, p 6

[98] Shah, Payal. "Ensuring Reproductive Rights: Reform to Address Women's and Girls' Need for Abortion after 20 Weeks in India." Center of Reproductive Rights, 2018, p 12

[99] Mary Philip Sebastian, et al., Population Council, Unintended Pregnancy and Abortion in India: Country Profile Report, 54 (2014)

allegations before being permitted to access abortion', whereas no such requirements are provided under the law[100].

For survivors of rape, especially in the case of minors, the pregnancy is not evident until the second or third trimesters[101], and in such cases, to have such pregnancy enforced upon a survivor can be connected to 'foreseeable physical and mental health harm'[102]. In this regard, The Supreme Court of India has held a fairly arbitrary stance, with many examples of the Court allowing abortions as well as denying them in many cases. On one hand, in October 2017, the Supreme Court of India has pushed for a "permanent mechanism for the expedient termination of pregnancies" even after the 20 week mark, where survivors of rape are concerned, and urged the government to form permanent committees, encouraging speedy resolution of cases where women and girls have passed the 20 week mark in their pregnancies[103]. Moreover, in one case, the Supreme Court has even allowed a 13 year old girl to proceed with an abortion while being 32 weeks pregnant, because she is "likely to suffer grave injury, not only to her physical, but mental health also"[104]. However, in contrast, there have been other cases, where even after identifying the foreseeable psychological harm and trauma that a rape survivor undergoes, the Court has arbitrarily denied abortions, even to minors[105]. Such contrasting outcomes,

[100] *Bashir Khan v. State of Punjab*, 14058 of 2014, Punjab-Haryana High Court., August 2, 2014; *Vijender v. State of Haryana and others*, CWP No. 20783 of 2014, October 7, 2014*; R v. State of Haryana*, W.P.(C), 6733 of 2016, H.C. P.& H., at 74, 30 May 2016

[101] *Alakh Alok Srivastava v. Union of India & Ors*. W.P.(C) 565 of 2017, S.C.C. 28 July 2017.

[102] The Medical Termination of Pregnancy Act, 1971; Shah, Payal. "Ensuring Reproductive Rights: Reform to Address Women's and Girls' Need for Abortion after 20 Weeks in India*."* Center of Reproductive Rights*,* 2018, p 12

[103] *Anusha Ravindra v. Union of India & Ors*. 934 of 2017, S.C.C. 13 Oct. 2017

[104] *Murugan Kayakkar v. Union of India & Ors*., W.P.(C) 749 of 2017, S.C.C., 6 Sept. 2017*; X v. State of H.P. and Others,* W.P.(C) 2250 of 2017, 17 Oct. 2017

[105] *R v. State of Haryana,* W.P.(C), 6733 of 2016, H.C. P.& H., 30 May 2016

often based on similar facts, set confusing precedent and result in lack of clarity from the highest Court of India, and hence, evidently also for the medical practitioners, and the larger public.

It is, hence, evident that effective measures need to be taken whereby third party authorization is minimized as much as possible, and in particular, judicial authorization. Moreover, medical professionals must be provided legal affirmation and awareness that they may carry out post 20-week abortion procedures without having fear of being penalized, or legally requiring authorization from Courts. Furthermore, especially in cases of survivors of rape, the medical practitioners and Courts must take into account the additional psychological harm and trauma caused to the woman or girl, and hence, should not delay the provision of abortion facilities under the law.

3.2 PAKISTAN

In Pakistan, about 93 women out of every 1000 suffer unintended pregnancies. This ratio is considerably high as compared to that of India, where 70 out of every 1000 women face the same[106]. According to a report from 2012, the total number of unintended pregnancies in Pakistan was about 4.2 million, while almost 54% of these were terminated[107]. According to another survey by Marie Stopes International, Pakistan, is one of the six countries that make up about half of the maternal deaths worldwide[108].

It was only under an amendment in 1990 that Pakistan managed to revise its outdated criminal laws, regarding abortion, which it inherited from the British-era Penal Code of 1860. However, in an

[106] Giddu, Bhavani. "National Estimate of Abortion in India Released." Guttmacher Institute, 20 Dec. 2017

[107] Sathar Z et al., Induced abortion and unintended pregnancies in Pakistan, *Studies in Family Planning*, 2014, 45(4):471–491; Vlassoff, Michael, et al. "Abortion in Pakistan." Guttmacher Institute, 20 Apr. 2016

[108] Marie Stopes International, Pakistan, https://mariestopes.org/where-we-work/pakistan/

attempt to 'liberalize' the Penal Code regarding "offences against the human body", the legislatures referred to Islamic jurisprudence on the matter, rather than the evolving international standards on laws of abortion. The Council of Islamic Ideology (CII) is a constitutional body in Pakistan, which was established by an authoritarian regime during 1962. The CII gained legitimacy by the populist rhetoric of said authoritarian regime, in order to advise the legislative assembly on Shariah Law. Hence, according to the recommendations of the CII and as stipulated by the injunctions of Islam, the revision in 1990 provided that an abortion may only be permissible, if it is conducted in "good faith" in order to save the pregnant "woman's life, or providing necessary treatment" to her[109]. However, this amendment in the Pakistan Penal Code is not for the purpose of providing reproductive rights to women, but rather the language of the law suggests that the purpose is to punish any individual who "causes a woman to miscarry"[110]. This provision also brings under its ambit a woman who attempts to terminate her own pregnancy. An important aspect of this law is that it does not use the words 'abortion', or 'termination of pregnancy', but rather 'causing a miscarriage', which has been expressly stated as a crime, with up to ten years of imprisonment[111]. Moreover, under this amendment, the two crimes, namely *'Isqat-i-Haml'* and *'Isqat-i-Janin'*, provide punishment for any individual, including medical practitioners, who may 'cause a miscarriage' to a woman with a child whose organs may or may not have formed. However, the only exception made is to save the life of said woman, and to "provide necessary treatment", only in the case where the child's organs have not formed. Terms such as 'necessary treatment', in this amendment, evidently make this law fairly vague, and difficult to interpret, as no further explanation has been provided under this provision as well. It is no surprise that

[109] Pakistan Penal Code (Act XLV of 1860), Chapter XVI, Section 338(A)-(C)
[110] Ibid.

[111] Ibid.

medical practitioners refuse to risk their careers by providing abortion services to women, even in the worst of medical conditions, unless it endangers her life[112].

Furthermore, the absence of awareness, even among medical practitioners, regarding the legality of the procedure under various circumstances, is a major reason why most women have to resort to clandestine methods. According to a research by the Pakistan Medical Council, it is often the medical practitioners who show reluctance in carrying out abortion procedures for women at healthcare facilities, due to the 'cultural taboo' surrounding the idea of abortion, and the narrow view adopted within the religion[113]. This study suggests that only 37.7% of the medical practioners believed that current laws regarding abortion ought to be amended, however, not to be liberalized, but they ought to be made stricter. The rest of the fraternity believed that no change within the current laws was required[114]. This is majorly due to the fact that all practicing gynecologists consider their personal beliefs to impact their professional practices, and do not eventually want to be labeled as an "abortionist" within the medical fraternity[115].

