# Medical Termination of Pregnancy in India: A Juridical Study

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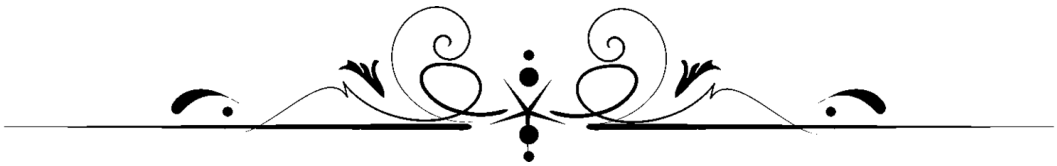
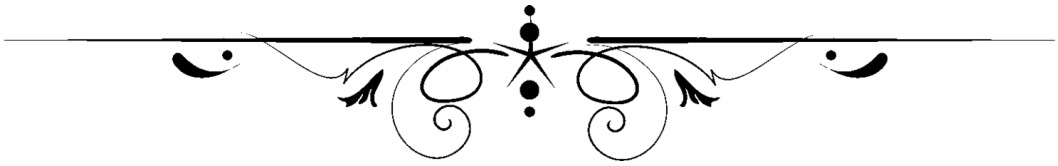


*Dedicated to*

*My Beloved Parents*



# DECLARATION

This is to declare that the thesis titled **"Medical Termination of Pregnancy in India: A Juridical Study"** is a bonafide work undertaken by me under the supervision of **Dr. Sufiya Ahmed**, Assistant Professor, Department of Law and School of Legal Studies, Babasaheb Bhimrao Ambedkar (Central) University, Lucknow, India for fulfillment of the requirements of the degree of **Ph.D.(LAW).** No part of this thesis has formed the basis for the award of any degree in this or any other university or Institution.

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# CERTIFICATE

This is to certify that the thesis titled **"Medical Termination of Pregnancy in India: A Juridical Study"** submitted by **Mr. Vir Vikram Bahadur Singh** is an original research work and has not been previously submitted in part or full for the award of any other degree or diploma to this or any other university.

The thesis submitted to Babasaheb Bhimrao Ambedkar University Lucknow satisfies all the requirements as stipulated in the *Doctor of Philosophy (Ph.D.) regulations-1999 as amended in 2008/2010/2013* and it is fit for submission and evaluation for the award of the degree of Doctor of Philosophy of the University.

**Date:** 25/01/2021

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# TABLE OF CONTENTS


| | |
|---|---|
| ***Declaration*** | ***i*** |
| ***Certificate*** | ***ii*** |
| ***Acknowledgements*** | ***iii-iv*** |
| ***Abbreviations*** | ***ix-xi*** |
| ***List of Cases*** | ***xii-xiv*** |
| **CHAPTER ONE** | **1-21** |
| ***Introduction*** | |
| 1.1 Hypothesis | 17 |
| 1.2 Research Questions | 18 |
| 1.3 Research Methodology | 19 |
| **CHAPTER TWO** | **22-59** |
| ***Medical Termination of Pregnancy: History and Concept*** | |
| 2.1 Introduction | 22 |
| 2.2 Abortion in Primitive Society | 23-29 |
| 2.3 Pre Modern Era | 29-30 |
| 2.4 Greco Roman Period | 30-33 |
| 2.5 Natural Abortion | 33-34 |
| 2.6 Process of Abortion | 34-35 |
| 2.7 Pro-Life Scenes, Pro-Polls and Exceptions | 36 |
| 2.8 Religious Views in Abortion | 37-39 |
| 2.9 Abortion Criminalization in the Modern Era | 39-41 |
| 2.10 Approaches of Abortion | 41-43 |
| 2.11 Announcement for Abortion and Abortion Services | 43-44 |
| 2.12 Deviation into Abortion Law | 45-46 |
| 2.13 Abortion Law Reform Movement | 46-48 |
| 2.14 Liberalization of Abortion Law | 48-50 |
| 2.15 Meaning and Types of Abortion | 50 |
| 2.16 Common Definition of Abortion | 51-56 |
| 2.17 Grounds for Legal Abortion | 56-59 |
| 2.18 Conclusion | 59 |

**CHAPTER THIRD** **60-98**

***Legal Status of Fetus***

3.1 Introduction 60

3.2 Moral Status of Embryo 60-61

3.3 Reproductive Technology and the Earliest Stages of Human Stages of Human Life 61-62

3.4 The Debate over the Moral Status of the Early Embryo 62

3.5 The Legal Position of the Fetus 63-67

3.6 Abortion Ethics 67-68

3.7 The Ethical Sustaining of Roe v Wade and Casey v Pennsylvania 68-70

3.8 The Status of the Fetus 70-71

3.9 The Fetus is a Person from the Moment of Conception 71-74

3.10 The Fetus has Moral Claims based on its Potential 74-76

3.11 The Fetus becomes as Human 76-78

3.12 The Fetus becomes a Person at Sentience 78-79

3.13 Personhood does not begin until sometime after Birth 79-84

3.14 The Right to Choose 84-89

3.15 The Morals of Abortion 89

3.16 Grounds of Moral Status 90-92

3.17 The Major Moral Positions of Fetus 92-98

3.18 Conclusion 98

**CHAPTER FOURTH** **99-141**

***Medical Termination of Pregnancy: International Perspective***

4.1 Introduction 99-100

4.2 Universal Declaration of Human Rights, 1948 100-101

4.3 International Covenant on Civil and Political Rights (1966) (ICCPR) 101-102

4.4 American Conference on Human Rights, 1969 (ACHR) 103

4.5 Vienna Program of Action 103

4.6 International Reproductive Rights Policy as Pronounced at International Human Rights Conferences 103-104

4.7 International Conference on Population and Development, 1994 (ICPD) 104-109

4.8 The Women's Conventions and Conferences 109-110

4.9 Health-Related Rights under the Women's Convention 110-111

4.9.1 Autonomy 111-112

4.9.2 Equality, Discrimination and Difference 112-113
4.9.3 Biological Difference 113-114
4.9.4 Non-Discrimination in Allocation of Resources 114
4.9.5 The Right to Life 114
4.9.6 Reproductive Choice - Abortion 115
4.9.7 Reproductive Choice - Family Planning 115
4.9.8 International Human Rights Instruments and Abortion 116-117
4.10 Beijing Declaration (1995) 118-125
4.11 Beijing +5 (2000) 125
4.11.1 First World Conference on Women 126
4.11.2 Second World Conference on Women 126
4.11.3 Third World Conference on Women 127
4.11.4 Fourth World Conference on Women 127-128
4.12 Convention on the Elimination of all form of Discrimination against Women (CEDAW), 1979 128-130
4.13 The African Charter on the Rights and Welfare of the Child 131-136
4.14 UN Millennium Declaration, 2000 136-137
4.15 The Convention on the Rights of the Child 137-138
4.16 Disability Rights Convention 138
4.17 Regional Treaties and Conventions 138-140
4.18 The U.K. Abortion Act, 1967 140-141
4.19 Conclusion 141

**CHAPTER FIFTH** **142-175**

***Medical Termination of Pregnancy in India***

5.1 Introduction 142-143
5.2 42nd Law Commission of India Report,1971 143-145
5.3 Implementation a Preliminary Report of the First Twenty Months of Medical Termination of Pregnancy Act 145-147
5.4 Position of Abortion Law in India 147-155
5.5 The Indian Penal Code, 1860 155-157
5.6 Offence against the Persons Act, 1861 157
5.7 The Report of Family Planning Commission (1951-1956) 157-158
5.8 Medical Termination of Pregnancy and its implementation 158-160
5.9 Critical Analysis of MTP Act, 1971 161
5.10 Characteristics of Women Who Terminate Unwanted Pregnancies 161-162
5.11 The Medical Termination of Pregnancy (Amendment) Bill, 2002 162

5.12 The Medical Termination of Pregnancy (Amendment) Rules, 2003 162-163
5.13 The Medical Termination of Pregnancy (Amendment) Bill, 2014 163
5.14 The Medical Termination of Pregnancy (Amendment) Bill, 2017 163
5.15 The Women's Sexual Reproductive and Menstrual Rights Bill, 2018 164-165
5.16 The Medical Termination of Pregnancy (Amendment) Bill, 2020 165-166
5.17 Objects and Reasons of MTP 166-167
5.18 The Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994 167-169
5.19 The Protection of Children from Sexual Offenses Act, 2012 169
5.20 Abortion and Sex-Determination: Different Issues 169-170
5.21 Relation between the PNDT and the MTP Act 170-171
5.22 Unsafe Abortion in India 171-173
5.23 Abortion law and Policy: Potential and Actual Abuse 173-175
5.24 Conclusion 175

**CHAPTER SIXTH** **176-202**

***Judicial Response***

6.1 Introduction 176
6.2 Reproductive Right of a Woman 176-178
6.3 Right of Fetus 178-183
6.4 Right of Abortion 183-190
6.5 Right of Safe Abortion 190-193
6.6 Right of Abortion of Rape Victim 193-197
6.7 Second Trimester Abortion 197-198
6.8 Minors Abortion 198-200
6.9 Right to Privacy 200-201
6.10 Conclusion 201-202

**CHAPTER SEVENTH** **203-212**

***Conclusion and Suggestions***

***BIBLIOGRAPHY*** **213-238**

***APPENDICES***

1. 42nd Law Commission of India Report, 1971
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# ABBRIVIATIONS

| | |
|---|---|
| ACF | Abortion Care Facility |
| AIDS | Acquired Immunodeficiency Syndrome |
| AIR | All India Reporter |
| ANC | Antenatal Care |
| ANM | Auxiliary Nurse Mid-wife |
| ASHA | Accredited Social Health Activists |
| BCC | Behavior Change Communication |
| Beijing Conference | The 4th World Conference for Women(Beijing, 1995) |
| BEE | Block Extension Educator |
| CHC | Community Health Centre |
| CFPC | Comprehensive Family Planning Centre |
| CEHAT | Centre for Enquiry into Health and Allied Themes |
| CBD | Community Based Distribution |
| CEDAW | Committee on the Elimination of the Discrimination against Women |
| CRC | Convention on the Rights of the Child |
| CHW | Community Health Worker |
| DWCRA | Development of Women and Children in Rural Areas |
| D&C | Digital Curettage |
| DSPD | Declaration on Social Process and Development |
| DLHS | District level Household and Facility Survey |
| EVA | Electric Vacuum Aspiration |
| ECG | Electro Cardiogram |
| EFM | Electronic Foetal Monitoring |
| Em.OC | Emergency Obstetric Care |
| FOGSI | Federation of Obstetrician and Gynaecologist Society of India |
| FP | Family Planning |
| FRONTIERS | Frontiers in Reproductive Health |
| GIS | Geographic Information System |
| GSM | Global System for Mobile Communications |

| | |
|---|---|
| HIV | Human Immunodeficiency Virus |
| ICMR | Indian Council of Medical Research |
| ICDC | Integrated Child Development Centers |
| ICPD | International Conference on Population and Development |
| ICT | Information and Communications Technology |
| IEC | Information, Education, and Communication |
| IUD | Intra Uterine Device |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICPD | 1994 International Conference on Population and Development |
| IGO | Inter-Governmental Organization |
| IVR | Interactive Voice Response |
| LHV | Lady Health Visitor |
| MDG | Millennium Development Goals |
| MMR | Maternal Mortality Rate |
| MMS | Multimedia Messaging Service |
| MASUM | Mahila Sarvangeen Utkarsh Mandal |
| MNCH | Maternal and Child Health |
| MR | Menstrual Regulation |
| MSH | Management Sciences for Health |
| MSI | Marie Stopes International |
| MTP | Medical Termination of Pregnancy |
| MVA | Manual Vacuum Aspiration |
| NFHS | National Family Health Survey |
| NGO | Non-Governmental Organization |
| NAI | National Archives of India |
| NRHM | National Rural Health Mission |
| ORS | Oral Rehydration Salt/Solutions |
| PAC | Post-abortion Care |
| PIL | Public Interest Litigation |
| PHC | Primary Health Care |
| PIP | Program Implementation Plan |
| PCPNDT | Preconception and Prenatal Diagnostic Techniques Act |

| | |
|---|---|
| PNDT | Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) |
| PPTCT | Prevention of Parent to Child Transmission |
| PWC | Prince water Coopers |
| RCH | Reproductive and Child Health |
| RH | Reproductive Health |
| RMNCHN | Reproductive, maternal, neonatal, child health and nutrition. |
| SA | Safe Abortion |
| SMS | Short Messaging Service |
| SRS | Sample registration system |
| STEP-UP | Strengthening Evidence for Programming on Unintended Pregnancy |
| STI | Sexually Transmitted Infection |
| TFR | Total Fertility Rate |
| UN | United Nations |
| UNFPA | United Nations Population Fund |
| UNICEF | United Nations Children's Fund |
| USAID | US Agency for International Development |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations |
| UNFPA | United Nations Population Fund |
| WHO | World Health Organization |

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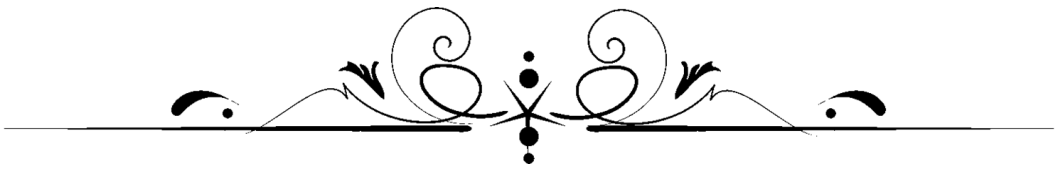
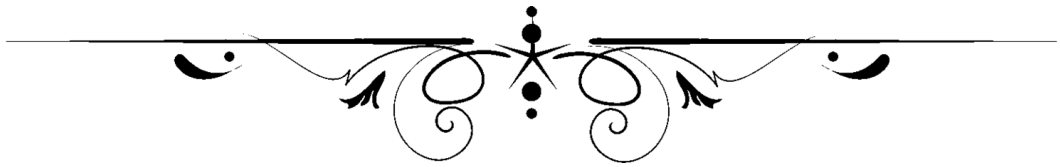


# Chapter One
# Introduction



# *Chapter One*

# *Introduction*

*"There is no freedom, there is no equality, there is no absolute human dignity, and it is possible for women until they switch and demand control of their own bodies and reproductive process .. Abortion rights are a matter of personal discretion and conscious choice for worried women."*

*Betty Friedan.*[1]

Abortion is artificial termination of conception as a universal miracle that has existed since time immemorial and is prevalent for every conceivable cause, from health to accessibility.[2] Reproductive rights are legal rights and autonomies related to procreative and reproductive health that differ among countries around the world.[3] The World Health Organization delivered reproductive rights as follows: "Reproductive rights rest on the recognition of the basic right of all couples and individuals and the information, number and space and timing between children to decide and do so independently and responsibly. And the right to achieve the highest levels of sexual and reproductive health". These include the right to take all decisions related to reproduction free from insight, coercion and ferocity.[4] The practice of abortion and the termination of a pregnancy has been known since ancient times. Several methods have been used to perform abortions, including the administration of abortifacient herbs, the use of sharp tools, the application of abdominal pressure, and other techniques. Abortion laws and their implementation have fluctuated during various periods. The abortion-rights movement was successful in the aftermath of the ban on abortion in many Western countries during the 20th century. While abortion is

[1] Betty Friedan, *Abortion: A Woman's Civil Right* 39 (Linda Greenhouse and Reva B. Siegel, Reprinted 1st edition 1999).
[2] K.D. Gangrade, I *Social Legislation in India* 261 (Concept Publishing Company (P) Ltd., New Delhi, Reprinted edition, 2011).
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legal in most of the West, this legitimacy is regularly challenged by anti-abortion groups.[5]

The Right to safe abortion has been granted to women as a fundamental Right under the Constitution of India and codified in the MTP Act, MTP Rules and MTP Regulations also. Anybody who inflicts, encourages or condones unsafe abortion in contravention of the codified law, commits a crime. Yet, as we have seen many articles in academic journals describe criminal abortions identifying the person who conducted it, and the place where it was performed. Legally, they are required to report these to the police administration, at least after treatment is given and certainly if the woman dies.[6]

Women's reproductive rights may include some or all of the following: legal and safe abortion rights; Right to birth control; freedom from forced sterilization and contraception; The right to access good quality reproductive healthcare; And the right to education and the right to make free and informed fertility choices. Reproductive rights may include the right to receive education about sexually transmitted infections and other aspects of sexuality and protection from practices such as female genital mutilation. The International Executive Committee (IEC) of Amnesty International has implemented "A new position on sexual and reproductive rights that includes support for abortion under special circumstances, in the context of our work to prevent serious human rights abuses against women and girls. This new policy, which grew out of our campaign to stop violence against women, and the tragic circumstances in which women too often find themselves, will enable the organization: women seeking safe, early medical termination of pregnancy in cases of rape Support, incest or when a woman's life or health is in serious danger. Urge governments to provide medical care to women experiencing complications from unsafe abortion; Resist imprisonment and other criminal penalties for abortion against women and their providers".[7]

[5] Brodie Janet Farrell, *Contraception and abortion in nineteenth-century America Ithaca* 254 (Cornell University Press, New York,1997).
[6] S.G. Kabra, *Abortion in India Myth and Reality* 43 (Rawat Publications Jaipur, 2013).
[7] Amnesty International, "Stop Violence Against Women: Reproductive rights" *Amnesty International, USA* (2007) *available at*: https://amnestyinternational.files.wordpress.com/2007/05/aiusapolicydocs.pdf, *accessed on* March 5, 2018.

Modern jurisprudence on reproductive rights is considered by two features: contraception and abortion rights are protected from only active governmental abridgement and the alternative choice to become a parent, despite dicta to the contrary, has virtually no constitutionally-based protection and little statutory protection. Consistent application of strict scrutiny to abridgements of the fundamental right of reproductive choice would yield a more socially progressive and legally defensible jurisprudence than contemporary common law and judicial practice.[8] The relationship between induced abortion and mental health is an area of political controversy. Abortion is associated with both negative feelings and clinically significant disorders among some women, but similar problems are also associated with carrying an unwanted pregnancy to term. Given these two alternatives, the best evidence suggests that a single, first trimester induced abortion for adult women poses no greater mental-health risks than carrying unwanted pregnancies to term. The evidence is less clear in situations such as repeat abortions, and late termination of pregnancy due to fetal abnormality.[9]

Among those women who do experience mental health issues, the American Psychological Association's Task Force on Mental Health and Abortion concluded that these issues are most likely related to pre-existing risk factors, including "terminating a pregnancy that is wanted or meaningful, perceived pressure from others to terminate a pregnancy, perceived opposition to the abortion from partners, family or friends, lack of perceived social support from others and various personality traits and a history of mental health problems prior to the pregnancy." Since these and other risk factors may also predispose some women to more negative reactions following a birth, the Task Force concluded that the higher rates of mental illness observed among women with a prior history of abortion are more likely to be caused by these other factors than by abortion itself. The best predictor of mental health issues following an abortion is a history of mental health issues prior to the pregnancy.[10]

[8] *Available at*: https://scholarshiplaw.berkeleyedu/cgi/viewcontent.cgi?referer=https://www.google.com/&https.redir =1&article=1020&context=bglj (last visited on May 25, 2018).
[9] B Major, M Appelbaum, L Beckman, MA Dutton, NF Russo and C West, "Report of the APA Task Force on Mental Health and Abortion" *Washington DC: American Psychological Association* 4–5 & 11–12 (2008) *accessed on* May 20,2018.
[10] *Ibid.*

In a society, a woman who is pregnant is pressurized to abort and one who is not pregnant is pressured to control her fertility. The women in societies such as that found in India do not have the choice to remain single and, having gotten married, they cannot choose when to have the sexual relations that make them pregnant. Nor is the choice to continue the pregnancy or not theirs. In India, today many pregnant women make their "only choice" induced abortions-which may be neither legal nor safe. Free access to abortion is a woman's right and a major demand of the feminist movement. It has being observed that abortions are damaging the health of women. In a patriarchal society where women have no rights over their bodies, and population control policy is being forced, abortions and abortion services add to being one more instrument for the exploitation of women. To be able to participate effectively in political and social processes, women must have access to information, choice, and control over reproductive technologies. However, as techniques of medically monitoring and managing labor became available, methods of induced abortions are developed.[11]

A person's life begins at birth and is extinguished with death. The most important right of human is the Right to life. This is the highest human right from which no insult is allowed. It is insufficient Article 6(1)[12] of the International Covenant on Civil and Political Rights prohibits arbitrary deprivation of life. But there are some provocative issues related to this supreme authority. One such issue is the right to abortion. Among other rights of women, it is believed that every mother has the right to abortion for her own interest or by her own choice, a universal right. Earlier abortion rights were not allowed and strongly opposed by the humanity. Termination of pregnancy was named as fetal killing. But due to changes in time and technology, nowadays this right has been legally approved by most people in the country after the famous decision of *Roe v. Wade*[13] by the US Supreme Court, which is the most politically significant the Supreme Court ruling in history is one of Reviving national politics, dividing the nation into "pro-choice" and "pro-life" camps,

[11] Shweta Rana Chauhan, "Induced Abortion in India" *Uttarakhand Judicial & Legal Review, available at*: file:///F:/ABORTION%20IN%20INDIA%20%20ART/INDUCED%20ABORTION%20IN%20IND-IA.pdf, *accessed on* Jan 15,2019.

[12] International Covenant on Civil and Political Rights, 1966; *Article* 6(1): "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".

[13] (1973) 410 U.S. 113.

and motivating grassroots activism. It is a milestone in the United States Supreme Court's decision that most laws against abortion violate the constitutional right to privacy, thus overturning all state laws or prohibiting abortion that is inconsistent with the decision *Jone Roe*, the plaintiff wanted to end her pregnancy because she argued that it was the result of rape. Relying on the current state of medical knowledge, the decision established a system of trimesters, which attempts to balance the legitimate interests of the state with the constitutional rights of the individual. The court considered that the state could not restrict a woman's right to an abortion during the first trimester, the state could regulate the abortion process during the second trimester "in ways that relate to maternal health," and the third trimester in, first delimiting the viability of the fetus, a state may choose to prohibit abortion or even prosecute it as it sees fit. *Roe v. Wade*[14] in response to several states enacted laws limiting abortion, including laws requiring parental consent for minors to have abortions, but protests still exist and people believe it should be legally banned.[15]

The Medical Termination of Pregnancy Act, 1971 is considered by many to be one of the significant land marks of India's social legislation. Its supporters have described it as a key, opening the doors for reform and social change. More cautious empiricists point to the gap between other social statutes, such as the Abolition of Dowry Act, 1961, and reality, while some critics describe the MTPA as a tool for encouraging immorality in society.[16] The MTP Act is based on the UK Abortion Act, 1967. In The UK Abortion act, abortion can do on the consent of Medical Practitioner only. At that time, it forms not available as Right to choose and Right to Abortion. After the *Roe case*[17] Right to choose is a part of Right to Privacy. Rapid growth of population remains one of the important problems of Indian society, despite efforts by the government to control it through various family planning programs. The population has been growing at a rate of 2.5 percent per year for the last two and a half decades. Legalizing abortion was another scheme to restrict the growth of the

[14] *Ibid.*
[15] Punam Kumari Bhagat and Pratish Sinha, "Abortion law in India: The debate on its legality" 4 *International Journal of Law* 272 (2018) *accessed on* March 12, 2018.
[16] Savithri Chattopadhyay, "Medical Termination of Pregnancy Act, 1971: A Study of the Legislative Process" 16 *Journal of The Indian Law Institute* 549-569 (1974) *available at*: www.ili.ac.in, *accessed on* March 16, 2020.
[17] *Supra* note 13 at 1.

population.[18] However, past abortions have been seen as an immoral act attacking the sanctity of life, a view embodied in the Indian Penal Code, 1860 and this attitude is still widely maintained by many sections of Indian society today is at the same time, approximately 4.4 million abortions occur each year, clearly revealing the difference between legally acknowledged social values and social realism.[19]

India initiated in sanctioning induced abortion (Medical Termination of Pregnancy (MTP) Act of 1971) under which a woman can legally avail abortion if the pregnancy carries the risk of grave physical injury, endangers her mental health, when pregnancy results from a contraceptive failure in a married woman or from rape or is likely to result in the birth of a child with physical or mental abnormalities. Abortion is permitted up to 20 weeks of pregnancy duration and no spousal consent is required. According to the Ministry of Health and Family Welfare, in 1996-97 about 4.6 lakh MTPs were performed in the country. Against that, an estimated 6.7 million abortions per year are performed in other than registered and government recognized institutions, often by untrained persons in unhygienic conditions. Despite an intensive national campaign for safe motherhood and after the initial attention on unsafe abortion in the 1960s and early 1970s that led to legalization of abortion, morbidity and mortality from unsafe abortion have remained a serious problem for Indian women 28 years after abortion was legalized in India. In the last decade, women's health advocates have tried to draw the attention of policy makers and administrators to a range of issues and concerns related to abortion in order to improve the availability, safety and use of services.[20]

In the post *Cairo* period, the comprehensive Reproductive and Child Health (RCH) programme initiated in India, has included abortion in the RCH package and work towards making it safe. While the climate seems to be favorable to initiate debate on safe abortion among key stakeholders, lack of reliable information, wide regional and rural-urban differences, inability to bring various constituencies on a common platform and a thin research base, make it difficult for policy makers, administrators and women's health advocates to develop strategic interventions. The

[18] *Supra* note 15 at 5.
[19] Government of India, "The Shantilal Shah Committee Report" 19 (Ministry of Health, 1964).
[20] Leela Visaria, Vimala Ramachandran, Bela Ganatra and Shveta Kalyanwala, "Abortion in India: Emerging Issues from the Qualitative Studies" 39 *Economic and Political Weekly* 5044-5052 (2004) *available at*: jstor.org/stable/4415809, *accessed on* Dec 15, 2019.

Abortion Assessment Project India (AAP-I), ventured to fill in the gap by creating evidence-based body of knowledge on all facets of induced abortion. This multi-centric research project commenced in August 2000 and was managed jointly by CEHAT (Mumbai) and Health Watch (New Delhi).[21]

Women have always been part of the birthing experience, either as the birthing woman, or the supporting woman or midwife. Women bonded over the birthing process, as part of their day-to-day life and within the social remit of their environment. This entrustment of nature is still the significant difference between males and females. Even though men were not allowed to be part of this natural part of reproduction, women have always had problems in making midwifery professionally accepted in the modern society. Midwives generally promote a non-medicalized approach to pregnancy and birth. For instance, they avoid the use of electronic fetal monitoring (EFM) and prefer stethoscope auscultation instead. They tend to discourage women from the need for pain relief, emphasizing the valuable function of pain for a more instinctive connection with the child, and thus for a satisfying experience of childbirth. They also defend their professional interest by not promoting such interventions, as only specialists can administer these interventions.[22]

However, even though midwives incline to the natural process of birth, as soon as there is a complication, the higher-ranking, most often male, obstetrician is called upon to assist. In contrast to the mid- wife, a medical professional treats a pregnant woman as someone who requires care and assistance. Thus, the pregnant body does not belong to the woman; the health professional objectifies it as the container of an unborn baby, which needs to be taken care of Woman's bodies are seen as being in production when going through childbirth. According to *Foucault*, "this kind of objectification of the body can be done with the idea of normalization through the modern medical gaze". According to *Martin*, "if birthing is seen only as production, then health professionals should manage it with the assistance of technology". The pregnant woman takes part in a medicalized system that is considered normal. As such, childbirth has moved from the social remit of the woman's environment, where women bonded over the birthing process, into a sterile

[21] *Ibid*.
[22] Smitha Nizar, *The Contradiction in Disability Law* 25 (Oxford University Press, London, 2016).

medical environment. The concept of medicalization was first defined in the 1970s in the social sciences. It indicates the process through which the medical institution extended its domain over daily life, transforming certain categories of people into 'patients' and certain attitudes or behaviors into 'illnesses'. This approach to human birth casts an obstetrician in the role of a lead decision-maker about the birthing process and places the birth in a hospital setting with intensive use of high technology. Medical science views pregnancy and the reproduction process as a deviant condition that could be dangerous and needs medical surveillance. Consequent to this view, medical intervention involves special assistance to monitor the mother's health, her obstetric history, and antenatal conditions of the fetus. Thus, the medical professionals progressively took over.[23]

The responsibility of the birth of a 'normal child', in addition supervising the natural process of childbirth. Medical science makes available a few prenatal monitoring machines for EFM or cardiotocography, and so on. The plethora of information can be overwhelming and frightening. Yet. the imperialistic perception of medicalized childbirth claims it to be uplifting, empowering, and wonderful. The rise of antenatal care, however, is noticeable for being more than an extension of medical service to the mother. The interest in the fetus marks a significant shift in the medicalization of birth. Screening tests such as amniocentesis and EFM that detect fetal conditions that are medically termed 'abnormal' have become more common. This process of screening fetal conditions ensures the monopoly of medicine over the entire process of childbirth.[24]

According to *Oakley*, "childbirth stands between nature and nurture, as it has been considered both a biological and a cultural process". It is biological because of the way babies are born; it is cultural because of the interference and impact that technology, science, and politics can have on the process. A woman decides to go through technocratic birth because only when she submits herself to the norms of medicalization of childbirth is, she deemed responsible. Society has deemed childbirth to be dangerous and therefore it is safe only in the hands of health professionals. This is the reason why babies are no longer born at homes, but in hospitals. Many feminist

[23] *Ibid.*
[24] *Ibid.*

accounts of the relocation of childbirth from the home to the hospital emphasize the political machinations of the emerging medical community and the impact of its propaganda on women's beliefs and preferences. According to these accounts, doctors used their growing political and cultural authority to redefine childbirth as a dangerous, pathological event, to denigrate and eliminate midwives, and to fuel the perception that middle-and upper-class women are less capable of withstanding the challenges of childbirth. This is despite all the possible complications that can be caused by technological interventions during childbirth in a hospital.[25]

The natural discourse in the reproduction process has thus changed to a medical discourse. According to *Foucault*, "it is possible to create socially accepted individuals who are acceptable to the medical system, by using power through discipline". The disciplinary process is done through the regulation of the smallest part of their lives. In the case of a pregnant woman, it would be by regulating the baby that would make the mother do as she is medically prescribed. Technology will let her know the minute details of the fetus growing in her body. Medical experts would examine the present and future 'medical problems associated with the baby. They claim that this will empower a woman to take an informed decision about her unborn baby. For a woman, it is wonderful to know the details of her baby before birth. The medicalization of human birth has thus resulted in scrutiny of the qualities of the fetus, deviating from its original objective of safety of the child and mother. The mother then does not seem to fit into the medical picture of childbirth, as she is objectified as merely the carrier of the baby. Childbirth, a natural everyday act, thus proceeded to become a medical act, where the qualities of the new human life are scrutinized to decide what kind of baby should be born. So, an unborn baby is not deemed to be a legal subject that could have rights over the mothers reproductive rights. Consequently, even the 'technological fix' hovers around a spectrum of issues such as: Who is a human? When does human life begin? Does the fetus possess the characteristic of a person to claim the right to life?[26]

Traditionally, birth was synonymous with viability, the point at which the human entity growing in the womb becomes an independent. In December 1994, an

[25] *Supra* note 15 at 20.
[26] *Supra* note 15 at 21.

extreme anti-abortionist opened fire on two neighboring abortion clinics in *Boston*, killing two people and injuring at least five others. He then headed 600 miles south and was arrested as he fired shots into another clinic. He later committed suicide in prison. In the same year, another anti-abortionist was convicted of shooting and killing an obstetrician and his driver outside a clinic in *Florida*. He was executed in 2003. Fortunately, such extremism on the abortion issue has not yet been seen in Britain. Abortion in a source of considerable controversy but lacks the nasty bite of the crusading killer. Abortion is after all really about the value that should be attached to human life. It is about whether it is permissible to kill a fetus and whether and when the medical profession should act to free a pregnant woman from an unwanted pregnancy.[27]

The abortion debate is trickled in ethical controversy and the moral position adopted makes a huge difference. The existence of different views and regulatory approaches raises practical issues beyond extremism. *Britain's* irrelatively permissive regulatory approach to abortion encourages medical tourism as women particularly *lrish* women travel to this country for treatment not available in their home country. Despite this tourism the *lrish* only narrowly rejected the adoption of an even stricter abortion law in a 2002 constitutional rejected the adoption of an even stricter abortion is permitted only to save the life of the pregnant woman the legality of abortion on more general grounds has been clear in Britain for nearly four decades. Before examining the detail of the abortion legislation however this chapter will seek to map the moral debate.[28] For convenience, I will refer to a human being from conception until birth as a fetus. Scientists tend to restrict use of the term "fetus" to eight weeks gestation and beyond. In other chapters where the focus is only on the very early stage of development I will use the term embryo. Here, however, using the term fetus seems stylistically preferable to constantly saying "embryo and/or fetus" or using the composite "Embryo-Fetus".[29]

Most antagonism to abortion depend on the foundation that the fetus is a human being, a person, from the flash of conception. The principle is argued for, but, as think, not well take, for example, the most common argument. We are asked to

[27] Shaun D. Pattinson, *Medical Law and Ethics* 209 (London Sweet and Maxwell, 1st edition, 2006).
[28] *Id.* at 210.
[29] *Ibid.*.

notice that the development of a human being from conception through birth into childhood is continuous; then it is said that to draw a line, to choose a point in this development and say before this point the thing is not a person, after this point it is a person is to make an arbitrary choice, a choice for which in things no good reason can be given. It is determined that the fetus is, or anyway that we had better say it is, a person from the moment of conception. But this conclusion does not follow. Similar things might be said about the development of an acorn into an *oak* tree, and it does not follow that acorns are *oak* trees, or that we had healthier say they are.[30]

The controversy relating to the legal rights of an unborn fetus has been the subject matter of debate at both National and International level. The question that arises for consideration is whether the fetus can be granted the status of a human being from its very inception and conferred the status of a person or not. Most legal systems in the world have regarded the fetus as part of a woman and have no rights as an entity separate from it. "The reason that different values are given to life inside the womb and to extracorporeal life in the modern legislation of many states lies in the fact that the term 'biological individual' is split into 'human being' and 'person'". Such a dichotomy is rendered probable by the "legal capacity" with which the individual patronizes with. "It is precisely this use of the category of legal capacity, in positive law, that makes it possible to recognize the personal status of beings that are different from the biological individual, and some biological individuals continue to be denied their legal capacity." It is also pertinent to note that the ambiguity relating to the legal personality of an unborn fetus in various jurisdictions across the world raises serious questions as to the legality of abortion.[31]

However, *Ronald Myles Dworkin*, an American philosopher, jurist, and scholar of United States, Constitutional law has argued that fetus is not a complete moral person from the moment of its conception. He has excluded claims by advocates of the prohibition of abortion that the unborn have the right to survive and that abortion is almost as wrong as murder or manslaughter. He contends that the

[30] R.M. Dworkin, *The Philosophy of Law* 113 (Oxford University Press, New York, Reprinted edition, 2007).