Religion, hence, becomes an important factor in this struggle to liberalize abortion laws in Pakistan. This is the reason why a majority of politicians in the country do not raise controversial subjects such as the question of reproductive rights for women, as it would result in a reduction in their voter bank.

[112] Pakistan Medical Research Council. 2003. "Attitudes of Health Care Providers to Induced Abortion in Pakistan".

[113] Ibid.

[114] Ibid.

[115] Ibid.

Another reason behind the absence of legal and political discourse on reproductive rights, and the impending need for clarification of the vague terminology used within the law, is the lack of litigation and jurisprudence on this amendment in Pakistani Courts. This is the reason why many other factors which may result in a woman requiring abortion facilities, have not been highlighted under the law. As opposed to the current provision in the Penal Code, many women who have undergone illegal abortions in Pakistan, have emphasized that their reasons for abortion have ranged from "sexual assault, poverty, desire for a smaller family, premarital affair, extramarital affairs", to "contraceptive failure, and abnormal foetus"[116]. However, despite numerous cases of rape, incest, societal pressures and constraints, abortion facilities are not accessible to women on request. With lack of legal attention on these causes of abortion services being attained by more than 2 million women every year, it is quite evident why the issue gets suppressed beneath debates surrounding religion and 'social norms and culture'.

While addressing social and cultural norms, it is important to highlight the fact that, as of 2016, the Pakistani Electronic Media Regulatory Authority (PEMRA) also banned any kind of media advertisements and awareness campaigns relating to contraception and family planning[117]. Such demands, met by the government departments, are often initiated by religious scholars who condemn all family panning practices in the country[118], and reduce the status of women to the traditional roles i.e. as subservient mothers, wives and child bearers. It is due to these cultural norms, perpetuated by religion, that no educational and awareness campaigns regarding reproductive health services are

[116] Awan, Purniya. "Advocate Blog: Unpacking Abortion in Pakistan." *Youth Coalition*, 12 Dec. 2017; Pakistan Medical Research Council. 2003. "Attitudes of Health Care Providers to Induced Abortion in Pakistan".
[117] Reuters. "Pakistan Bans Contraceptive Advertisements on TV and Radio." *The Guardian*, Guardian News and Media, 29 May 2016

[118] Patel, Rashida Mohammad Hussain. "Family Laws and Judicial Perceptions." Supreme Court of Pakistan, 2003

initiated by the State. As a result, not only is the maternal mortality rate extremely high, but also lack of health facilities, leads to young pregnant women developing rare health conditions such as obstetric fistula. There are approximately 5000 cases of fistula which occur among Pakistani women each year, which leads to these women eventually being ostracized by the society[119]. This condition is prevalent among young survivors of sexual assault, or young mothers, under the age of 18, who do not have access to adequate reproductive health facilities.

It is also important to acknowledge the lack of legal recourse available for survivors of rape, requiring abortion services in Pakistan. The issue for rape survivors in Pakistan is having to deal with a problematic criminal justice system, if in the first place, and if at all, they wish to pursue the matter legally. The conviction rate for such cases is almost close to none[120]. The chances of an unmarried woman, who has been previously sexually active, claiming to be raped, and aiming to attain justice within the current criminal justice system, are also close to none. This is due to the fact that the Courts judge such cases based on the victim's previous sexual history and whether their "character appears doubtful"[121]. Moreover, marital rape is recognized neither within the legal framework, nor in religion. Hence, any claims of a married woman being raped are all invalid under the law. Hence, with such a problematic nature of the rape laws in Pakistan, it is evident that no woman would voluntarily file a petition for her right to abortion in a Court of law, while also claiming to be raped. This would mean that the woman would first have to prove the fact that she has been raped, before reaching a point where she can claim her right to abortion on this basis. This major lacunae in the legal system has been

[119] Amnesty International. "Pakistan- Submission to the United Nations Committee on Social, Economic, and Cultural Rights, 61st Session." Office of the High Commission for Human Rights, 2017

[120] Chaudhry, Asif. "Official Data since January 2018: No Conviction in 141 Child Rape Cases Reported in Lahore so Far." *DAWN*, 10 Aug. 2018; Khan, Azam. "Zero-Conviction Rate for Rape: Senator Proposes Constitutional Changes." The Express Tribune, 30 June 2014

[121] *Ghulam Mohay-ud-din vs. The State*, 2012 PCrLJ 1903

perpetuating discriminatory practices, resulting in women having to resort to illegal abortion services, and unsafe reproductive health facilities.

Hence, it is essential that adequate amendments be proposed in Section 338 of the Penal Code in order for it to become less restrictive, in terms of allowing abortion services to survivors of rape, not just for 'necessary treatment'. Moreover, policies regarding safe abortion facilities in case of unwanted pregnancies, resulting from rape, should be formulated and effectively implemented.

3.3. MALAYSIA

Malaysia faces approximately 90,000 abortions every year, according to a report by the Federation of Reproductive Health Associations Malaysia[122].

Before amendments in Section 312 of the Malaysian Penal Code in 1971 and 1989 respectively, abortion was criminalized in the country, under all circumstances, as per the archaic Colonial-era abortion laws which reached Malaysia through the sub-continent, in the form of Indian Penal Code, 1871[123]. These amendments in 1971 and 1989 allowed women to obtain abortion services through a registered medical practitioner, in cases where their life, physical and mental health are at risk[124]. This amendment does not distinguish between a woman with less than four months of pregnancy, and a woman "quick with child" i.e. after four months of pregnancy[125]. Strictly under the

[122] Federation of Reproductive Health Associations Malaysia (FRHAM) (2015) Country Profile. On universal access to sexual and reproductive rights – Malaysia, p.4

[123] Archer, Nandini. "The Law, Trial and Imprisonment for Abortion in Malaysia." Edited by Marge Berer, International Campaign for Women's Right to Safe Abortion, June 2018,

[124] Malaysia: Penal Code, Act No. 574 of 1997, 7 August 1997, Section 312

[125] Ibid.

law, the medical practitioners have not been restricted by time limitations depending on various stages of the pregnancy. Considering the fact that the language of the law can be interpreted as being seemingly liberal, civil society organizations are of the opinion that survivors of rape or incest are implicitly covered by the law, as there is serious risk of damage to 'mental health' in such cases[126]. However, there is a substantial difference between allowing a liberal interpretation of the law, and on-ground realities, when it comes to accessibility of abortion for women in Malaysia. Most medical practitioners are of the opinion that survivors of rape, requesting abortion services, are not explicitly covered by the law, and hence, cannot obtain such facilities legally[127]. Furthermore, with regards to girls younger than 18 years of age, the requirement is to obtain consent from a parent or a guardian, when requesting abortion services at a health care facility. In cases of rape, as per the law, the doctor, even at private healthcare facilities, is required to inform the authorities if the parents claim that their daughter has been raped, and hence, it (unwillingly, under some circumstances) leads to a criminal case[128]. Even so, doctors at Government healthcare facilities are generally not known to be empathetic and supportive of performing an abortion due to rape[129].

In other cases, the law lacks an effective implementation mechanism, as public hospitals fail to provide abortion facilities to women, and hence, women have to resort to private clinics for abortion services, which are often expensive. There are approximately 240 private clinics offering abortion facilities to women in Malaysia, however, most of these are not inspected for the provision of safe

[126] "RRAAM: Reproductive Rights Advocacy Alliance Malaysia." RRAAM Reproductive Rights Advocacy Alliance Malaysia RSS, 2007

[127] Tong, Wen Ting, and Veenah Gunasegaran. "Issues to Safe Abortions in Malaysia: Reproductive Rights and Choice." Edited by Wah Yun Low, United Nations Population Fund, Aug. 2013

[128] "RRAAM: Reproductive Rights Advocacy Alliance Malaysia." RRAAM Reproductive Rights Advocacy Alliance Malaysia RSS, 2007

[129] Supra 120.

abortion services and treatment, necessarily[130]. Moreover, these facilities are not accessible to women who cannot afford between US $60 to $800, depending on the stage of pregnancy[131].

Another factor, which hampers the easy accessibility of abortion facilities, is the lack of awareness, not only among the general public, but also among medical practitioners. About 43% of doctors and nurses were unaware of the legality of abortion, according to a survey in 2007[132]. Over 80% of doctors were uncertain regarding the legality of abortion, in cases of rape[133]. It is essential to note that before 1989, several medical practitioners were prosecuted and penalized for conducting abortions in the past, whereas, no such cases have been brought to courts post-1989[134]. However, even so, most of the doctors have been known to hold a 'pro-life' stance when it comes to abortions, and out of the medical professionals who privately, though not illegally, provide abortion services, very few are willing to be openly recognized as 'abortion providers', due to the stigma attached to it. This stigmatization is essentially perpetuated by the State refusing to raise awareness on issues which concern a woman's reproductive health. Additionally, let alone initiating government funded campaigns, it does not help that all advertisements advising women on abortion practices and procedures are also banned in Malaysia[135].

[130] Archer, Nandini. "The Law, Trial and Imprisonment for Abortion in Malaysia." Edited by Marge Berer, International Campaign for Women's Right to Safe Abortion, June 2018

[131] Ibid.

[132] Archer, Nandini. "The Law, Trial and Imprisonment for Abortion in Malaysia." Edited by Marge Berer, International Campaign for Women's Right to Safe Abortion, June 2018; Reproductive Rights Advocacy Alliance Malaysia (RRAAM) Statistics

[133] Tong, Wen Ting, and Veenah Gunasegaran. "Issues to Safe Abortions in Malaysia: Reproductive Rights and Choice." Edited by Wah Yun Low, United Nations Population Fund, Aug. 2013

[134] Archer, Nandini. "The Law, Trial and Imprisonment for Abortion in Malaysia." Edited by Marge Berer, International Campaign for Women's Right to Safe Abortion, June 2018

[135] Malaysia, Advertising Standards Authority. "The Malaysian Code for Advertising Practice." 2008

In 2012, the Ministry of Health in Malaysia introduced 'Guidelines for the Termination of Pregnancy for Hospitals in the Ministry of Health', which in many ways, further restricted the procedure at public hospitals. It requires the presence and approval of two medical practitioners at Government hospitals, even though under Section 312 of the Penal Code[136], approval from only one medical practitioner is required[137]. Moreover, it requires women to obtain consent from their husbands in order to obtain abortion services at a Government hospital. The guidelines do not acknowledge cases of pregnancy where a woman may be unmarried[138]. Additionally, any contraceptive services under the national programme are inaccessible to unmarried women who may be sexually active[139]. This is unanticipated in a State where, in a survey consisting of students from secondary school, 20% stated that their friends have had pre-marital sex, and 10% stated that their friends have had abortions[140].

However, the positive aspect of the Guidelines introduced is the emphasis it provides to the mental status of the woman requiring abortion facilities. It highlights the need for professional support to be provided for the physical and emotional needs of women undergoing the process of abortion. Moreover, it should be noted that the guidelines further lay down procedures for medical abortions until 22 weeks of pregnancy[141], whereas in Malaysia, *Fatwas* by 'Malaysian Fatwa Committee' stipulate that abortions may only be permissible up until 120 days of pregnancy when the 'ensoulment'

[136] *Malaysia: Penal Code*, Act No. 574 of 1997, 7 August 1997, Section 312
[137] Ministry of Health (2012) Guidelines on the Termination of Pregnancy in Government Hospitals

[138] Ibid.

[139] Tong, Wen Ting, and Veenah Gunasegaran. "Issues to Safe Abortions in Malaysia: Reproductive Rights and Choice." Edited by Wah Yun Low, United Nations Population Fund, Aug. 2013

[140] Ibid.

[141] Supra 130.

takes place, as provided by Shariah Law[142]. Hence, even though it should be acknowledged that these guidelines highlight possible areas of improvement within the law, the fact remains that abortion in government healthcare facilities still continues to be inaccessible[143]. As a result, women have to resort to other economical substitutes, if they cannot afford an abortion in private clinics. Medical abortion pills, such as 'mifepristone', are one such example. However, they not easily accessible to women in Malaysia, as they have not been registered by the government[144]. Therefore, many women are known to have ordered such abortion pills online in the past. However, in 2017, the Ministry of Health issued a statement whereby all individuals purchasing abortion pills online would be prosecuted[145]. With such increasingly restrictive measures by the government, most working class migrant women find abortion services extremely inaccessible under all circumstances.

In October 2014, a Nepalese migrant worker in Malaysia, Nirmala Thapa, discovered that she was six weeks pregnant. She requested a doctor at a private clinic to provide abortion services, as she risked losing her job, being forced to pay compensation to her company and having to go back home. After an assessment, the medical practitioner provided approval for her abortion, as this posed harm to her mental health. However, during the procedure, the Malaysian Ministry of Health arrested her as well as the medical practitioner. Nirmala, hence, became the first woman in Malaysia to be convicted for an 'illegal abortion' under Section 315 of the Penal Code[146]. However, an appeal at the Penang

[142] Ilim, Umi & Uma, V. (2012). CASE REPORT Termination of Pregnancy for a Muslim Rape Victim and Dilemma in Malaysian Setting: A Case Report.

[143] Archer, Nandini. "The Law, Trial and Imprisonment for Abortion in Malaysia." Edited by Marge Berer, International Campaign for Women's Right to Safe Abortion, June 2018

[144] Ibid.

[145] Ibid.

[146] "Retrial Begins for Nepalese Migrant Worker Wrongfully Accused of Obtaining Illegal Abortion." Center for Reproductive Rights, 26 Feb. 2015

High Court resulted in the overturning of the judgment, and Nirmala being acquitted of the charges[147]. This was due to the fact that the prosecution could not eventually prove that Nirmala's doctor had not approved her case "in good faith". Many human rights activists in Malaysia saw her case as a threat to the reproductive rights of women in Malaysia, as this provided the Ministry of Health and the Courts with unrestricted powers to criminalize and prosecute any such cases of abortion, which they arbitrarily considered not to have been made "in good faith"[148].

Hence, as a State with a moderately liberal stance on abortion as per the law, the problematic aspect lies in the conservative interpretation of such law, as well its ineffective implementation mechanism. Lack of awareness campaigns, regulatory bodies, and policies for monitoring and evaluation of reproductive health policies are a major issue in the Malaysian legal system, with regards to abortion.