[31] Siddhartth Singh Nehra and Abhay Singh Rajput, "The Legal Personality of an Unborn Child: A Comparative Analysis of USA & India" 5 *Amity International Journal of Juridical Sciences* (2019) *available at*: file:///F:/ABORTION%20IN%20INDIA%20%20ART/amity%20university%20article%20on%20Fetus.pdf, *accessed on* Jan 12, 2020.

fetus has no interest until the end of the third trimester. As the brain of a fetus is not sufficiently developed until the twenty-sixth week, it cannot feel pain which is further supported by scientific claims. The question whether abortion should take place is dependent on the fact that the fetus has developed interests and not on the fact that it will develop interests if no abortion takes place. Something that does not have life cannot be said to have developed interests. A fetus would thus develop interests only when it can live on its own which happens only after the third trimester. However, the fundamental question that needs to be resolved is whether the fetus right to life if any, conflicts with the rights guaranteed to a pregnant girl which safeguards her right to health, life and in the interests of a female where the pregnancy jeopardizes her bodily injury or even life and where pregnancy is a consequence of rape or incest.[32]

Abortion is hardly in need of a definition, but in the interests of complete clarity, let me define it as the deliberate ending of a pregnancy with the known or desired result that the embryo or fetus will die. This matter is predominantly concerned with how claims about the moral and legal permissibility of abortion intersect with claims about fetal, or 'prenatal', personhood- in other words, claims about whether the fetus is a person in the philosophical sense. In different places, refer to this issue interchangeably as the question about what constitutes 'personhood' or 'moral status' or 'full moral standing' or full 'moral consider ability'. Exactly what is meant by that question, and how the designation 'person' differs from that if 'human being' will clarified.[33]

Pregnancy is a natural phenomenon. In view of this, the need for abortion will always remain irrespective of the reason. Abortion, being a sensitive issue, is possibly the most neglected and underexplored women's health issue leading to maternal morbidity and mortality. Nearly 97% of unsafe abortions take place in developing countries. About 8% of maternal deaths in India are attributed to unsafe abortions. The view point of different persons has been different on the matter of abortion. Some argue on its ethicality and others opine that it is a right of a woman to choose whether she wants to give birth or not. Over the past 15 years, abortion has been increasingly viewed in perspectives of human rights such as right to life, health, equality,

[32] *Ibid.*
[33] Kate Greasley, *Arguments about Abortion Personhood, Morality and Law* 2 (Oxford University Press, London, 2017).

nondiscrimination, liberty, and security of privacy. In 1979, the United Nations Committee on the Elimination of All Forms of Discrimination against women (CEDAW) reinforced the legalization of abortion.[34]

Despite difference range of physical, economic, social, and policy factors limit the access to competent care. Social factors such as stigma, conscientious objection to abortion in community, gender discrimination and low status of women, women avoiding male providers, lack of understanding and awareness of rights, and provider's attitude result in women conforming to unsafe methods. Behavioral theory suggest that women's attitudes, perceived norms, and knowledge of abortion may prevent them from considering it as an option. Pregnancy termination may be against women's personal, moral, and religious beliefs. While alternated, it is possible that abortion attitudes of women affect abortion-seeking decisions, behaviors, and experiences. For occasion, research has shown that a woman's abortion attitudes are even related to the type of procedure that she elects. To emphasize the right of pro-life, the fetus or embryo, and the right of women to be born and to have a pre-natal abortion, to choose whether to abort or preserve a pregnancy The debate on abortion affects the moral condition can issues of increasing attitude have been dealt with in studies addressing the Indian context in Gujarat, Bihar, Jharkhand and Uttar Pradesh. Perspectives about abortion are required by public health managers to better implement strategies for diverse population groups.[35]

"Reproductive rights are the rights of individuals to decide whether to reproduce and have reproductive health. This may include an individual's right to plan a family, terminate a pregnancy, use contraceptives, learn about sex education in public schools, and gain access to reproductive health service". Even Universal Declaration of Human Rights, 1948 considered Reproductive Rights as one of the basic Human Rights[36]. Even according to Para 7.3 of the International Conference on

[34] Pallabi Das Gupta, Romy Biswas, Dilip Kumar Das and Jayanta Kumar Roy, "Pro-life or Pro-abortion–Women's Attitude toward Abortion in Darjeeling, India" 7 *Archives of Medicine and Health Sciences* 42-47 (2019) *available at*: http://www.amhsjournal.org, *accessed on* Nov 28, 2019.
[35] *Ibid.*
[36] The Universal Declaration of Human Right, 1948; Article 3 : Everyone has the right to life, liberty and security of person. Article 16: 1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. 2. Marriage shall be entered into only with the free and full consent of the intending spouses. 3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Population and Development (ICPD) 1994, "Reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents, and other consensus documents. These rights can be freely and responsibly decided upon the recognition of the fundamental right of all couples and individuals. The number, spacing and timing of their children and the information and means to do so, and the right to achieve the highest standard of sexual and reproductive health. Human rights documents, including the Beijing Declaration, Fourth World Conference on women also includes their right to make decisions relating to reproduction free of discrimination, rebellion and violence expressed. The explicit recognition and reaffirmation of the right of all women to control all aspects. In their health, especially their own fertility is fundamental to their empowerment". In many International Conventions, Reproductive rights is considered to be as one of the basic human right which is included under Right to Privacy of Fundamental Rights. Where a woman has a Right for safe Abortion under Reproductive health not only abortion rights but right to decide number of children, spacing between the child etc. is also included in Reproductive Rights. Also, in country like UK and Singapore abortion is allowed up to 24 weeks. But in India, abortion is allowed up to 20$^{th}$ weeks. Now in recent time Medical Termination of Pregnancy (Amendment) Bill, 2020 pending in the Parliament. In this Act Termination is exceed from 20$^{th}$ to 24$^{th}$ weeks. After the *Menaka Gandhi case*[37] when Article 21 was elaborately discussed. And, Right to Abortion was considered as a part of Right to Privacy and included under Article 21 of the Constitution of India. But biasness is there. As only rape victim and married lady could have safe abortion under MTP Act. The Act is silent about the right of the Unmarried lady, divorcee and Widow. Even married lady had to show or proved that there was a failure of contraceptive and because of which she gets pregnant. Then, in such situation where is the privacy of Indian Women, when she must answer so many questions before availing the service of safe legal abortion under MTP Act, 1971. Moreover, Indian women are not that lucky like women in European countries who enjoyed their Reproductive rights with full freedom. we can say that Indian society and Government does not want to give this right to the women

[37] (1978) SCR (2) 621.

of our country as still our country is patriarchal society or male dominating society, where every decision is to be taken by the male member of the society.[38]

In a society, a woman who is pregnant is pressurized to abort and one who is not pregnant is pressured to control her fertility. The women in societies such as that found in India do not have the choice to remain single and, having gotten married, they cannot choose when to have the sexual relations that make them pregnant. Nor is the choice to continue the pregnancy or not theirs. In India, today many pregnant women make their "only choice", induced abortions- which may be neither legal nor safe. Free access to abortion is a woman's right and a major demand of the feminist movement. It has been observed that abortions are damaging the health of women. In a patriarchal society where women have no rights over their bodies, and population control policy is being forced, abortions and abortion services add to being one more instrument for the exploitation of women. To be able to participate effectively in political and social processes, women must have access to information, choice, and control over reproductive technologies. However, as techniques of medically monitoring and managing labor became available, methods of induced abortions are developed.[39] The major deficiency of the Medical Termination of Pregnancy Act, 1971 is that although it allows women to access abortion under certain circumstances, it does not provide the option of abortion as a right. More prominently, it does not provide for abortion as her right, granting a monopoly to medical opinion without any respect for the opinion of the woman who should be given the crucial right of choice making.[40] In The Medical Termination of Pregnancy Act, 1971 there are many issues which need to be resolved :

1. The Act initiatives the power of decision-making on medical practitioners, expropriating women's right to autonomy and self-determination.
2. When a woman is beyond 20 weeks pregnant, the pregnancy may be terminated only if it's immediately necessary to save her life. The Medical Termination of Pregnancy (MTP) Act of 1971 only makes abortion legal till 20 weeks.

[38] Pyali Chatterjee, "Medical Termination of Pregnancy Act: A Boon or a Bane for a Woman in India- A Critical Analysis" 5 *International Journal of Science and Research* 236-240 (2016) *available at*: www.ijsr.net, *accessed on* September 16, 2017.
[39] *Supra* note 8 at 6.
[40] Nitu Nawal, *Human Rights and Women Justice International and National Perspectives* 156 (Regal Publications, New Delhi, 2015).

3. The baby's physical and mental health, which is a ground to terminate pregnancy prior to 20 weeks, is no ground to terminate pregnancy post 20 weeks.
4. This artificial distinction is not rational, for, medical opinions suggest that several fetal faculties develop much later than the 20-week period. Several fetal abnormalities become conspicuous only during late-term pregnancy.
5. The Act is confined in scope for it discounts a whole range of factors which compel a woman to terminate her pregnancy much later than the 20-week period. For illustration, when there is a sudden change of personal circumstances like separation from, or death of the partner, the woman might not be able to raise the child single-handedly due to several reasons.
6. There are also illustrations where women do not even realize that they are pregnant until much later in the term, as they are using contraceptives, or their periods do not stop, or they are menopausal, etc. These situations, although fallible, reasonably impel them to rule out pregnancy.
7. There are also emotional factors like living in denial, until a time when it is too late when they finally gather the courage to even think of abortion. In the case of unmarried women, it is even more common to conceal pregnancy over long durations, owing to an ultra-conservative and a taboo-replete society.
8. Article 21 of the Constitution entails right to live with dignity. A woman who's certain that she will not be able to fulfill basic needs and raise her child with a life of dignity she predicts must be facilitated to exercise her right to reproductive freedom and fetus rights which also is an integral facet of Article 21.
9. The draconian requirements of the Act have been coercing women to access abortion services through backdoor channels, further affecting the bargaining power of vulnerable women and the unsafe abortions contribute to 8% per cent of the total maternal deaths.
10. Also, the Act must be amended to increase the availability of safe and legal abortions in India, all stakeholders argue that unsafe abortions continue to outnumber safe and legal abortions in the country.
11. These maternal deaths and morbidities can be addressed through expanding the base of safe abortions, with increasing medical advancements.

12. Medical Termination of Pregnancy Act, 1971 and its implication should be amended. Under section 3, abortion should be legal from 20 week to 24 weeks within limit prescribed under this Act.

Our Indian Law is not specified clearly for safe abortion and not give consent for abortion after 20 weeks. Followings are some problematic areas related to abortion in law.

1. In the Indian Penal Code, 1860, which were made about the age of a century, were prepared keeping in mind the British law on the subject. Abortion was made a crime for which the mother, as well as the abortionist, could be punished, except where she was to be induced to save the mother's life. It has been said that this extremely strict law has been violated in breech, with an exceptionally large number of cases having their pregnancy hidden.
2. In current years, when health services have expanded and hospitals have been fully taken advantage of by all sections of society, doctors have often expanded and hospitals have been fully taken advantage of by all sections of society, doctors have been provoked with seriously ill or pregnant women whose pregnant uterus has tampered with the approach of having an abortion and suffered very severely as a result.
3. Thus, there is wastage of mother's health, strength, and, sometimes life. The projected measure which seeks to loosen certain existing provisions relating to termination of pregnancy has been received as a health measure when there is a threat or risk to the physical or mental health of the woman; On human grounds such as pregnancy arises from a woman's sexual crime health; And the eugenic base where there is a substantial risk that the child, if born, will agonize from deformities and diseases.

**1.1 Hypothesis**

India is one of the few countries in the world to legalize abortion by passing the MTP Act in 1971. Though the abortions are legalized in India yet the right to abortion is not recognized in absolute terms. The act confers on the women the right to privacy in restricted and regulated manner. Right to safe abortion is also one of the fundamental issues which must be taken into consideration.

**1.2 Research Questions**

The main research problem of the issue that we goal to answer are following:

1. Is having an abortion a risk to a woman's health?
2. What is the impact of abortion on the health of women?
3. What measures could to be taken to reduce the unsafe abortions leading to increased maternal mortality and morbidity?
4. What is the condition of accessibility and availability of abortion related services?
5. What is the role of primary health care centers to provide safe abortion services?
6. Whether the informed consent is obtained from the women or not?
7. Is if the persons free will to decide whether she wants to choose baby or not?
8. Is Termination of Pregnancy is a debate between Pro-choice and Pro-life?

**1.3 Research Methodology**

My study has been based on the doctrinal as well as analytical research. The researcher has used mainly the methods of doctrinal and analytical tools simultaneously. The researcher has studies the literature available in Library as well as online journals and materials have been consulted. In addition to it descriptive, explanatory method have applied in accordance with the need of the proposed study. At the same time, the researcher has discussed international and national provisions and judicial pronouncement, and critically analyzed to substantiate the logic and rational behind the different provisions relating to the Abortion and Reproductive Rights and their problem. All the primary as well as secondary documentary sources have utilized. The researcher has consulted the reports of the Law Commission of India, 1971 on the topic of Abortion, articles, journal, judicial decisions of Supreme Court and high courts of India and other significant foreign decisions.

I have designated many issues in all chapters. It comprises as follows:

The *First chapter* something of a fresh start with the Introduction, issue and argument in MTP Act, Statement of Problem, Research Hypothesis, Research

Questions and Research Methodology also. In this chapter, I have described Reproductive Rights, Right to Life, Right to Abortion and Fetus Right's also.

The *Second Chapter* is explained History and Concept of Medical Termination of Pregnancy and deals with historical background of Abortion in Primitive Society to Pragmatic Society, Criminal Abortion in Modern Era. Meaning and Definition of Abortion and Medical Termination of Pregnancy with Religious Views also.

The *Third Chapter* is relating to Legal Status of Fetus. In this chapter researcher has discussed Meaning of Fetus, Legal status of Fetus, Moral status, ethics also and other issues raised by abortion, relationship view. It chapter coherent in following topic Introduction, Meaning of Moral Status of Fetus, Reproductive Technology and the Earliest Stages of Human Stages of Human Life, The Debate over the Moral Status of the Early Embryo, The Legal Status of the Fetus, Abortion Ethics, The Ethical Sustaining of Roe v Wade and Casey v Pennsylvania, The Status of the Fetus, The Fetus is a Person from the Moment of Conception, The Fetus has Moral claims based on its Potential, The Fetus becomes as Human, The Fetus becomes a Person at Sentience, Personhood does not begin until sometime after Birth, The Right to Choose, The Morals of Abortion, Grounds of Moral Status, The Major Moral Positions of Fetus, Conclusion.

The *Fourth Chapter* considers on Medical Termination of Pregnancy: International Perspective. It is particularly devoted to the comparative Law of other country and International Norms. In this chapter, I have discussed United Nations Conventions, treaties and International guidelines for woman on this topic. Introduction, Universal Declaration of Human Rights, 1948, International Covenant on Civil and Political Rights, (1966) (ICCPR), American Conference on Human Rights, 1969 (ACHR), Vienna Program of Action, International Reproductive Rights Policy as pronounced at International Human Rights Conferences, International Conference on Population and Development, 1994 (ICPD), The Women's Conventions and Conferences, Health-Related Rights under the Women's Convention-Autonomy, Equality, Discrimination and Difference, Biological Difference, Non-Discrimination in Allocation of Resources, The Right to Life, Reproductive Choice–Abortion, Reproductive Choice -Family Planning, International Human Rights Instruments and Abortion, Beijing Declaration (1995), Beijing +5

(2000)- First World Conference on Women, Second World Conference on Women, Third World Conference on Women, Fourth World Conference on Women, Convention on the Elimination of all form of Discrimination against Women (CEDAW), 1979, The African Charter on the Rights and Welfare of the Child, UN Millennium Declaration, 2000, The Convention on the Rights of the Child, Disability Rights Convention, Regional Treaties and Conventions, Conclusion.

The *Fifth Chapter* is relating to Medical Termination of Pregnancy in India. In this chapter, I have discussed Medical Termination of Pregnancy Act, 1971, previous all amendment and recent Amendment, 2020 in MTP Act also. I elaborate many laws relating to Abortion and the policy, The Constitutional Law of India and The Indian Penal Code, 1860. It chapter articulate in following topic Introduction, 42nd Law Commission of India Report, 1971, Implementation a Preliminary Report of the First Twenty Months of Medical Termination of Pregnancy Act, Position of Abortion Law in India, The Indian Penal Code, 1860, Offence Against the Persons Act, 1861, Family Planning Commission Report (1951-1956), Medical Termination of Pregnancy and its implementation: Critical Analysis of MTP Act, 1971, Characteristics of Women who Terminate Unwanted Pregnancies, Medical Termination of Pregnancy (Amendment) Bill, 2002, Medical Termination of Pregnancy (Amendment) Rules, 2003, Medical Termination of Pregnancy (Amendment) Bill, 2014, Medical Termination of Pregnancy (Amendment) Bill, 2017, Women's Sexual Reproductive and Menstrual Rights Bill, 2018, Medical Termination of Pregnancy (Amendment) Bill, 2020, Objects and Reasons of MTP, Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994, The Protection of Children from Sexual Offenses Act, 2012, Abortion and Sex-Determination: Different Issues, Relation between the PNDT and the MTP Act, Unsafe Abortion in India, Abortion Law and Policy: Potential and Actual Abuse, Conclusion.

The *Sixth Chapter* examined the Judicial Response. In this chapter, I have discussed Foreign and Indian cases related to topic. This chapter deals various cases of the UK, USA and Indian Judiciary which gave so many directions to safe abortion, right to Abortion Fetus rights also. It cases have been enunciated in following topic Introduction, Reproductive Right of a Woman, Right of Fetus, Right of Abortion, Right of Safe Abortion, Right of Abortion of Rape Victim, Second Trimester Abortion, Minors Abortion, Right to Privacy, Conclusion.

The *Seventh Chapter* deals with Conclusion and Suggestions. In this chapter researcher have discussed all important issue relating to the topic. To some we have seen the shocking failure of our legal system to protect the most vulnerable members of our society like unborn child from being killed. To others we have seen the struggle for control over women's bodies, especially during pregnancy. Although women have right is own bodies and control over their reproductive right this control is said by some only to be to the extent that it is permitted by the male dominated legal or medical establishment. For those seeking a middle path of respecting the interests of the fetus and rights of the mother with safe life, there should be balance between each other.

I have discussed many issues relating to the topic of Medical termination of Pregnancy in the aforesaid chapters. Because MTP and issues related to theme are very controversial. We should balance right from each other. Without balancing we cannot survive in life on the Earth.

# Chapter Two
# Medical Termination of Pregnancy: History and Concept

# *Chapter Two*

# *Medical Termination of Pregnancy: History and Concept*

*"Democracy demands that the religiously motivated translate their concerns in to universal, rather than religion-specific, values... it requires that their proposals be subject to argument and amenable to reason. Now I may be opposed to abortion for religious reasons, to take one example, but if I seek to pass a law banning the practice, I cannot simply point to the teachings of my church or evoke God's will. I have to explain why abortion violates some principle that is accessible to people of all faiths, including those with no faith at all."*

*— Barack Obama*[1]

## 2.1 Introduction

Abortion, intended to culmination a physical condition before birth, is efficient from the past. Over the years, there have been disturbances in laws and attitudes regarding abortion and this is a social and political matter, as it can be a medical problem. The primary testimony of abortion through the *Egyptian era* dates back to exactly 1550 BC. There are a series of references to abortion in inexperienced and Roman classical texts. The philosopher said that abortion was not quickly confused. *Aristotle's* was that "A male gives birth to a soul of fourteen days and a fetus for ninety days, so if an abortion is done before these deadlines it is not killing a human being". The pledge forbids the service of epithelial tube suppositories for abortions, which are probably far from the dangerous abortions imposed in practices. Alternative writing by the medical practitioner showed evidence that he indicated the methods below for abortion to be applied safely and for early jumping, and for abortion all the way. In addition, natural abortions have been used throughout history and until now.[2]

[1] *Available at*: https://www.goodreads.com/quotes/631579-democracy-demands-that-the-religiously-motivated-translate-their-concerns-in (last visited on Feb 12, 2018).
[2] *Available at*: https://www.historyof.net/history-of-abortion.html (last visited on Feb 12, 2019).

**2.2 Abortion in Primitive Society**

Imaginary abortion was unsafe and morally wrong in *Roman*. A Roman writer still goes on to say that if a girl lost her life during the end of her pregnancy, she would "... suffer emotional punishment."[3] The request of abortion is well known from the past to now. Various strategies attempt to perform or abort, as well as administering abortifacient herbs, sharp tool work, abdominal pressure, and the application of alternative techniques. Abortion laws and their enforcement have fluctuated in mixed ages. The abortion rights movement was fortunate after the abortion was banned in many western countries in the twentieth century. While abortion is legally condemned in most of the West, this legitimacy is usually challenged by "pro-life" groups.[4]

There is no historical evidence of abortion being illegal or criminal under colonial rule in India until the 19th century. Some indirect references to the *Vedas* indicate that "it was allowed up to five months after which the fetus was considered viable". *Charaka Samhita* mentions nothing on abortion, nor has religion or state taken any place on abortion at any historical juncture, notwithstanding *Kautilya's economists*, in which a slave woman was severely punished for having an abortion. After Independence, the Code of Medical Council of India, 1956 ethics continued the colonial tradition. I will maintain the utmost respect for human life from the time of conception and the ban on abortion.[5]

*Kautilya's Arthashastra*[6] provides for "the imposition of a fine of 1,000 panas for the miscarriage by physical assault and a fine of 500 panas for miscarriage by administering drugs, and 250 panas. for miscarriage by rigorous labour".

And now we can discuss another way of history of abortion. Miscarriage is the termination of unnecessary pregnancy from the ruin of the fetus. It is one of the oldest methods of reproductive control and one of the most commonly used. This has been

[3] *Ibid*
[4] *Ibid*
[5] Ravi Duggal and Sandhya Barge, "Abortion Services in India Report of a Multicentric Enquiry" *Abortion Assessment Project- India* 1-7 (2004) *available at*: https://www.researchgate.net/publication/268518761, *accessed on* Jan 13, 2019.
[6] *Available at*: https://csboa.com/eBooks/Arthashastra_of_Chanakya_-_English.pdf (last visited on Jan10, 2019).

done and completed in all regions of the world.[7] All societies have permitted laws or recognized policies related to induced abortions. Those policies and laws are generally a product of the country's legal heritage as well as the institution of political, economic, social and spirituality and culture.

In the foregoing societies a woman whose pregnancy is intolerable to the community, a woman who has her own rules regarding the number of suitable sexual partners or children, a pregnant widow, an unmarried girl or a young girl who has intercourse with an organ have broken. An outsider or someone whose pregnancy is the result of an adulterous relationship is estimated to have an abortion. There is no decision in favor of abortion, but habitually strong moral decisions about pregnancy and conditions. The relation of nursing to abortion in examining laws and policies related to going back into history suggests that abortion was deliberately performed under the law against the husband in ancient Greek and Roman societies. The earliest Christian views on abortion can also be found in a second-century letter printed by Barnabas, a colleague of *St. Paul,* stating: 'You will not kill hypocrites by correlating them with nursing abortion or feticide'.

*St. Basil* the Good of the Jap Church wrote in 376 A.D.[8] "A girl the World Health Organization deliberately destroys an armistice that is a command to murder." The primary system for organizing religious legislation took place in 1140. The laws state: "He is not a murderer. The World Health Organization reminds of abortion within the soul of the body". However, the twelfth-century priestly law measured abortion if it was done solely when the fetus was given a motion (which began eight weeks after the fetus began to move to the male crypt, and was unspecified to take place for eighty days). John T. With Noonan, Catholic theology "treated the life of the fetus, but in its entirety, although especially the value of the mother's life was given great weight". In addition to a small amount within the mid-sixteenth decade, once abortion could be fined by well boycott, read that abortion was not a punishable act if it occurred in an initial physical condition, in 1869 by Christian churches. *Pope Pius IX* was once appointed by the "It begins with a haste which was austerity boycott for abortion for Roman Catholics". The Second Vatican Palace Council under *Pope John*

[7] Rita J. Simon, *Abortion, Statutes, Policies and Public Attitudes the World Over* 1-2 (Greenwood Publishing Group Inc. United states of America, 1st edition, 1998).
[8] *Ibid.*

*XXIII* confirmed that "life should be protected with the best care immediately after conception", while abortion and child murders are inexplicable crimes. The shift to irreligious law shows us that early English common law presupposes a distinction between early and late abortion, drawing the peculiarity of hurrying. Before 1803, abortions before haste were considered against the law, and still later abortions in physical condition were considered harsh penalties. In 1803, the primary unlawful law about abortion was in force in England, the Commonwealth Act. A Women's World Health Organization was fined in the National Chocolate Act, which was procured and repealed. The Irish Chalky Act was followed in 1861 by the Crimes Against Persons Act. That Act states: "It may be a law- to acquire any girl unlawfully or to have her abortion or to be broken by immoral punishment for another. The person shall be subject to such purpose." He tries to do the same thing with the child, whether it is with the child or not. Crimes against Persons Act of 1861 for common law abortion law set of four.[9]

In *Civil Law*, the first widely adopted law about induced abortion was written in the Napoleonic Code of 1810. This allowed for drastic abortions for any woman who had an abortion and for anyone who had an abortion. Another situation related to "religious laws" in Muslim countries also had significant implications for abortion policies. *Islamic law* engages in the *Quran* and *Sunna,* a compilation of acts and statements prepared by the Prophet and by scholarly interpretation. While different schools of Islamic law differ somewhat in their analysis, Islamic law forbids killing the soul. Various schools of Islamic law struggle when a fetus acquires a soul. Some pronounce the time as 40 days after the beginning and others as 120 days. Some schools allow abortions prior to abortion on reasonable grounds, others refuse abortions early. Islamic law, generally, allows abortions when the pregnancy threatens the mother's life, except during the period of conception.[10]

Although the leaders of *American Jewish society* and especially Jewish women are among the most verbal of "the right to choose woman", the traditional Jewish position is derived from the body of law in the Talmud that "the unborn fetus is for all intents and purposes a person." And allows itself to have the same safeguards and protections that society does for all its members. "Under Orthodox principles

[9] *Supra* note 7 at 3 .
[10] *Supra.*

abortion is allowed only to save the life of the mother. Its is not allowed abortion to destroy an imperfect child unless and only if it is not necessary to protect the physical and mental health of the mother.[11]

In *Israel,* abortions are performed to protect the mother's physical and mental health, if the fetus is impaired, or if the mother was a victim of rape or interbreeding. The root cause of the latter two criteria is that allowing pregnancy to continue would be intimidating for the mental and physical well-being of the mother. The opportunity for abortion was in print in 1917 by *Canon Law*, if the pregnancy threatened by extinction of the mother's life. A major change in English common law occurred after the Act of 1861 in 1938. When *Rex v. Bourne*[12] case, the Judge specifically set the precedent when an abortion would be legal. In the Bourne case, a physician was charged with rape at the age of 14 for performing art. Dr. *Alek Bourne* was clean on the grounds that the continuity of motherhood caused the woman to become a "mental stop". The decision affirmed that within 1861 the term "illegally" acted vaguely as an abortion intended to protect a woman's life or health was not a criminal act that accompanied each physical and mental condition together, there is health.[13]

Changes made in *French civil law* in 1920 and 1923 reduced crime with the reduction of crime. In November 1920, in the recently shaped Union of the Soviet Socialist Republic, *Lenin* approved the first abortion law in *Europe*. Abortion was legal under hospital conditions. This law was recognized in gratitude for the origin of female equality and the right of the woman to control her own fertility. But in 1935, the law was reviewed and in June 1936, the Council of People's Directives decided to prohibit the display of abortion, but when the mother's life was picketed there was evidence of hereditary disease. Sentenced to two to three years in custody. All legal abortions were abolished in 1944, and those who assisted women in getting abortions were condemned to two years of detention. A major impetus for the change in policy from pro-abortion to state was the fear of the state and the Communist Party that the country's population growth was declining. Stalin saw the growth of residents as important for a strong armed society.[14]

[11] *Supra.*
[12] (1939) 1 K.B. 687.
[13] *Supra* note 7 at 4.
[14] *Supra.*

In 1955, the *Soviet* government reversed itself and passed legislation that legalized abortion based on previous Leninist grounds that no woman should be mandated to afford a child she did not want, and because a large number of abortions Were happening illegally under unlawful conditions. Maternal death was very high. Laws permitting abortion were also passed in the countries of the "Soviet Bloc" (Bulgaria, Hungary, Poland, Romania, etc.), passed in the Soviet Union in 1955. Elsewhere in *Europe,* abortion was also illegal, although with the onset of universal depression in the 1930s, there was a fundamental increase in the number of abortions. When the National Socialist Party increased power in Germany in 1932, *Hitler* declared: "The use of contraception means the destruction of nature, motherhood, femininity, and the lack of love. Nazi ethics demands that abortion practice be abolished with a strong hand ". In 1936, in response to the events of international feminist actions and liberal Western government, Hitler stated: I am often told, you want to exclude women from occupations, and no, I am only likely to establish myself to the greatest extent want to make up. Having family and children, our people need them above all things. "The female followers of the Nazi Party arranged with *Hitler* and HA: German woman to serve only work German man- first of uninterrupted service in the home minister, man, soul, body and take care of the mind. Till the last moment of human presence ". Family system clinics were closed and prison decisions ranging from six to fifteen years were mandatory on abortion doctors. In 1943, the law made abortion a crime.[15]

*Marshal Henry Philippe Patten* allowed "a law under the Vichy government of France during *World War II* that made abortion a capital crime". The Fascist government also supported anticreative and anti-abortion legislation in Italy. In the early period of American history, abortion was seen primarily as an option for women who wanted to get rid of pregnancies caused by illicit relationships. But the birth rate defeats any record in Europe by the end of the eighteenth century. With the rapid rise in birth rates, the frequency of miscarriages also increased higher. By mid-century, studies were released claiming that at least one in five had been eliminated by American women.[16]

[15] *Supra* note 7 at 5.
[16] *Supra*.

Most of the women who had abortions were married, white and normal. Many Americans do not consider pre-accelerated embryos as a separate human with their own secretive nature. The idea of "hurrying" continued in vogue in every state in the United States until the late 1860s. This rule or test was practically unaffected by British and colonial common law. Within this theory, the delivery of an abortion was not an unforeseen event, if it occurred before the spurt and if the woman was not hurt. It was the country's physicians who initiated and reconciled a major campaign in the United States, which he called the "abortion crisis". The program was structured under the aegis of the United States Medical Association. Many state legislatures have been influenced by the agitation to waive fast provisions from their criminal codes and renounce common law immunity for abortive women. The result was that most, but not all types of abortions were prohibited as unlawful actions, accepting legal penalties. Many of the laws that individual states enacted in the post-Civil War period remained unchanged for over a century. Those laws recognized official policies towards the abortion practice that the Supreme Court in *Roe v. Wade*[17].

Although the *British Common La*w doctrine on abortion expands and bends Canadian, American, Australian, and other former British colonies, the Napoleonic Code adopted in France in 1810 extends throughout the French colonies and Latin into countries such as Thailand, Japan, and Iran. America, Asia and Middle East which were never part of the French territory. For abortion and divorce in Western law, *Mary Ann Glendon* advises that "countries should achieve the same requirements for allowing or prohibiting abortion, but the values or beliefs underlying those criteria may differ rather". For example, *Glendon* comments on what US abortion law means by waiting for the last trimester, the fetus's "potential life" is offset by any need for a pregnant woman. Even after this, as a constitutional matter, there is no need to cover the life of the fetus. Nevertheless, in the hiatus of all Western European legislation, she states, although allowing broad-based abortions, she expresses that fetal life is an important awareness for society, and that abortion is not an option for birth control.[18]

According to *Glendon,* "United States law emphasizes sexual and social unity similar to Western European countries such as Sweden, even emphasizing autonomy,

[17] (1973) 410 U.S.113.
[18] *Supra* note 7 at 6.

isolation, and elimination from family issues; West Germany, social unity and lifestyle; And France, freedom, life and harmony". Americans believe that abortion problems include freedom, either the fetus's right to life or the dignity, choice or power of a woman's body. European laws emphasize community ethics. They highlight the interests of society as a whole, not only in abortion decisions, but also in the long-term expansion of benefits and attitudes about human life.[19]

**2.3 Pre Modern Era**

*Vedic* and *Smriti* laws of India highlight that "An uneasiness with the male seeds of the three upper castes, and religious courts forced various self-penalties for pre-communication aborting a woman or ex-chief priest." The only evidence of the "death penalty" for abortion in early laws is found in Assyrian law, in the Asura Code, c.1075 BC; and it is only forced on a woman who secures abortion against her husband's will. The first evidence of induced abortion is from the Egyptian Ebers Papyrus in 1550 BC.[20]

Many of the methods practiced in early civilization were non-surgical. Physical activities such as strenuous labor, climbing, paddling, weightlifting or diving were common techniques. Others included the use of irritant leaves, fasting, bloodshed, buckets of warm water above the abdomen, and lying on a hot coconut shell.[21]In practically all cultures, the diversity and transculturation of residential, obstetric methods through abortion technique observation.[22]The physical resources of abortion, including battery, exercise, and girdle, were kept muted, often used as early modern times among women in the family.[23]

Archaeological innovation indicates an early surgical attempt to eject a fetus; However, such methods have not been considered common, in view of which

[19] *Supra.*
[20] Potts Malcolm and Martha Campbell, "History of Contraception" *the Global Library of Woman's Medicine* (2002).
[21] Devereux G, "A typological study of abortion in 350 primitive, ancient, and pre-industrial societies" In Harold Rosen (ed.), *Abortion in America: Medical, psychiatric, legal, anthropological, and religious considerations* (Boston, Massachusetts: Beacon Press, 1967).
[22] Devereux George, *A Study of Abortion in Primitive Societies* 2 (International Universities Press, 1976).
[23] Macfarlane Alan, "Abortion methods in England*" The Savage Wars of Peace. Basingstoke: Palgrave Macmillan* (2002).

they are revealed in ancient medical texts.[24] A Sanskrit text from the 8th century includes women who want to persuade abortion to sit on a steam pot or stewed onion.[25] Massage abortion therapy, which engages in pressurizing the pregnant belly, has been experienced for centuries in Southeast Asia. One of the base reliefs from decorating the temple of *Angkor Wat* in Cambodia, 1150, portrays an evil spirit who performs such abortions.