3.4. COMPARISON OF LEGISLATION IN PAKISTAN, INDIA AND MALAYSIA

In terms of legislative reform, the laws in Pakistan with regards to reproductive rights of women are seemingly the most restrictive in comparison with the two other jurisdictions. Section 3 and 5 of the MTP Act in India[149], and the 1971 and 1989 Amendments to Section 312 of the Malaysian Penal Code[150], lay down equally liberal provisions for both India and Malaysia. In fact, in some ways, as per the law, the Malaysian stance on abortion could be seen as more liberal on paper,

[147] Loone, Susan. "Nepali Worker Acquitted of Abortion Charge." *Malaysiakini*, 21 Sept. 2015
[148] Archer, Nandini. "The Law, Trial and Imprisonment for Abortion in Malaysia." Edited by Marge Berer, International Campaign for Women's Right to Safe Abortion, June 2018,

[149] Medical Termination of Pregnancy Act, 1971 (Act No. 34 of 1971), Section 3, 5.

[150] Malaysian Penal Code (Act 574), Chapter XVI, Section 312

than that of India. This is due to the fact that Section 312 of the Malaysian Penal Code[151] provides no limitations with regards to the particular stages of pregnancy until which an abortion may be permitted for a pregnant woman. Instead, the decision is left to the approval of the medical practitioner, who may assess and decide "in good faith", whether in certain cases a woman's physical or mental health may be at risk. However, since Malaysia also tends to comply with Shariah law, hence, the opinions of the *Malaysian Fatwa Committee* are also taken into account. The Malaysian Penal Code, taken in conjunction with the *Fatwa* regarding abortion, stipulate that as a general rule, medical practitioners cannot consider cases of abortion beyond 120 days of pregnancy[152].

In the case of India, whereas the law clearly provides limits as to under which stages of pregnancy a medical practitioner may exercise his/her authority of performing abortions, it also covers the circumstances under which these abortions can be carried out for the pregnant women. Even though the language in which the MTP Act in India is phrased is very similar to the provisions on abortion in Malaysia, however, it is quite evident that the law itself has been interpreted and implemented much more liberally in India.

In contrast, the law on abortions in Pakistan[153] is undoubtedly the most restrictive out of the three jurisdictions. Termination of pregnancy is not only prohibited after the four month period, but also the fact that even before this time limit, an abortion can only be performed by a medical practitioner for purposes of "necessary treatment". This ambiguity in the law has not been further

[151] Ibid.
[152] Ilim, Umi & Uma, V. (2012). CASE REPORT Termination of Pregnancy for a Muslim Rape Victim and Dilemma in Malaysian Setting: A Case Report.

[153] Pakistan Penal Code (Act XLV of 1860), Chapter XVI, Section 338(A)-(C)

elaborated upon by either the legislatures or the Courts, and hence, abortion policies in Pakistan remain largely restrictive.

Another aspect of comparison is the criminalization of abortion within the law. As per the laws of Pakistan[154] and Malaysia[155], abortion after a certain period, stated within the law, and for reasons outside of the ambit of the law, is criminalized with up to 7 years of imprisonment. In both jurisdictions, the woman is held equally liable and penalized as well. However, under Section 312 and 313 of the Indian Penal Code[156], abortion is only criminalized if the medical practitioner is not said to have performed the procedure "in good faith", or without the consent of the woman. Hence, under Indian law, the woman does not fall under the ambit of the criminality.

With regards to reproductive rights for survivors of rape, India is the only country of the three, which has set a precedent in terms of expanding the purview of its statute to cover a vast amount of cases where a woman or girl's mental health may be at risk. Indian Courts have expanded the ambit of the law to include cases of rape and incest, under the assumption that such a case would cause mental trauma to the survivor, and hence, falls under the law. However, the application of this rule within the law has not been uniform across the board, as can observed from the aforementioned case law, and the precedent set by the Indian Courts in this regard, has been fairly ambiguous. Malaysia, being a country with a similar law, has not managed to expand the scope of it abortion laws as wide as to clearly bring survivors of rape or incest under its ambit. In this sense, Pakistan is far behind in terms of developing its jurisprudence in this area.

[154] Pakistan Penal Code (Act XLV of 1860), Chapter XVI, Section 338(A)-(C)
[155] Malaysian Penal Code (Act 574), Chapter XVI, Section 312-316

[156] The Indian Penal Code, 1860 Act No. 45 OF 1860 [6th October, 1860.], Section 312, 313

4. REPRODUCTIVE RIGHTS THROUGH AN INTERNATIONAL LENS

4.1 PAKISTAN, INDIA AND MALAYSIA'S INTERNATIONAL OBLIGATIONS

Pakistan, India and Malaysia are all parties to CEDAW, and they have ratified, or acceded to, the Convention in 1996, 1993 and 1995 respectively. The ratification of this Convention requires that all State parties take effective measures to eliminate all form of discrimination against women within their legal and institutional frameworks, as well as within their national policies and political patterns. The most relevant provisions of this Convention are ones that point towards the right to 'equality', 'dignity', 'personal autonomy', and 'choice'.

Article 1 of CEDAW states:

"..."discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

Additionally, Article 2(a) of CEDAW states:

"...embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle..."

Furthermore, Article 12 of CEDAW states:

"*States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning…"*

Soon after CEDAW, the United Nations International Conference on Population and Development, held in Cairo in 1994, laid down that 'reproductive rights' make up an essential part of one's 'personal autonomy'[157]. This includes an individual's right to make their own reproductive and sexual choices. This could be further expanded to include "access to contraception, the right to legal and safe abortion, the right to make decisions regarding reproduction, free of discrimination, coercion and violence, and the right not to subject to…coerced bearing of children."[158]

The area requiring immediate attention with regards to reproductive rights for women, is that legal systems of all three countries have either selective or restrictive abortion laws, and treat the 'termination of pregnancy' as a criminal offence, equal to that of murder or manslaughter of another human being. The CEDAW General Recommendation 35 and the Convention on the Rights of the Child General Comment 20 also call attention to this issue, whereby concluding that it is the right of every human being to 'enjoy the highest attainable standard of physical and mental health'[159]. Moreover, the UN Special Working Group on the Discrimination of Women in Law have also highlighted, in their report of October 2017, that the criminalization of abortions for the women as well as the medical practitioners need to end, as the terms 'murder' and 'manslaughter' are only

[157] "Report International Conference on Population and Development." United Nations, Sept. 1994

[158] "Reproductive Rights Are Human Rights- A Handbook for National Human Rights Institutions." United Nations Population Fund, 2014; Ghosh, Arijit, and Nitika Khaitan. "A Womb of One's Own: Privacy and Reproductive Rights." Economic and Political Weekly, 6 Aug. 2018

[159] "General Recommendation 35, Committee on the Elimination of Discrimination Against Women." OHCHR, 2017

applicable to human beings, which is a 'status acquired at birth'[160]. The General Recommendation 24 of the CEDAW Committee expressly states: "*Prioritize the prevention of unwanted pregnancy through… sex education. When possible, legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion*"[161]

Moreover, in 2016, the Committee of Economic, Social and Cultural Rights (CESCR) stated in General Comment 22 that States must "repeal or reform laws and policies…and practices that undermine autonomy…and non-discrimination in full enjoyment of the right to sexual and reproductive health, for example the criminalization of abortion…"[162]. Since both Pakistan and India are parties to ICESCR as well, this is rule is applicable to them.

All three comparative jurisdictions, in an attempt to 'liberalize' their laws on reproductive rights, legally permit abortion procedures only in the rare cases where there may be a serious threat to the life or health of the woman in question. In certain cases, a 'severely impaired foetus' is also considered an exception[163], as is the case in India. However, in contrast, a woman's basic rights to life, health and her right to choose, are being compromised in this process. Furthermore, the woman's right to choose is also being restricted due to the fact that abortion laws, in all three countries, hand this power to the medical practitioners, rather than the women themselves. In none of these States do the

[160] "Women's Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends." Office of the High Commission for Human Rights, Oct. 2017

[161] "Women's Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends." Office of the High Commission for Human Rights, Oct. 2017; UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health), 1999, A/54/38/Rev.1, chap. I

[162] "General Comment No. 22 on the Right to Sexual and Reproductive Health." Committee on Economic, Social and Cultural Rights, 2016

[163] "Women's Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends." Office of the High Commission for Human Rights, Oct. 2017

women possess the power to 'choose' an abortion for themselves, and that their request for termination of pregnancy can be denied based of the decision of the medical practitioners.

It is important to note that the denial of abortion, in cases of rape or incest, fall into a more severe category, whereby the Human Rights Committee, the CEDAW Committee and UN Special Rapporteur on Torture have classified denying abortions to such women as amounting to "cruel, inhumane and degrading treatment or punishment or torture, or a violation of their right to life."[164] Furthermore, elaborating upon the reasons, the UN Working Group on Discrimination Against Women has provided in its report that in majority of the cases, it is actually the "oppressive legal, cultural, social, or economic circumstances"[165] that lead women to seek illegal abortions.

Hence, it is a necessity that States correspond with international human rights instruments calling for a legalization of abortion at all stages, especially for survivors of rape and minor girls. This is not only to protect survivors of rape or incest from psychological trauma, but also to prevent risking their lives, while ensuring safe reproductive health practices, and protecting them from reproductive function complications such as obstetric fistula[166]. These international obligations that all three States have been neglecting, holds them not only in violation of international law, but also makes them answerable to their citizens and the international community at large, for failure to incorporate international instruments into domestic law.

[164] UN Human Rights Committee decisions in *Whelan v. Ireland* No. 2425/2014, UNHRC, 2017; *Mellet v.Ireland* No. 2324/2013, UNHRC, 2016; and *VDA v. Argentina*, No. 1608/2007, UNHRC, 2011; and *KL v. Peru*, No. 1153/2003, UN CEDAW Committee, 2005; "General Recommendation 35, Committee on the Elimination of Discrimination Against Women." *OHCHR*, 2017; Special Rapporteur on Torture and other cruel, inhuman and degrading treatment Report, UN Human Rights Council.

[165] "Women's Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends." Office of the High Commission for Human Rights, Oct. 2017

[166] Ibid.

4.2 STATE REPORTS AND RESERVATIONS

4.2.1 INDIA

India has made four submissions to the CEDAW Committee in 1999, 2005, 2009 and 2012[167]. India's State Reports to the Committee refer mostly to forced or sex-selective abortions, and the measures that the State has taken to tackle these issues[168]. However, the Shadow reports for India state that the 'right to abortion' is presently not recognized under India law, but only selective abortion is permitted[169]. The latest State report has not addressed the 'barriers to safe abortion services and access to contraception'[170]. Yet, India continues to have the highest rate of maternal mortality in the world, due to lack of healthcare facilities for safe abortions[171]. Moreover, the Shadow Report highlights the issues in the manner where reproductive health and sexuality are dealt with in educational texts. The fact that most of the population associates "promiscuity and shame" with these concepts, is mainly due to the way they have been addressed in the curriculum, and hence, a revision in the text and 'adult literacy programs' are required to tackle this issue[172]. Furthermore, the Shadow report also pointed out that State sponsored campaigns on family planning practices have, rather than resulting in "informed

[167] "CEDAW: Country Reports." Reporting Status for India, Office of the High Commissioner for Human Rights, United Nations.

[168] Second and Third periodic reports on the Convention on the Elimination of All Forms of Discrimination Against Women, Government of India, October 2005, CEDAW/C/IND/2-3.

[169] "India: Second NGO Shadow Report on CEDAW." National Alliance of Women, Nov. 2006; The Medical Termination of Pregnancy Act, 1971

[170] Fifth periodic report on the Convention on the Elimination of All Forms of Discrimination Against Women, Government of India, 2012, CEDAW/C/IND/5; "Supplementary Information on India, Scheduled for Review by the Committee on the Elimination of Discrimination against Women." Center for Reproductive Rights, 1 Oct. 2013

[171] WHO, UNICEF, UNFPA and the World Bank, Trends in Maternal Mortality: 1990 to 2010 1 (2012)

[172] "India: Second NGO Shadow Report on CEDAW." National Alliance of Women, Nov. 2006

and planned reproductive choice", instead had a negative effect on the mental health of women at large, due to lack of safe abortion facilities. A study mentioned in the Report states that out of the huge number of abortions carried out in India every year, the rate of unsafe abortions is 56%[173]. Thus, unsafe abortions are also the reason behind the high maternal mortality rate. In the State of Uttar Pradesh alone, about 2 million abortions take place annually, out of which 15-30% result in maternal deaths[174]. Yet, the State Report of India does not address the issue of accessibility of abortions, which affects such a huge number of women annually.

Additionally, the report also sheds light on the reproductive rights of women in Kashmir that are being violated more than any other part of India, as contraception is prohibited, and the rate at which women are raped and abducted is extremely high. Hence, with the mobility of women also being restricted in most cases, the reproductive health of women is adversely affected[175]. Additionally, it addresses the 683 tribal communities in India, where unlawful practices are carried out, to govern the "mobility, sexuality and reproductive capacity" of women. However, the Government and the law have been adopting a 'non-interference' policy, and the neglecting the plight of women and a severe violation to their sexual and reproductive rights in these areas[176].

India has been repeatedly pushed by the Indian National Commission on Women (NCW) to increase the abortion time limit from 20 weeks to a 24 week mark, in order to cover women who discover their pregnancies at later stages. The Shadow Report emphasizes that as a result of failing to

[173] Duggal R, Ramachandran V, "The abortion assessment project - India: key findings and recommendations", Reproductive Health Matters 12, 122-129 (2004).

[174] "India: Second NGO Shadow Report on CEDAW." National Alliance of Women, Nov. 2006

[175] "India: Second NGO Shadow Report on CEDAW." National Alliance of Women, Nov. 2006

[176] Ibid.

formulate and implement "a comprehensive national strategy…to guarantee reproductive health services", India is in serious violation of Articles 10(h)[177] and 16(e)[178] of the Convention, as well as General Recommendation 24[179].