Records from Japan reveal evidence of abortion in the early 12th century. During the Edo period, it became much more widespread, especially among the peasant class, which was most commonly hit by everyday famine and high age taxation.[26] The statue of the *Bodhisattva Jizo*, "Established in memory of abortion, miscarriage, miscarriage or the death of a young child, began to appear at least as early as 1710 in a temple in Yokohama". The statue of the *Bodhisattva Jizo*, erected in remembrance of miscarriage, miscarriage, childbirth or the death of a young child, began to appear at least as early as 1710 in a temple in Yokohama.[27]

### 2.4 Greco Roman Period

In antiquity, abortion was controversial. *Hippocratic* oath doctors swore not to perform abortions, but other *Hippocratic* texts suggest that "prostitutes often performed abortions". A piece by *Lysias* suggests that "abortion in Athens against the husband was a crime if his wife was pregnant when he died because the property of her unborn child could be claimed". The *Greek temple* inscription shows that "abortion made a woman unclean for forty days".[28]

Much has been identified in the *Greek* and *Roman* text about abortion methods and practice derived from early classical texts. Abortion was primarily a county of women who were midwives or well versed as a gynecological procedure. *Plato* addresses the ability of a midwife to facilitate abortion in the early stages of

[24] Doerfler Stephanie, "Abortion*" Archived from* original *on* June 30, 2007, *accessed on* Feb 20, 2018.
[25] London Kathleen, "The History of Birth Control, The Changing American Family: Historical and Comparative Perspectives" *Yale University* (1982).
[26] M Obayashi, "Historical background of the acceptance of induced abortion" 36 *Josanpu Zasshi* in Japanese 1011–1016 (1982) *accessed* on March 13, 2018.
[27] Brookes Anne Page, "Mizukokuyo and Japanese Buddhism*"* 8 *Japanese Journal of Religious Studies* 119–147 (1981) *accessed on* April 12, 2018.
[28] Robert Sallares, "Abortion" *Gender Studies, Science, Technology, and Medicine, Oxford University Press USA* (2015) *available at*: https://doi.org/10.1093/acrefore/9780199381135.013.4, *accessed on* April 5, 2020.

pregnancy in his theatus.[29] "Abortion was unimaginable in ancient Greece."[30] However, a piece recognized to the poet *Lysius* recommends that "abortion was a crime against a husband in Athens". If his wife was prenatal when he died, his unborn child may have acknowledged the property.[31]

The *Stoics* supposed that "the fetus bear a resemblance to a plant and only became an animal at birth when it happening breathing." This attitude finished abortion acceptable. *Roman* jurisprudence preserved that "the fetus was not independent from the mother's body." There is no evidence for laws in contradiction of abortion during the Roman republic. It was common during the early Roman empire, and was practised for many explanations, e.g. for family limitation, in case of adultery, or because of a desire to maintain physical beauty. *Soranus,* distinguished deliberate from 'spontaneous abortion', and abortion from contraception. He believed abortion if the woman's life was in danger. *Galen and Dioscorides* mention many plant products used, either orally or by vaginal suppository, to provoke abortions. Some plants, e.g. aristolochia and squirting cucumber, can indeed have such effects. Mechanical procedures were also castoff.[32]

The ancient *Greeks* relied on the aromatic plant Sylphium as an unproductive and contraceptive. The herb, as a major export of cybin, has been ambitious for destruction, but it has been speculated that it may have abortifacient properties similar to the remaining relatives of some Apiaceae family. Siphenium was so important to the Sirenian financial system that most of its coins were inscribed with plant icons. Pliny the Elder cited common cotton wool refined as an effective abortion. Sorenus Sammonicus regrets, a mixture made of potatoes and dill. This application of the plant was also explained by Sorenus, Dioscorides, Oribius. Modern technological work has assumed that rue in reality contains three abortive compounds.[33] A plant was used to make childbirth possible, miscarriage was also the cause of miscarriage. Galen

[29] Depierri Kate P., "One Way of Unearthing the Past" 68 *The American Journal of Nursing, Lippincott Williams* 521–524 (1968) *accessed on* Jan 20, 2018.
[30] Johannes M. Röskamp, "Christian Perspectives On Abortion-Legislation In Past And Present" *GRIN Verlag* (2010) *accessed on* Feb 10, 2018.
[31] Sallares J. Robert, "Abortion in Hornblower" Simon; Spawforth, Anthony (eds.), *The Oxford Classical Dictionary* Oxford: Oxford 1 (3rd edition, 2003).
[32] *Supra* note 28 at 120.
[33] Hurst W. Jeffrey and Deborah J, "Hurst Ruta Graveolens" *Medicina Antiqua*, The Welcome Trust Centre for the History of Medicine at UCL (2008).

included it in the De Antidotes Potion Guidelines, "while dioscorides believed that it could be given by mouth, or in the form of vaginal pessori pepper and myrrh".

Through a satirical reference to his satire, Peace, the Greek playwright *Aristophanes* mentioned the deplorable wealth of Peniroil in 421 BCE. *Hippocrates*, the Greek physician, would advise a pregnant prostitute to jump up and down, shaking her back with each heel with her heel to induce an abortion.[34] Other writings recognized by him systematically explain how to dilute the cervix and diuretic inside the uterus.[35] *Sorenus* was second century Greek physician, suggested diuretics, emmenagogues, enemas, miscarriages and disputes as effective methods of miscarriage, although he warned against using sharp tools for abortion due to the risk of organ damage. He directed women to make their gestures by force-walking, carrying heavy objects, riding animals, and jumping, so as to touch their backs with the woman's corrections, which she referred to as the "Ledemonian leap" defined that "She also offered a variety of herbal bathing dishes, rubbers and disappointments."[36] The Greek pharmacologist *Dioscorides* defined the elements of a drink called "Aboriginal wine" in De Materia Medicibri Quinque- halbore, spirit cucumber, and scammni but ignored it to provide the way it was to be arranged.[37] Miscarriages are identified in specific Hellebore. Tertullian, a Christian theologian of the 2nd and 3rd centuries, accepted surgical instruments that were runoff in a similar procedure to modern thinning and clearance. One device used for dispersion consisted of a "well-adjusted flexible frame," a "annular blade", used for diuretics, and the use of a "smear or shielded hook" for removal. Used to be done. The second was a spike or copper needle.[38] He employed *Hippocrates, Scylopides, Herophilus, Erasistatus*, and *Sorenus* for the title of such objects.[39] *Aulis Cornelius Salus*, "a Roman encyclopedia of the 1st century, gave a very detailed account of a method to eradicate an already dead fetus in his only prevalent book, De Medicina". In Book IX of the Paradox of All Heresies, Hippolytus of Rome, a third-century alternative Christian theologian, asserted that

[34] Lefkowitz Mary R. and Maureen R. Fant, *Intercourse, conception and pregnancy Women's life in Greece & Rome: A source book in translation.* 341 (Johns Hopkins University Baltimore Press, 1992).
[35] Klotz John William, "A Historical Summary of Abortion from Antiquity through Legalization*" A Christian view of abortion* (St. Louis, Missouri*:* Concordia Publishing House, 1973).
[36] *Ibid.*
[37] Riddle John M., *Contraception and abortion from the ancient world to the Renaissance* 29 (Cambridge: Harvard University Press, 1991).
[38] *Ibid.*
[39] Tertullian, "Tertullian Refutes, Physiologically, the Notion that the Soul is Introduced After Birth" *A Treatise on the Soul*, in Philip Schaff, *Ante-Nicene Fathers* 3 (Edinburgh: T & T Clark, 1885).

women are bound tightly everywhere in the middle to tighten themselves, which was supposed to be.[40]

## 2.5 Natural Abortion

Botanical preparations prescribed for abstraction were common in traditional literature and folk medicine. Such folk remedies, though, are diverse in effectiveness and were not without risk of adverse effects. Some herbs used many times to end a pregnancy are toxic. A list of the plants that led to the miscarriage was written in the De Viribus Herbarium as an 11th century herbal poem, the author of which is incorrectly recognized to Aemilius Messer. They included Rue, Italian catnip, savory, sage, sopvort, cyparsuvifite and black halberd and peniroal. Physicians in the Islamic world in the medieval period renowned the use of abortions, commenting on their effectiveness and predominance.[41]

The King's American Dispensary of 1898 recommended a brewer's yeast and pennyroyal tea mixture as "a safe and sure abortion"[42]. Penitroyal is deliberation to cause complications when used as an abortion. In 1978, a pregnant Colorado woman died after consuming two teaspoons of panirole vital oil[43], which is considered toxic. In 1994, a pregnant woman, unconscious of an ectopic pregnancy that required instant medical care, drank a tea containing cinnamyl take out to induce an abortion without medical aid. She later on died as a result of untreated ectopic pregnancy, which condensed symptoms for miscarriage.

Many types of juniper, known as savin, were often mention in European writings. In one case in England, a rector of Essex affirmed that he had bought it for a woman whom he planted in 1574; In another, a man advised his pregnant girl to use black halberd and boil the sevine together and dip it in milk, or else sliced murders boiled in beer. Other substances used by the English comprise Spanish fly, opium,

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[40] Hippolytus, "The Personal History of Callistus; His Occupation .." *Refutation of all Heresies* in Alexander Roberts and James Donaldson. *Ante-Nicene Fathers* 5 ( Edinburgh: T & T Clark, 1870).

[41] Sadiyya Shaikh, "Family Planning, Contraception, and Abortion in Islam: Undertaking Khilafa" In Daniel C. Maguire (ed.), *Sacred Rights: The Case for Contraception and Abortion in World Religions* 107 (Oxford: Oxford University Press, 2003)

[42] Felter Harvey Wickes and John Uri Lloyd, "Hedeoma (U.S.P.)—Hedeoma" *King's American Dispensatory* (1854).

[43] *Available at*: http://www.metroactive.com/papers/metro/12.14.95/pennyroyal-9550.html (last visited on April 20, 2019).

watercress seed, iron sulfate, and iron chloride. Another mixture, not a miscarriage, but as a substitute intended to be aborted by miscarriage, contains detanyi, hyssop, and hot water.[44] The source of the young insect leaf, called "whore origin" in French, was used in France and Germany; It was also recommended by a Greek physician in the 1st century. In German folk medicine, there was also a contraceptive tea, including marjoram, thyme, parsley and lavender. Other arrangements of undetermined origin included crushed ants, camel saliva, and bear-fat black-tailed deer tail hair.[45]

**2.6 Process of Abortion**

The Embryo in the *Stoic* was similar to the plant in nature, and was not an animal until the moment of birth when it finally breathed. Therefore, they found abortion to be morally acceptable.[46]

*Aristotle* wrote, "The line between legal and illegal abortion will be marked by the fact of sensation and being alive."[47] *Aristotle* did not consider "abortion to be the killing of some human before he reached the point".[48] *Aristotle* considered "the fetus to receive a human soul on fourteen days if male and ninety days if female; Earlier, it had botanical and animal spirits." The oath recognized to *Hippocrates* forbids the use of pessimists to induce abortion. Modern scholar suggests that pessimists were banned because they were cited as the cause of vaginal ulcers. This specific prohibition has been interpreted by some medical scholars as prohibiting abortion in the broadest sense.[49]

*Hippocrates*, "who establish our profession, laid the foundation for the oath of our discipline, condemning the pregnant woman of not giving a kind of medicine which Expels the fetus."[50]Other medical scholars disagree that *Hippocrates* tried to

[44] Macfarlane Alan, *Abortion methods in England* 48 (The Savage Wars of Peace, Basingstoke*:* Palgrave Macmillan, 2002).
[45] London Kathleen, *The History of Birth Control* 4 (The Changing American Family: Historical and Comparative Perspectives, Yale University, 1982).
[46] *Supra* note 31 at 3.
[47] Aristotle, *Politics* In H. Rackham (ed.), *Aristotle in* 237 (Cambridge, Massachusetts: Harvard University Press, 1944).
[48] *Ibid.*
[49] *Supra* note 37 at 31.
[50] Scribonius, *Compositions Praef* 20–23 (Translated and cited in Riddle's history of contraception and abortion).

discourage physicians from trying dangerous methods of aborting the fetus.[51] This may have arisen from the fact that the oath was originally also illegal surgery at the time, it was far more dangerous, and surgeons were a different profession from physicians.[52]

*Sorenus* accepts "two parties among physicians: those who do not perform abortions citing the *Hippocratic* oath, and the other party, his own." *Sorenus* recommended abortions in health complications as well as cases involving emotional irresponsibility and comprehensive suggestions in his work Gynecology.[53] In the Roman Republic, punishment for abortion was usually instigated as a violation of the father's right to dispose of his offspring. Due to the influence of Stoicism, which did not see the fetus as a person, the *Romans* did not punish abortion as punishment.[54]

Although abortion was generally accepted in *Rome*, around 211 CE the emperors Septimius Severus and Caracalla prohibited abortion as a violation of parental rights; Temporary deportation was a punishment.[55] Attitudes began to change with the spread of Christianity. The third-century legal compilation Pauli Sententia attributed to *Julius Paulus Prudentissimus* wrote: "Those who give abortions or love feelings, and do not cheat, yet, because it sets a bad example, to offend will be banned." "Mary, and honesty will be banned on an island after confiscating a part of their property, and if that woman or man is not If there is harm, they will receive the death penalty." It refers more to the killing of a woman who takes an abortion woman than the fetal murder. Roman jurist *Ulpian* wrote in the digest that, "An unborn child is being given birth, as far as it is concerned about its profit." Despite this, the practice of abortion continued "with little or no meaning to shame".[56]

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[51] Joffe Carole, M Paul, ES Lichtenberg, L Borgatta, DA Grimes, PG Stubblefield and MD Creinin (eds.), *Management of Unintended and Abnormal Pregnancy* 2 (Oxford, United Kingdom: John Wiley & Sons, Ltd., 1st edition. 2009).
[52] *Available at*: https://www.pbs.org/wgbh/nova/body/hippocratic-oath-today.html (last visited on April 15, 2019).
[53] Soranus and Owsei Temkin, *Soranus Gynecology* 19-60 (JHU Press, 1956) *accessed on* October 6, 2018.
[54] Jeffrey H. Reiman, *Abortion and the Ways We Value Life* 19 (Rowman and Littlefield, 1998).
[55] *Supra* note 31 at 2.
[56] Hopkins Keith, "Contraception in the Roman Empire" 8 *Comparative Studies in Society and History* 124–151 (1965) *accessed on* Feb 25, 2018.

**2.7 Pro-Life Scenes, Pro-Polls and Exceptions**

While there are three dissimilar views about abortion, they all differ in their own way and are a lot debated against. The three different groups include the pro-life, pro-choice and exception groups. The pro-life group favors the fetus, abortion is morally intolerable. Under the pro-life group approach, having an abortion and performing is equivalent to killing a human being. Once a conception occurs, it is considered a living human and, therefore, should be given the right to live. At the same time in which abortion is considered, when the mother's life is at stake. This approach has been taken by many Protestant Christians such as the Roman Catholic Church.[57]

The second group on abortion views is pro-choice. From this point of view, it is supposed that the mother is in control of her body and she can choose whether abortion is necessary for her own life. Individuals in support of the pro-choice group dispute that a fetus is not considered a human unless they are fully capable of physically surviving outside the mother's womb. The amount of time that an embryo is viable is anywhere from 24–28 weeks. According to followers of the pro-choice group, the mother must decide to have the child miscarried or not before the given time. Once a week, the mother is no longer lawfully able to abort the baby and must be taken to birth.[58]

The third group related to abortion is of exceptions, otherwise known as "situational abortions". From this specific point of view, abortion is seen and accepted in certain situations. Abortion is acknowledged when it is in the benefit of the mother's physical and mental health. It is also accepted in cases of rape and incest. It is seen that if a mother becomes pregnant as a result of rape or incest, they should not be forced to take the child to birth due to reasons related to mental health and financial conditions or difficulties, physical health etc. Abortion is also accepted from exception groups in situations where parents may find that their child has a mental or physical barrier.[59]

[57] The Pro-life v Pro-choice debate, "What Pro-Life vs. Pro-Choice Supporters Believe" *About.com News & Issues, accessed on* Nov 11, 2019.
[58] *Available at*: "Abortion ProCon.org*" Britannica Procon.Org, accessed on* Nov 24, 2019.
[59] Crook Roger, *An Introduction to Christian Ethics* 13 (6th edition, 2013).

**2.8 Religious Views in Abortion**

*Hinduism*

Prehistoric Hindu writings forbade abortion. Confirmation of this can be found from another source: Hindu scriptures and tradition have from the earliest of times condemned the practice of abortion, except when the life of the mother is in danger. Hinduism teaches that the fetus is a living, conscious person needing and deserving protection. *Hindu scriptures* refer to "abortion as *garbha-hattya* (womb killing) and *bhroona hathya* (killing the undeveloped soul)." A hymn in the *Rig Veda*...begs for "protection of fetuses". The *Kaushitaki Upanishad*...draws "a parallel between abortion and the killing of one's parents." The *Atharva Veda*...remarks that "the fetus slayer. . .is among the greatest of sinners".[60]

*Islam*

*Mohammed Saheb* fought "the practice of burying female babies under the Arabian sand." His first *Koranic* revelation spoke of an embryo. At least for some time in ancient Iran, abortion was an "unforgivable sin, "During the *Avesta* period, using instruments for abortion was not permitted; and abortion was met with the most severe penalties".[61]. The Supreme Court could surely have found evidence supporting this point of view in their library, one would have thought. The evidence is so clear that it is hard to understand how or why the Supreme Court disregarded it. Yet, the Court did not simply disregard recorded history; it rewrote it. It is one thing to ignore the facts. It is quite another to do as the Court did here and alter the facts.

[60] *Available at*: https://www.hinduhumanrights.info/hindu-religious-quotes-on-abortion (last visited on Jan 12, 2019).
[61] Ayatullah Damad, "Abortion, the Shiite Tradition" 5 (2004) *available at*: http://www.Almahdiat.comiconpagi.html, *accessed on* Jan 20, 2018.

*Buddhism*

Ancient *Buddhism* "opposed abortion". *Daniel Maguire*, author of Sacred Choices: The Right to Contraception and Abortion in Ten World Religions, noted that there were strong religious prohibitions in ancient Buddhism.[62]

*Christianity*

Early *Christian* leaders often called "abortion murder". Barnabas prohibited killing by abortion? *Anon* wrote graphically in The *Apocalypse* of Peter that abortionists ended up in hell to be tortured forever, for God wills it so, *Athenagoras* called abortion "murder", for which one was accountable to God.! Clement of Alexandria also called it murder, as did Tertullian, who said that "It makes no difference whether one destroys a life that has already been born or one that is in the process of birth". *Hyppolytus* called "feticide murder" and *Minicius Felix* referred to "it as infanticide". *Saint Basil* the Great called "the woman and anyone who gave her abortive drugs murderers". *Saint Ambrose* stated the same: "The poor expose their children, the rich kill the fruit of their own bodies in the womb, lest their property be divided up, and they destroy their own children in the womb with murderous poisons, and before life has passed on, it is annihilated." *Saint John* of Chrysostom stated his strong religious conviction in the following way: "Why sow where the ground makes Its care to destroy the fruit? Where there are many efforts at abortion? Where there is murder before the birth? For you do not even let the harlot remain a mere harlot, but make her a murderer also." You see how drunkenness leads to whoredom, whoredom to adultery, adultery to murder; or rather something even worse than murder. I have no real name to give it, since it does not destroy the thing born but prevents its being boom. Why then do you abuse the gift of God and fight with His laws, and follow after what is a curse as if a blessing, and make the place of procreation a chamber for murder, and arm the woman that was given for childbearing unto slaughter?, *Saint Jerome* said: Frequently die themselves and are brought before the rulers of the lower world guilty of three crimes: suicide, adultery against Christ, and murder of an unborn child, In his sermon on the subject, Tertullian evoked the image of John the Baptist leaping in the womb of *Elizabeth* at the visit of *Mary*, mother of *Jesus Christ*, and said that "it did not matter when the killing took place whether after or before birth-both were killings." The Didache commanded: Thou shalt not murder a child by abortion.

[62] Terry Mattingly, "Watching the Religious Left we Pray" (2004) *available at*: http://tmatt.gospe! .com.Netlco!umn/2004104/28, *accessed on* Nov 15, 2018.

The Spanish Synod of Elvira canonized that a woman, who adulterated and then destroyed the child, could be permanently barred from communion because she has doubled her crime. The Synod of Ancyra's penalty was penance for ten years.[63]

**2.9 Abortion Criminalization in the Modern Era**

At the Common Law, and by many on our State codes, fetal life, per se, is almost wholly ignored, and its destruction unpunished; abortion, in every case, being considered an offence mainly against the mother, and as such, unless fetal to her, a mere misdemeanor, or wholly disregarded. By the Moral Law, "the willful killing of a Human Being at any stage of its existence is Murder." In undertaking the discussion of this subject, three preliminary facts must be assumed:[64]

*First*- That, if abortion be ever a crime, it is of necessity, even in isolated cases, one of no small interest to moralist, jurist, and physician; and that, when general and common, this interest is extended to the whole community, and fearfully enhanced.

*Secondly*- That, if the latter assumption be true, both in premise and conclusion- neglected as the crime has been by most ethical writers and political economists, hastily passed over by medical jurists, and confessedly everywhere the great opprobrium of the law, often indeed by taunt that of medicine-either it cannot in the nature of things be suppressed, as by these facts implied, or its suppression has not been properly attempted. Discarding the former of these alternatives, as alike unworthy of belief, and proved false by facts hereafter to be shown, it will appear.

*Thirdly*- That the discussion now broached is neither supererogatory nor out of place; further, that it is absolutely and necessarily demanded.

Medicine saw amazing progress in the field of surgery, and hygiene in the nineteenth century. The social attitude towards abortion shifted as a reaction against the women's rights movement, and the desire of medical doctors to increase their power as an expression. Abortion has previously been widely practiced and legal

[63] Spencer Var Rosenbaum, "How Roe Got Ancient Religious Prohibitions on Abortion Wrong" *Mountbatten Journal of Legal Studies* 74-75 (2004) *accessed on* Jan.15, 2019.
[64] Storer Horatio R and Heard Franklin Fiske, *Criminal Abortion: It's Nature, It's Evidence and It's Law* 1-2 (Cambridge Press of John Wilson and Son, 1868).

under common law in early pregnancy, but the world passed legislation against abortion at all stages of pregnancy.[65]

In the early nineteenth century, there were many factors that contributed to the opinion about abortion. In the United States, where physicians were prominent advocates of abortion criminalization laws, some argued that advances in medical knowledge showed that hurrying up the conception process was neither less important than any other step, And thus if abortion was opposed. After hurrying, one must resist it before hurrying.[66] Practical reasons also influenced the medical field to implement anti-abortion laws. For one, abortion providers should be untrained and not members of medical societies. In an era where the nation's leading physicians were attempting to standardize the medical profession, these "irregularities" were measured a nuisance to public health.[67] The "irregulars" were disliked by the more dignified medical profession because they were competition and often inexpensive competition. Although the physicians movement against abortion began in the early 1800s, little progress was made in the United States until after the *Civil War*.[68] The *English law* on abortion was first codified into law under sections 1 and 2 of the Malicious Shooting or Stabbing Act, 1803. The Bill was proposed by the *Lord Chief Justice* of England and Wales, Edward Law, 1st *Baron Ellenborough*, to clarify the law relating to abortion and the first law to make it clear. The Act provided that it was a crime for any person to have an abortion or cause it. The punishment for performing or attempting to perform a post-accelerated abortion was the death penalty (section 1) and otherwise transport for fourteen years (section 2). In 19th century America, the regulation of abortion was very low, in the tradition of English common law, most abuses were considered pre-accelerated abortions. The trial in these cases proved difficult as the mother's testimony was usually only to determine when the spurt occurred.

The law was amend in 1828 and 1837, the latter bridged the gap between women who were quick with children (late pregnancy) and those who were not. It

[65] Reagan Leslie J, *When Abortion Was a Crime: Women, Medicine, and Law in the United States,* 1867-1973 8 (University of California Press, 1997).
[66] James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy* 35-36 (Oxford University Press 1978).
[67] *Supra* note 63 at 2.
[68] *Supra.*

also abolished the death penalty as a probable punishment. The late 19th century saw abortions become increasingly punished. One author justified this by claiming that the number of abortions among married women had increased since 1840.[69] Crimes against the Personnel Act, 1861 created a new initial offense of the purchase of poison or equipment with the intention of procuring abortions. During the 1860s, abortion services were available in New York, New Orleans, Cincinnati, Louisville, Cleveland, Chicago, and Indianapolis; With one miscarriage estimate for every four live birth.[70] Conversely, social perceptions of abortion change for progress in France. In the first half of the 19th century, abortion was seen as a last resort for pregnant but illiterate women. But as authors began to write about abortion in the context of family planning for married women, the practice of abortion was reorganized as a logical solution to unwanted pregnancies resulting from ineffective contraceptives. Formulation of abortion as a form of family planning for married women was made "thoughtful" because both medical and non-medical practitioners agreed on the relative safety of the procedure.

### 2.10 Approaches of Abortion

Since 1870, there was a steady decline in fertility in England, with some commentators not linking to the increase in the use of artificial contraception but to more traditional methods such as withdrawal and abstinence. This was associated with a change in perceptions of costs relative to delivery. Of course, women found themselves with unwanted pregnancies. Abortion was judiciously advertised and there was a considerable body of folklore about how to induce abortion. Violent purists were popular among working women, with Peniroil, Aloe and Turpentine all being used. Other ways to induce abortion were very hot baths and gin, extreme exertion, a flight of stairs, or a controlled fall of veterinary medicines. So-called 'backstreet' abortions were fairly common, although their bloody efforts could be fatal. Estimates of the number of illegal abortions performed in England vary widely: in 1914, according to an estimate, 100,000 women commonly attempted abortions by drugs.

In *New York*, surgical abortion in the 1800s carried a death rate of 30% regardless of a hospital setting, and the AMA launched an "anti-abortion campaign"

[69] *Supra.*
[70] Alesha E. Doan, *Opposition and Intimidation: The abortion wars and strategies of political harassment* 46 ( University of Michigan, 2007).

that resulted in abortion becoming the exclusive domain of doctors. A paper published in 1870 on the abortion services to be found in Syracuse, New York, concluded that the method most often practiced there during this time was to flush inside of the uterus with injected water. In this matter author, *Ely Van de Warkle*, claimed this procedure was affordable even to a maid, as a man in town offered it for $10 on an instalment plan. Other prices which 19th century abortion providers are reported to have charged were much steeper. In *Britain*, it could cost from 10 to 50 guineas or 5% of the yearly income of a lower-middle-class household.[71]

A rash of mysterious miscarriages in Sheffield, England was attributed to lead poisoning caused by the metal pipes which fed the city's water supply. Soon, women began using diachylon, a substance with a high concentration of lead, as an abortifacient. In 1898, a woman confessed to having used diachylon to induce a miscarriage. The use of diachylon became prevalent in the English Midlands up until *World War I* in 1914. Criminal investigation of an abortionist in Calgary, Alberta in 1894 revealed through chemical analysis that the concoction he had supplied to a man seeking an abortifacient contained Spanish fly.[72]

Dr. *Evelyn Fisher* wrote how women living in a mining town in Wales in the 1920s used candles for Roman Catholic ceremonies to dilute the cervix in an attempt to self-induce abortion. Similarly, candles and other objects, such as glass sticks, cuttings, curling irons, spoons, sticks, knives, and catheters were used in the United States during the 19th century. Women of Jewish descent in Manhattan's Lower East Side are said to have practiced the ancient Indian practice of sitting on steam vessels in the early 20th century. Some commentators stated that abortion was a dangerous process in the early 20th century, more dangerous than childbirth, until the 1930s. But others have said that early miscarriages in the 19th century under hygienic conditions in which midwifery was usually relatively safe. In addition, some authors have written that, despite improvements in medical procedures, the period from the 1930s until

[71] Potts Malcolm and Martha Campbell, "History of Contraception. Gynecology and Obstetrics", Archived from the original (2003) *accessed on* Jan 15, 2018.
[72] Beahen William, *"*Abortion and Infanticide in Western Canada, 1874 to 1916: A Criminal Case Study*"* 53 *Historical Studies. The Canadian Catholic Historical Association* 53–70 (1986) *accessed on* Jan 14, 2019.

legalization saw more enthusiastic enforcement of anti-abortion laws, and due to the increased control of organized abortion providers.[73]

**2.11 Announcement for Abortion and Abortion Services**

Despite restrictions on both sides of the Atlantic Ocean, abortion access to abortion services in the form of abortion, abortion-inducing devices, and disguised advertising of contraceptive drugs in the Victorian era continues. Clear print advertisements of this nature were found in the United States, United Kingdom, and Canada. A British Medical Journal writer, who responded to newspaper advertisements in 1868 to relieve "temporarily unrefined" women, found that more than half of them were, in fact, promoting abortions.

*Bechem's* pills were marketed primarily as a laxative from 1842. He was invented by *Thomas Beecham of St. Helens*, Lancashire, England. The pills were a combination of aloe, ginger, and soap, along with some other ingredients. The popularity of the tablets produced a wide range of testimonials that were used in advertising. Poet *William Pukhraj McGonagall* advertised the pills giving his recommendation in the verse. Bechem's expenditure on advertising increased from £ 22,000 in 1880 to £ 95,000. An 1897 advertisement in the Christian Herald edition for the Diamond Jubilee of *Queen Victoria* states: "A thong a box, Bikam pills all cause sick and neurological disorders such as sick headaches, constipation, weak stomach, impaired digestion, disorders". "For liver and female diseases." Sales are now 6 million boxes per year. "The text was printed on a beach with a picture of a young woman and was given the caption" What are the wild waves saying? Try Bechem's bullets?[74]

"Old Dr. *Gordon's* Pearls of Health", manufactured by a pharmaceutical company in Montreal, "if treated all monthly and irregularities" if "used monthly". However, some advertisements explicitly warned against the use of their product, which was expecting or listed abortion as its inevitable side effect. The copy for "Dr. *Peter's French* Renovating Pills" advised, "... pregnant women should not use them, because they always produce abortions ...", and both "Dr. *Monroe's* French periodic

[73] *Supra* note 65 at 9.
[74] Geoffrey Davis, *Interception of Pregnancy: Post-Conceptive Fertility Control Immunology* 5 (Harper Collins Publishers Australia, 1974).

pills "and" Melvo's "Portuguese female pills" were certain to produce miscarriages". In 1901 EF Karna, a Toronto man, warned women not to use the pills they had advertised as "fryer's French female regulators" to get themselves pregnant, because they will rapidly restore menstrual discharge. Historian *Ann Hibnerköblitz* comments that "Nineteenth-century customers may have interpreted this 'warning' exactly as the sellers intended: as an advertisement for the preparation of an abortion."[75]

In the mid-1930s, women in the United States were marketed to drugs by various companies under various names, such as molex pills and cote pills. Since birth control devices and abortions were illegal to market and sell at the time, they were introduced to women who were "delayed". The recommended dose constituted seven grains of ergotin in one day. These pills usually contain ingredients such as ergotin, allo, black helbore. The efficacy and safety of these pills is unknown. In 1940, the FTC deemed them unsafe and ineffective and demanded that these companies stop selling these products.[76]

A well-known example of a Victorian-era abortion was *Madame Restel*, or *Ann Lohman*, who provided both surgical abortion and abortion pills in the northern United States over a period of forty years. He started his business in New York during the 1830s, and by the 1840s, expanded to include franchises in Boston and Philadelphia. It is estimated that by 1870 his annual spending on advertising alone was $ 60,000. Because of her reputation, restalism became synonymous with abortion. Such advertising leads to criticism of cleverness and immorality. The safety of many breeds was questionable and the efficacy of the non-presence of others. *Gorsley Greeley*, in a New York Herald editorial written in 1818, characterized abortion and its propaganda as a "notorious and maliciously common crime", which is a fascinating one. Support to a regular guild of professional murderers is so secure that its perpetrators advertise their calling in newspapers. Although the paper in which *Grelley* wrote, he accepted such advertisements, others, such as the New York Tribune, published him. *Elizabeth Blackwell*, the first woman to receive a Doctor of Medicine in the United States, also stated that The ads led to "woman doctor" of contemporary Synonyms "abortion".[77]

[75] *Supra* note 63 at 3.
[76] *Supra.*
[77] *Supra.*

**2.12 Deviation into Abortion Law**

Abortifacient advertising was highly effective in the United States, although apparently less so across the Atlantic. Contemporary estimates of abortion rates in the United States in the mid-nineteenth century between 20% and 25% of all pregnancies in the United States suggest abortions ended in that era.[78] This era also saw a notable change among those who were receiving abortions. Prior to the beginning of the 19th century, the highest number of abortions were demanded by unmarried women who had passed out of the womb. But, of the 54 abortion cases published in American medical journals between 1839 and 1880, more than half were sought by married women, and more than 60 percent of married women already had at least one child. In the Post-Civil war era, much of the blame was placed on the women's rights movement.[79]

Abortion was opposed by many feminists of the era. Revolution, *Elizabeth Cady Stanton and Susan B* powered by Anthony, an anonymous contributor "A" wrote about the subject in 1869, arguing that only one law was attempted to be passed instead. Abortion, root cause, should also be addressed. Just in passing an anti-abortion law, the author said, "Weed should only be cut from the top of the weeding grass while the root remains. No matter what motive, love of spontaneity, or suffering the unborn innocent desiring to save., The woman is horribly guilty who acts, It will burden her conscience in life, it will put her soul in the burden of death, but oh! Three times guilty is the one who made her laugh. Pushed the issue that led to her crime." According to many feminists of this era, abortion was considered as an undesirable necessity forced on women by thoughtless men. Even the "free love" wing of the feminist movement refused to advocate abortion and the practice was regarded as an example of the loathsome extremes in which modern marriage was driving women. Marital rape and the temptation of unmarried women was a social ointment, which feminists believed required abortion, as men do not respect women's right to abstinence.[80] Socialist feminists expressed more sympathy for the need for an abortion option for the poor, and indeed socialist feminist doctors, such as *Mary Equi*,

[78] James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy* 76–82 (Oxford University Press, 1978).
[79] *Ibid.*
[80] *Supra* note 63 at 4.

*Madeline Pelletier*, and *William J. Robinson* himself demonstrated low-cost or free abortions for poor women.[81]

### 2.13 Abortion Law Reform Movement

The movement towards liberalization of abortion law emerged in the 1920s and 30s in the context of victories that had recently been won in the area of "birth control". Campaigners including *Mary* Stop in England and *Margaret Sanger* in the US succeeded in getting the issue out in the open, and birth control clinics were established that offered "women family planning advice and contraceptive methods". In 1929, the Infant Life Protection Act was passed in the UK, amending the law (an Offence against the Personal Act, 1861) so that an abortion done in good faith for the sole purpose of preserving the mother's life would not occur a crime. *Stella Brown* was a leading birth control campaigner who began venturing into the more controversial issue of abortion in the 1930s. *Brown's* beliefs were strongly influenced by the work of Havelock Ellis, Edward Carpenter, and other sexologists. She strongly believed that working women should have the option of getting pregnant and ending their pregnancy while pregnant, while they worked around the pregnant woman was still required to work hard during her pregnancy. In this case she argued that doctors should give free information about birth control to women who wanted to know about it. This would give women agency over their circumstances and allow them to decide whether they wanted to become mothers or not. At the World Sexual Reform Congress in London in 1929, *Stella Brown* was the first woman to talk about her "abortion rights", who spoke of her legalization at the World Sexual Reform Congress. As a result of the work of these women, the National Birth Control Council was established in 1930.[82]

In the late 1920s, *Brown* began speaking tours around England, requiring information about high maternal rates on birth control for women, women's health problems, problems related to puberty and sex education, and other topics. Information about his beliefs was provided. These talks urged women to take matters of their sexuality and their health into their own hands. Her interest in the idea of a

[81] Robinson William J, *Doctor Robinson and Saint Peter: How Dr. Robinson Entered the Heavenly Gates and Became St. Peter's Assistant* 25 (Eugenics Publishing, 1931).
[82] Rowbotham Sheila , *A New World for Women: Stella Browne: social feminist* 66–67 (Pluto Press, London, 1977).

woman's right to terminate her pregnancy sparked interest, and in 1929 she advanced her lecture "the right to abortion" in front of the World Sexual Reform Congress in London. In 1931, *Brown* began to develop his argument for women's right to decide abortion. She started visiting again, lecturing on abortions and the negative consequences that would follow if women were unable to end pregnancies of their own choosing such as: suicide, injury, permanent invalidation, dementia, and blood-poisoning.[83] Other prominent feminists, including *Frida Laski*, *Dora Russell*, *Joan Malleson*, and *Janet Chance* began to champion the cause, which dramatically broke into the mainstream in July 1932 when the British Medical Association Council on a change in laws for abortion discussed. On 17 February 1936, *Janet Chance*, *Alice Jenkins* and *Joan Malleson* founded the Abortion Law Reform Association as the first advocating organization for abortion liberalization. The association promoted abortion access in the United Kingdom and campaigned for the abolition of legal barriers. In its first year ALRA recruited 35 members, and by 1939 had approximately400 members.[84]

ALRA was very active between 1936 and 1939, sending speakers from around the country to talk about Labor and Equal Citizenship, and although papers and articles published in newspapers were often tried unsuccessfully. They became most popular when a member of the Medico-Legal Committee of ALRA received a case of rape of a fourteen-year-old girl, and her ALRA ancestor Dr. this pregnancy ended with *Joan Malleson*. The case gained much publicity, although once the war started, the matter was deferred and lost importance again to the public for this reason. In 1938, *Joan Malleson* adopted one of the most influential cases in British abortion law when she referred a pregnant fourteen-year-old rape victim to gynecologist *Alec Bourne*.[85] She miscarried, then outlawed, and was placed on trial on charges of procuring an abortion. Bourne was eventually acquitted in *Rex v. Bourne*[86] described his actions as "an example of unsympathetic conduct in harmony with the highest traditions of the profession". This court case set an example that doctors cannot be prosecuted for performing abortions in cases where pregnancy would probably cause

[83] Hall Lesley, "The Life and Times of Stella Browne: Feminist and Free Spirit" 27–178 (2011).
[84] Hindell Keith and Madeline Simms, *"*How the Abortion Lobby Worked*" The Political Quarterly* 271–272 (1968).
[85] *Ibid.*
[86] (1939) 1 K.B. 687.