4.2.2 PAKISTAN

Pakistan has made three submissions to CEDAW Committee in 2005, 2011 and 2018[180]. The State report clearly provides that abortion is illegal in Pakistan, and the law only permits an abortion "if the life of the mother is in danger". The fact that the report does not mention any abortions which are carried out for "necessary treatment" points towards the fact that it is not a common practice in government hospitals. Moreover, all reports refer to reproductive health awareness as 'family life education', and reduce them to family planning for child bearing women. Additionally, the report limits the provision of reproductive health awareness and services to "childbearing women"[181]. According to the Shadow reports submitted to CEDAW[182], there is a serious need for Pakistan to

[177] CEDAW, Article 10(h): "…Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning."

[178] CEDAW, Article 16(e): "…The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights"

[179] "Supplementary Information on India, Scheduled for Review by the Committee on the Elimination of Discrimination against Women*."* Center for Reproductive Rights, 1 Oct. 2013

[180] "CEDAW: Country Reports." Reporting Status for Pakistan, Office of the High Commissioner for Human Rights, United Nations

[181] Fifth Periodic Report submitted by Pakistan on the Convention on the Elimination of All Forms of Discrimination Against Women, Government of Pakistan, October 2018, CEDAW/C/PAK/5; Combined initial, second and third periodic reports on the Convention on the Elimination of All Forms of Discrimination Against Women, Government of Pakistan, August 2005, CEDAW/C/PAK/1-3.

[182] "Pakistan: NGO Alternative Report on CEDAW 2009-2012." *Aurat Foundation*, 2012

review its laws and policies on abortion, reproductive and sexual rights. This is mainly due to the fact that prevailing "sex roles and stereotyping" have limited the role of women to mainly child bearing, and hence, disregards their "choice in marriage and reproductively"[183]. Moreover, even though the State report mentions that there is an increased awareness and availability of contraceptives since 1998, however, Pakistan has not been able to justify the increasing number of illegal abortions, and maternal deaths with the country. As per the Shadow report, unless the patriarchal mindset and gender discrimination which is perpetuated by the social and cultural norms are dealt with, the 'availability of contraceptives will have limited impact'[184]. Furthermore, it is important to question the impact of the awareness programs which have been mentioned in the State report, and their outreach and outcomes within the timelines stipulated by the Government. In the year 2008-2009, the "total expenditure on health was about 0.56% of the GDP", out of which majority was spent on 'tertiary health facilities', whereas primary health, such as reproductive health facilities in rural areas, were mostly overlooked[185].

Furthermore, the Shadow report provided by Amnesty International to UNCESCR on Pakistan provides that lack of awareness about reproductive health is not just an issue with the general public, but also amongst the medical practitioners, whereby many women who are running a serious

[183] Ibid.
[184] Ibid.

[185] Ibid.

risk to their health are still refused by healthcare facilities for abortion services[186], and hence, they have to resort to unsafe and illegal abortions[187].

4.2.3 MALAYSIA

Malaysia has made two submissions to the CEDAW Committee in 2006 and 2018[188]. The Malaysian State report to the Committee states that abortion is not legalized in Malaysia, apart from certain circumstances. The law in Malaysia permits "therapeutic abortions", which are allowed if the woman's physical or mental health is threatened, but only after authorization from two medical professionals. However, the State report also recognizes that "illegal abortions take place", and in such cases the doctors are to give preference to restoring a woman's life and health[189]. Moreover, the report also recognizes that the key problematic areas are "reproductive health and sexuality…teenage pregnancies, unwanted pregnancies…abortions"[190].

The Shadow Report for Malaysia, however, states that the stigmatization and expensive nature of abortions, as well as the lack of abortion facilities in government healthcare centers make it even more difficult for women to exercise their reproductive rights. Furthermore, counselling services provided at government healthcare centers are from a religious point-of-view, rather than through the

[186] Z A Sathar et al, "Post-Abortion Care in Pakistan: A National Study". (Population Council, Islamabad 2013); Asma Kundi, "Resorting to unsafe abortion for family planning", Dawn, 25 September 2016.

[187] Amnesty International. "Pakistan- Submission to the United Nations Committee on Social, Economic, and Cultural Rights, 61st Session." Shadow Report, Office of the High Commission for Human Rights, 2017.

[188] "CEDAW: Country Reports." Reporting Status for Malaysia, Office of the High Commissioner for Human Rights, United Nations

[189] Combined initial and second periodic reports on the Convention on the Elimination of All Forms of Discrimination Against Women, Government of Malaysia, April 2004, CEDAW/C/MYS/1-2/.

[190] Ibid.

lens of reproductive health. Similarly, the framework of sex education in schools is also through a religious lens, rather than a "rights-based approach to bodily integrity"[191]. The Shadow Report mostly maintained that the issues mentioned CEDAW Committee's Observations towards Malaysia in 2006 still remain pertinent, in most cases. This is further illustrated by the fact that reproductive rights for women are still restricted, and access to services is limited as the "use of contraception has remained stagnant at 52% since 1984"[192]. Furthermore, reproductive healthcare facilities and contraceptives are mostly inaccessible to refugee and asylum-seeking women[193]. All reproductive health facilities promoted by the government center around married women, whereas as reproductive rights of young and single women who may be sexually active, as well as sex workers, are not recognized as they cannot access such facilities[194].

4.3 LACUNAE IN THE APPLICATION OF CEDAW WITHIN THE DOMESTIC FRAMEWORK

All three countries have a wide range of issues in their State Reports to the CEDAW Committee that have been overlooked, and have instead been mentioned by civil society organizations in their Shadow Reports. One such issue of importance is that of pregnancies resulting from rape or

[191] "NGO CEDAW Shadow Report, for the Malaysian Government's Review by the CEDAW Committee, at the 69th CEDAW Session." Office of the High Commission for Human Rights, Women's Aid Organization (WAO) and Joint Action Group for Gender Equality (JAG), 29 Jan. 2018

[192] "NGO CEDAW Shadow Report, for the Malaysian Government's Review by the CEDAW Committee, at the 69th CEDAW Session." Office of the High Commission for Human Rights, Women's Aid Organization (WAO) and Joint Action Group for Gender Equality (JAG), 29 Jan. 2018; "2014 Family Planning Survey in Malaysia." LPPKN. 2014.

[193] "Independent Shadow Report to the Committee ON the Convention on the Elimination of Discrimination Against All Women (CEDAW) Refugee and Asylum-Seeking Women." Office of the High Commission for Human Rights, Asylum Access Malaysia, Jan. 2018

[194] Ibid.

incest. None of the States have referred to reproductive and sexual rights of survivors of rape, or any form of healthcare facilities that have been ensured for their physical and psychological recovery, if they require an abortion.

Another matter of concern with regards to the State reports submitted to the CEDAW Committee is the irregular reporting mechanism. Under the Convention, States are required to submit their first reports to the Committee within a year of coming into force, and then every four years regularly after that. It is evident that all three States have failed to submit their first reports on time, and subsequently others after that as well. Due to this reason, the purpose behind State reporting is lost, and monitoring a State's progress with regards to guaranteeing women their rights under the Convention becomes a difficult and lengthy process.

Furthermore, it should also be noted that all three States have not signed the Optional Protocol to the Convention, whereby the individual complaint mechanism to the CEDAW Committee is ensured. By limiting this option for the individuals of their respective States, Pakistan, India and Malaysia, have restricted their citizens from approaching an international body which evaluates the States' negligent performance from a neutral perspective, pushes States to take corrective measures and ensures that women are guaranteed their rights under the Convention.