"mental and physical debris". Finally, the Birkett Committee, set up in 1937 by the British government, recommended changes to abortion laws after two years, "to investigate the prevalence of abortion, and the laws related to the law". The intervention of *World War II* meant that all plans were sheltered.[87]

**2.14 Liberalization of Abortion Law**

The *Russian* Soviet Federalist Socialist Republic was the first government to "reduce abortion" and provide it on request, often at no expense. The Soviet government hoped to provide access to abortions in a safe environment performed by a trained physician instead of babki. While the campaign was highly effective in urban areas (by 1925 more than 75% of abortions were performed in hospitals in Moscow), it had little impact on rural areas that had neither access to doctors, transportation, or both, and where Women relied on traditional medicine. Especially in rural areas, women continued to see Babaki, midwives, barbers, nurses, and others for the procedure after abortions in the Soviet Union.[88] From 1936 to 1955, the Soviet Union outlawed *Joseph Stalin's* concerns about population growth making mass abortions then excluding medically recommended cases illegal. *Stalin* wanted to encourage population growth, while simultaneously emphasizing the importance of the family unit for communism.[89]

During the *Spanish* Civil War on 25 December 1936 in Catalonia, "free abortion was legalized during the first 12 weeks of pregnancy", with a decree signed by *Josep tardelles*, the first minister of the Government of Casponia, and published on 9 January 1937. In Britain, the Abortion Law Reform Association continued its campaign after the war and, combined with widespread social changes, brought the abortion issue back into the political arena in the 1960s. *John Peelchair*, president of the Royal College of Obstetricians and Gynecologists, appointed a committee advising the British government on the formation of the Abortion Act of 1967. On the basis of reducing the amount of illness and death associated with illegal abortion, the Abortion Act carried out legal abortions on a number of grounds, including to prevent

[87] Hyde H. Montgomery, "Norman Birkett: The Life of Lord Birkett of Ulverston" *Hamish Hamilton* 462 (1965).
[88] Barbara Evans Clements, Barbara Alpern Engel and Christine Worobec, *Russia's Women: Accommodation, Resistance, Transformation* 260 (Berkeley: University of California Press, 1991).
[89] Randall Amy, "Abortion Will Deprive You of Happiness!: Soviet Reproductive Politics in the Post-Stalin Era" 23 *Journal of Women's History* 13-38 (2011) *accessed on* Feb.19, 2018.

serious permanent injury to a woman's physical or mental health, to avoid physical or bodily injury gave permission. The mental health of the woman or her current children was still less than 28 weeks, or if the child was likely to be physically or mentally challenged. Free provision of abortion was provided through the National Health Service.[90]

An abortion reform movement emerged in the US in the 1960s. The Society for Human Aborts was created in 1963, in which women were informed about how to obtain and abort. In 1964, *Gerry Santoro* of Connecticut died while trying to get an illegal abortion and his picture became a symbol of the pro-choice movement. Some women's rights activist groups developed their skills to get women to have abortions that they could not get elsewhere. As an example, in Chicago, a group known as "Jane" operated a temporary abortion clinic during the 1960s. Women seeking the procedure will call a designated number and will be instructed to search for "Jane". In the late 1960s, several organizations were formed to mobilize opinions against and against the legalization of abortion. The pioneer of NARAL Pro-Choice America was formed in 1969 to oppose the ban on abortion and expand access to abortion. In late 1973, NARAL became the "National Abortion Rights Action League". In 1967, 21 members of the clergy in the New York Times announced that they would help women find safe abortion providers.[91]

In 1967, Colorado became the first state to reduce abortion in rape, incest cases, or in which pregnancy would lead to permanent physical disability of a woman. Similar laws were passed in California, Oregon and North Carolina. In 1970, Hawaii became the first state to legalize abortion at the woman's request, and New York repealed its 1830 law and allowed abortion until the 24$^{th}$ week of pregnancy. Similar laws were soon passed in Alaska and Washington. A law in Washington D.C., that allowed abortions to protect a woman's life or health, was challenged in the Supreme Court in the United States in 1971. The court upheld the law, believing that "health" means "psychological and physical well-being", essentially allowing abortion in Washington, DC. By the end of 1972, 13 states had the same law as Colorado, while

[90] House of Commons, Science and Technology Committee, "Scientific Developments Relating to the Abortion Act 1967" 1 (2006-2007) *accessed on* March 18, 2019.
[91] Alesha Doan, *Opposition and Intimidation: The Abortion Wars and Strategies of Political Harassment* 59 (University of Michigan Press, 2007).

Mississippi permitted abortions only in cases of rape or incest, and Alabama and Massachusetts permitted abortions only in cases where the woman's physical health was endangered.[92]

*Roe v. Wade*[93] the landmark judicial decision of the Supreme Court in Wade ruled that a Texas statute prohibited abortion, except when necessary to save the mother's life was unconstitutional. The Apex Court reached its decision that the issue of abortion and abortion rights fall under the right to privacy. The Court held that the right to privacy existed and included the right to abortion. The Court found that a mother had the right to an abortion, a point to be determined by the abortion doctor. A woman may receive an abortion due to health reasons after viability, which the court has defined broadly to include psychological well-being. Since the 1970s, and the spread of second-wave feminism, abortion and reproductive rights issues have been unified among various women's rights groups in Canada, the United States, the Netherlands, Britain, Norway, France, Germany, and Italy.[94]

**2.15 Meaning and Types of Abortion**

"Termination of pregnancy" or "miscarriage" means that the spontaneous or induced termination of pregnancy before conception is independently feasible, usually occurring twenty weeks after conception. Children born a few days before twenty weeks are considered to be endowed with modern care. Medically, abortion means removal of the egg within the first three months of pregnancy; Abortion, expulsion of the fetus from the fourth to the seventh month; And premature delivery, seven months after pregnancy and delivery of the baby before full term. Legally abortion, miscarriage and premature delivery are now accepted as synonyms, which signify the termination of pregnancy before conception at any stage. Abortion, criminal abortion, medical termination of pregnancy, feticide, female feticide, fetal loss and female fetal loss are frequently used interchangeably creating confusion. The basic terms related to the subject, therefore, need to be defined to ensure parity.[95]

[92] *Ibid.*
[93] (1973) 410 U.S.113.
[94] Le Gates Marlene, "In Their Time: A History of Feminism in Western Society Routledge" 363-364 (Psychology Press, 2001).
[95] S.G. Kabra, *Abortion in India: Myth and Reality* 11 (Rawat Publication, Jaipur, 2013).

**2.16 Common Definition of Abortion**

The word abortion originates from the Latin word, *aboriri* which means the failure to be born. Abortion can be defined as the termination of pregnancy, spontaneous, therapeutic or induced, before the fetus has become viable outside the uterus or before the fetus is capable to have a life outside of the womb.

- Abortion is the termination of pregnancy by any method (spontaneous or induced) before the fetus is sufficiently developed to survive independently (fetus less than 20 weeks of pregnancy).
- Another definition is the delivery of the baby/fetus that is less than 500 grams.
- Another (clinical) definition is the expulsion of the product of conceptus, spontaneous or induced, before viability.

Abortion may be off the record into various categories depending upon the nature and circumstances under which it occurs. For instance, it may be either, (i) natural; (ii) accidental; (iii) spontaneous; (iv) artificial or induced abortion. Abortions falling under the first three categories are not punishable, while induced abortion is criminal unless exempted under the law. Natural abortion is a very common phenomenon and may occur due to many reasons, such as bad health, defect in generative organs of the mother, shock, fear, joy, etc. Accidental abortion very often takes place because of trauma consequent to accidents. In accidents there is always some direct or indirect forceful impact on the uterus dislodging the ovum, embryo, or placenta from the natural attachment. Spontaneous abortion sometimes may take place because of pathological reasons, where pregnancy cannot be completed and the uterus empties before the maturity of fetus. This may happen because of metabolic circumstances or accumulation of poison which interferes with the development of embryo and advancement of pregnancy. Criminal abortion is destruction and expulsion of the fetus unlawfully and the wrongdoer is punishable according to criminal law. It is generally induced between second and third months of pregnancy, but occasionally between the fourth and fifth months of pregnancy when the woman is certain of her condition. In India, induced abortion is defined in law as any abortion, which does not come under the rules of the Medical Termination of Pregnancy Act, 1971, although performed by qualified doctors, and the doctors are liable for prosecution and punishment. Abortion is a medical process in which medicine or surgery is used to end a pregnancy. This is also known as a ‘termination’.

According to *Oxford Dictionaries* Abortion means "The deliberate termination of a human pregnancy, most often performed during the first 28 weeks".[96]

According to *Cambridge Dictionaries* abortion means "The intentional ending of a pregnancy".[97]

According to English *Oxford Dictionaries* Abortion means in medical "The expulsion of a fetus from the uterus by natural causes before it is able to survive independently."[98]

According to *Dictionary* abortion means "The definition of abortion is when a pregnancy ends abruptly, either voluntarily or involuntarily, and the fetus is expelled from the womb before it can live on its own".[99]

*Unsafe abortion*: "The World Health Organization(WHO) defines unsafe abortion as "a procedure for terminating an unwanted pregnancy either by persons lacking the necessary skills or in an environment lacking the minimum medical standard".[100]

*Meaning of Reproduction*: "The act or process of reproducing specifically: the process by which plants and animals give rise to offspring and which fundamentally consists of the segregation of a portion of the parental body by asexual or an asexual process and its subsequent growth and differentiation into anew individual".[101]

*Meaning of Termination of Pregnancy:* "termination of pregnancy" means a procedure to terminate a pregnancy by using medical or surgical methods.[102]

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[96] *Available at*: http://www.oxforddictionaries.com/definition/english/abortion (last visited on March 15, 2018).
[97] *Available at*: http://dictionary.cambridge.org/dictionary/english/abortion (last visited on March 18, 2018).
[98] *Available at*: https://en.oxforddictionaries.com/definition/abortion (last visited on March 20, 2019).
[99] *Available at*: http://www.yourdictionary.com/abortion (last visited on March 20, 2018).
[100] World Health Organization, "The Prevention and Management of Unsafe Abortion" 11 *Prevention and Management of Unsafe Abortions* Geneva (1992) *accessed on* Feb 12, 2020.
[101] *Available at*: https://www.merriam-webster.com/dictionary/reproduction (last visited on March 25, 2018).
[102] *Available at*: file:///C:/Users/Dell/Desktop/The%20Medical%20Termination%20of%20Pregnancy%20(Amendment)%20Bill,%202020.pdf, *accessed on* April 15, 2020.

Definitions of abortion differ from one source to another. Abortion have many definitions that can differ from each other in significant ways. Given the controversial nature of abortion, lawmakers and other stakeholders often face controversy in defining abortion. Language referring to abortion often reflects societal and political opinions. Influential non-state actors like the United Nations and the Roman Catholic Church have also engendered controversy over efforts to define abortion. Later termination of pregnancy is the term usually used for later uterine evacuation. Thus, from the above definition we find that abortion means termination of early pregnancy mostly three months from the date of conceived, because during this time period the fetus if born can't be survive. Abortion is mainly divided into two types-

1. **Spontaneous Abortion**– Is a kind of abortion which occurs during pregnancy due to any complication and it is also known as miscarriages.

2. **Induced Abortion-** Induced abortion has also been divided into two types: a) Therapeutic abortion– From its name it is clear that when abortion is done for the protection of the mother life or when child is suffering from some severe health problem like *Hydrocephalus* (brain not developed) it is known as Therapeutic abortion. b) Elective abortion– An abortion induced for any other reason is known as elective abortion.

A spontaneous abortion or also known as a "miscarriage" is when the pregnancy is terminated by the removal of the fetus from the uterus without the use of any external methods. A spontaneous abortion can be characterized by feelings of discomfort, sudden cramps and vaginal bleeding. Moreover, accidental traumas; or natural causes; or environmental factors can be the result of a spontaneous abortion. A spontaneous abortion can also be the result of a medical problem for example; a sudden illness that occurs in the woman during her pregnancy and/or the fetus presents genetic defects or malformations. A therapeutic abortion takes place when a pregnancy is terminated by the removal of the fetus from the uterus by the use of external methods, however, unlike an induced abortion that is performed as result of an unwanted pregnancy, therapeutic abortion is performed to either save the life of a pregnant woman; or when a woman's physical or mental health is in jeopardy; or if a child would be born with a congenital disorder that may be terminal or related to

significant illness; or to selectively decrease the number of fetuses to reduce health risks that are linked to multiple pregnancies. An induced abortion takes place when a pregnancy is terminated by the deliberate removal of the fetus from the uterus by the use of external methods as a result of an unwanted pregnancy. There are different circumstances that result in an unwanted pregnancy and thus lead to women having an induced abortion. Thus it is these different circumstances that cause an induced abortion to be a very controversial topic. Mainly abortion may be classified as under:[103]

i. *Accidental abortion*

When abortion is caused by an accident, say fall from a vehicle, fall from a high object, collision with another object, and the like, it is known as accidental abortion.

ii. *Artificial abortion*

Where the abortion is purposely induced, say by a surgeon, it is known as artificial abortion.

iii. *Complete abortion*

Where the complete product of conception is expelled, it is known as complete abortion. After complete abortion the bleeding stops and pain subsides.

iv. *Incomplete abortion*

As the name suggests, it is abortion where part of the product of conception is retained is uterus. In this case the bleeding does not stop and the patient continues to bleed sometimes, the bleeding may be profuse.

v. *Criminal abortion*

An illegal abortion is termed as criminal abortion. It is an induced abortion performed illegally.

[103] J.V.N. Jaiswal, *Legal Aspects of Pregnancy, Delivery and Abortion* 166-168 (Eastern Book Company, Lucknow, 2009).

vi. *Habitual abortion*

When the abortion is recurrent, it is known as habitual abortion. It is a spontaneous abortion which may occur at least three times in succession.

vii. *Inevitable abortion*

It is a sort of abortion that cannot be prevented and chances of continuation of pregnancy are remote. In this kind of abortion, the vaginal bleeding is severe and uterine contractions are painful.

viii. *Missed abortion*

In such cases of abortion the dead fetus is retained in the uterus for at least four months after its death. In this case the pregnant woman usually has normal symptoms of an early pregnancy, like vomiting, breast enlargement, etc.

ix. *Septic abortion*

Where the abortion is due to infection of the foetus and the internal uterine wall, it is known as septic abortion. A spontaneous abortion may become septic. In a missed abortion, the uterus may get infected.

x. *Spontaneous abortion*

Where the abortion occurs without any apparent cause it is known as spontaneous abortion.

xi. *Therapeutic abortion*

An abortion performed to save the life of the pregnant woman when her mental and physical health is endangered by continuation of pregnancy.

xii. *Threatened abortion*

Where there is slight vaginal bleeding with or without intermittent pain. In such cases the abortion may or may not take place and pregnancy may continue if the

fetus is alive. According to medical opinion, the best treatment, apart from medicines, is complete bed rest till a week after the stoppage of bleeding.

**2.17 Grounds for Legal Abortion**

The law on abortion is governed by statute. Unfortunately it is not governed by just one statute. The starting point is the Offences against the Person Act, 1861. Section 58 of this Act makes it a criminal offence, punishable by up to life imprisonment, to unlawfully and intentionally attempt to procure a miscarriage. The woman only commits this offence if she is in fact pregnant, whereas anyone else committee an offence whether or not the woman was in fact pregnant. A woman who mistakenly believes that she is pregnant and attempts to procure a miscarriage with another could, nonetheless, be guilty of conspiring to commit this offence. Also section 59 makes it an offence to supply drugs or other instruments for use in procuring a miscarriage[104].

There were doubts about whether the Offences against the Person Act, 1861covered a fetus during childbirth, so the offence of "child destruction" was created by the Infant Life (Preservation) Act, 1929. Section 1(1) provides that any person who intends to destroy the life of a child "capable of being born alive" commits an offence, unless the act was done" in good faith for the purpose only of preserving the life of the mother". Section 1(2) creates an evidential presumption that a 28 week fetus is capable of being born alive. Before 28th weeks the prosecution could still prove that the fetus was capable of being born alive, without the assistance of an evidential presumption. In *C v S,* the Court of Appeal held that "An 18-21 week fetus in question would not have been capable of breathing either naturally or artificially, and so was not "capable or being born alive" under the 1929 Act". In *Rance v Mid-Downs*[105] *HA, Brooke J.* held that 'a child was capable of being born alive' within the meaning of this Act when it possessed the attributes needed to breathe "through its own lungs alone, without deriving any of its living or power of living by or through any connection with its mother".[106]

[104] Shaun Pattinson, *Medical Law and Ethics* 218 (sweet and Maxwell limited, London, 2006).
[105] (1990) 2 Med LR 27.
[106] *Supra* note 103 at 169.

The Abortion Act, 1967 as amended in 1990, now provides that no offence is committed under the 1861 or 1929 Acts when a pregnancy is terminated in accordance with its provisions. Thus, the 1929 Act is now of little relevance. It will only apply to late abortions not falling within statutory defences created by the 1967 Act and to situations where an attack on the pregnant woman intentionally kill he viable child that she is carrying. The 1861 Act applies to a wider range of conduct and has recently been applied in a number of cases where men have attempted to procure the miscarriage of their pregnant partners. A man was convicted in 2008 for porting crushed abortifacient pills into his wife's food and another man was convicted in 2009 for spiking the coffee and orange juice of his pregnant lover. The enactment of the Abortion Act, 1967 was driven by concerns about the high mortality rates of illegal abortions and to remove the remaining legal uncertainties. The Act provides that "abortion is not unlawful if certain conditions are satisfied". It must be performed by a registered doctor in circumstances where two doctors are of the opinion, formed in good faith, that grounds specified in the Act are met (s.1(1). Also, the abortion must take place in an approved place (s.1(3) and the Chief Medical Officer must be notified within the time, and in the form, prescribed by regulations (s.2).

What the Act does not do is provide pregnant women with a legally enforceable right to abortion. Nor does it require that the statutory grounds be proven to be objectively satisfied. Instead it provides that abortion can lawfully be provided where two doctors are of the good faith opinion the statutory ground are satisfied. This means that it is just about impossible to obtain a conviction against a doctor who performs an abortion, unless it can be proven that there has been a failure to fulfill the Act's procedural requirements or the act was not in good faith.

There has been only one successful prosecution against a doctor performing an abortion in bad faith. In *K. v Smith*, the evidence was that "the doctor had made no internal examination, asked no questions about the woman's medical history, and had incompletely performed the abortion". The Court of Appeal refused to overturn his conviction, holding that "The question of good faith is essentially one for the jury to determine on the totality of the evidence". In view of the rarity of past prosecutions and, as we shall see, the ease with which a doctor can plausibly claim that the grounds for abortion are satisfied, prosecution is highly unlikely. *Mason* and *Laurie* go so far

as to declare that "possibly the only way in which a termination can be carried out in bad faith is when it is done without the woman's consent". Prosecutor and juries could adopt such a narrow view of bad faith, but they are not required to do so.[107]

The Abortion Act clearly places considerable power in the hands of doctors. Unfortunately, we shall see that the grounds under which abortion is legal are not purely medical. Doctors are making decisions (indeed are required to make decisions) that are not strictly within their competence. The law has, in essence, medicalized abortion. Abortion is principally seen as a matter for the medical professional. There are a number of grounds under which abortion is lawful under the Abortion Act as amended. Abortion is permitted until the 24th week on therapeutic and social grounds, i.e. where the continuance of the pregnancy involves risk of physical or mental injury to the pregnant woman or any existing children of her family (s.(1)(a). Abortion is also permitted up to birth to save the life of the woman, to prevent "grave permanent injury" to the physical or mental health of the pregnant women, or on grounds of fetal abnormality (s.`1(1)(b)-(d).[108]

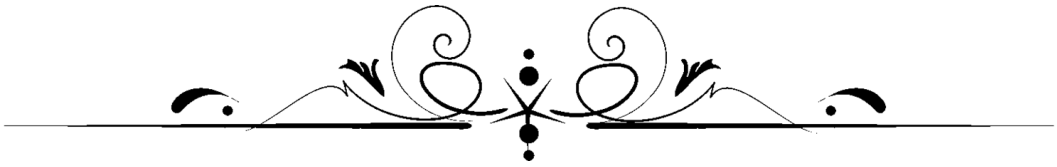
Before examining these grounds in turn, it is instructive to note the official statistics on lawful abortions taking place in England and Wales that are collected under the notification procedure. These statistics highlight a number of practical issues. First, in 2009 some 6,6643 women principally from Ireland and Northern Ireland travelled here to have abortions. This is a significant number of women travelling to Britain to escape their home country's restrictive abortion laws, but it is lower than it has been in any year since 1969. From 1995 to 2003, the figure was between 9,000 and 10,000 a year. Secondly, while the majority of abortions for women resident in England and Wales were funded by the NHS (some 94 per cent), over one-half (60 per cent) of these actually took place in the independent sector under NHS contract. The UK's leading independent provider of abortion care is the charity BPAS (British Pregnancy Advisory Service). Thirdly, this figure for abortions funded by the NHS belies notable regional variation. In 2009, the NHS funded 99 percent of abortions performed in Don caster and Warwickshire compared to only 74 percent of those performed in Kensington and Chelsea. While some suggest that such

[107] *Supra* note 63 at 9.
[108] *Supra.*

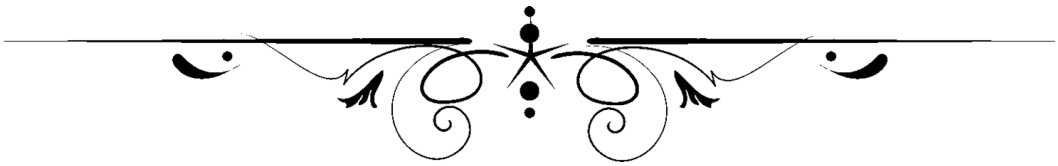
variations provide sufficient evidence of the inconsistent application of the abortion legislation by doctors in different parts of the country, they might also be accounted for at least in part by variations in the ability and willingness of residents in different parts of the country to seek faster and more convenient private treatment. Nonetheless, given the vagueness of the grounds for lawful abortion it is to be expected that there will be significant variation in the way that different doctors interpret of this expectation in practice. Fourthly, since the enactment of the 1967 Act, abortions in England and Wales have increased from 54,819 in 1969 to 195,743 in 2009. Only some of this least 20,000 before the 1967 Act. The total number of abortions has been rising since it was first legalized, with an occasional dip, which suggests that the legalization of abortion has led to the procedure being seen as a form of post conception contraception.

**2.18 Conclusion**

Throughout history, abortion caused much debate, controversy, and protest. The debate covers ethical, religious, and philosophical issues about abortion. Understanding the human problems from its historical perspective is useful if efforts to solve it are motivated by experience and learning. How the major groups of Hindus and Muslims and Christianity community are facing abortion in their religious past it is worth exploring the cultural history of the social system. This can help clarify questions about socio-religious attitudes.



# Chapter Third
# Legal Status of Fetus



# *Chapter Third*

# *Legal Status of Fetus*

*"The fetus is the property of the entire society. Anyone having children is a deserter who abandons the laws of national continuity."*

*—Nicolae Ceausescu*[1]

## 3.1 Introduction

Human fetus, moral status in early embryological development is a pressing issue in bioethics since embryonic stem cell research requires sacrificing early human fetus in the derivation of multi-potent cell lines and allowing early fetus sacrifice as a result of cryopreservation in vitro fertilization techniques in reproductive medicine. Sometimes, therefore, certain forms of contraception can work by avoiding implantation. In late embryological development, the moral status of the embryo postures other ethical issues; including the morale of the first trimester allows abortion. When human embryos have a moral status as human beings, they have a broad range of human rights, including the right not to be killed in medical experiments and the right not to be jeopardized by sexual actions of other people.[2]

## 3.2 Moral Status of Embryo

During the discuss on Pre-implantation Genetic Diagnostic (PGD) in the Swiss parliament, several opponents argued that cells taken from the embryo for testing should be considered equivalent to an embryo proper. The reason is that each cell is tot potent. So, continue the opponents, this cell should be treated as a human being, and PGD thus constitutes an unethical instrumentalization of a human being. But is this really the case? Is such a cell, even tot potent, the moral equivalent of an embryo? And if it is, is an embryo a kind of entity that it is unethical to instrumentalism.[3]

[1] *Available at*: https://www.goodreads.com/author/show/291981.Nicolae_Ceausescu, *accessed on* Nov 22, 2018.
[2] Mark T. Brown, "The Moral Status of the Human Embryo" 43 *Journal of Medicine and Philosophy* 132–158 (2018) *available at*: doi:10.1093/jmp/jhx035, *accessed on* Nov 13, 2019.
[3] Bernard Baertschi, "The question of the embryo's moral status" 1 *Bioethical Forum* (2008) *accessed on* Nov 14, 2019.

*Mary Warren* says quite correctly: "To have moral status is to be morally considerable, or to have moral standing. It is to be an entity towards which moral agents have, or can have, moral obligations". If an entity has moral status, then we may not treat it in just any way we please. So, if an entity has no moral status, then we may act toward it as we please; this is no longer the case if it possesses moral status. As the debates on PGD and those on abortion and embryonic cell stems show, for most participants, human embryos have moral status. If this were not the case, questions about its fate would not even be raised. However, as those same debates also show, there is no agreement on the kind of moral status the embryo possesses. Thus, there exist several sorts of moral status. How can we describe and determine them? This amounts to asking: what gives moral importance to entities that possess moral status? Giving a general answer to this question is easy: the moral status of an entity depends on certain of its intrinsic properties.[4]

### 3.3 Reproductive Technology and the Earliest Stages of Human Stages of Human Life

The abortion debate, which deals with the removal or destruction of developed fetuses located within a woman's body, has for too long rested on a monolithic view of prenatal status that ignores significant differences in prenatal development. In most instances, all stages of provable human life have been valued equally by each side (either having great value or no value), even though major developmental differences exist between a fertilized egg, zygote, blastocyst, just implanted pre-embryo, eight-week fetus, sixteen-week fetus, and twenty-four-week fetus. A more focused and nuanced look at these different stages is now unavoidable as technological developments in reproduction allow the earliest post fertilization stages to be isolated outside the body, removed from one woman and placed in another, observed, frozen and thawed, and manipulated in various ways. Two technological developments are of immediate interest: contraceptive agents of birth control and in vitro fertilization of human eggs to treat infertility.[5]

[4] *Ibid.*
[5] John A. Robertson, "In the Beginning: The Legal Status of Early Embryos" 76 *Virginia Law Review* 437-517 (1990) *accessed on* Sep 2, 2019.

The technological development affecting the largest number of persons is the development of post fertilization or contraceptive techniques of birth control, which prevent fertilized eggs and early embryos from implanting in the wall of the uterus. Acting after fertilization has occurred, they are not, strictly speaking, contraceptives, though they have the same effect. Such devices, including IUD's, low-dose birth control pills, and ant progesterone drugs such as RU 486 or eposotane, may also operate soon after implantation has occurred, depriving the uterus of the hormones needed to continue the pregnancy. If such devices operate after implantation has occurred rather than before, they are technically abortifacients, since they cause an early pregnancy to terminate or abort. Even so, they operate at such an early stage of embryo development before the primitive streak or organs have differentiated that they should be regarded differently from surgical abortions that occur several weeks later.[6]

### 3.4 The Debate Over the Moral Status of the Early Embryo

Fierce controversy has marked discussions of the moral status of the early embryo. A fervent minority believes that fertilization marks the emergence of a new person, or at the very least, of a "human life" or "human being" that deserves the same rights accorded other persons. Others deny that fertilization or even later stages of biological development create a prenatal human entity with rights and would give persons wide leeway in their disposition of prenatal human life. By now the arguments for and against these positions are well known. The pro-life position argues that a new person exists from the "moment" of conception or fertilization, because a new, genetically unique, living human being exists. This position ignores the fact that the fertilized egg and early embryo lack the ability to interact, be conscious, have experiences, or be sentient the usual attributes of persons or rights-bearing entities. Genetic uniqueness, life, humanness, and the potential to develop later attributes count for all. Accordingly, the fertilized egg and early embryo may not be destroyed or aborted, and they deserve the rights and respect accorded persons.[7]

[6] *Ibid.*
[7] *Ibid.*

### 3.5 The Legal Position of the Fetus

With this background, we now address the legal status of early embryos. Legal status-position or standing in law-will define what rights, if any, early embryos have and what duties are owed to them, thus determining what might be done with these entities, and by whom. The main issues of legal status are who may properly exercise decisional authority over embryos, and what limits, if any, the state may or should place on that dispositional authority. The question of legal status is a question of positive law, or rather of what positive law should be. Until very recently, positive law had very few things to say about early embryos. The law of prenatal and preconception torts, estate law's concept of a being "inventers mere," and criminal prohibitions on abortion did define in important ways some aspects of the legal status of fetuses, though not necessarily the status of preimplantation embryos. With a few exceptions, recognition of in uterus deaths under state wrongful death laws also required that the fetus be viable to obtain recovery, and thus did not apply to early embryos. Because this law developed before the ability to externalize the early embryo and contra gestion became an issue, it has limited relevance to answering the myriad questions that arise from medical developments that currently make the early embryo a subject of such intense interest[8]. English law is clear that a fetus is not a person until it is born. *Baker P* went further and stated: "The fetus cannot, in English law, in my view, have any right of its own at least until its born and has a separate existence from the mother".[9]

But that does not mean that a fetus is 'a nothing'. In Attorney-General's Reference the House of Lords rejected an argument proposed by the Court of Appeal that a fetus should be regarded as part of the mother, equivalent to a leg or an arm. Instead, *Lord Musrill* declared that "a fetus is a unique organism". This, of course, leaves much to question. The courts, perhaps understandably, have sought to avoid the controversial issue of the status of the fetus and tend to talk more about what a fetus is not rather than what a fetus is, but it seems we can say the following[10]:

[8] *Supra* note 3 at 2.
[9] *Paton v BPAS* (1978) 2 All ER 987, 989.
[10] Jonathan Herring, *Medical Law and Ethics* 305 (Oxford University Press, New York, 3rd edition, 2010).

i. The fetus is not a person. Only at the point of birth does the fetus become a person. But once the child is born, she or he can sue for injuries suffering while she or he was a fetus.[11]
ii. The fetus does not have rights that can be enforced by other people.
iii. The fetus is not simply part of the mother.
iv. In St. George's Healthcare Judge *LJ* stated that 'a 36-week-oldFetusis not anything: it is not lifeless and is certainty human'.
v. It is not possible to bring proceedings in the name of the fetus.
vi. A fetus cannot be made a ward of court.
vii. The fetus has interests which are protected by the law.
viii. A fetus could not be abducted. So, a man could not prevent a pregnant woman from travelling out of the country.

The following cases give a flavor of how the courts deal with the fetus:

(i) *Evans*:[12] The Court of Appeal heard a dispute over what should happen to a frozen embryo created using the gametes of a couple who were undergoing assisted reproductive treatment. Essentially the man wanted the embryo destroyed, while the woman wanted to keep the embryo. The woman sought to argue that the rights of the embryo should be considered in their dispute. *Lord Justice Thorpe* felt that the position in English law was so clear chat he did not even need to hear the barristers arguments on the issue:

"In our domestic law it has been frequently held that a fetus prior to the moment of birth does not have independent rights or interests: Thus, even more clearly can there be no independent rights or interests in stored embryos. In this respect our law is not inconsistent with the decisions of the ECHR. Article 2 protects the right to life. No Convention jurisprudence extends the right to an embryo, much less to one which at the material point of time is non-viable".[13] It is possible that *Thorpe L J* dealt with this issue a little too quickly. Although it is clearly established that the fetus has no interests that can trump the rights of autonomy or bodily integrity of the mother, this does not mean that the fetus has no rights at all.

[11] Under Congenital Disabilities (Civil Liability) Act, 1976 , In *Burton v Islington HA* (1993) QB 204, "it was explained that the fetus's potential claim crystallizes at birth".
[12] *Evans v Amicus Healthcare Ltd* (2004) 3 All ER 1025.
[13] *Ibid.*

(ii) *Attorney-General's Reference*:[14] The Case involved a man who stabbed a pregnant woman, injuring her and her fetus. The child was subsequently born, lived for a short while, and then died. The man was charged with murder. The House of Lords emphasized that "murder involved the killing of a human being". Therefore, the killing of a fetus was not murder. However once the fetus was born alive it was a person. The man had therefore in this case killed a person. He was not guilty of murder, because he lacked the necessary intention to kill or cause grievous bodily harm to the victim but could be guilty of manslaughter. *Lord Mustill* had the following to say about a fetus. He first rejected the view expressed in the Court of Appeal that the fetus should be regarded as part of the mother: The emotional bond between the mother and her unborn child was also of an incredibly special kind. But the relationship was one of bond, not of identity. The mother and the fetus were two distinct organisms living symbiotically, not a single organism with two aspects. I The mother's leg was part of the mother; the fetus was not.

He went on to say that the fetus does not for the purposes of the law of homicide and violent crime have any relevant type of personality but is an organism *sui generis* lacking at this stage the entire range of characteristics both of the mother to which it is physically linked and of the complete human being which it mil latter become I would, therefore, reject the reasoning which assumes that since in the eyes of English law the fetus docs not have the attributes which make it a 'person' it must be an adjunct of the mother. Eschewing all religious and political debate I would say that the fetus is neither. It is a unique organism. There has been much debate over whether the fetus can claim protection under the European Convention on Human Rights. The issue has recently been considered in the following case *Vo v France:*[15] Ms. Vo attended a routine antenatal appointment. Due to a mix-up over names a doctor thought she was present for the removal of a contraceptive coil, in attempting this procedure he ruptured her amniotic sac and as a result the pregnancy had to be terminated. The doctor was charged with negligently injuring or killing the fetus. Under French law the courts found that he could not be guilty of criminal offences against the fetus. The case was brought before the European Court of Human Rights. The claim was the absence of a criminal remedy to punish the unintentional

[14] (1998) AC 245.
[15] (2004) 2 FCR 577 (ECTHR).

destruction of the fetus meant that the fetus's right to life under Article 2 of the European Convention on Human Rights was inadequately protected.

The majority found that *French law* did not violate the fetus's rights under Article 2. The majority, however, refused to make a clear ruling on the status of the fetus under the Convention. It was confirmed, as had been held in previous cases, that the fetus was not a person and so was not directly protected by Article 2. However, it was left as an open question whether the fetus could claim a version of right to life under Article 2. The court explained that even if the fetus did have such a right, it would be limited by the mother's rights and interests. The majority took the view that when the right to life begins and becomes protected by the Convention it comes within 'the margin of appreciation' and that each European Country can deckle the legal status of the fetus for itself. This meant that although it was not contrary to the Convention for French law not to protect the fetus in criminal law, it would also not be contrary to the Convention for another country to protect the fetus. However, the European Court held that there was common ground between European States that the potentiality of the fetus and its capacity to become a person required protection in the name of human dignity. The majority went on to suggest that even if Article 2 were held to protect the fetus, still its rights were not Improperly interfered with by not providing a criminal offence, because the fetus could be protected under the civil law[16].

In dissenting speeches judges criticized the majority for not being willing to make a dear finding on whether the fetus was protected within Article 2. They were adamant that It would be perfectly possible to hold that a fetus was protected under Article 2, but still uphold a right to abortion. It could, for example, be argued that a case where a pregnant woman harms her fetus is entirely different from where a third party does so (Judge Rees). *Judge Rees* argued that the civil law protection was 'Inadequate'. *Judge Mularoni* pointed out that "If the fetus did not have any rights then there would be no need for there to be special legislative provisions relating to

[16] *Supra* note 10 at 307.

abortion". The fact that all European countries had such legislation Indicated that there was a consensus that the fetus had rights.[17]

The failure of the Court to make a determinative ruling on the status of the fetus has led *Ken Mason*[18] to state that the reader is likely to feel, by analogy, that it had been a long journey to the pub with no beer. As he points out, English law at present has produced the odd result that if a fetus is so gravely injured that the fetus dies in the womb there is no murder or man slaughter, but if the fetus is less seriously injured and is able to be born alive, but then dies from her or his injuries then there could be an offence of murder or manslaughter. *Katherine O' Donovan* criticizes the decision for being overly concerned with the interface with abortion law. She sees the case as involving an interference with the woman's right to bodily integrity, given that this was a wanted pregnancy. Such a wrong to the mother should be recognized in the law, she argues.[19]

### 3.6 Abortion Ethics

Few areas of medical law and ethics are more controversial than abortion. People fall into one of two camps[20]:

- Those who emphasize a 'woman's right to choose' whether or not to terminate her pregnancy. To them abortion is a fundamental aspect of personal freedom to decide what happens to person's body.
- Those who emphasize a right to life of the unborn child. To them abortion is total amount to murder.

Hereafter we have the well-known division between the pro-choicer and the pro-lifers. As may appear from this summary it is often difficult for the two camps to reach any consensus. They appear to be emphasizing two utterly different principles. Public debates on abortion can sometimes appear to involve each side simply repeating to the other their key principles. The entrenchment is enhanced by the fear

[17] *Ibid.*
[18] David Mason, "CD molecules 2005: human cell differentiation molecules" 106 (2005) *available at*: https://www.academia.edu /17211163/CD_molecules_2005_Human_cell_differentiation_molecules, *accessed on* Dec 15, 2018.
[19] *Supra* note 10 at 308.
[20] *Ibid.*

that both sides have in 'giving an inch'. Once a pro-lifer agrees there may be some cases in which abortion is legitimate it becomes difficult for her or him to still maintain that the life of the fetus is as valuable as a life of an adult. Similarly once a pro-choicer accepts that sometimes a woman should not be permitted to abort, she or he is taken to admit that it is not simply a matter of choice for a woman.[21]

Before going any further, it is worth emphasizing that this is an area of the law where some commentators distinguish between what is moral and what should be illegal. It is, for example, a perfectly respectable view to believe that abortion is or nearly always is immoral, but that the law should leave the choice up to the individual.[22] There are plenty of examples of where the law permits individuals to act in a way which might be regarded as being immoral. A far rarer view would be that abortion is morally justified but should be illegal. That view might be supported by someone who believes that the state needs to increase its population, or that the claims of infertile couples wishing to adopt outweigh the rights of pregnant women. That said, for many people the moral and legal positions are interlinked. If you believe that a fetus is a person, it is difficult to then explain why you think that person can be lawfully killed.[23]

As already specified, one's starting point in looking at the debate depends on one's view of the issue. Pro-lifers would want to start with the right to life of the fetus, and pro choicer with the right to choose of the woman. We will start by looking at the position of the fetus, because if you conclude that the fetus has no right to life or no interests to be protected that is practically the end of the debate.

### 3.7 The Ethical Sustaining of Roe v Wade and Casey v Pennsylvania

The U.S. Supreme Court decisions identifying and affirming the abortion right are determined by Constitutional law and legal reasoning, not abortion ethics. However, sometimes legal reasoning concurs with ethical reasoning. Here in this

[21] R. Jo Kornegay, "Hursthouse's Virtue Ethics and Abortion: Abortion Ethics without Metaphysics?" 14 *Ethical Theory and Moral Practice* 51–71 (2011) *available at*: https://doi.org/10.1007/s10677-010-9230-2, *accessed on* Dec 20, 2018.
[22] David Boonin, *A Defense of Abortion* 5 (Cambridge University Press, 1st edition, 2002).
[23] *Supra* note 10 at 308.

matter simply point out conducts in which the law established in *Roe*[24] and *Casey*[25] is consistent with the approaches to abortion ethics reviewed above. This overlap recommends another way to read these decisions-as an expression of the kind of "ethical eclecticism" representative of ordinary moral reasoning.[26]

Before feasibility, the Supreme Court's abortion rulings are reliable with the medical ethics principle of autonomy. *Roe* and *Casey* don't say embryos or fetuses have no moral value. In its place, they rule that the person in whom an embryo or fetus lives, not the government, is the decisionmaker on its moral status. If houses pass laws forcing abortion of embryos or fetuses the majority thinks have no moral value, or if they pass laws forcing continued pregnancy for nonviable embryos and fetuses the mainstream thinks have great moral value, lower courts are grateful to strike these laws. *Roe's* emphasis on how a woman experiences the burdens of pregnancy is consistent with both the traditional one-person autonomy method and a two-person analysis. *Casey's* additional emphasis on how women as a class must have reproductive control to fully participate in society is consistent with an equity of autonomy approach to abortion ethics.[27]

After feasibility, the Supreme Court's abortion rulings are consistent with a single-intrinsic property (biological) approach to abortion ethics. *Roe* held, and *Casey* acknowledged, that "a state may take away pregnant women's decision making autonomy after fetuses pass a certain biological point of development (viability) if that state values the potential life of these fetuses more than the needs and desires of the women carrying them". This focus on "potential life" is also reliable with valuing entities in their transitive state because of their potential to be something else. The Court ruled a viable fetus in utero is not a person under the Constitution. Yet because it could become a legal person in the future, a state may assert an interest in protecting it.[28] *Roe* required, and *Casey* affirmed, a life-and-health exception to the viability line. In *Doe v. Bolton*[29], decided "the same day as *Roe*, the Court provided a definition of "health" that is consistent with the broad World." Health Organization definition that

[24] (1973) 410 U.S. 113.
[25] (1992) 505 U.S. 833.
[26] Katie Watson, *The Ethics, Law and Politics of Ordinary Abortion* 140 (Oxford University Press, New York, 2018).
[27] *Id.* at 141.
[28] *Ibid.*
[29] (1973) 410 U.S. 179.

helps drive public health ethics:[30] "A physician's medical judgment may be exercised in the light of all factors-physical, emotional, psychological, familial, and the woman's age-relevant to the wellbeing of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgement. And it is room that operates for the benefits, not the disadvantage of the pregnant woman."

### 3.8 The Status of the Fetus

What status should the fetus have? Before looking at some of the answers to that question we must point out that many people object to it. They argue that you cannot look at the fetus without looking at the woman as well. We should be asking what status the pregnant woman and fetus have together.[31] Even if it is the wrong question, it is one about which there has been much discussion, and so we will address it: what status should the fetus have? Before looking at the answers to this question it is appropriate to have a woefully brief biology lesson. Conception takes place while the sperm enters the egg. Fertilization actually takes place quite some time later up to twenty-four hours. The concepts then moves from the fallopian tube to the womb and attaches to the womb. This is sometimes known as implantation. The next point of significance occurs about fourteen days after the conception and is known as a 'primitive streak'. Another time of significance is viability. This is when the fetus can live outside of the mother. This, with present technology, can be at twenty-two weeks. At about twenty-six weeks a fetus can experience pain and has basic responses to external stimuli. Birth normally occurs about thirty-eight weeks after conception[32].

Before looking at these views it might be worth drawing a distinction between saying a fetus is human and saying it is a person[33]. There seems to be general agreement that the fetus is living it is growing and developing and that it is human it can hardly be said to belong to another species. The debate is over whether the fetus is

[30] *Supra* note 26 at 142.
[31] Jonathan Herring and P.L. Chau, "MY BODY, YOUR BODY, OUR BODIES" 15 *Medical Law Review* 34–61 (2007) *available at*: https://doi.org/10.1093/medlaw/fwl016, *accessed on* Feb 22, 2020.
[32] *Supra* note 10 at 309.
[33] Jane E.S. Fortin, "Legal Protection for the Unborn Child" *Modern law review* (1988) *available at*: https://doi.org/10.1111/j.1468-2230.1988.tb01743, *accessed on* Jan 12, 2018.

regarded as a person. We will now consider some of the views as to the status of the fetus:

### 3.9 The Fetus is a Person from the Moment of Conception

This is a view taken by many people opposing abortion, especially those writing from a religious perspective. However, it also has its supporters among those who have no explicit religious affiliation. We will now only consider the secular reasoning that supports the view that the fetus is a person from the moment of conception.[34]

It is important to look at three kinds of argument that can be made about conception being the start of personhood. First, it can be claimed that the fetus is a person at the point of conception. Second, it can be claimed that at the point of conception the fetus is not yet a person but has the potential to be a person, and therefore should be treated in the same way as a person. Third, it can be claimed that because we do not know when life begins, the safest assumption is that life begins at conception[35]

One common argument in favor of regarding a fetus as a person from the moment of conception is that at that point the entire genetic make-up of the person is complete. Apart from growing and developing there is nothing that will be added or taken away in genetic terms from a person.[36] Opponents may reply that in fact it is not until the forming of the primitive streak that this is so.

A slightly different argument is that apart from conception there is no other clear point in time at which it is possible to say that a fetus's personhood begins. *Koop* writes as follows: "My question to my pro-abortion friend who will not kill a newborn baby is this: Would you kill this infant a minute before he was born, or a minute before that, or a minute before that, or a minute before that?" Such an argument assumes that there must be a clear point in time at which a fetus becomes a

[34] *Supra* note 10 at 309.
[35] *Supra.*
[36] Johannes Jacobse, "John Finnis on the Moral Status of Fetus" *American Orthodox Institute* (1995) *available at*: https://www.aoiusa.org/john-finnis-on-the-moral-status-of-the-fetus, *accessed on* Dec 10, 2018.

person, and that conception provides the clearest place to draw the line. There is no other point in fetal development which is as dramatic as conception and as clear an indicator of the beginning of life.[37]

Another point that is made in favor of conception as being the start of life is that the embryo has within it all the genetic material it needs to develop into a human being. The embryo is the same physical organism that develops into a person. It is, therefore, 'one of us'[38]. Against such an argument it could be said that a corpse is the same human organism that the alive person was. However, we do not attach the same moral status to a corpse and a live person. The fact that the embryo can be said to be the same organism as the person it grows into does not, therefore, mean it must be given the same moral status.[39]

One reply to such an argument is that we should not assume that there needs to be a clear moment in time when life begins. We know there is a difference between day and night, even though there are times of the day when it is unclear whether night has started or finished. But in response it might be said that while it might be easily accepted that daytime and night-time are relative concepts, we believe that something cither is or is not a person: that an entity either does or does not have a right to life[40]. Another criticism that could be used against an argument like that made by *Koop* is that in fact conception is not the bright line event that it is sometimes portrayed to be. Rather conception and fertilization take place over a period (normally about twenty-two hours) and it might be as difficult to pinpoint the moment during the conception process; at which personhood begins as it is for other theories to pinpoint when life begins. Another argument against this 'line drawing' argument is to ask whether it is sensible to draw a distinction between the sperm and egg a few seconds before fertilization and the concept us produced shortly afterwards. There is a further difficulty. *Stretton notes*, "Most of the cells in the incredibly early embryo go towards the creation of the placenta and amniotic sac rather than the later embryo". Thus, we cannot identify the incredibly early embryo with the later embryo, because the

[37] *Supra* note 10 at 310.
[38] C Wolf Devine and P Devine, "Abortion a communitarian prolife perspective" in M Tooley, C Wolf Devine and P Devine (eds.), *Abortion Three Perspective* 86 (Oxford University Press, 2009).
[39] *Supra* note 10 at 310.
[40] *Supra* note 22 at 35.

incredibly early embryo has a better claim to being identical with the placenta or amniotic sac[41].

Those who disagree with the argument that personhood begins at conception, as well as making the responses mentioned already, could also make the following argument: 'it is striking that the usual fate of the fertilized human egg is to die'.[42] It has been estimated that fewer than 15 per cent of fertilized eggs will result in a birth.[43] This might be taken as an argument that setting personhood at conception means that most people die within a few days. Some see this as a strong argument against conception being the start of personhood. However, in reply to such points it has been asked: would we say that in an impoverished country where there was an infant mortality rate of ninety percent that the children born were of lower moral status than those born where there was a much lower rate?[44]

Some argue that even if life does not begin at conception an embryo has moral value on account of its symbolic status. It represents the beginning of a human life, and is therefore deserving of respect, even if it is not actually yet a human. *Lisa Bortolotti and John Harris* reject such arguments, claiming that "the embryo is not in itself of value, even if you think it represents something valuable life". It therefore docs not itself have moral value[45].

A final point to note is that if personhood starts at conception then many forms of contraception would become immoral, namely all those which operate after conception, including the contraceptive pill. It would also mean that all forms of embryo research and IVF practices which involved discarding embryos would probably be immoral. Such consequences lead some to argue that we cannot accept

[41] Francis J. Beckwith, "The Human Being, a Person of Substance: A Response to Dean Stretton" *Journal of Medical Ethics review* 793–797 (2008) *accessed on* Nov 15, 2018.
[42] Prof. Brown reported in Smeaton (2002) 2 FCR 193, at *para* 129.
[43] Brad Sagarin, "Reconsidering Evolved Sex Differences in Jealousy: Comment on Harris (2003)" 9 *Personality and Social Psychology Review* 76-86 (2005) *accessed on* Dec 16, 2018.
[44] Backwith (2005), Keown and Jones (2008) respond that 'the fact that nature permits this does not grant us a moral warrant to murder fetuses'.
[45] Lisa Bortolotti and John Harris, "Embryos and Eagle: Symbolic value in Research and Reproduction" 15 *Cambridge Q. Healthcare Ethics* 22 (2006) *accessed on* Feb 15, 2018.

this conception view. But if the view is correct should we shy away from it because of its undesirable consequences?[46]

### 3.10 The Fetus has Moral Claims based on its Potential

A different kind of argument in favor of treating the fetus as a person from the moment of conception is that even accepting that at conception a fetus is not a person it has the potential to become a person. We must therefore respect the fetus, not for what it is, but for what it has the potential to become. By killing fetuses, you are depriving them of the future lives they would have. The deprivation of future life is the essential wrong in killing. We must therefore treat the fetus as a person. *Christopher Nobbs* has developed a version of this argument suggesting that the greater the likelihood the fetus will become a person the greater value it has. Hence less value attaches to a concept us and much more value to a fetus just prior to birth.[47]

Inevitably such an argument has its critics. We do not normally treat someone who has the potential to be something as if they have acquired it. You might have the potential to qualify as a doctor, but that does not mean we should treat you as a qualified doctor. There is a distinction, of course, in that a fetus will certainly develop naturally into a person. It is not inevitable that you will develop into a doctor. Taking the potentiality argument to its logical limits might entail one saying that refraining from sexual intercourse is depriving someone of a potential future. Further, whether it is wrong to deprive someone of a future about which they have no awareness is debatable. It is arguable that it is worse to kill a human with a self-conscious future than to kill one who has no such awareness. This would suggest that although killing a fetus may be a wrong it is not as wrong as killing a child or adult.[48]

But if a person who has no awareness of the value of their future cannot be killed, does that mean a person in a temporary coma or in a depressed suicidal state has no right not to be killed? A different reply to the potentiality argument is that it could apply to a couple who have undergone IVF treatment and decide not to use their

[46] *Supra* note 10 at 311.
[47] *Supra.*
[48] Albert Weale, "Rights, Values and Welfare in Parliamentary Debates on Abortion" *available at*: https://ecpr.eu/Filestore/PaperProposal/cfc2b2ba-600d-41a2-9a22-6c80976ac6e0.pdf, *accessed on* Jan 15, 2020.

stored gametes to produce an embryo, or even a couple who decide not to have sex at a time when a woman was fertile. These couples too could be said to have deprived someone of a future,[49] although it might be said in reply that in such a case an identified individual is not deprived of a future.[50]

Of course the potentiality view is criticized by those who are adamant that a fetus is a person from conception. *Finnis* argues: 'he or she is a human being and human person with potential, not merely potential human person or potential human being'.[51] This dispute is probably best measured when all the arguments over the status of the fetus have been measured. But it will be discussed here because it is a powerful argument in favor of emphasizing conception. Let us imagine you have read all" the writing on the status of the fetus, and your conclusion is simply that you do not know whether the fetus is a person or not, you might have sympathy with *Brazier's* comments:[52] 'Perception of the status of the embryo derives in many cases from the presence or absence of religious belief...The dispute reaches stalemate'. The humanity of the embryo is unproven and unprovable. But that acts both ways. Just as I cannot prove that humanity was divinely created and that each and every one of us possesses an immortal soul, so it cannot be proved that it is not so.[53]

If we do not know when a fetus becomes a person it is possible that a fetus is a person at conception, is it not better to resolve the doubt in favor of life?[54] In other words is it far better to treat a non-person as a person than to treat a person as a non-person? In reply it might be asked whether this is a strong enough justification to compel a woman to go through an unwanted pregnancy with all the bodily invasion and loss of autonomy that results. *Thompson* has argued that given the lack of consensus on the status of the fetus the law should prefer liberty. She gives three

[49] Julian Savulescu, "The Embryonic Stem Cell Lottery and the Cannibalization of Human Beings" *available at*: https://doi.org/10.1111/1467-8519.00308, *accessed on* Jan 23, 2019.
[50] Don Marquis, "Abortion and the Beginning and End of Human Life" *the Journal of Law, Medicine and Ethics available at*: https://doi.org/10.1111/j.1748-720X.2006.00004.x, *accessed on* Feb 25, 2019.
[51] John Finnis, "Law, Morality and "Sexual Orientation" *Theology and Ethics* 14 (1994) *available at*: http://web.mit.edu/anscombe/www/finnisorientation.pdf, *accessed on* Jan 23, 2019.
[52] Amel Alghrani and Margaret Brazier, "What is It? Whose is It? Repositioning the Fetus in the Context of Research" 70 *Cambridge Law Journal* 51-82 (2011) *available at*: https://doi.org/10.1017 /S0008197311000171, *accessed on* Dec 14, 2018.
[53] *Ibid.*
[54] Smith for a development of such a dispute (2008).

principles:[55] First, restrictive regulation of abortion severely constrains women's liberty. Second, severe constraints on liberty may not be imposed in the name of considerations that the constrained are not unreasonable in rejecting. And third, the many women who reject the claim that the fetus has a right to life from the moment of conception are not unreasonable in doing so.[56]

*Beckwith*[57] argues that "we would not allow a shooting range to operate if it was close to a school and there was a small chance a child would be killed and therefore, we should not allow abortion if there is a small chance a fetus is a person". That analogy is not, however, exact because those who are prevented from being shot arc not suffering the fetus becomes a person at fourteen days.

### 3.11 The Fetus becomes as Human

Those who support the view that the fetus becomes a person at fourteen days when the primitive streak appears tend to support it with the kind of arguments that have been made above in relation to relying on conception. However, they argue that it is at fourteen days rather than conception that the embryo becomes a distinct entity.[58] It is, for example, not until fourteen days that it is clear whether the embryo will divide and form two people (twins). It is only then that we can be confident that we have, at least in genetic terms, an identified person. One difficulty with this view is that it does not provide a precise moment in time at which human life starts. The exact moment of the primitive streak is unclear.[59]

Historically the moment the fetus 'quickened' was regarded as of moral and social significance. This was the time the mother could feel the fetus moving inside her. This was seen by some as the moment life begins. With modem technology and scans it is possible to see images of the fetus at an early stage. Expectant mothers looking at books with pictures of how their fetus might look arc understandably excited at the stage when the fetus starts to look recognizably human. Much was made

[55] J Thomson, "A Defense of Abortion" *Philosophy & Public Affairs* 20 (1995).
[56] *Ibid.*
[57] Simon J. Tunster, Mathew Van de Pette and Rosalind M. John, "Fetal overgrowth in the Cdknc mousemodel of Beckwith-Wiedemann syndrome" 60 (2007) *available at*: https://dmm.biologists.org/content/4/6/814, *accessed on* Jan 23, 2019.
[58] Mc Mahan and Warnock sees the development of the primitive streak at 14 days, as signaling that it acquires a special moral status, 82 (2002), although not personhood, 64 (1998).
[59] *Ibid.*

of recent pictures appearing to show a fetus waving and smiling. Nowadays, although these points in time arc no doubt of emotional importance, few people suggest that they should carry moral significance. *John Burgess* suggests that 'the crucial point should be six weeks when a rudimentary cardio-vascular system starts to function'. His argument is that as death is marked by the stopping of the heart beating, the start of life should be marked at the first heartbeat. *Penner and Hull* see the moment when receptors in the brain appear, which is around twenty-three weeks.[60] To some commentators it is the moment of viability which is crucial, that is the moment at which the fetus becomes capable of existing independently of the mother with appropriate medical support; in other words, the time at which, if prematurely born, the child would be capable of living, and which is currently about twenty-two weeks. The significance that may be attached to viability can result from two different kinds of arguments:[61]

i. At viability the fetus becomes a person.
ii. At viability the mother is entitled to withdraw her support of the fetus but not in such a way as to kill the fetus.

The second kind of argument is an argument about the responsibility of the mother to the fetus, rather than the moral status of the fetus as such. The notion of viability is seen as important by some because it marks the transition from being a human entity dependent on another for survival, to someone capable of independent life. The fetus has at that point sufficient independence to be regarded as clearly separate from the mother. The notion of viability as a criterion for life is not without its critics. Some are simply, critical of uncertainty. It can be exceedingly difficult to know whether a fetus could survive outside the mother.[62] Others argue that it might mean that the moment at which a fetus becomes a person depends when in history and even where in the world you live. A 26 -week-old fetus may be viable in Britain but would not be in a developing country with limited medical facilities. Should the moral status of the fetus depend on where; in the planet the mother is? A further argument concerns the meaning of viability. A premature fetus may be viable if placed in an

[60] Paul S Penner and Richard T Hull, "The beginning of individual human personhood" 33 *The Journal of Medicine and Philosophy: A Forum for Bioethics and Philosophy of Medicine* 174–182 (2008), *available at*: https://doi.org/10.1093/jmp/jhn003, *accessed on* Jan 25, 2019.
[61] *Supra* note 10 at 313, 314.
[62] Cave, "Plato's Allegory of the Cave Explained" 15 (2004) *available at*: https://mygestaltherapy.com/platos-allegory-of-the-cave-explained-with-examples, *accessed on* Jan 28, 2019.

incubator and is receiving full-time nursing care, but such a baby is utterly dependent on others to provide the essentials for life. Being completely independent from others is in fact not possible until the child is several years old.[63]

### 3.12 The Fetus becomes a Person at Sentience

A popular approach is to argue that a fetus becomes a person when it develops sentience's or is capable of sensation or desires. This may be around twenty to twenty-four weeks, although this is debated. One way of justifying this approach is to argue that we should base our approach to the question 'when does life begin?' on the question when does life end? There is much support for the view that brain death the cessation of brain activity should be the mark of death. If so, it is arguable that life should therefore be said to begin at the point when brain activity starts.[64] *John Harris* has put the argument this way: "I argue that the moral status of the embryo and indeed of any individual is determined by its possession of those features which make normal adult human individuals morally more important than sheep or goats or embryos".[65]

In this matter author have discussed such an approach could, in fact, also lead to the view that life does not begin until sometime after birth. What makes someone a person is not merely sensation or sentience, but rather being a 'rational self-conscious being' and that does not start until sometime after birth. We will discuss this view below. From a different perspective is the argument that a person's life should be valued not for what they do or think, but for what they are: a living person. Indeed, it has been suggested that seeing brain activity as being the start of life creates an artificial divide between the brain and the body. There is also a concern voiced by some that if sentience is seen as the criterion for life, then as fetal science develops it may be that fetal sentience will be found to start at an earlier and earlier point in time.[66]

There is no doubt that birth is a dramatic event in human life. To some it is the most natural moment to see the fetus as having its own existence. It is the point at

[63] *Ibid.*
[64] T Douglas and J Savulescu, "Destroying unwanted embryos in research Talking Point on morality and human embryo research" (2009) *available at*: https://doi.org/10.1038/embor & 54; 2002, *accessed on* Jan 28, 2019.
[65] K Harris, "Kamala Harris Wanted to Put Pro-Lifers in Jail Who Exposed Planned Parenthood Selling Baby Parts" 79 (1998) *available at*: https://www.lifenews.com/2020/10/06/kamala-harris-wanted-to-put-pro-lifers-in-jail-who-exposed-planned-parenthood-selling-baby-parts, *accessed on* Oct 10, 2020.
[66] *Supra* note 10 at 314.

which the child becomes an entirely separate entity from the mother. There are others, however, who see birth as essentially an arbitrary occasion. It is clearly of great significance to the mother and her relationship to the fetus, but doe it alters the status of the fetus? Why does a 30-week-old fetus who has been born and kept alive in an incubator have a different moral status from a 30-week-old fetus which is yet to be born? Where they are living is different, but should that alter their moral status? In response it might be said that the law often must use apparently arbitrary points in time to ascribe statuses.[67]

### 3.13 Personhood does not Begin Until Sometime After Birth

One view which appears to have growing support is the view that someone is not a person until they are 'a rational and self-conscious being'. This means that a fetus is not a person. Nor indeed is a newborn infant. *Kuhse and Singer* have written: "We must recall however, that when we kill a new-born infant there is no person whose life has begun". When I think of myself as the person I now and realize that I did not come into existence until sometime after my birth.[68]

The shocking conclusion, if this argument were accepted, would be that infanticide (the killing of babies) is permissible. To many the shock is such that the argument must immediately be rejected. However, there is undoubtedly logic to the argument. If we are looking at what makes an entity distinctly human, the traditional religious answer would be: a soul. But if that view is rejected it is difficult not to conclude that capacities such as rationality and self-consciousness are the most obvious hallmark of people. Yet newborn babies appear to lack these. Is therefore our rejection of infanticide based on a failure to think clearly and on sentimental attachments to babies? Or is it that the supporters of such a view have taken their logic to extremes? *Anne Maclean* argues that: 'We treat babies in certain ways and not in others; not for example, as if their lives were at our disposal'. Bioethicists demand

[67] Norrie, p. 226 (2000).
[68] P Kuhse and H Singer, "Debate: Embryo Research: The Ethics of Embryo Research" *The Journal of Law, Medical and Ethics* 133 (1985) *available at*: https://doi.org/10.1111/j.1748-720X.1986.tb00966 .x, *accessed on* Feb 21, 2019.

for what reason we do so, but there is no reason or, to put the same point differently, their being babies is the reason, all the reason in the world.[69]

*Jeff McMahan*[70], taking a view similar to that of *Kuhse and Singer*, argues those suffering severe mental illness do not have the status of people, as they lack an awareness of self or an ability to think rationally. *Eva Feder Kittay*[71] argues that such arguments involve 'creating a category of moral status extended to certain human beings (along with unspecified, hypothetical others) based on intrinsic valued properties but denied to other human beings is dangerously close to the harmful exclusions of racism and pernicious nationalism'.[72]

A popular answer to the status of the fetus is an attempt to move away from having to locate a point in time at which the fetus becomes a person. Instead, we should recognize that the status of the fetus changes during pregnancy.[73]It has a special status which means it is more than merely a bit of human tissue but is less than a person. The old fetus, the greater the respect due to it. The *Polking horne Committee* argued for 'a special status for the living human fetus at every stage of its development which we wish to characterize as a profound respect based on its potential to develop into a fully formed human being'[74]. Others talk of the fetus moving from being a human organism, to a human being to being a person. Indeed, it has been argued that we should not base our discussion around what is or is not a person but rather around the moral relevance of characteristics.[75]

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[69] R. Joseph, "Fetal Brain Behavior and Cognitive Development" 20 *Developmental Review* 81–98 (2000) *available at*: http://www.idealibrary.com on Ideal, *accessed on* Feb 12, 2019.

[70] Jeff McMahan, "The Ethics of Killing: Problems at the Margins of Life" (2002) *available at*: https://ndpr.nd.edu/news/the-ethics-of-killing-problems-at-the-margins-of-life, *accessed on* Feb 20, 2019.

[71] Feder Kittay, "The Moral Significance of Being Human" 131 (2005) *available at*: https://www.researchgate.net/publication/321947320_The_Moral_Significance_of_Being_Human, *accessed on* Feb 22, 2019.

[72] *Ibid.*

[73] C. C. Hsieh, T. T. Hsieh, C. Hsueh, D. M. Kuo, L. M. Lo and T. H. Hung, "Delivery of a severely anaemic fetus after partial molar pregnancy: clinical and ultrasonographic findings" 14 *Human Reproduction* 1122–1126 (1999) *available at*: https://doi.org/10.1093/humrep/14.4.1122 & 49;1992, *accessed on* Feb 25, 2019.

[74] John Keown, "The Polkinghorne Report on Fetal Research: Nice Recommendations, Shame About the reasoning" 19 *Journal of Medical Ethics* 114-120 (1993) *available at*: https://repository.library.george town.edu/handle/10822/741878?show=full &1989, *accessed on* Feb 26, 2019.

[75] A Julie. Mennella, P Coren. Jagnow and K. Beauchamp Gary, "Prenatal and Postnatal Flavor Learning by Human Infants" *Pediatrics Official Journal of American Academy of Pediatrics* (1999) *available at*: https://pediatrics.aappublications.org *accessed on* Feb 27, 2019.

Such arguments seek to drive a middle way between saying that a fetus is a person or a nothing, but rather that a fetus is somewhere in between. Some add that such a view enables us to say that as the fetus grows older the fetus acquires an increasing measure of respect until it reaches the status of a person.[76] *Mackenzie* argues that this accords with the experiences of pregnant women, which change as their pregnancy progresses: Firstly, from the perspective of the woman, the fetus becomes more and more physically differentiated from her as her own body boundaries alter. Secondly, this gradual physical differentiation... is paralleled by and gives rise to a gradual psychic differentiation, in the experience of the woman, between herself and the fetus...Thirdly, physical and psychic differentiation are usually accompanied by an increasing emotional attachment of the woman to the fetus, an attachment which is based both in her physical connection with! The fetus and in anticipation of her future relationship with a separate being who is also intimately related to her.[77]

This middle view of the fetus might be said to accord with the real views of many of the protagonists in the debate.[78] Many staunch pro-lifers are willing to concede that abortion might be permissible following a rape and many staunch pro-choicers would be unhappy with the idea of a woman carrying out an abortion at thirty-eight weeks without a good reason. Does this not suggest that in fact many pro-lifers do accept that fetal life is not exactly equal to adult life and that many pro-choicers do accept that fetal life has at least some value? As Wolf points out many people's attitudes to fetuses depends on whether the fetus is wanted: So what will it be: Wanted fetuses are charming, complex, REM-dreaming little beings whose profile on the sonogram looks just like Daddy, but unwanted ones are mere 'uterine material?[79]

To another group of commentators much of the discussion on the status of the fetus is misguided. We cannot consider the status of the fetus in isolation from the

[76] Julianne Malveaux, "Sanger's Legacy Is Reproductive Freedom and Racism" (2001) *available at*: https://womensenews.org/2001/07/sangers-legacy-reproductive-freedom-and-racism, *accessed on* Feb 27, 2019.
[77] B. Jessie Hill, "Dangerous Terrain: Mapping the Fain: Mapping the Female Body in Gonzales v Female Body in Gonzales v. Carhart" *Columbia Journal of Gender and Law* 76 (2010) *available at*: https://scholarly.commons.lawcase.edu/faculty_ publications, *accessed on* Feb 28, 2019.
[78] Warren Quinn, "Abortion: identity and loss" 13 *Philosophy Public Affairs* 24-54 (1984) *available at*: https://pubmed.ncbi.nlm.nih.gov/11651752, *accessed on* March 6, 2019.
[79] Wolf, p. 4 (1995).

woman. She is not simply a fetal container.[80] Rather our discussion should focus on the relationship between the mother and fetus: they are both two and one. Any dealings with the fetus must be mediated by the woman. *Dworkin* puts it this way: her fetus in not merely 'in her' as an inanimate object might be, or something live but alien that has been transplanted into her body. It is 'of her and is hers more than anyone's' because it is, more than anyone else's, her creation and her responsibility; it is alive because she has made it come alive.[81] *Seymour* argues that instead we need to emphasize the relationship between the fetus and woman. He explains that the key feature of the relationship approach is its emphases on the shared needs and interdependence of the woman and her fetus, whose relationship is seen as characterized by 'connectedness, mutuality, and reciprocity'.[82]

The alternative, he suggests, involves setting up the interests of the fetus in conflict with the interests of the mother. *Catherine Mackinnon* argues 'the only point of recognizing fetal personhood, or a separate fetal entity, is to assert the interests of the fetus against the pregnant woman'.[83] *Mackinnon*, however, also argues that it is wrong to see the fetus as simply as a body part of a woman: 'Physically, no body part takes, as much and contributes as little. The fetus does not exist to serve the woman as her body parts do...No other body part gets up and walks away on its own eventually.'[84] We need an approach that recognizes the intimacy of the relationship between the two. As *Dawn Johnsen* points out, there are dangers with presenting the interests of the fetus and the woman as separate: 'By creating an adversarial relationship between a woman and her fetus, the state provides itself with a powerful means of controlling women's behavior during pregnancy, thereby threatening women's fundamental rights'.[85]

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[80] J George Annas, "Pregnant Women as Fetal Containers" *The Hastings Center Report* (1986) *available at*: https://doi. org/10.2307/3562083, *accessed on* March 10, 2019.
[81] Dworkin, p. 55 (1993).
[82] John Seymour, "Review: The Law's Response to Pregnancy and Childbirth: Consistency, Conflict or Compromise?" 65 *The Modern Law Review* 190-303 (2002) *available at*: https://www.jstor.org/stable /1097643, *accessed on* March 12, 2019.
[83] D P Mackinnon, R M Williams-Avery and M A Pentz, "Youth beliefs and knowledge about the risks of drinking while pregnant" *Public Health Report* (1995) *available at*: https://www.ncbi.nlm.nih.gov/ pmc/articles/PMC1381820/1315&1991, *accessed on* March 15, 2019.
[84] *Ibid.*
[85] D. Johnsen, "The Creation of Fetal Rights: "In recent years, however, courts and state legislatures have increasingly granted fetuses rights traditionally enjoyed by persons. Some of these recent 'fetal rights' differ radically from the initial legal recognition of the fetus in that they view the fetus as an entity independent from the pregnant woman with interests that are potentially hostile to hers."..", 95 *YALE L.J.* 599 (1986), *available at*: https://downloads.frcaction.org/EF/EF09A10.pdf, *accessed on* March 16, 2019.