Moreover, since all States have not managed to effectively formulate and implement any laws or policies after their ratification of the Convention, with regards to guaranteeing sexual and reproductive rights to women, it could be derived that there is a clear gap in abiding by and applying international law within the domestic framework. Hence, taking all of the State reports and Shadow reports into account, as well as legislative measures and case law, it can be concluded that all three States are in violation of 10 of the Convention, and have failed to comply with General Recommendations 24 and 35 by the CEDAW Committee.

4.4 OVERCOMING SELECTED OR RESTRICTIVE LEGISLATION ON ABORTION

Legislations and policies based on selected or restricted abortion laws have been criticized by the CEDAW Committee in its previous decisions[195]. This particularly applies to those States that criminalize or make abortions illegal under all circumstances apart from saving the life of the woman[196]. It is due to these restrictive laws that women have to resort to illegal measures[197], thereby resulting in unsafe reproductive health practices. According to the CEDAW Committee, restrictive legislation on abortion violate both the 'right to life' and 'right to health' of the woman[198], as these rights cannot be enjoyed freely without an individual possessing and exercising complete autonomy over their body. In several cases, the Committee has stated that penalizing either the pregnant woman or the medical practitioner should be avoided,[199] as it also has a chilling effect, whereby inculcating a restrictive environment, where even the most fundamental rights, i.e. life and health, are not absolute.

It is essential that policies with regards to availability of contraceptives and awareness programs relating to reproductive health are prioritized by States, as it is only due to lack of such facilities that women are forced to resort of illegal and unsafe abortion services. The CEDAW Committee has also criticized States where due to lack of contraceptives, illegal abortions are often

[195] Nepal, No. 139, 147, U.N. Doc. A/54/38 (1999); Portugal, No. 345, A/57/38 (2002); Ireland, No. 185, U.N. Doc. A/54/38 (1999)

[196] Chile, No. 19, U.N. Doc. CEDAW/C/CHI/CO/4 (2006); Honduras, No. 24, U.N. Doc. CEDAW/ /C/HON/CO/6 (2007).

[197] Antigua and Barbuda, No. 258, U.N. Doc. A/52/38/Rev.1, Part II (1997); Chile, No. 19, U.N. Doc. CEDAW/C/CHI/CO/4 (2006).6)

[198] Chile, No. 228, U.N. Doc. A/54/38 (1999); Colombia, No. 393, U.N. Doc. A/54/38 (1999); Dominican Republic, No. 337, U.N. Doc. A/53/38 (1998); Paraguay, No. 131, U.N. Doc. A/51/38 (1996)

[199] Liechtenstein, No. 25-26, U.N. Doc. CEDAW/ (2007); Mauritius, No. 31, U.N. Doc. CEDAW/C/MAR/CO/5 (2006); Nicaragua, No. 18, U.N. Doc. CEDAW/C/NIC/CO/6 (2007); Philippines, No. 28, U.N. Doc. CEDAW/C/PHI/CO/6 (2006).

seen as a means for family planning by women[200]. Furthermore, third party authorization is also a challenging aspect, whether requiring permission from the medical practitioner or the spouse. In cases where there is a serious threat to a woman's life or health, this requirement in the law whereby abortion is not possible without spousal or parental consent, may prove problematic[201].

Forming reproductive rights laws where abortion is allowed for survivors of rape and incest, is a starting point for States like Pakistan and Malaysia, where abortion has not yet been legalized. While constitutionally, most jurisdictions in the world derive their right to abortion from broad terms such the right to 'life' or 'dignity', which have been known to include one's right to exercise control over their body[202]. Similar is the case with Indian jurisprudence. The ultimate achievement for women's reproductive and sexual rights would be introduce provisions in the Constitution of a State, such as the guarantee of "personal autonomy" and "bodily, psychological, moral and sexual safety", and "bodily and psychological integrity". These provisions are actually part of the Constitution of Ecuador[203] and South Africa[204], as often Courts are reluctant on extending the right to 'life' and 'dignity' to what may appear to the Courts as being a much more vague concept: the idea of "personal well-being". Moreover, explicitly stating that every individual of the State is guaranteed their "sexual and reproductive rights"[205] as well as "reproductive healthcare"[206], under the law, makes the exercise of

[200] Kyrgyzstan, No. 137, U.N. Doc. A/54/38 (1999); Ukraine, No. 266, U.N. Doc. A/57/38 (2002); Yugoslav Republic of Macedonia, No. 32, U.N. Doc. CEDAW/C/MKD/CO/3 (2006).

[201] "Abortion and Human Rights: Government Duties to Ease Restrictions and Ensure Access to Safe Services." *Center for Reproductive Rights*, Oct. 2008

[202] Ali, Maha. "Draft Constitutional Provision on Reproductive Rights", Fundamental Rights in Comparative Perspective, Dec 2017.

[203] Constitution of Ecuador (2008), Chapter VI, Article 66 (3) (a) [rev. 2015]

[204] Constitution of South Africa (1996), Chapter II, Article 12 (2), [rev 2012]

[205] Constitution of Plurinational State of Bolivia (2009), Section VI, Article 66

[206] Constitution of Ecuador (2008), Chapter VII, Article 32 [rev. 2015]

such rights less challenging, and prevents the medical practitioners to object on moral grounds, and the Courts from being burdened with all such cases, and leading to ambiguous and arbitrary decisions, in some circumstances. Moreover, this allows women to take decisions relating to their health and reproductive life and exercise control over their bodies, whereby limiting the State's interests in a woman's body to an extent. A woman who may wish to terminate her pregnancy at a later stage, should still be allowed to do so without any difficulty, regardless of her physical or mental health, the abnormality of the foetus, her financial conditions, or other circumstances affecting her personal life[207].

Such constitutional and legislative measures are necessary, in order to restore the 'bodily autonomy' of women, and guarantee their reproductive and sexual rights. In various studies, where women are forced to continue their unwanted pregnancies, has been known to lead to development of depression, and self-destructive tendencies, as well as increase in suicide rates[208], especially with survivors of rape. Furthermore, in cases where the woman has to give birth, for lack of other options, it has also been known to affect infant and child health in the long term, physically and psychologically[209].

[207] Ali, Maha. "Draft Constitutional Provision on Reproductive Rights", Fundamental Rights in Comparative Perspective, Dec 2017.

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5. ANALYSIS

5.1 A 'GENDERED' VIEW IN POLICY-MAKING, AND THE IMPLEMENTATION MECHANISMS, AND THEIR IMPORTANCE FOR REPRODUCTIVE RIGHTS

The 'right to abortion' and access to reproductive health facilities for women, are ingrained in the most fundamental 'rights to life, dignity, health, privacy and non-discrimination'[210]. These rights can be further extended to include reproductive and sexual rights.

In order for women to exercise full enjoyment of their 'bodily autonomy' and sexual and reproductive rights, decriminalization of abortion is necessary. Moreover, access to safe and quality abortion services in cases of sexual assault, incest or rape, is essential. Such services should be available for all women, without discrimination, regardless of their age, marital status, nationality, ethnicity, religion, race etc. Moreover, the privacy of the concerned women should be respected, in such cases, in order to avoid issues of stigmatization. Provisions with regards to third party authorization should be waived, where possible, as these hinder in exercising full autonomy over one's own body[211].