Opponents of the relationship approach argue that to focus on the relationship between the two rather than separate out the interests, despite its worthy aims, is misguided. How can we discuss the maternal fetal relationship in any meaningful way without deciding whether a fetus should be regarded as equivalent to a strand of her hair, or has the same status as an adult person? Others are concerned that emphasis on the relationship rather than the interests of those involved might too easily lead to an overriding of the woman's rights; especially given the strong image that motherhood holds in our society.[86]

Certainly, it is true that the relationship approach does not necessarily point in a particular direction in the abortion debate and could even be used to support abortion. *Petcheksy* argues: "A feminist challenge to fetocentrism must assert that, while some fetuses may become at some point transplantable, no fetus is viable". Fetuses are biologically dependent on a pregnant woman and will be physically and socially dependent on her after birth. This dependence provides the basis for both her moral obligation to regard the fetus with care and her moral right to decide whether to keep it.[87]

The relationship approach has received some support from pro-life feminists. They emphasize what are the feminist values of nurturing, caring, and the value of life. *Wolf-Devine* argues that "there is a prima facie inconsistency between the ethics of care and abortion". Quite simply, abortion is a failure to care for one living being who exists in a particularly intimate relationship to oneself. If empathy, nurturance, and taking responsibility for caring for others are characteristic of the feminine voice, then abortion does not appear to be a feminine response to an unwanted pregnancy.[88] This property model sees the fetus as the property of the mother. *Mary Ford* explains 'the benefits of this approach: By treating the fetus as the property of the pregnant woman, it allows us to understand why the law should only protect the fetus against the actions of third parties, and not against the actions of the woman herself'. Within a

[86] Sara Fovargue, "Review: The Law's Response to Pregnancy and Childbirth: Consistency, Conflict or Compromise?" (2002) *available at*: https://www.jstor.org/stable/1097643, *accessed on* March 17, 2019.

[87] Rosalind Pollack Petcheksy, "Fetal Images: The Power of Visual Culture in the Politics of Reproduction" 13 *Feminist Studies* 263-292 (1987) *available at*: http://www.Jstor.org/stable/3177802; 1984, *accessed on* March 19, 2019.

[88] Celia Wolfe-Devine, "Abortion and the Feminine Voice" 3 *Public Affairs Quarterly* 81-97 (1989) *available at*: https://www.jstor.org/stable/40435721, *accessed on* March 20, 2019.

property framework, she is entitled to I dispose of her property without legal interference, and she is also entitled to seek compensation from and criminal sanctions for those who interfere with her property.[89]

She denies that this approach leads to the conclusion the fetus has no interests. By regarding it as a piece of property it is recognized as having value and having interests that should be protected by the law. However, harms to the fetus arc seen as harms to the mother. A problem with this approach is that it may not accord with any women's own understanding of pregnancy. At least in the case of a wanted pregnancy, few women will regard their fetuses as analogous to their microwaves. Although one response to that would be that no legal approach can hope to properly capture the experience of pregnancy.[90]

### 3.14 The Right to Choose

Many pro-choicer reject the argument that the fetus has any rights or interests until birth and argue that what is important is the "Right of Autonomy" of the woman. Such a view is relatively straightforward: if a fetus has no interests of its own until birth then it is difficult to think of any convincing arguments that would justify denying that women have a right to abortion.[91] More difficult is the position of a person who wishes to argue that a fetus is a person or has rights to be treated in the same way as a person, but the rights of the fetus are trumped by the woman's right to autonomy or bodily integrity. The debates over the legitimacy of such a view have been dominated by a hugely influential article by *Judith Jarvis Thomson*.[92]

At the heart of *Thomson's* article is the following hypothetical example: You wake up in the morning and find yourself back-to-back in bed with an unconscious violinist, a famous unconscious violinist. He has been found to have a fatal kidney ailment, and the Society of Music Lovers has canvassed all the available medical records and found that you alone have the right blood type to help. They have therefore kidnapped you, and last night the violinist's circulatory system was plugged

[89] Ford, p. 263 (2005).
[90] *Supra* note 10 at 318.
[91] Dadlez and Andrews, "Some have argued that pregnant women are not aware of the psychological harm that abortion can cause and therefore do not give informed consent. whether abortion causes psychological harm is much debated" (2009).
[92] *Ibid.*

into yours, so that your kidneys can be used to extract poisons from his blood as well as your own. The director of the hospital now tells you, look, we're sorry the Society of Musk Lovers did this to you, we would never have permitted it if we had known. But still, they did it, and the violinist is now plugged into you. To unplug you would be to kill him. But never mind, it is only for nine months. By then he will have recovered from his ailment and can safely be unplugged from you.[93]

*Thomson* assumes that you will say that you are entitled to unplug yourself. She expects you would agree that if you were an extremely virtuous person you may be willing to make the sacrifice and remain plugged in, but that it is something that you should not be legally compelled to be. Many people have accepted this analysis; *Thomson* then argues that if you agree you must agree that abortion likewise is permissible. In the same way you think that your right to bodily integrity means that you do not have to remain plugged in to the violinist, you should also think that you do not have to remain pregnant. If, however, you feel that the person plugged into the violinist should not be permitted to unplug themselves, then the article offers you no arguments in favor of abortion.[94]

Many have found *Thomson's* argument highly persuasive. But also, there are many who seek to distinguish her scenario from the abortion debate. Some of the points they make are as follows. Thomson's analogy involves a person who is kidnapped and forced into being linked up to the violinist. This is only analogous to pregnancy following rape. So, some commentators have taken the view that whilst *Thomson's* analogy creates a powerful case to justify abortion in the case of rape, it is unconvincing in other cases.[95]

*Thomson* foresees this objection and produces another analogy: Suppose it were like this: people-seeds drift about in the air like pollen, and if you open your windows, one may drift in and take root in your carpets or upholstery. You do not want children, so you fix up your windows with fine mesh screens, the absolute best you can buy. As can happen, however, and on exceedingly rare occasions do happen,

[93] *Supra* note 55 at 132.
[94] *Supra.*
[95] Gilbert Meilaender, "Biotech Babies How far should Christian couples go in the quest for a child of their own?"(1998) *available at*: https://www.christianitytoday.com/ct/1998/december7/8te054.html, *accessed on* March 23, 2019.

one of the screens is defective; and a seed drifts in and takes root. Does the person-plant who now develops have a right to the use of your house? Surely not even though you voluntarily opened your windows, you knowingly kept carpets and upholstered furniture, and you knew that screens were sometimes defective. Here *Thomson* is arguing that a woman should not be regarded as responsible for the fetus's vulnerable position where she has taken precautions against the child being born. She argues that a fetus has no rights to use a woman's body without her consent. In cases of contraceptive failure clearly the woman has not consented.[96]

Some commentators do not find this seed analogy very convincing. *Meilaender* argues that the womb is the natural place for a fetus to be, it cannot be like an invader or intruder.[97] Others reply that the fact a woman has known that using contraception is not 100 per cent reliable means that she has undertaken the risk of pregnancy and so is responsible for the fetus. *Warren*[98] modifies that *Thomson's* violinist analogy to one where you have joined the society of music lovers and accepted that in the event of a violinist's illness there will be a lottery and you will have a 1 in 100 chance of having to be plugged into the violinist for nine months. In such a case if you are selected you are morally bound to remain plugged in because you took on the responsibility by joining the club. Similarly, if you decided to engage in sexual intercourse you voluntarily undertake the risk of pregnancy. But others are not convinced by this. It can be argued that you cannot in advance give away your right to bodily integrity. Just because a person agreed to provide ten sessions of bone marrow transplant treatment does not mean we would force her or him to do so if she or he changed her or his mind mid-way through. *Boonin* suggests that in "the end this comes down to a question of society's conventions: do we as a whole society agree that a woman who engages in sexual intercourse thereby takes on the responsibility for any fetus thereby created? He suggests we do not. But not everyone will agree." In part the question is whether the personal and societal benefits of sexual freedom outweigh the harms of unwanted pregnancy that result.[99]

[96] *Supra* note 10 at 320.
[97] *Supra* note 95 at 2.
[98] Mary Anne Warren, "On the Moral and Legal Status of Abortion" 57 *The Monist Part II reprinted, with postscript in The Problem of Abortion* (1973) *available at*: https://douglasficek.com/teaching/phil-2222/warren.pdf, *accessed on* March 25, 2019.
[99] *Supra* note 22 at 164.

Another distinction between *Thomson's* violinist analogy and abortion is that in the case of the violinist by unplugging yourself you are letting the violinist die, while in some methods of abortion you are killing the fetus.[100]The validity of this argument depends in part on whether you think there is a difference between an act and an omission. As we noted there are many philosophers who find the distinction one of little or no moral significance, although it plays an important role in the law. To some the crucial distinction between pregnancy and the violinist analogy is that the violinist is a stranger to you, while the woman is no stranger to her fetus. The argument here is that a stranger owes no duty to another. To use yet another of *Thomson's* analogies: "If I am sick unto death, and the only thing that will save my life is the touch of *Henry Fonda's* cold hand on my fevered brow, then all the same, I have no right to be given the touch of *Henry Fonda's* cool hand on my fevered brow".[101]

However, parents, unlike strangers, do owe a duty to act reasonably in order to protect their children from danger. Pro-choices might respond to such an argument by saying that even parents are not required to give a kidney or even blood if necessary, to save the child's life, although a pro-life might want to argue that we should compel parents to offer life-saving treatment to their children.[102]

Another distinction some seek to make surrounds the concept of intention. In the case of the violinist when you unplug yourself you do not intend to kill the violinist. You would be delighted if somehow, he managed to survive, although you realize that is unlikely. However, in the case of abortion most procedures are done with the purpose of killing the fetus. If the fetus survives in utero the abortion will be regarded as a failure. Even if the woman does not want the baby to die, she is consenting to a process which will inevitably result in the fetus's death.[103] Such an argument relies on the doctrine of double effect which we shall discuss the

[100] Baruch Brody, "Fetal Humanity and Brain Function" 27-30 (1975) *available at*: http://www. stephenhicks.org/wp-content/uploads/2018/08/BrodyB-Fetal-Humanity-and-Brain-Function.pdf, *accessed on* March 27, 2019.
[101] *Supra* note 48 at 31.
[102] Lindsay Beyerstein, "The Problem with Paper Abortions" *In These Times* (2013) *available at*: https: //in-thesetimes.com/article/fatherhood-not-voluntary-no-matter-the-circumstance, *accessed on* March 29, 2019.
[103] Dr A. Monteagudo, I. E. Timor- Tritsch, A. H. Friedman and R. Santos, "Autosomal dominant cataracts of the fetus: early detection by transvaginal ultrasound" (1996) *available at*: https://doi.org /10.1046/j.1469-0705.1996.08020104.x, *accessed on* March 31, 2019.

controversial distinction between foresight and intention. Also, it appears arguable that at least some women having an abortion would be happy if the fetus were born alive, if they were no longer pregnant. Presumably, some would then consent to adoption.[104]

Interestingly *Thomson's* article has also been criticized by those who are pro-choice. These critics have made the following arguments:[105]

i. The article does not emphasize the fact that only women get pregnant. In other words, the violinist analogy overlooks the point that abortion can be justified as part of the equality between the sexes. To look at abortion without looking generally at the position of women and mothers in society is to miss much of the context within which the abortion debate must take place.
ii. Thomson appears to accept that it is selfish to abort. Her argument is that the law does not expect people to be 'Good Samaritans' and go the extra mile for other people. Rather the law requires that we be 'minimally decent Samaritans- This implied criticism of those who choose to have abortions is objected to by some.
iii. Thomson is wrong to assume that it is wrong to detach oneself from the violinist. *Kamm* has argued that unplugging the violinist simply returns him to the position he would have been in before he came to contact with you. This was support to which he had no right. So, by unplugging him you are not harming him, but returning him to the position he was initially. Similarly, in relation to abortion, no wrong is done to the fetus through abortion: the fetus is simply returned to the position it would have been in without the woman's sustenance.
iv. Thomson's article is based on assumption, that a fetus is a person, an assumption that Thomson makes absolutely clear she is only making for the purpose of the article. But some pro-choice critics think she moves too quickly from accepting that the fetus is a person to saying that a fetus has a right to life. It is arguable that if a person's existence is dependent on the body of another, that person cannot assert their right to life against the other. The

[104] *Supra* note 10 at 321.
[105] *Supra* note 10 at 322.

fetus's life is dependent on the mother's support and this is something to which it has no right; although it may be replied, as has been already argued, that a woman who engages in intercourse thereby accepts a risk that a fetus will be created and therefore has responsibilities towards it.

### 3.15 The Morals of Abortion

Abortion is sometimes presented as involving a conflict between the moral interests of the unborn child and those of the pregnant woman. While such an approach is rejected by some virtue and compromise positions it is unavoidable if one adopts a duty-based rights-based or utilitarian position granting direct moral protection to both the fetus and the pregnant women. For there to be a conflict at all a fetus must have moral value or status in the sense of being granted duties of protection. This issue the moral status of the unborn child is one of the most hotly debated issues within bioethics.[106]

Conceptually moral duties towards a being can be imposed in two ways. The first way is for that being to be owed duties directly solely based on its characteristics. The second way is for the being to attract protection indirectly, as a means of protecting those others who possess moral status. This is often forgotten. We do not need to have duties directly to a fetus for us to have duties in relation to a fetus. Even if the fetus had no more moral status than a sausage or tomato, it would not follow that anything and ever thin could permissibility be done to a fetus. In some circumstances deliberately damaging a fetus might harm those to whom we have direct duties. It might for example, endanger the pregnant woman violate the property rights of its parents. Or demonstrate harmful tendencies lively to lead to the violation of duties to those who do matter. This whole area is beset with terminological difficulties. What is clear is that the most controversial issue is whether the early human is owed direct duties. It the fetus is owed direct duties it can be said to have moral status. This issue will be addressed before considering the ajar arguments over abortion within medical ethics.[107]

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[106] Shaun D. Pattinson, *Medical Law and Ethics* 242 (London Sweet and Maxwell, 1st edition, 2006).
[107] *Ibid.*

### 3.16 Grounds of Moral Status

Grounds for moral status: Possession of moral status can be grounded on possession of several characteristics or properties. There are many possible criteria. Some wish to grant moral status to those who are:

1. Living Creatures.
2. Sentient, i.e. capable of experiencing pleasure or pain.
3. Biologically Human.
4. Agents able to act for purposes constituting their reasons for action.
5. Partial Agents, i.e., non-agents who possess some of the characteristics of the characteristics of agents; or
6. Potential Agents, i.e., non-agents who have the potential to become agents.

These are just examples. Each criterion has its supports and critics. For example, some duty-based positions wish to ground possession of moral status on membership of the species *Homo Sapiens*[108]*;* yet others denounce this criterion as amorally repugnant prejudice comparable to racism and sexism. All attempts to distinguish those possessing moral status from those not possessing moral status will inevitably be considered morally arbitrary by those who take a different view of where this distinction is to be drawn.[109]

The criterion of moral status in play will determine the extent to which our moral obligations to protect the unborn child's interests can come into conflict with our moral obligations to the pregnant woman. As stated in the value of the fetus is easy to map according to weather and to what extent it is thought to possess moral aerates. At one extreme are moral positions holding that the fetus deserves the level that of protection as an adult human being. According to what may be called the full status position, full moral sweats are to be granted to the fetus from the moment of its creation. At the other extreme is what may be called no status position; which holds that the getups itself has no intrinsic value or status; until at least birth. According to

[108] John R. Connery, "Book Review of The Morality of Abortion: Legal and Historical Perspectives, edited by John T. Noonan" 38 *The Linacre Quarterly Journal* (1971), *available at*: marquette.edu/cgi/viewcontent.cgi?referer=https://www.bing.com/&httpsredir=1&article=2915&context=*lnq, accessed on* April 4, 2019.
[109] *Supra* note 106 at 211.

this position, a fetus is no more than a collection of cells whose intrinsic features grant it no special protection. Between these two extremes are limited status positions, is the proportional status position, which holds that the moral status at birth or beyond. Thus, the fetus can be recognized as having moral status to the same degree as the pregnant woman, to a degree less than the pregnant woman (limited status, or where that status increase with gestational development, proportional status), to no degree at all.[110]

The moral status of the fetus is a key factor in determining the permissibility of abortion. Those adopting the full status position must consider abortion to be morally equivalent to murder. To deliberately induce the termination of a pregnancy is equivalent to poisoning or stabbing an innocent adult. At the other extreme the no status position must hold that abortion involves no intrinsic wrong. If we ignore it effects on others killing a fetus is no more problematic than cutting one's toenails. Between these two extremes the unborn child cannot be treated as if it has the same status as the pregnant woman or as if it were a mere collection of cells. It follows that from the limited status position, abortion cannot be left as a free for all or prohibited in all circumstances. The proportional status position is more specific. The closer to birth, the greater weight must attach to the fetus and the greater the justificatory burden placed on those who wish to abort.[111]

Some prefer the labels of "pro-choice" and "pro-life" (or "liberal" and "conservative") these positions reduce to what I have called the no and full status positions respectively. The "pro-choice" position implies that the fetus has no status because otherwise abortion cannot always and automatically be solely because otherwise abortion cannot always and automatically be solely a matter of choice for the pregnant woman. As Peter Singer has put it: "To present the issue of abortion as a question of individual choice is already to presuppose that the fetus does not really count"[112]

[110] *Supra* note 106 at 212.
[111] *Ibid.*
[112] Peter Singer, "A philosopher's attempt to justify aborting a fetus with Down Syndrome" 85 (1994) *available at*: https://www.psychologytoday.com/gb/blog/the-love-wisdom/201111/philosopher-peter-singer-ethical-theory-and-down-syndrome, *accessed on* April 7, 2019.

In contrast, the "pro-life" position implies that the fetus has full status. Singer argues that the pro-life label is also misleading because it is human life that advocates tend to value and then not all human life is valued equally because advocates tend to support killing in war or capital punishment and focus more on abortion than on saving the lives of existing humans dying from starvation or preventable disease. "Although labels are no more than tools for communication the no, full and limited status labels should be less misleading.[113]

### 3.17 The Major Moral Positions of Fetus

It cannot be emphasized too strongly that utilitarianism rights-based duty-based virtue ethics, and compromise positions are all collections of moral theories. To locate one's position within one of these camps does not automatically commit one to a particular view on the moral status of the fetus. It does, however, commit one to a view on how the interests of the fetus are to be weighed against those of the pregnant woman. Utilitarianism comes in many flavors and is compatible with several criteria of moral status. For a utilitarian granting moral status to those capable of sentience, the permissibility of abortion depends on the distress inflicted by abortion on the fetus which usually means the earlier the better and the distress on the mother if she must carry the fetus to term. If one assumes that the early fetus is not capable of consciousness and experiencing pain, the fetus has moral status only when this threshold is crossed. For a utilitarian granting moral status only to shoes capable of exercising preference understood as choices, not mere interests or pro-attitudes, moral status is grounded in agency. If one assumes that a fetus is not an agent, then the no status position follows automatically from this version of utilitarianism.[114]

*Peter Singer* adopts a version of preference utilitarianism holding that moral status depends on having preferences, understood as interests. According to *Singer*, to have any moral status at all one must be sentient and those with greater capacity for suffering have greater moral status. Only when the fetus becomes capable of feeling pain-which *Singer* judges to be at around 18 weeks-does it have any moral interests.[115] According to *Singer*, it follows that, At least when carried out before 18 weeks,

[113] *Ibid.*
[114] *Ibid,*
[115] *Supra* note 112 at 163.

abortion is morally neutral. Even later abortions, when some pain may be involved, could be justified if the outcome were to prevent much greater suffering.[116]

The moral status of a fetus is thus limited. *Singer* holds that it does not gain full status until well after birth when it becomes a "person". A person is understood as a rational being with a conception of self in the present and future what I have called an agent. The implications of applying a utilitarian calculus go far beyond abortion. As *Singer* willingly concedes, it follows that the killing of an early infant can also be permissible, at least when the parents-to-be do not want a child, and more so when the infant is disabled.[117] *Singer* is not the only utilitarian theorist to rest full status on agency. Rights-based theories-where rights are understood as justifiable moral claims imposing correlative duties, the benefits of which are weighable by the rights-holder-are committed rights in the sense of waiving the benefit of those rights. As already stated, if one assumes that the fetus is not an agent, the o status position automatically follows. This is, for example, the position of *Mary Anne Warren*, who appears to use the word "person" to refer to what I have called an agent.[118]

The duty-based camp is compatible with any criterion of moral status. Although membership of Homo sapiens is of key importance to all *Judaeo- Christian* religions, not all adopt the full status position of the Catholic Church. The present day official position noticeably rests possession of moral status on being human, so that all *Roman Catholic* biological human s from conception are regarded as possessing the same level of moral status as you or me. This position holds that it is always wrong to intentionally kill an innocent human-the sanctity of life position and a human is defined to exist from conception. It follows that bringing about fetal death is only permitted if it is not international. In contrast, Orthodox Judaism does not grant moral status to the early fetus. It is often forgotten that *Immanuel Kant's* duty-based theory granted "moral status only to agents".[119]

Many philosophers have argued that resting moral status on agency irrespective of whether one is a utilitarian, duty-based or rights-theorists not only denies the fetus moral status, but also denies moral status to infants and mentally

[116] *Supra* note 112 at 164.
[117] *Ibid.*
[118] *Supra* note 98 at 2.
[119] Kant, "The Kant's theory" ch.16 (1948).

disabled adults. Positions holding abortion to be permissible on such a ground thus become positions supporting in feticide and the killing of mentally disabled adults.[120] However, this makes assumptions about the attributes of fetuses, infants, and mentally disabled adults that are not morally neutral. It needs to be borne in mind that all moral theories require both a criterion of moral status and a theory of what beings in the empirical world satisfy the relevant criterion. Applying a criterion of moral status to fetuses can, depending on the moral theory in play, require both a criterion of moral status and a theory of what beings in the empirical world satisfy the relevant criterion. Applying a criterion of moral status to fetus can, depending on the moral theory in play, require counter-intuitive moral assumptions about the attributes of the being that you are dealing with. This complicates the application of many moral theories.[121]

There are also many theories that appeal to potentiality. Some uses of potentiality are invalid. It does not follow from the fact that an actual x (agent human or whatever) has moral status that a potential x has moral status. Potential qualification is not the same thing as actual qualification. To use the words of *John Harris*: "We are all potentially dead, but no one supposes that this fact constitutes a reason for treating us as if we were already dead."[122] This logical point argument suggests that we must regard as morally significant anything which has the potential to become a fully-fledged human being, and hence have some moral duty to protect and actualize all human potential, and then we are in for a very exhausting time of it indeed."[123]

There are two possible responses to that: First, a proponent of potentiality could simply bite the bullet and accept that we are obliged to protect and actualize such potential insofar as we can. Secondly, a proponent can take advantage of the "if" and develop a potentiality argument that does not impose a duty to protect and actualize all potential. Potentiality does not have to be used to ground full moral status; it can also be used to ground a fixed level of limited status or status that is proportionate to the degree of potentiality possessed. If potentiality gives rise to less than full moral status, then depending on the underlying moral theory protecting the greater needs of those with greater moral status could be a more important moral

[120] Philip Abbott, "Philosophers and the Abortion Question" 6 *Political Theory* 313-335 (1978) *available at*: http://www.jstor.org/stable/190808, *accessed on* April 10, 2019.
[121] *Ibid.*
[122] G. Bahadur, "The Human Rights Act (1998) and its impact on reproductive issues" 16 *Human Reproduction* 785–789 (2001) & 50;1998, *available at*: https://academic.oup.com/humrep/article/16/4/785/3114069, *accessed on* April 12, 2019.
[123] *Ibid.*

objective. Also, potentiality itself might only be viewed as morally relevant when it achieves a particular threshold.[124]

It is hardly worth mentioning that the compromise position is compatible with any view of the status of the fetus. Predictably, many of those in the compromise camp are attracted to the limited status position as some form of mid-way between the no and full status positions. In practice, just about all legal systems can only be consistently viewed as adopting compromise positions(Ireland is an exception.) As will become apparent, the compromise position adopted in Britain is best viewed as adopting a proportional status position. The legal constraints on what may be done to a fetus increase with gestational development. Before implantation, the fetus can be lawfully destroyed without relying upon any of the grounds in the abortion legislation and, if created outside the body, it must be destroyed unless both gamete donors' consent to its storage or use. The legal grounds for abortion are more restrictive after 24 weeks and legal personality is only obtained at birth. Thus, it can be said that fetal development can be divided into three legally relevant stages: pre-implantation, implantation to 24 weeks, and post-24 weeks to birth.[125]

*Marquis* explicitly assumes that "whether or not abortion is morally permissible stands or falls on whether or not a fetus is the sort of being whose life it is seriously wrong to end". There are two issues that arise in assessing this claim: (1) Is the fetus the sort of thing that could have any rights or toward which we could have obligations? (2) Are these rights or obligations prima facie or absolute? *Marquis's* claim seems to conflate the two issues, assuming that whatever rights of, or obligations to, fetuses there are, they must be absolute.[126]

The assumption that any obligation we must fetuses is absolute, presented without argument, is philosophically and politically irresponsible. It is as if fetuses were things growing out in the garden, and the question of abortion were whether one may decide to till them under rather than let them come to fruition. The question of abortion inextricably involves at least two lives and a compelling bundle of rights on the side of the woman carrying the fetus, whatever we decide about the status of the fetus. Ignoring these rights makes about as much sense as considering the issue of the moral permissibility of killing adult, fully conscious humans without considering the

[124] *Supra* note 106 at 215.
[125] *Supra* note 106 at 216.
[126] Ann E Cudd, "Sensationalized Philosophy: A Reply to Marquis's, Why Abortion is Immoral" 87 *The Journal of Philosophy* 262-264 (1990) *accessed on* Sep 03, 2019.

justification of self- defence. If no countervailing rights or other moral considerations were to be allowed to figure into the judgment, the criterion on which *Marquis* claims that "abortion is impermissible", having a "future-like-ours", would also rule out killing in self- defence. He makes no exceptions to his claim that abortion is immoral. Thus, it seems that to be consistent he would also have to reject any self- defence plea in killing any human being. The only justification *Marquis* provides for the dubious assumption that a fetus's right to its future is absolute and overriding is an appeal to his favorite authors on abortion. He writes: Many of the most insightful and careful writers on the ethics of abortion...believe that whether abortion is morally permissible stands or falls, whether the fetus is the sort of being whose life it is seriously wrong to end emphasis mine.[127]

With regard to the first group, it is an obvious logical mistake to infer from: (A) Since the fetus is not the sort of being whose life it is seriously wrong to end, it is morally permissible to abort. that, therefore, (B) If it were the case that the fetus is the sort of being whose life it is seriously wrong to end, then it would be morally impermissible to abort. The writers in the first group hold (A), but they make no claims like (B). That is, these writers merely claim that the fetus's lack of personhood is a sufficient, though not necessary, condition for abortion to be morally permissible. *Marquis's* phrase 'stands or falls' requires it to be both a necessary and sufficient condition on the permissibility of abortion. In the second group, both authors deny (A), but allow that, in cases in which the mother's life is in danger, or, perhaps, the woman was a victim of rape, abortion is morally permissible, thus denying (B) as well. In these cases, they reason, the woman's right to life or her serious loss of well-being overrides the rights of the fetus. Thus, they regard the woman's rights as a relevant issue in deciding the moral permissibility of abortion, and so could hardly be said to argue that the moral permissibility of abortion stands or falls with the issue of whether it is wrong to kill fetuses. Even if we might ultimately agree that the fetus is the sort of thing whose killing is so morally wrong as to overwhelm completely a woman's rights to privacy, health, medical care, and even life, the point surely needs argument. Nothing that has been said in the abortion debate to date has come close to settling this issue against the woman. So, at most *Marquis* can claim to have shown "Why Abortion is Killing a Being-Like-Us." When one recalls that persons may

[127] *Ibid.*

legitimately be killed for many reasons, this title has not the same moral urgency of *Marquis's.*[128]

Abortion as it is presently practiced may simply be an unhappy compromise between two logically separable actions. An abortion (i) terminates a pregnancy, ending the physical dependency relationship the fetus has to the mother, and (ii) terminates the life of the fetus, ending both its present functions as an organism and its ongoing development into a more complex one. Now performing (ii) will guarantee (i) in any situation, as one cannot (logically) be pregnant unless one is keeping a fetus alive. And in current practice, we cannot perform (i) without simultaneously performing (ii). This however is not a matter of logic but of fact, and like many matters of fact, we can easily imagine it otherwise. It is quite possible, conceptually and practically, that we would be able to separate the fetus from the mother, even at the earliest stages, performing (i), but keep it alive until it is fully viable elsewhere, thereby not performing (ii). Abortion then would become skewered on its two struts. There would be abortion, where the pregnancy but not the life of the fetus would be ended, and abortion two, where the fetus would be killed even though this was not at all necessary to our accomplishing (i). I will call current practice, where separation and death occur simultaneously, abortion three. Separating abortion 3 into abortion 1 and abortion two seems to take an extremely contentious practice and leave us with two remarkably uncontentious ones.[129]

It is difficult to see how we could have any objection to abortion one, and it seems equally difficult to see how we could possibly justify abortion two. With abortion one everyone should be satisfied. The liberal achieves the termination of an unwanted pregnancy, without the result that so infuriates the conservative, the termination of what is surely in some sense an innocent life. There is no reason to think of the death of the fetus as something the liberal passionately wants so much as something, given what he does want, he is prepared to accept. That is, his commitment to abortion one is strong enough to carry him over into a commitment to abortion third, even though this brings with it the additional un pleasantries of abortion two. The conservative starts at the other end and moves in the opposite direction: he is sufficiently repulsed by abortion two to oppose abortion third, even

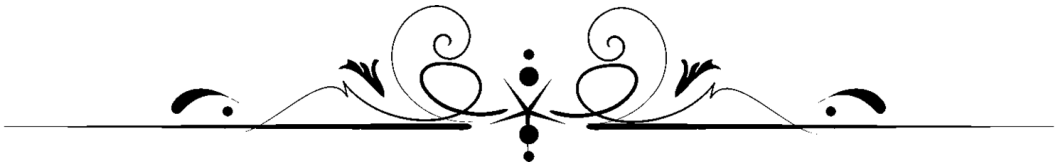
[128] *Ibid.*
[129] Steven L Ross, "Abortion and the Death of the Fetus" 11 *Philosophy & Public Affairs* 232-245 (1982) *accessed on* Sep 05, 2019.

though insofar as abortion third involves abortion one, clearly there are some things that may be said in defence of it.[130]

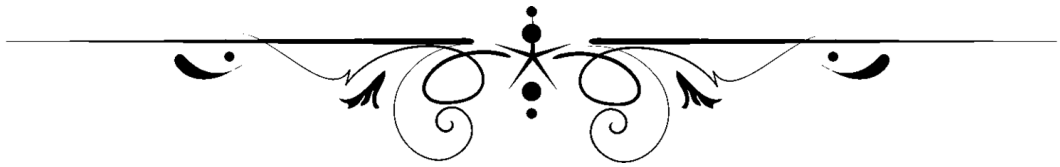
### 3.18 Conclusion

Moral status is a differential relationship that an equal set of rights and duties are given to individuals who meet the morally important group membership requirements, and those who fall below the threshold do not have the same moral status. Ethical status decisions make processes operating in biology and other areas of life at points of complete dissatisfaction in morally important qualities. Most people believe that one point of maximum dissatisfaction is the difference between man and the rest of the natural and social world. Many persons have questioned the argument that membership of the Homo sapiens group has such intrinsic moral meaning. It is appealing to conclude that all of the theories outlined above have problems. Some lead to what would be widely regarded as undesirable consequences: such as the legality of infanticide or the illegality of the contraceptive pill; others appear to rest on uncertain or arbitrary distinctions: whether the fetus is born or the current state of technology. In the end the question of when life begins depends on what meaning and value you give to life, and as there are so many answers to those questions, it is not surprising that there is such dispute over when life begins. Its problem is that compromise is hard to find.

[130] *Ibid.*



# Chapter Fourth
# Medical Termination of Pregnancy: International Perspective



# *Chapter Fourth*

# *Medical Termination of Pregnancy: International Perspective*

*"A man reduced to despair by a series of misfortunes feels wearied of life, but is still so far in possession of his reason that he can ask himself whether it would not be contrary to his duty to himself to take his own life. Now he inquires whether the maxim of his action could become a universal law of nature. His maxim is: From self-love I adopt it as a principle to shorten my life when its longer duration is likely to bring most evil than satisfaction. It is asked then simply whether this principle founded on self-love can become a universal law of nature. Now we see at once that a system of nature of which it should be a law to destroy life by means of the very feeling whose special nature it is to impel to the improvement of life would contradict itself, and therefore could not exist as a system of nature; hence that maxim cannot possibly exist as a universal law of nature, and consequently would be wholly inconsistent with the supreme principle of all duty."*

*— Immanuel Kant, Fundamental Principles of the Metaphysic of Morals*[1]

## 4.1 Introduction

In recent years, supporters of abortion have sought to advance the idea that abortion exists based on international law, and that is why sovereign nations should amend their laws to allow the exercise of this right. This right exists before UN treaty compliance committees, national constitutional courts, and national legislature advocates of abortion meet with both success and failure.[2]

Most United Nations treaty substantiation committees now not only donate to the notion that access to abortion is an integral part of the modern human rights paradigm, but actively participate in advancing it. However, the record has been amalgamated in constitutional courts, while many national and local legislatures,

[1] *Available at*: https://www.goodreads.com/author/show/11038.Immanuel_Kant (last visited on Feb 24), 2018.

[2] A Piero and J. D. Tozzi, *International Law and the Right to Abortion* 495 **(**Catholic Family and Human Rights Institute United Nations Plaza, Suite, New York, 2010).

primarily in the US, have rejected the contention that they recognize any such right in domestic law rather than strengthen the protection of unborn life.[3]

**4.2 Universal Declaration of Human Rights, 1948**[4]

*Article* 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

*Article* 3: Everyone has the right to life, liberty and security of person.

*Article* 5: No one shall be subjected to torture or to cruel, inhuman or degrading treat mentor punishment.

*Article* 6: Everyone has the right to recognition everywhere as a person before the law.

*Article* 10(2): Special protection should be provided to mothers during the appropriate period before and after delivery.

*Article* 12(1): States of the present system recognize the right of all to enjoy the highest attainable standard of physical and mental health.

*Article* 12(2): Steps to be taken by States Parties. For the full realization of this right, it is necessary to include: (a) the reduction in stillbirth and provision for infant mortality and healthy development of the child; (d) Creation of a condition that assures all medical service and medical attention in the event of illness.

*Article* 16(1): Men and women of full age without any limitation due to caste, nationality or religion, have the right to marry and find a family. They are entitled to equal rights for marriage, during marriage and its dissolution.

*Article* 16(2): Marriages shall be recorded only with the free and full consent of the intending spouse.

[3] *Ibid.*
[4] *Available at*: file:///G:/abortion/reproductive%20right%20and%20international.pdf (last visited on March 14, 2019).

*Article* 25(1): Everyone has the right to an adequate standard of living for the health and well-being of himself and his family…Economic, Social and Cultural Rights Covenant.

*International Economic and Social Cooperation*[5]

*Article* 55: "With a view to creating conditions of stability and welfare, which are necessary for peaceful and friendly relations between nations on the basis of respect for the principle of equal rights and self-determination of the people, the United Nations shall promote:

a. Conditions of living, full employment, and economic and social progress and development;
b. Solutions to international economic, social, health and related problems; And international cultural and educational cooperation; And
c. Universal respect for all in the form of race, gender, language, or religion, and adherence to human rights and fundamental freedoms."

*Article* 56: "All members pledge to take joint and separate action in cooperation with the organization to achieve the objectives set out in Article 55."

**4.3 International Covenant on Civil and Political Rights (1966) (ICCPR)**

The United Nations International Covenant on Civil and Political Rights (ICCPR) seeks to ensure the protection of civil and political rights. It was adopted by the United Nations General Assembly on December 19, 1966 and came into force on March 23, 1976. The International Covenant on Economic Social and Cultural Rights, the Universal Declaration of Human Rights, and the ICCPR and its two alternative protocols, are cooperatively known as the Bill of International Rights.[6]

[5] *Ibid.*
[6] *Available at*: https://ccla.org/summary-international-covenant-on-civil-and-political-rights-iccpr, *accessed on* Dec 10, 2018.

*Article* 1(1) of the ICCPR provides that "All people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".

*Article* 2 (2) of the ICCPR provides that state parties must take necessary steps to adopt such laws or other measures as may be necessary to give effect to the rights described in the current covenant. Countries that have ratified the ICCPR must step into their own jurisdictions to accept the acceptance of this international agreement, because in international law, a signature usually does not bind a state. The treaty usually Future ratification is subject to approval, approval, or accession. In Canada, the accession process includes review by the federal government and a series of consultations are included and a table of treaties is then made in Parliament.[7]

*Article* 6(1) of this Covenant provides that "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".

In addition to formally adopting and recognizing the ICCPR of state parties within their jurisdiction, Article 28 of the ICCPR sets up a human rights committee to oversee the implementation of the covenant of state parties. States parties are required to submit a report to the committee for review on measures used to adopt and give effect to the rights vested in the ICICR.[8]

As noted above, the first alternative protocol can be heard by the committee to victims of human rights violations. However, ICCPR Article 41 also provides that a state party that claims another state party is not fulfilling its obligations to implement ICCPR may make written presentations to the committee for consideration. In addition, non-governmental organizations can also participate in ensuring that values under the ICCPR are limited to submitting 'shadow reports' and exposing areas for consideration by the committee.

[7] *Ibid.*
[8] *Ibid.*

### 4.4 American Conference on Human Rights, 1969 (ACHR)

*Article* 1(1):[9] States participating in this Convention to recognize their rights and freedoms and to ensure the free and full exercise of those rights and freedoms to all individuals subject to their jurisdiction, without causing race Of any discrimination, color, gender, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social location.

*Article* 5(2):[10] No one shall be subjected to torture or inhuman or degrading punishment or treatment. All persons deprived of their freedom shall be treated with respect for the inherent dignity of the human person.

### 4.5 Vienna Program of Action

*Article* 41: The World Convention on Human Rights recognizes the importance of enjoyment by women of the highest levels of physical and mental health throughout their lifetimes. The World Conference on Human Rights reaffirms a woman's right to equal, accessible and adequate health care between women and men, and a broad range of family planning services, as well as equal access to education at all levels.[11]

### 4.6 International Reproductive Rights Policy as Pronounced at International Human Rights Conferences

In the 1990s, a series of U.N. conferences relating to human rights, population, and women's equality reaffirmed the importance of reproductive rights, including family planning, as critical for the advancement of women's human rights and development. Both the United States and the PRC participated in these conferences and committed to improving reproductive rights for women throughout the world. Although not binding as treaties are, international conferences articulate reproductive rights policies and goals for the international community. Though many U.N. conferences end with the adoption of a document adopted by General Assembly resolutions, these documents are not treaties. These documents represent the goals and policies agreed upon by the international community and do not create specific

[9] *Supra* note 4 at 2.
[10] *Ibid.*
[11] *Available at*: https://reproductive rights.org/sites/default/files/documents/V4Repro%20Rights%20 Are%20Human %20Rights%20-%20FINAL.pdf, *accessed on* Dec 2, 2019.

obligations under which states must act. When looking to these conferences and their delineations of reproductive rights, many claim the resulting texts produce binding legal obligations upon member states. Even without this elevated standard, these texts reflect the international community's common goals and policies regarding reproductive rights.[12]

### 4.7 International Conference on Population and Development, 1994 (ICPD)

The International Conference on Population and Development (ICPD) was organized under the sponsorship of the United Nations and was structured by a secretariat composed of the Population Division of the then United Nations Department of Economic and Social Information and Policy Analysis which is now the Economic and Social Department Cases and UNFPA.[13]

*ICPD Programme of Action*:[14]

*Principle* 1: "All human beings are born free and equal in dignity and rights. Everyone is entitled to all the rights and freedoms set forth in the Universal Declaration of Human Rights, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Everyone has the right to life, liberty and security of the person".[15]

*Principle* 8: "Everyone has the right to the enjoyment of the highest attainable standard of physical and mental health. States should take all appropriate measures to ensure, on a basis of equality of men and women, universal access to health-care services, including planning and sexual health. Reproductive health-care programs should provide the widest range of services without any form of coercion. All couples and individuals have the basic right to decide freely and responsibly the number and

[12] Hannah A. Saona, "The Protection of Reproductive Rights under International Law: The Bush Administration's Policy Shift and China's Family Planning Practices" *Pacific Rim Law & Policy Journal Association* (2004).
[13] *Available at*: https://www.unfpa.org/events/international-conference-population-and-development-icpd, *accessed on* Jan 15, 2019.
[14] *Supra* note 4 at 3.
[15] Programme of Action, "The International Conference on Population and Development, Cairo" 8 (1994).

spacing of their children and to have the information, education and means to do so"[16].

*Paragraph* 7.2: "Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and process. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safety through pregnancy and childbirth and provide couples with the best chance of having a healthy infant. In line with the above definition of reproductive health, reproductive health care is defined as the constellation of methods, techniques and services that contribute to reproductive health and well-being by preventing and solving reproductive health problems."[17]

*Paragraph* 7.3: "Reproductive rights include rights of the couple and the individual, who make decisions related to reproduction free of discrimination, coercion and violence as expressed in human rights documents".

Articles of ICPD and Governments at all levels are urged to evaluate systems of monitoring and evaluation of user-centric services for family-planning managers and providers to detect, prevent and control misconduct and for the purpose, governments hold ethical and professional values in the delivery of human rights and family planning and related reproductive health services Responsible for issues, to make voluntary and informed consent and regarding service provision.

The Conference unanimously adopted the program of action, which emphasized the fundamental role of women's interests in matters of population and introduced concepts of sexual and reproductive health and reproductive rights. A new definition of population policy was advanced, which brought reproductive health and

[16] *Id.* at 10.
[17] *Supra* note 15 at 45.

women's empowerment to fame. The ICPD was by far the largest intergovernmental conference on population and development, with 179 governments participating and some 11,000 registered participants from governments, UN specific agencies and organizations, intergovernmental organizations, non-governmental organizations and the media[18].

Interest and participation from civil society were included. More than 4,000 delegates from more than 1,500 non-governmental organizations from 113 countries attended the independent NGO Forum 94, helping parallel the official conference. Regional intergovernmental conferences convened to review regional experiences and perspectives, in collaboration with regional commissions, UNFPA and regional non-UN organizations. Population Division, in consultation with UNFPA, six expert group meetings on Population, Environment and Development (New York, 20–24 January 1992); Population Policies and Programs (Cairo, 12–16 April 1992); Population and Women (Gaborone, 22–26 June 1992);Family Planning, Health and Family Welfare (Bangalore, 26–29 October 1992); Population growth and demographic composition (Paris, 16–20 November 1992); Population Distribution and Migration (Santa Cruz, 18–23 January 1993).[19]

The program, adopted by the Proclamation on 13 September 1994, emphasizes the integral relationship between population and development and focuses on meeting the needs of individual women and men rather than achieving demographic goals. The program of action is based on the World Population Plan adopted at the World Population Conference held in Bucharest in 1974, and the recommendations adopted at the International Population Conference held in Mexico City in 1984. It is also formed based on the results. The World Summit for Children (1990), United Nations Conference on Environment and Development (1992), and World Conference on Human Rights (1993). In turn, the major empires of the ICPD were reaffirmed at the World Summit for Social Development and the Fourth World Conference on Women, both held in 1995. It also informed Millennium Development Goals (2000–2015).

The International Conference on detained Population and Development (ICPD) in *Cairo* in 1994 accepted a new paradigm in addressing human reproduction

[18] *Supra* note 4 at 4.
[19] *Supra*.

and health. For the first time, there was a clear focus on people's needs and women's empowerment, and the emergence of an evolving discourse about the connection between human rights and health, linking new concepts of health to the struggle for social justice and respect for human respect.[20]

The new focus for human rights in the ICPD is a departure from previous approaches that treated women as tools through which population programs and policies were implemented. The approach to reproductive health and rights adopted in the ICPD is based on an approach that values women naturally and is genuinely concerned about their health and well-being. Women's fertility was distorted in their social, economic and political contexts with an objective of population control in terms of female empowerment for personal autonomy in relation to their sexual and reproductive health. Women's health in general and their sexual and reproductive health, are determined not only by their access to health services, but also by their status in society and widespread gender discrimination. The ICPD thus presented women's human rights as a right to their individual reproductive autonomy and collective equality as a primary principle in reproductive health and the development of population programs.[21]

The course of action adopted in the ICPD is a consensus document, with the final product of the process of negotiating and negotiating over 180 states. A separate chapter addresses gender equality and women's empowerment, which highlights the elimination of sex discrimination as a priority objective of the international community in relation to population and development policies and programs. Chapter VII, titled "Reproductive Rights and Reproductive Health", expresses the principle of autonomy and is central.[22]The program of reproductive health is defined as "a state of complete physical, mental and social well-being...in all matters relating to the reproductive system", meaning that people are capable of a satisfactory and safe sex life. And that they have ability to reproduce and the freedom to decide when, and how

[20] Carmel Shalev, "Rights to Sexual and Reproductive Health: The ICPD and the Convention on the Elimination of All Forms of Discrimination against Women the President and Fellows of Harvard College on behalf of Harvard School of Public Health François-Xavier Bagnoud Center for Health and Human Rights Stable".

[21] *Available at*: https://www.un.org/womenwatch/daw/csw/shalev.htm, *accessed on* Feb 12, 2019.

[22] The essence of this Chapter is captured in its *Principle* 4 as follows: "Advancing gender equality and equity and the empowerment of women, and the elimination of all kinds of violence against women, and ensuring women's ability to control their own fertility, are cornerstones of population and development-related programmes".

often to do so.[23] The ICPD referred to the term "reproductive rights" as "embracing certain human rights that are already recognized in international human rights documents and other consensus documents". The most notable "consensus" document is the Universal Declaration of Human Rights, and the Declaration and Program Action of the World Conference on Human Rights, *Vienna,* June 1993.

The "International Human Rights Documents" already enumerated include "the right of all to enjoy the highest attainable standard of physical and mental health" guaranteed by Article 12 of the International Covenant on Economic and Social and Cultural Rights (1964) (ICESCR). Other Health Related Human Rights under the International Covenant on Civil and Political Rights (1964) (ICCPR) Injuries fall within the purview of certain fundamental freedoms. These include the right to life, the right to freedom and security of the person and the right to privacy, just to mention a few. In addition, all forms of discrimination against women (1978), The Convention on the Elimination of what is known as the CEDAW and subsequently the Women's Convention is considered particularly relevant to the enjoyment of sexual and reproductive rights.[24]

Reproductive rights, according to the ICPD, rest on the recognition of the fundamental right of all couples and individuals to decide freely and responsibly, the number, vacancy and time of their children and the information and means and authority to do so. To achieve the highest standard of sexual and reproductive health. The language is derived from Article 16 (1)(e) of the Women's Convention, which states that parties of states Ensure on the basis of equality of men and women: "Equal rights to decide freely and responsibly on the number and vacancy of their children, and enable them to access information, education and means to use these rights." Let's make.[25]

Reproductive rights, according to the ICPD, "include the right to make decisions related to reproduction free of discrimination, coercion and violence, as expressed in human rights documents." This aspect of reproductive rights can also be derived from the Women's Convention.

[23] *Supra* note 15 at 45, 46.
[24] *Ibid.*
[25] *Ibid.*

Before proceeding to examine the Convention more closely, it is worth noting that the international community forum, For Four Actions of Fourth World Conference on Women (FWCW) held in 1995 in Beijing, has repeated the paradigm. Shift of ICPD. One of the key areas of concern identified at the Beijing conference is the disparity in access to health care and related services and the remarkableness in adopting a life-cycle approach from women's health to old age. The Beijing Declaration states that "explicit recognition and reassessment of the rights of all women is fundamental to all aspects of their health, particularly their own fertility, their empowerment". The Platform for Action adopted in Beijing included a notable addition in addition to the ICPD, which provides further information about women's human rights regarding their sexuality.[26]

**4.8 The Women's Conventions and Conferences**

Both the ICPD and the FWCW accredited the essential relation of gender equality to women's health, including sexual and reproductive health. Both are consensus documents, expressing political will. As opposed to this, international human rights documents treaties or conventions are sources of international law, and as such are considered be legally binding. The Women's Convention is the core human rights treaty to address discrimination against women and is sometimes referred to as the international bill of women's rights. In general, States Parties to the Convention undertake to pursue a policy of eliminating discrimination in all its forms, and to guarantee women the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men. It covers all areas of women's lives in both the public and private spheres, including discrimination in relation to the right to health and health services.[27]

The Committee on the Elimination of Discrimination against Women the CEDAW Committee is established under article 17. It is composed of 23 expert members elected by States Parties from among their nationals and serving in their personal capacity. The Committee's main function is to monitor implementation of the Convention by considering periodic reports submitted by States Parties on the measures they have adopted to give effect to the provisions of the Convention and on

[26] *Supra* note 4 at 5.
[27] *Supra* note 2 at 496.

the progress made in this respect. The Committee may also make general recommendations based on the examination of reports and information received from the States Parties. Some of these general recommendations address formal matters, such as the reporting obligations of States Parties, while others are explications of substantive matters and constitute authoritative interpretations of the rights guaranteed under the Convention.[28]

### 4.9 Health-Related Rights under the Women's Convention

As already mentioned, article 16(1) (e) of the Convention guarantees the right to decide on the number and spacing of children, but that is only one of the articles that address Women's rights in relation to health Article 12 is central. It formulates States Parties' obligation "to 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." It further stipulates their undertaking to "ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation."[29]

It should be renowned that the Women's Convention is the only one of the six human rights treaties in the United Nations system to mention family planning. In addition to the aforesaid articles, the right of access to specific educational information and advice on family planning is guaranteed under Article 10(h). And Article 14(b) specifies, right of women in rural areas to have access to adequate health care facilities, including information, counseling and services in family planning. The Convention also refers to women's right to protection of health and to safety in working conditions, including "the safeguarding of the function of reproduction", in Article 11(1)(f).[30] Many other provisions of the Convention have an implicit or indirect bearing on women's rights in relation to health, some of which have been explicated in the General Recommendations of the CEDAW Committee in relation to female genital mutilation; sexual violence; HIV/AIDS; and reproduction. Before

[28] *Available at*: Article 18 and 21 of the Women's Convention (last visited on Jan 20, 2019).
[29] *Available at*: Women's Convention, article 12, para.1 and 2 (last visited on Feb 13, 2019).
[30] *Supra.*

examining actual instances of violations of health-related rights, I would like to clarify the meaning of two key concepts: autonomy and discrimination.

### 4.9.1 Autonomy

"Autonomy" means the "right of a woman to make decisions" concerning her fertility and sexuality free of coercion and violence. Many turns on our understanding of coercion and violence. Key to this is the notion of choice. In health care contexts, the rights to informed consent and confidentiality are instrumental to ensuring free decision making by the client. These rights impose certain correlative duties upon health care providers and deliverers of services. They are bound to disclose information of proposed treatments and their alternatives to obtain the informed consent of the client, and they must respect her right to refuse treatment. Likewise, they are bound to maintain secrecy to allow her to make private decisions without the interference of others whom she has not chosen to consult, and who might not have her best interests at heart. "Autonomy" also means that a woman seeking health care in relation to her fertility and sexuality is entitled to be treated as an individual in her own right the sole client of the health care provider, and fully competent to make decisions concerning her own health. This is a matter, among other things, of the woman's right to equality before the law as to her legal capacity.[31]

As mentioned earlier, the human right of women to control their fertility and sexuality free of coercion is assured implicitly by the Women's Convention. The right to autonomy in making health decisions in general, and sexual and reproductive decisions, derives from the fundamental human right to liberty. The word "autonomy" itself is not mentioned expressly in the Convention, but the value of autonomy is certainly implicit in the fundamental freedoms it guarantees to women, on a basis of equality with men. Autonomy is intimately and intrinsically connected with many fundamental human rights, such as liberty, dignity, privacy, security of the person, and bodily integrity. These form the basis for asserting rights to informed consent and confidentiality in relation to health services and health care. Moreover, Article 15 of Indian Constitution guarantees women's right to equality before the law and to full legal capacity. This includes women's right to make free and informed decisions about health care, medical treatment and research. Women have the right to be fully informed of their options in health care, including likely benefits and potential

[31] *Supra.*

adverse effects of proposed methods of treatment and available alternatives, including the option of refusing treatment[32].

One of the most persuasive explications of the meaning of "autonomy" is that of Isaiah Berlin in his essay, *Two Concepts of Liberty*. For Berlin "liberty" in the ordinary sense is a "negative" right to freedom, in that one is entitled to be free in certain areas from the interference of others. "I am normally said to be free to the degree to which no man or body of men interferes with my activity." But "liberty" also has a "positive" sense. It is not merely freedom "from" but freedom "to". This positive right to freedom is "autonomy", in the sense that one is entitled to recognition of one's capacity, as a human being, to exercise choice in the shaping of one's life.[33]

### 4.9.2 Equality, Discrimination and Difference

The second concept that deserves some explication is that of "discrimination". Equality implies non-discrimination, and discrimination is violation of the right to equality. Article 1 of the Convention defines the term 'discrimination against women' as any distinction, exclusion or restriction made based on 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.[34]

Two comments are in place. First, the Convention adopts an effective approach, whereby discrimination is condemned even if it is not purposeful. This is of particular significance in the area of health, where much of the discrimination is evident in differences in the health status of women and men, but is the result of certain patterns of behavior, sometimes described as "natural". These patterns persist by the mere inertia of habit if no intervention is undertaken for the removal of discriminatory barriers, or if we fail to pay attention to the factors that comprise the "real" differences some biological or physiological, and some social between women and men in relation to their health. It should be mentioned in this context that the

[32] *Supra.*
[33] I. Berlin, *Two Concepts of Liberty in Four Essays on Liberty* 118 (Oxford: Oxford University Press, 1969).
[34] *Supra* note 27 at 496.

Committee has noted that discrimination under the Convention is not restricted to action by or on behalf of governments. This means that states may also be responsible for acts of discrimination perpetrated in the private sphere by non-governmental actors, including health care providers.[35]

The second comment is that the definition of "discrimination" under the Convention applies to all women, irrespective of their marital status. This is of significance in two respects. First, it expresses the underlying recognition of the institution of marriage as constructing women's social status, which is relevant in the health area, where women are sometimes denied care and services because they are not married. Second, it also gives expression to an underlying theme of feminist theory on gender equality that equality is not a matter of a woman's personal relations with men, but rather a matter of women's discrimination, as a group, in a society that is structured collectively by gendered patterns of power one of which is the traditional marital relation.

The area of health is particularly interesting in terms of equality theory because of what has already been noted: "real" differences between women and men some biological or physiological, and some social. Women's health needs are different from men's due to both biological differences and societal factors. This is particularly true as regards women's reproductive and sexual health, not only because biological differences are of the essence, but also because discrimination against women is associated with prejudices and stereotypes based on patriarchal notions of women's sexual and reproductive roles and functions.[36]

### 4.9.3 Biological Difference

While such social phenomena are clearly mediated by gender discrimination, health-related discrimination might be endorsed in part to biological differences between women and men. Contemporary feminist legal theory propounds that the principle of gender equality considers such difference, rather than requiring women to meet standards set by a male model. Equality requires that we treat the same interests without discrimination, and that we treat different interests in ways that respect those

[35] *Supra* note 27 at 497.
[36] *Supra.*

differences. Failure to consider the special health needs of women, to ensure their access to appropriate health information and services, constitutes discrimination. Equality is not a formal matter of guaranteeing to women the same rights as men and combating purposeful discrimination, but rather a substantive matter of ensuring the effective enjoyment of equal outcome in health status and well-being. Women's rights to health and health care on a basis of equality with men encompass both comparable health needs as well as sex-specific health needs. Failure to allocate resources or to ensure the provision of services for women's special health needs, in addition to those common to women and men, is discriminatory.[37]

### 4.9.4 Non-Discrimination in Allocation of Resources

The issue of distributive justice in the allocation of resources for health is of major concern throughout the world, given the rising costs of medical technology and budget cuts often associated with programs of structural adjustment. Too often women's health needs are the first to be affected. The bias against the allocation of resources necessary to provide health services to meet women's special needs, is a form of gender discrimination. This is illustrated well in those countries characterized as "economies in transition".

### 4.9.5 The Right to Life

Indeed, discrimination against women is a significant factor in the high numbers of deaths and complications related to pregnancy and childbirth. Failure to provide maternal health services often reflects the low priority attached to women's special needs in the allocation of resources. Maternal mortality and morbidity can largely be avoided through the provision of reproductive health services, including contraception, safe abortion, and essential and emergency obstetric care. The most obvious human right violated by avoidable death in pregnancy or childbirth is women's "fundamental right to life" itself.[38] It is arguable that the core minimum content of governments' obligations under international human rights instruments is to provide access to affordable quality health services that would prevent maternal mortality.

[37] *Supra.*
[38] R. Cook, "International Protection of Women's Reproductive Rights" 24 *Journal of International Law and Politics* 688 (1992) *accessed on* Feb 20, 2019.

### 4.9.6 Reproductive Choice- Abortion

Unsafe abortion is also a major cause of maternal mortality and morbidity. States Parties' reports to the Committee often fail to contain official data on this due to the illegal nature of abortion in many countries, but they consistently demonstrate a correlation between unsafe abortion and high rates of maternal mortality and morbidity, presented as hemorrhaging and complications of pregnancy.[39]

There are grounds for the view that laws which criminalize health services that only women need whether aimed at the persons who provide such services or the women who receive them discriminatory as such. The criminalization of abortion is particularly heinous, because it not only impairs women's right to reproductive choice to make free and responsible decisions concerning matters that key to control of their lives but also exposes them to the serious health risks of unsafe abortion, violating their rights to bodily integrity and, in the most extreme cases, to life itself.

### 4.9.7 Reproductive Choice- Family Planning

The right to reproductive choice means that women have a right to choose whether to reproduce, including the right to decide whether to carry or terminate an unwanted pregnancy and the right to choose their favored method of family planning and contraception. A violation of this right was revealed by a nongovernmental report on widespread pregnancy-based discrimination against women employed in Mexico's export-processing sector. A fact-finding mission investigating allegations of the practice, found that all women applying for work in this sector were routinely required to undergo pregnancy testing for screening, and that employed women were forced to resign when they became pregnant. In some factory's women were obliged to show sanitary napkins to company nurses as a condition of ongoing employment. The report concluded that such practices penalize women for exercising reproductive choice, and inherently compromise their ability to decide freely on the number and spacing of their children, and that the government of Mexico was responsible to ensure that such employment practices cease.[40]

[39] *Supra* note 22 at art. 4..
[40] *Supra* note 27 at 496.

### 4.9.8 International Human Rights Instruments and Abortion

Abortion, per se, is not mentioned in any of the major international (U.N.) human rights documents. Neither is the act of abortion-- the termination of the life of a developing being before it is born-specifically mentioned by any other terminology. However, the right to life, upon which objections to abortion are based, is, of course, mentioned prominently. "The right to life is undoubtedly the most fundamental of all rights." Also, the rights or needs of those that are still in the womb are mentioned, probably most directly in the Covenant on the Rights of the Child, which states, "The child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." The rights of women, including those that are pregnant, are, of course, also included, most prominently in the Convention on the Elimination of All Forms of Discrimination against Women.

Also, we may have reference to the basic definition of human rights, which is, according to *Miriam-Webster*, "rights regarded as belonging fundamentally to all persons", and, according to the U.N. Office of the High Commissioner for Human Rights, "rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, color, religion, language, or any other status". None of these human rights instruments gives an exact definition of the term "human rights", but the Universal Declaration of Human Rights hints very clearly at the above definitions when it states, "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". In other words, human rights are simply those rights that all human beings possess simply by virtue of being human beings- no other condition or qualification required. If you are a human being you have them. They may not be respected or upheld, but they are yours even if they are violated over and over.

In 1948, the United Nations promulgated the Universal Declaration of Human Rights (UDHR), the first international document to attempt to lay out the concept of human rights. Since then, numerous other documents have been created and brought into force by the United Nations and by regional human rights systems. According to the U. N. Office of the High Commissioner for Human Rights, there are ten primary

human rights instruments of the United Nations, each with a monitoring body charged with enforcing its application. These ten documents are:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- International Convention for the Protection of All Persons from Enforced Disappearance
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Rights of the Child
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention on the Rights of Persons with Disabilities

The first two of these covenants/conventions essentially expand upon and codify the rights delineated in the UDHR. The next three prohibit a certain type of action. The remaining five afford protections to certain groups of people.

In addition, there are three major regional human rights systems: The Council of Europe, the Organization of American States, and the Organization of African Unity/the African Union. Asia, yet has no major system of human rights promulgation and oversight. Each of the three regional systems has its primary human rights instruments which operate in conjunction with those of the United Nations, each with its respective oversight body.

I will examine and discuss each of the United Nations instruments as well as those of the three major regional systems to try to come up with a comprehensive assessment of what human rights documents have to say that applies to the subject of abortion.

**4.10 Beijing Declaration (1995)**

The Beijing Declaration distorted substantially from the opening to the conclusion of the FWCW. The negotiating process deliberately related sections of the Declaration to negotiations on similar segments of the Platform for Action. As a result, delegates formed a relatively lengthy and dense document that highlights and repeats key parts of the Platform, avoids some of the most controversial elements and adds a broad statement on human rights.[41] Negotiations on the Declaration were assigned early on to a Contact Group under *Olga Pellicer (Mexico)*. Four difficult paragraphs were eventually passed to the Main Committee in brackets. Those were handled in the high-level group that negotiated remaining disputes during the Conference's final day.

The Contact Group decided to use a G-77/China draft from 13 June as the basis for negotiations. A revised version of the G-77/China draft was disseminated early in the negotiations, incorporating some projected amendments from the EU, the US, Switzerland, Australia and others. The draft, as well as the final Declaration, was written in four sections: a preamble; reaffirmed commitments; principles under the heading "We are persuaded that;" and actions that governments are determined to carry out. While the original G-77/China proposal comprised 16 paragraphs, the final version contained 38.

The Declaration recognizes that the status of women has highly developed, but that inequalities and obstacles remain. It reaffirms commitments to equal rights in a number of existing agreements; ensuring full implementation of human rights of women and the girl child; and empowerment and advancement of women, including the right to freedom of thought, conscience, religion and belief. Delegates stated their conviction that: women's empowerment and full participation are fundamental to equality, development and peace; equal rights and responsibilities are critical to families; women's involvement is required to eradicate poverty; peace is linked to the advancement of women; and gender-sensitive policies are essential to foster women's empowerment and advancement. Governments are determined to: intensify efforts to achieve goals from the Nairobi strategies; ensure the full enjoyment by women and

[41] *Available at*: http://enb.iisd.org/download/pdf/enb1421e.pdf, *accessed on* Dec 20, 2018.

the girl child of human rights; eliminate discrimination and remove obstacles to equality; encourage men to participate in actions towards equality; promote women's economic independence; promote sustainable development and education; prevent and eliminate violence against women and girls; ensure full participation; and ensure equal access to economic resources.[42] Delegates approved quickly on most of the preamble, adding references to the goals of equality, development and peace and women's voices and diversity. Reaffirmation of past agreements and the Nairobi Strategies were acknowledged, as were endorsements of the human rights of women and the girl child.

The statement that "women's rights are human rights" was adopted in paragraph 14 of the Declaration, despite the objections of some delegations that it could be interpreted as establishing as human rights activities not already enclosed in international legal instruments. Delegates added a paragraph inserting the "Conference of Commitments" language into the Declaration, that through their commitments at the Conference and elsewhere, Governments and the international community recognize the need for action.[43]

The Contact Group settled only one of the most contentious paragraphs of the Declaration. Delegates maintained an early agreement to include language from Working Group II on the right of all women to control all aspects of their own health, in particular their fertility. The issue was debated repeatedly, but the language was not altered after initial amendments by the Contact Group.

*Platform for Action*

CHAPTER I (*Mission Statement*): The Mission Statement notes that the Platform for Action is an agenda for women's empowerment, reaffirms the human rights of women and the girl child, and calls for strong commitments. As part of the package of agreements on references to human rights, delegates agreed to unbracket paragraph 2, which reaffirms that the human rights of women and the girl child are part of universal human rights. Subsequent references to "universal" human rights, advocated by the Holy See during the CSW, were deleted. During final adoption of

[42] *Ibid.*
[43] *Ibid.*

Chapter I in the Main Committee, the G-77/China noted that the Chapter did not adequately reference development and peace, two of the three themes of the Conference. The Main Committee agreed to add a new paragraph 5, which recognizes the necessity of broad-based and sustained economic growth in the context of sustainable development for social development and justice. Paragraph 6 (resources) generated considerable debate throughout the drafting process. The G-77/China called for new and additional resources, stressing their importance for implementation. The EU and others stressed adequate resources, national commitments and rearranged priorities. An informal group negotiating several paragraphs on resources drafted the final formulation, calling for the adequate mobilization of resources at the national and international levels, and new and additional resources from all available funding mechanisms.[44]

CHAPTER II (*Global Framework*): The Global Framework describes the international condition in twenty-six paragraphs. It includes references to: past UN conferences; changes since the end of the Cold War; the movement towards democratization; the growing strength of NGOs; women and family; women and religion; and barriers facing women. Paragraph 9 (implementation in conformity with cultural and religious backgrounds) was among the last paragraphs to be resolved at the Conference. Originally proposed by Iran, the compromise text drafted by an informal group folded in elements from a proposed footnote to Section C (health) that implementation would bear in mind the different cultural and religious differences that exist in countries. Chair *Licuanan* ruled that the footnote in paragraph 9 would stand, but that it would be deleted in Section C. A paragraph regarding excessive military expenditures, debt and structural adjustment was opposed by the EU, but emerged from the informal group on resource questions in much the same form as originally drafted. Two other compromises were made on the paragraphs regarding women and family and women and religion. The paragraphs were proposed by the *Holy See* during the CSW, and came to Beijing entirely in brackets. The final paragraph, negotiated in an informal group, notes that women play a critical role in the family and that various forms of the family exist in different cultural, political and social systems. The final text on religion notes that the right to freedom of thought,

[44] *Supra* note 28 at art.18.

conscience and religion is inalienable and that religion and belief may, and can, contribute to fulfilling moral and ethical needs and to realizing one's full potential.

CHAPTER III (*Critical Areas of Concern*): Paragraph 43 of this Chapter reaffirms that the "advancement of women and the achievement of equality" are a matter of human rights and a condition for social justice. The Chapter also identifies political, economic and ecological crises along with war and terrorism among the impediments encountered by women since the World Conference in Nairobi. Governments, the international community, civil society and the private sector are called upon to address the interrelated areas of: poverty; unequal access to education and training; inequalities in health care; violence against women and the girl child; effects of conflict; participation in the definition of economic structures and policies; power sharing; mechanisms to promote advancement of women; human rights of women; the media; the environment; and persistent discrimination and violation of the rights of the girl child.