Additionally, efforts should be made to inform medical practitioners on the legality of abortions, and under which circumstances[212]. All health workers, responsible for reaching out to women in remote rural areas of the country, should also be provided adequate training, while formulating monitoring mechanisms to evaluate the progress made, in terms of statistics. In

[210] "Abortion and Human Rights: Government Duties to Ease Restrictions and Ensure Access to Safe Services." *Center for Reproductive Rights*, Oct. 2008

[211] Amnesty International. "Pakistan- Submission to the United Nations Committee on Social, Economic, and Cultural Rights, 61st Session." Shadow Report, Office of the High Commission for Human Rights, 2017.

[212] Ibid.

addition, gender-sensitization trainings and programs should be carried out for all medical professionals and healthcare workers. Furthermore, awareness programs to disseminate information on sexual and reproductive health, and working towards eliminating the taboo surrounding issues of sexual and reproductive rights should be implemented. This would not only lead to informed decision making on part of the women, but also tackle with the cultural vulnerabilities which are faced while working towards gender equality.

It can be inferred that the laws and policies on abortion, and reproductive and sexual rights, are known to have a direct influence on "reproductive health, laws on education, employment and property" which affect a woman's status within a society[213]. It is also important to tackle the area of "social and economic conditions", while also formulating strategies to evolve pre-existing cultural and traditional norms and values[214]. All of these factors affect the accessibility of any reproductive health facilities to women, and hence, they need to be taken into account while formulating any strategy with regards to healthcare services for women.

[213] Ibid.

[214] Ibid.

5.2 RECOMMENDATIONS FOR THE PROTECTION OF REPRODUCTIVE AND SEXUAL RIGHTS THROUGH AN INTERNATIONAL PERSPECTIVE

Reproductive rights are an amalgamation of 'civil, political, economic, social and cultural rights'[215] which directly affect the life of women, not only in terms of their sexuality and reproductivity, but also their socio-economic status. The Programme of Action of the International Conference on Population and Development states:

"Reproductive rights embrace certain human rights that are already recognized in… international laws and international human rights documents and other consensus documents. These rights rest on the recognition of the basic rights of… individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes the right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents."[216]

The enjoyment of sexual and reproductive rights is essentially affected by gender-based violence, which is a grave violation of international human rights laws. Such abuse of human rights challenge the 'sexual and reproductive autonomy' of the women, and damage their mental and physical health in the long term[217]. Gender equality and sustainable development become challenging goals to aim towards, when such basic rights are denied to women in their everyday lives.

[215] "Reproductive Rights Are Human Rights- A Handbook for National Human Rights Institutions." United Nations Population Fund, 2014

[216] International Conference on Population and Development, Programme of Action, UNFPA, Para 7.3

[217] "Reproductive Rights Are Human Rights- A Handbook for National Human Rights Institutions." United Nations Population Fund, 2014

According to international standards, the 'right to bodily integrity' for a woman includes her right to have "control over and decide freely and responsibly on matters related to… sexuality, including sexual and reproductive health, free of coercion, discrimination and violence"[218]. While, bringing in the equality of men and women, in terms of their sexual and productive rights, these include the ideas of "mutual respect, consent, and shared responsibility for sexual behavior and its consequences"[219].

The first international instrument to officially address 'reproductive rights' within the human rights framework was the 1968 Final Act of the Tehran Conference on Human Rights[220], which was followed by all other human rights conferences highlighting this as a fundamental principle for gender equality. Incorporating these international instruments into the legislative and policy reform within the domestic legal framework requires amendments within the Family Laws, especially in the cases of Pakistan and Malaysia. Bring family laws closer to international human rights standards, rather than those influenced mainly by religion, would be first step in this direction. Furthermore, access to quality healthcare facilities, is essential, whereby minimum standards for safety in abortion procedures are established, and monitoring and evaluation mechanisms are implemented to follow through with such health policies. Additionally, these standards can also be used to regulate private healthcare facilities offering abortion services to women. Taking into account the cultural context, effective awareness campaigns should be designed and implemented, whereby young women are educated regarding the basic rights, including the right to privacy, the right to information, the right to consent, sexuality, and the right to personal autonomy. It is also essential to ensure that such awareness

[218] Ibid.

[219] Ibid.

[220] Tehran Conference on Human Rights, UN Doc. A/CONF. 32/41.

campaigns and healthcare facilities are also accessible to the most marginalized communities, and hence, women are not discriminated based on their socio-economic status, religion, or ethnicity[221].

Customary law should also be reviewed by States to ensure that it does not violate the human rights of women, and endorse harmful practices. In Malaysia, where *Fatwas* passed by the Malaysian Fatwa Committee also have credibility under the law, especially with regards to the gestational limit for abortions, it is important to ensure that these do not curb the basic rights and freedoms of women. Similarly in Pakistan, where the Council of Islamic Ideology (CII) receives legitimization from the State to issue *Fatwas*, on any legal matter, especially those which regards to curbing the rights and freedoms of women, it is important to put a monitoring mechanism in place, whereby there is a proper check and balance, and that they are not declared the absolute authority on matters of the law. This would ensure that the masses, including medical practitioners, are not as easily influenced and swayed, with regards to the moral aspect of abortions within law and religion. Furthermore, any discriminatory practices, cultures, or policies which prevent survivors of rape from attaining the same healthcare facilities as other women, regardless of their marital status, should also be revised and eliminated by the State.

The intersections between violence against women and culture has been highlighted by the Special Rapporteur to the Human Rights Council in her Report of 2007: *"Recent policies on reproductive rights…which give preference to sexual abstinence and fidelity over condom use, are particularly illustrative. They not only fail to recognize the problems that oppressed women face in asserting their sexual rights against their male partners, but also reinforce ideologies of men's control over women's sexuality (however they may be culturally framed) and thereby contribute to the*

[221] UNFPA Asia Pacific Forum Consultation, 20-21 June 2011, Kuala Lumpur, p. 6.

perpetuation of the root cause of many forms of violence against women."[222] Such policies adversely affect the overall struggle for improved sexual and reproductive health services for women, and hence, "entrenching the intergenerational transmission of poverty and violence"[223].

5.3 CONCLUSION

To conclude, and to re-iterate, the majority of the discrimination encountered by women in their daily lives, is derived from a restriction in their right to exercise their 'bodily autonomy', and their right to adequate healthcare services. These can be credited to the "instrumentalization and politicization of women's bodies and health"[224]. Prioritizing the potential 'right to life' of the foetus over the rights to life, health, dignity and personal autonomy of a woman, who is a living human being, is one such harmful aspect of said 'politicization', whereby her agency is taken and placed at the disposal of the State and other third parties. The criminalization of abortion not only risks the life, mental and physical health of the women, but also denies them of their 'right to choice', and free decision-making with regards to their 'bodily autonomy'.

[222] Special Rapporteur on Violence Against Women, UN Human Rights Council, A/HRC/4/34 of 17 January 2007

[223] Ibid.

[224] Women's Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends." Office of the High Commission for Human Rights, Oct. 2017

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