CHAPTER IV (*Strategic Objectives and Actions*): The introduction to this Chapter contains two paragraphs. The first introduces the twelve sections that diagnose the critical areas of concern and propose concrete actions. The second "diversity" paragraph recognizes that many women face particular barriers because of a certain group they belong to, based on race, age or culture. The debate over "sexual orientation" determined on the bracketed reference in this paragraph. During the final Main Committee session, the debate moved out of an informal group and revealed two main positions. Canada, New Zealand, South Africa and others supported the reference, stating that discrimination on any grounds should be prohibited. *Egypt, Iran* and others opposed the reference, stating it would contradict their religious and cultural values and noted that no international precedent exists for using the term. Chair *Licuanan* ruled that since the term had not been aired in the UN before and given the strong opposition, the term should not appear in the text. Section Poverty: This Section describes the feminization of poverty and its causes, including the lack of women's participation in decision--making and economic structures, migration and changes in family structure, limited access to education, support services, training and resources and rigidity of socially ascribed gender roles. The actions States and other actors are called on to take include: ensure food security; strengthen social safety nets;

support female-headed households and anti-poverty programs; recognize women migrants' human rights; ensure access to financial services; use gender perspectives in economic policy making; examine the relationship between unremunerated work and poverty; provide new and additional financial resources to target women living in poverty; and integrate a gender perspective into lending programs, including structural adjustment programs. Delegates debated whether to distinguish between documented and non-documented migrant workers in paragraph 60(l). The G-77/China preferred the reference to both while the EU and others preferred only a reference to documented migrants. The final paragraph refers to ensuring the full realization of the human rights of all women migrants, including women migrant workers, and calls for empowerment of documented women migrants, including migrant workers. A paragraph regarding inheritance was contested by many Islamic States but was deleted once a similar paragraph was agreed to in the section on the girl child. Section B (*Education*): This section notes that many children, especially girls, do not have access to primary education. More than two-thirds of adult illiterates are women. An environment where girls and boys are treated equally and where non-stereotyped images of women and men are promoted would help eliminate causes of discrimination and inequality. Actors are called on to: eliminate discrimination in education; ensure universal access to and completion of primary education; increase enrollment and retention rates of girls; eliminate barriers to the schooling of young mothers and pregnant girls; eradicate illiteracy among women; promote equal sharing of family responsibilities by girls and boys; remove barriers to sexual and reproductive health education; educate rural women; and ensure sufficient resources for educational reforms and monitoring implementation. Points of discussion in this section included paragraphs that reference religious, moral and spiritual values (74), sexual and reproductive education (76), the parents' ability to choose education for the girl child (82(f)), freedom of conscience religion in educational institutions (82(f)), and the expansion of the definition of literacy (83(f)). All these references are included in the final document, but delegates agreed to "work towards an expansion of the definition of literacy." Section C (Health): This section contained almost a quarter of the unresolved text held over from the CSW. The theme of the text is "the human rights of women...to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence" (97). In this and other related

paragraphs, including paragraph 95discriminatory and harmful practices, divisions in opinion were determined largely by religious or secular views on the permissibility of sexual relations outside marriage and attitudes toward contraception and abortion. A proposed footnote qualifying government commitment to implementation with references to sovereignty and respect for religious and cultural values was dropped from this Section, but the reference remains in paragraph 9. A commitment to "consider reviewing laws containing punitive measures against women who have undergone illegal abortions" was retained after the addition of a reference to paragraph 8.25 of the ICPD Programme of Action[45], which notes that abortion should not be promoted as a method of family planning. References to the "integrity of the body" previously used in the ICPD Programme of Action and the Report of the 1975 Women's Conference in *Mexico* were amended to refer to "integrity of the person" in paragraphs 97 and 108(d). Language on parental rights and duties balanced the right of adolescent girls to privacy and counseling e.g. reporting sexual abuse involving family members with the rights and duties of parents, but notes that the primary consideration is the best interest of the child. References to "race and ethnicity" (105, 110(a), and 111(d)) were replaced by references to demographic factors after delegations expressed fears about racial discrimination. Disagreements over reference to the ICPD were resolved in a formula referring to the commitments contained in the Programme of Action in the report of the Conference. The section also reaffirms the ICPD goal of universal access to health services by the year 2015, addresses gender sensitive programs on HIV/AIDs and sexually transmitted diseases and shared responsibility between men and women in matters related to sexual and reproductive behavior. Section D (*Violence against women*): In this Section, delegates resolved that in "all" societies, to a greater or lesser degree, women and girls are subjected to physical, sexual and psychological abuse. Among the types of abuse that are identified are acts of violence in situations of armed conflict (115) and forced sterilization, abortion and forced use of contraceptives, prenatal sex selection and female infanticide (115 bis). Delegates identified as particularly vulnerable displaced women, repatriated women, migrant workers, women living in poverty, and those living under conditions of foreign occupation, wars of aggression, civil wars, and terrorism, including hostage taking (116). Delegates noted the adverse impact of

[45] *Supra* note 15 at 70.

images in the media in paragraph 119. A reference to "unwanted pregnancy" is included in paragraph 123, calling for implementation and strengthening of the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, and other relevant instruments. The term "female feticide" was deleted from paragraph 125(i), which calls for legislation against female genital mutilation, prenatal sex selection, infanticide and dowry-related violence. Section E (*Armed conflict*): This Section links peace with development and equality between men and women. It also sets forth the human rights abuses that often accompany armed conflict and notes their disproportionate effect on women. Actors should: increase women's participation in conflict resolution and leadership; train officials dealing with cases of violence against women in situations of armed conflict; convert military industries to peaceful purposes; recognize effects of excessive military expenditures and the need to combat trafficking in drugs, arms, women and children; establish moratoria on anti-personnel land-mines and assistance in mine clearing; ratify international instruments on the protection of women and children in armed conflicts; recognize that rape is a war crime; and protect, assist and train refugee and displaced women.[46]

Delegates debated the references to foreign occupation and alien domination (paragraphs 132, 136, 144(c), and 144(d)). The G-77/China preferred to keep the language, but others wanted it deleted. An informal group formulated a reference that was used throughout the document. Malta objected to the reference to forced pregnancy (132), which was only retained in paragraph 136 (consequences of armed conflict). An informal group expanded the language on land mines (145(e)) to five sub-paragraphs that call for: working towards ratification of international instruments prohibiting or restricting the use of land mines; consider strengthening the 1981 Convention on Prohibitions and Restrictions on Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects; promoting assistance in mine clearance; support for efforts to coordinate a common response programme of assistance in demining; adoption of a moratorium on the export of anti-personnel land-mines; and solutions for problems caused by land mines. In paragraph 149(l), Canada, the EU and US wanted to delete reference to increasing funds for refugee programs, but the G-77/China objected. The final version calls for recognition

[46] *Supra* note 28 at art.19.

of the effects of large numbers of refugees on host countries and the need to share this burden.[47]

**4.11 Beijing +5 (2000)**

In the Political Declaration adopted in by the United Nations General Assembly at its twenty-third special session in June 2000, Member States agreed to "assess regularly further implementation of the Beijing Platform for Action with a view to bringing together all parties concerned in 2005 to assess progress and consider new initiatives, as appropriate, ten years after the adoption of the Beijing Platform for Action".[48]

A review and appraisal of the implementation of the Beijing Declaration and Platform for Action adopted at the Fourth World Conference on Women (Beijing, 1995), and the outcome of the twenty-third special session of the General Assembly (2000), was mandated in the multi-year programme of work of the Commission on the Status of Women for its forty-ninth session in March 2005. The Commission considered two themes:[49]

- "Review of the implementation of the Beijing Platform for Action and the outcome documents of the twenty-third special session of the General Assembly"; and
- "Current challenges and forward-looking strategies for the advancement and empowerment of women and girls".

The review and appraisal by the Commission focused on implementation at national level and identified achievements, gaps and challenges and provided an indication of areas where actions and initiatives, within the framework of the Platform for Action and the outcome of the special session (Beijing+5), were most urgent to further implementation.

[47] *Ibid.*
[48] *Available at*: https://www.un.org/en/development/devagenda/gender.shtml, *accessed on* Jan 12, 2019.
[49] *Ibid.*

### 4.11.1 First World Conference on Women

Mexico City, 19 June-2 July 1975

At this meeting, the process was launched, and three objectives were identified in relation to equality, peace and development for the Decade:[50]

- Full gender equality and the elimination of gender discrimination.
- The integration and full participation of women in development.
- An increased contribution by women towards strengthening world peace.

The Conference urged Governments to formulate national strategies, targets and priorities. It led to the establishment of the International Research and Training Institute for the Advancement of Women (INSTRAW) and the United Nations Development Fund for Women (UNIFEM), which serve as an institutional framework for research, training and operational activities in the area of women and development. At this Conference, held in *Mexico* City, women played a highly visible role. Of the 133 delegations from Member States, 113 were headed by women. Women also organized the International Women's Year Tribune, which attracted some 4,000 participants, and a parallel forum of non-governmental organizations that signaled the opening of the United Nations to non-governmental organizations, which enable women's voices to be heard in the organization's policy-making process.

### 4.11.2 Second World Conference on Women

Copenhagen, 14-30 July 1980

This Conference recognized that there was a disparity between women's guaranteed rights and their capacity to exercise them. Participants identified three spheres in which measures for equality, development and peace were needed:

- Equal access to education.
- Equal access to employment opportunities.
- Equal access to adequate health care services.

[50] *Available at*: https://www.unsystem.org/content/first-world-conference-women-1975 (last visited on Feb 15, 2019).

### 4.11.3 Third World Conference on Women

Nairobi, 15-26 June 1985

The data presented by the United Nations to the delegations of Member States revealed that the improvements observed had benefited only a limited number of women. Thus, the *Nairobi* Conference was mandated to seek new ways of overcoming obstacles for achieving the objectives of the Decade: equality, development and peace.

Three basic categories were established to measure the progress achieved:

- Constitutional and Legal measures.
- Equality in Social Participation.
- Equality in political participation and decision-making.

The *Nairobi* Conference recognized that gender equality was not an isolated issue but encompassed all areas of human activity. It was necessary for women to participate in all spheres, not only in those relating to gender.

### 4.11.4 Fourth World Conference on Women

Beijing, 4-15 September 1995

The Beijing Declaration and Platform for Action were adopted at the Fourth World Conference on Women, held from 4 to 15 September 1995, by the representatives of 189 countries. The Platform reflects the new international commitment to achieving the goals of equality, development and peace for women throughout the world. It also strengthens the commitments made during the United Nations Decade for Women, 1976-1985, which culminated in the *Nairobi* Conference, as well as related commitments undertaken during the cycle of United Nations world conferences held in the 1990s.

The twelve critical areas of concern in the Platform for Action are as follows:

1. Women and poverty
2. Education and training of women

3. Women and health
4. Violence against women
5. Women and armed conflict
6. Women and the economy
7. Women in power and decision-making
8. Institutional mechanisms for the advancement of women
9. Human rights of women
10. Women and the media
11. Women and the environment
12. The girl child.

The Platform for Action sets out strategic objectives and explains the measures that should be adopted by Governments, the international community, non-governmental organizations and the private sector.

### 4.12 Convention on the Elimination of all form of Discrimination Against Women (CEDAW), 1979

*Article* 1:[51] For the purposes of the present Convention, the term "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.

*Article* 12(1): 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.

*Article* 12(2): States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free

[51] Convention on the Elimination of All Forms of Discrimination against Women, Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of December 18, (1979).

services where necessary, as well as adequate nutrition during pregnancy and lactation.

*Article* 14(2): States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas and ensure to such women the right: (b) To have access to adequate health care facilities, including information, counseling and services in family planning.

*Article* 16(1): States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (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.[52]

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), is an international bill attempting to end discrimination against women. Article 16, states that all women, as well as men, have the right to choose their spouse, to have the same responsibilities, and to decide on how many children and the spacing between them. The article bans child marriage and wants that all marriages are registered. India signed the convention on 30 July 1980 but made the declaration that, because of the nation's size and amount of people, it is impractical to have a registration of marriages.[53]Launch of CEDAW General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19.On 14 July 2017, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) adopted General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19.[54]

General Recommendation No. 19 from 1992 was historic as it clearly framed violence against women as a form and manifestation of gender-based discrimination, used to subordinate and oppress women. It unequivocally brought violence outside of

[52] *Ibid.*
[53] Mary Philip Sebastian, M.E. Khan and Daliya Sebastian, "Unintended Pregnancy and Abortion in India: Country Profile Report" *India Research Report* (2014) *available at*: www.popcouncil.org, *accessed on* Feb 10, 2019.
[54] *Available at*: https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/GR35.aspx, *accessed on* Dec 13, 2018.

the private sphere and into the realm of human rights.[55] Twenty-five years later, General Recommendation No. 35 elaborates on the gender-based nature of this form of violence, building on the work of the Committee and other International Human Rights mechanisms, as well as developments at national, regional and international levels.[56] General Recommendation No. 35 is also a milestone:

- It recognizes that the prohibition of gender-based violence has become a norm of international customary law.
- It expands the understanding of violence to include violations of sexual and reproductive health rights.
- It stresses the need to change social norms and stereotypes that support violence, in the context of a resurgence of narratives threatening the concept of gender equality in the name of culture, tradition or religion.
- It clearly defines different levels of liability of the State for acts and omissions committed by its agents or those acting under its authority - in the territory of the State or abroad- and for failing to act with due diligence to prevent violence at the hands of private individuals and companies, protect women and girls from it, and ensure access to remedies for survivors.
- It unequivocally calls for the repeal of all laws and policies that directly and indirectly excuse, condone and facilitate violence; and
- It emphasizes the need for approaches that promote and respect women's autonomy and decision-making in all spheres of life.

With a view to disseminating the content of General Recommendation No. 35 and discussing how it can be promoted as a tool for accelerated implementation of regional and international obligations to eliminate gender-based violence against women, the Committee will hold a high-level panel discussion in a public meeting during its 68th session.

The specific objectives of the event, which will be webcasted live, will be to highlight the most important and innovative elements of the General Recommendation and identify the main "shifts" that are required in States Parties' efforts to address gender-based violence against women.

[55] *Ibid.*
[56] *Ibid.*

### 4.13 The African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child, unlike the CRC, does not contain the phrase "before as well as after birth". The similar statement in the preamble reads: "the child, due to the needs of his physical and mental development requires particular care with regard to health, physical, mental, moral and social development and requires legal protection in conditions of freedom, dignity and security". However, Article 2 states, "For the purposes of this Charter, a child means every human being below the age of 18 years". A human being in the womb is below the age of 18.[57]

The nondiscrimination clause is found in *Article* 3: "Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the Childs or his/her parents or legal guardians' race, ethnic group, color, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status." Once again, one cannot discriminate based on any status; that would include age, stage of development or state of dependence.

The right to life is found in *Article* 5: "Every child has an inherent right to life. This right shall be confined by law." It goes on to state, "State Parties to the present Charter shall ensure, to the maximum extent possible, the survival, protection and development of the child." One cannot kill a child, born or unborn. *Article* 4(1) state, "In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration". Killing a child can hardly be in his or her best interest. *Article* 14(1) state, "Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health." Killing the child clearly violates this provision.

This instrument, though, does sophisticated two rights which do not apply until birth. *Article* 6(1) states, "Every child shall have the right from his birth to a name", and that "a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the childbirth he is not granted nationality by any other State in accordance with its laws".

[57] *Available at*: https://www.unicef.org/esaro/African_Charter_articles_in_full.pdf (last visited on March 12, 2019).

*Article* 11(6) states, "State Parties to the present Charter shall take all appropriate measures to ensure that children who become pregnant before completing their education shall have an opportunity to continue their education on the basis of their individual ability." Some might argue that this grants a right to abortion to children who become pregnant so that they can meet this goal.

*Article* 14(2) states, "State Parties to the present Charter... shall take measures: to reduce infant and child mortality rate". This article might be interpreted as either allowing or proscribing abortion, depending on how one defines infant and child mortality, but given the definition above of any human being under 18 years of age, it would seem clear that this should proscribe abortion.

*Article* 20(1) states, "Parents or other persons responsible for the child shall have the primary responsibility for the nurture and development the child and shall have the duty: to ensure that the best interests of the child are their basic concern at all times." Killing a child (that is, any human being under 18 years of age) is clearly not in its best interests.

There is no wording in the charter making any reference specifically to abortion, termination of pregnancy, reproductive "choice", or other similar language, and there is no statement anywhere in this document that states or implies that there is some point, birth or otherwise, prior to which the rights enclosed therein do not apply, except for the two specific rights of having a name and nationality.

The AU Convention Governing Specific Aspects of Refugee Problems in Africa deals with the rights of those who are fleeing persecution and makes no mention of anything related to abortion. Once again, there is no wording in the convention making any reference specifically to abortion, termination of pregnancy, reproductive "choice", or other similar language, and there is no statement anywhere in this document that states or implies that there is some point, birth or otherwise, prior to which the rights contained therein do not apply[58].

[58] *Available at*: https://www.unhcr.org/about-us/background/45dc1a682/oau-convention-governing-specific-aspects-refugee-problems-africa-adopted.html (last visited on March 15, 2019).

Protocol to the African Charter on Human and Peoples Rights on the establishment of the African Court on Human and Peoples Rights deals mainly with the structure and organization of the African Court on Human and People's Rights and does not deal with specific rights of people. Once again, there is no wording in the protocol making any reference specifically to abortion, termination of pregnancy, reproductive "choice", or other similar language, and there is no statement anywhere in this document that states or implies that there is some point, birth or otherwise, prior to which the rights contained therein do not apply. Despite frequent claims that laws prohibiting termination of pregnancy are out of step with international human rights norms, there is no international (U.N.) human rights instrument that provides any right to have an abortion. The document that comes closest to this is the Convention on the Elimination of All Forms of Discrimination against Women, which states that women have the right to decide the number and spacing of their children. However, this document only provides that they have this right to the same extent as men do. The Covenant on the Rights of the Child, on the other hand, states specifically that the child is entitled to "special safeguards and care, including appropriate legal protection, before as well as after birth". Nondiscrimination statements are typical in these instruments, stating that human rights are applied "without distinction of any kind" and cannot be abridged based on any status, and that would have to include age, stage of development and state of dependence. All human beings are entitled to human rights period.[59]

Regional Human Rights instruments are somewhat more specific and do reference abortion. The Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa states that women have a right to have an abortion. The American covenant on human rights, on the other hand, states that the right to life is to be respected and protected "from the moment of conception". What is perhaps most important to note is that there is no statement anywhere in any of these documents, including the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa, that states that there is some point, birth or otherwise, prior to which the rights contained therein do not apply. Such a statement would be in clear contradiction to the principle that these rights apply to everyone

[59] Rhona K. M. Smith, *Textbook on International Human Rights* 49 (Oxford University Press, 5th edition, 2012)

"without distinction of any kind". As the Human Rights Committee prepares to comment on the meaning of *Article* 6 of the International Covenant on Civil and Political Rights (ICCPR), which guarantees the "Right to life", the National Right to Life Committee (NRLC) urges the Committee to carefully consider the proper scope of this right. NRLC argues that the right to life should be interpreted to apply to all human beings, at every stage of biological development and in every condition, including the unborn and those, whose lives are taken by euthanasia and assisted suicide.[60]

The ICCPR states, "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".[61] The right to life should be interpreted to apply to the unborn (i.e., human embryos and fetuses) for several reasons.

*First*, the unborn are, in fact, human beings. They are living human organism's individual members of the species *Homo sapiens*—at the earliest stages of development. All human adults were once embryos and fetuses, just as they were once infants and adolescents (they have the same DNA throughout). The scientific evidence has established this fact beyond any doubt. Why shouldn't the ICCPR's reference to "every human being" include every member of the human species? If human rights are universal, then they apply to all human beings, including human beings who have not yet been born.

*Second*, the ICCPR prohibits discrimination based on birth or other characteristics. It states, "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[62] It also affirms that every child has a right to protection "without any discrimination" (Article 24). Denial of the right to life to human beings *in utero* is discrimination based on age, size, ability, location, or dependency. This discrimination is arbitrary

[60] *Ibid.*
[61] ICCPR 1966, art. 6.1.
[62] *Id.,* art.26.

and unjustified. No human beings should be excluded from recognition and protection of their human rights.

*Third*, the ICCPR says that the human right to life is "inherent" (Article 6.1) and derives from "the inherent dignity of the human person". This can reasonably be understood to mean that human beings have a right to life simply because they are human. They have human rights by nature, by virtue of what they are. And that means that all human beings, at all stages of their lives, have a right life—from the time they begin to exist at conception until the time of their death. It means that they have a right to life *during the embryonic and fetal stages of their development*. Thus, if human beings "inherently" have a right to life, then unborn human beings have a right to life.

*Fourth*, Article 6 of the ICCPR prohibits the death penalty for pregnant women. It states, "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women" (Article 6.5). This implicitly recognizes the independent status and value of unborn children.

*Fifth*, the right to life of the unborn is supported by other international instruments. The Convention on the Rights of the Child explicitly recognizes that unborn children deserve legal protection. The treaty states, "The child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before as well as after birth*" (Preamble). It also affirms, "States Parties recognize that every child has the inherent right to life," and "States Parties shall ensure to the maximum extent possible the survival and development of the child" (Article 6). Similarly, the American Convention on Human Rights explicitly protects the right to life of the unborn. It states, "Every person has the right to have his life respected. This right shall be protected by law and, in general, *from the moment of conception*. No one shall be arbitrarily deprived of his life". Many signatories to the ICCPR protect the unborn in their laws or constitutions.

*Sixth*, no right to abortion—the killing of human beings before they are born—has ever been established in international law. No United Nations treaty or customary international law can accurately be interpreted as creating such a right. The ICCPR

certainly does not include a right to abortion. Nor does the International Covenant on Economic, Social, and Cultural Rights or the Convention on the Elimination of All Forms of Discrimination Against Women.

For all these reasons, Article 6 of the ICCPR should be interpreted to apply to the unborn. Human beings *in utero*, like all other members of the human family, have a right to life deserving of recognition and protection under the law.

The human right to life belongs to all humans being. The Human Rights Committee, in its 1982 General Comment on Article 6, explained that the right to life "is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation." The Committee also wrote that it is "a right which should not be interpreted narrowly."

Every human being—every member of our species—has the inherent right to life. States Parties ought to apply this right inclusively, not exclusively. The right to life belongs to the whole of the human family, including the unborn, sick, disabled, and elderly. No part of humanity should be left out.

**4.14 UN Millennium Declaration, 2000**

At the United Nation's Millennium Summit in 2000, world leaders agreed on a declaration that resulted in eight Millennium Development Goals (MDGs), which together form a policy framework for reducing extreme poverty by 2015 while increasing education, gender equality, health and environmental sustainability.[63]

*Sexual and reproductive health and rights are essential to the achievement of the MDGs and are included as a target under MDG 5.*

Amongst the most severe impediments to achieving the Millennium Development Goals is the dual burden of Africa's high population growth rate and the extremely poor reproductive health conditions of so many of the continent's people. It is very clearly understood today that achievement of nearly all the MDGs depends upon success in achieving the principal goal of the landmark International Conference

[63] *Available at*: http://www.ppdafrica.org/docs/RH-MDGs.pdf (last visited on Feb. 24, 2019).

on Population and Development (ICPD) in *Cairo, Egypt* in 1994: universal access to reproductive health services.

**4.15 The Convention on the Rights of the Child**

Likewise, both the negotiations and the interpretation by its expert treaty body make clear that the Convention on the Rights of the Child (CRC) does not recognize the right to life until birth. An argument to the contrary is erroneously built upon Paragraph 9 of its Preamble, which provides: ‘‘Bearing in mind that, as indicated in the Declaration of the Rights of the Child, ‘the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.’’

This reflects, at most, recognition of a state’s duty to promote, through nutrition, health and support directed to the pregnant woman, a child’s capacity to survive and thrive after birth. The travail makes clear that this duty must not affect a woman’s choice to terminate an unwanted pregnancy. As originally drafted, the Preamble did not contain the reference to protection ‘‘before as well as after birth,’’ although this language had been used in the earlier Declaration on the Rights of the Child. The Holy see led a proposal to add this phrase, at the same time as it ‘‘stated that the purpose of the amendment was not to preclude the possibility of an abortion’’. Although the words ‘‘before or after birth’’ were accepted, their limited purpose was reinforced by the statement that ‘‘the Working Group does not intend to prejudice the interpretation of Article 1 or any other provision of the Convention by States Parties’’ The reference is to the definition of ‘‘a child’’. Article 1 states: ‘‘For the purposes of the present Convention a child means every human being below the age of 18 years…’’which, consistent with the Universal Declaration of Human Rights, refers only to born persons.

The Committee on the Rights of the Child, the expert treaty body that interprets and applies the Child Rights Convention, likewise denies a right to life to the fetus. The Committee has expressed repeated concern over adolescent girls’ access to relate to their personal development. They also impose inequitable burdens of work on women. The number and spacing of their children have a similar impact on women’s lives and also affect their physical and mental health, as well as that of

their children. For these reasons, women are entitled to decide on the number and spacing of their children.''

### 4.16 Disability Rights Convention

The UNCRPD, 2006 is the Convention of the disable person. It convention significant in many respects. It is not a mere anti-discrimination convention. It provides a wide range of basic rights to persons with disabilities. This Convention provides many rights for disable person that:[64]

*Article* 3: It article provides for dignity, individual autonomy, full and active participation and inclusion, respect for difference and accessibility.

*Article* 5(3): The provision of reasonable accommodation and positive action measures under this article of the convention also reflects the substantive approach to equality and non-discrimination.

*Article* 10: This article also provides "State Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others,"

*Article* 23(1): States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure . . . the rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided.[65]

*Article* 25: This Article provides "State Parties recognize that persons with disabilities have the right to enjoyment of the highest attainable standard of health without discrimination on the basis of disability."

### 4.17 Regional Treaties and Conventions

[64] Smitha Nizar, *The Contradiction in Disability Law* 121 (Oxford University Press, London, 2016).
[65] *Supra* note 11 at 2.

*Banjul Charter*

*Article* 16(1*)*: Every individual shall have the right to enjoy the best attainable state of physical and mental health.

*Article* 16(2): States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

*Protocol of San Salvador*

*Article* 10(1): Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being.

*European Social Charter (Revised)*

*Article* 11: the Parties undertake…to take appropriate measures designed to ensure the right to protection of health:

1. to remove as far as possible the causes of ill health.
2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health.
3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

*Convention on Human Rights and Biomedicine*

*Article* 3: Parties, considering health needs and available resources, shall take appropriate measures with a view to providing, within their jurisdiction, equitable access to health care of appropriate quality.

*Article* 4: Any intervention in the health field, including research, must be carried out in accordance with relevant professional obligations and standards.

*African Women's Protocol*

*Article* 14(1): States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. It includes:

a) the right to control their fertility.
b) the right to decide whether to have children, the number of children and the spacing of children.
c) the right to choose any method of contraception.
d) the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS.
e) the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognized standards and best practices.
f) the right to have family planning education.

*Article* 14(2): States Parties shall take all appropriate measures to:

a) provide adequate, affordable and accessible health services, including information, education and communication programs to women especially those in rural areas.
b) establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding.
c) protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and Physical health of the mother or the life of the mother or the fetus.

**4.18 The UK Abortion Act, 1967**

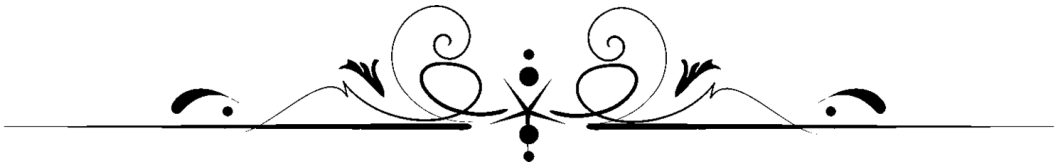
In 1967, the Abortion Act was passed in the UK which meant that abortion was permitted by licensed practitioners and could be provided as a free service via The National Health Service (NHS).This Act ensured that abortion was available up to the 28$^{th}$ week of pregnancy. This was amended by the 1990, Human Fertilization and Embryology Act which reduced this from 28 weeks to 24 weeks maximum.

Abortion could only be performed after 24 weeks in extreme cases such as severe disability in the fetus, or serious or potentially fatal disease in the woman. In May 2008, there were arguments for lowering this limit to 22 or 20 weeks, but the 24-week abortion limit remains in place. The Act also states that abortion must be performed in a hospital or a licensed clinic. Abortion is legal in England, Scotland and Wales but the situation is different in Northern Ireland. Abortion is only permitted in rare cases where the baby is likely to be stillborn or the mother's health is at risk. In India Medical termination of Pregnancy Act, 1971 based on UK Abortion Act, 1967. UK abortion Act provision based on doctor opinion. It means mothers have no right to abortion. After Leading case *Roe v Wade*[66] abortion form has changed into right to choose as a right to abortion.

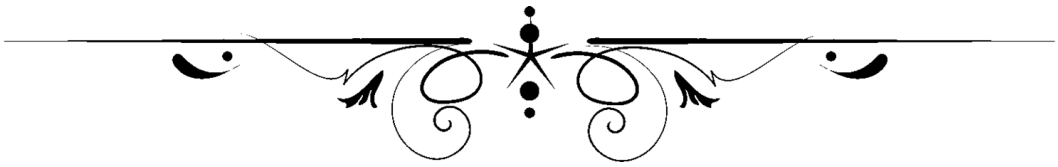
**4.19 Conclusion**

For all the laws, rules, convention, programs and initiatives that have been implemented as well as attempts made by the government, women's problems remain. Because of prejudice, moral restriction or the desire of a husband, most women are still denied freedom to control their fertility. Nevertheless, in places where tradition is deeply rooted, to be government is unable to enforce laws. In fact, there is a clear difference between to be law as it stands and the law as it works, which is constantly marred by unprecedented injustice events. This rejection has a serious impact on her health and life expectancy. Denial of sexual and reproductive rights, including free choice of pregnancy and childbearing, contributes to the systematic discrimination and violence against women in human rights. In reviewing the legal basis for the defense of reproductive rights and keeping pace with emerging reproductive technology, legal structure needs to be adopted and implemented based on the needs of women. The current regulatory structure is extremely helpful, while the challenge is to use the legislation pragmatically to make it accessible to the mass population. While only legislation can guarantee the protection of women's reproductive rights, proper implementation of machinery and the right climate is also especially important.

[66] (1973) 410 U.S. 113.



# Chapter Fifth
# Medical Termination of Pregnancy in India



# *Chapter Fifth*

# *Medical Termination of Pregnancy in India*

*"It seems to me as clear as daylight that abortion would be a crime."*

*— Mahatma Gandhi, All Men are Brothers: Autobiographical Reflections*[1]

## 5.1 Introduction

Induced abortion is lawfully defined as a voluntary delivery intended to destroy the fetus. It can be acquired at any time before the natural birth of the child. However, in medical terminology, abortion refers to premature delivery of a child. A baby is considered viable from the twenty eightth week of pregnancy.[2]

India is a pioneer in legalizing induced abortion (Medical Termination of Pregnancy (MTP) Act 1971), under which if a woman risks serious bodily injury, she can legally avail abortion when pregnancy is a contraceptive failure. Arises from a married woman is likely to result from rape or the birth of a child with physical or mental abnormalities. Abortion is permitted up to 20 weeks after the gestation period and no consent is required. According to the Ministry of Health and Family Welfare, around 4.6 lakh MTPs were performed in the country in 1996–97. Against this, an estimated 6.7 million abortions per year are performed by untrained persons under unauthorized circumstances, in addition to registered and government recognized institutions.[3]

In *The Hindu view of life* on the famous philosopher and authority of Hinduism. *Dr. Sarvapalli Radhakrishnan*[4] is of the opinion that there is no consensus in classical texts about when and where life begins. One school of thought states that

[1] *Available at*: https://www.goodreads.com/author/show/5810891.Mahatma_Gandhi (last visited on Jan 21, 2019).
[2] Paul and Schopp, "Abortion and the Law in 1980" 25 *Nyl. Sch. L. Rev*.497; 500-502 (1980); Devid, *The Abortion Division* 57 (1979), Habnel, "The Artificial Abortion in Antiquity" 29 *National and International Perspectives in Abortion Policy Arch. Geschicht Med.* 224 (1936); P. Thomas, *Indian Women Through Ages* (1964).
[3] Leela Visaria, Vimala Ramachandran, Bela Ganatra and Shveta Kalyanwala, "Abortion in India: Emerging Issues from the Qualitative Studies" 39 *Economic and Political Weekly* 5044-5052 (2004) *available at*: https://www.jstor.org/stable/4415809, *accessed on* Jan.15, 2019.
[4] *First Vice President of India*.

"life begins at conception", another thinks it begins with "the first movement of the fetus", and yet another claims that "it begins with the infant's first breath after delivery it happens". Today it seems that these questions are losing their relevance, because our crowded world will have to control its increasing numbers. References to induced abortion can be found in the ancient Indian scriptures- the *Rigveda*, the *Dharm Sutra* and the *Smriti*, and all refer to it and consider "It a sin". In later epics, like the *Mahabharata and the Ramayana*, some references to abortion are also found. The root cause of such condemnation seems to be that the predominant Hindu view of women in ancient texts is that they are objects of "honour and respect". For example, *Manu*, in his theology, is of the opinion that "Where women are honoured there are many gods who delight, but where they are not honoured, no holy rite can even reward."[5]

One point that comes to the surface is that all ancient texts consider abortion as a "sin". However, according to *S. Chandrasekhar*, there is an admirable and practical duality of ideal and permissible in Hindu philosophy. The ideal code of behavior was for the dedicated 'righteous' and saintly minority and the permissible method was for millions of people a day to work. Thus, while ancient Hindu law lovers condemned abortion severely induced, they made it difficult and provided the extraordinary. This philosophy has not remained stagnant, as it has changed circumstances. Innovative laws approve abortion. Even in others that the current Indian social system displayed old ideals and contemporary realities.[6]

### 5.2 42nd Law Commission of India Report, 1971

"Culpable homicide" is causing human death. The crime will not result from an act that destroys a life, before it is separated from the mother. This gap is filled by five sections[7] 312 to 316 in the Indian Penal Code, 1860 on Combating Abortion. Section 312 cites the main crime as the reason for the abortion of a woman with a child voluntarily. It is punishable only if the abortion is in harmony with the purpose of saving a woman's life. For the last thirty years, the movement to reform the

[5] Raj Pal Mohan and Raj Pa Mohan, "Abortion in India" *Pi Gamma Mu, International Honour Society in Social Sciences, available at*: https://www.jstor.org/stable/41885953, *accessed on* May 02, 2020.
[6] *Ibid.*
[7] Section 315, punishes acts done with intent to cause an infant to die after birth, as well as acts done with intent to prevent an infant being born alive.

abortion law operating outside India has received official support in India. Some time ago, the Government of India appointed a committee to study the subject, and considering its recommendations introduced a bill in the *Rajya Sabha*. Its provisions can be summarized as follows:[8]

1. The Indian Penal Code or under any other law if a pregnancy is terminated by registered Medical practitioner in accordance with the provisions of the Bill, shall not be guilty of any offence.
2. A registered medical practitioner can terminate pregnancy if it is of opinion, is made in harmony, that
3. the continuation of the pregnancy would comprise a risk to the life of the pregnant woman or of damage to her physical or mental health, or
4. If the child were born that it is an extensive risk, it would suffer from such physical or mental deviations as to be seriously handicapped.
5. Wherever the pregnancy is assumed by the woman to have been caused by rape, "the pain caused by such pregnancy will cause serious injury to the mental health of the pregnant woman."
6. Wherever pregnancy occurs as a result of the failure of any instrument used by any married woman or her husband for the purpose of limiting the number of children, "the suffering caused by such unwanted pregnancy is a serious injury to mental health." Could be the reason for a pregnant woman.
7. In defining whether there is a risk of health injury from continuation of pregnancy, as noted above, the "actual or reasonable environment" of the pregnant woman may be considered.
8. If the length of pregnancy does not exceed twelve weeks, the opinion of a registered physician is sufficient. If it is more than twelve weeks, but not more than twenty weeks, then the opinion of two medical practitioners is required. If it exceeds twenty weeks, the bill does not apply.
9. The consent of the woman must be involved in the termination of pregnancy.
10. The operation of pregnant woman is to be done only at a Government hospital or other place permitted by the Government.

[8] Government of India, "42nd Law Commission of India Report" 246-247 (Ministry of Law, June 1971).

The details of the cause and the objects are attached on the Bill, first emphasizing that (i) this extremely strict law has been seen in violation of an exceptionally large number throughout the country; (ii) Majority of these mothers are married women, who have no specific reason to hide their pregnancy; and (iii) doctors have often been confronted with critically ill or dying pregnant women "whose pregnant uterus has been tampered with." It then pacifies evil by saying that "thus, wastage is avoided for the health, strength and sometimes life of the mother." It is then stated that the proposed measures, seeking to liberalize the existing provisions, are conceived as a health measure (i), when there is a risk to life or risk to a woman's physical or mental health; (ii) as a human remedy, when pregnancy arises from a sexual offense; And (iii) as a eugenic therapy where there is a widespread risk that the child, if born, will suffer from diseases and deformities.

## 5.3 Implementation of a Preliminary first Twenty-Month Report of Medical Termination of the Pregnancy

The practice of constraining healthy pregnancy is an antique worldwide. The provisions associated to abortion in the Indian Penal Code, 1860 were instigated a century ago. According to that law, abortion was a wrongdoing for which the mother as well as the abortionist could be punished in all cases, except where she was to be induced to save the mother's life. This very stringent law was seen in destruction of many cases across India. Whatever moral and ethical sentiments one might have on question of induced abortion, it was an incontrovertible fact that many women, most of whom married, have no need to conceal their pregnancy, but rather an illegal abortion in their own wanted to risk his life rather than carry that particular child. In their 16th meeting held on August 25, 1964, the Central Family Planning Board articulated concern over the increase in the number of illegal abortions done in unnatural conditions by untrained persons affecting the lives and health of women and recommended that a committee check this question was formed. Therefore, a committee under the Chairmanship of *Shri Shanti Lal Shah*[9] then Minister for Health, Law and Judiciary, Government of Maharashtra was instituted in 1964 to examine the question of legalization of abortion. The committee indorsed that the existing the Indian Penal Code was too restricted and that it should be liberalized. Proposals were

[9] Government Of India, "Chairman, The Shantilal Shah Committee Report" (Ministry of Health, 1964).

also received from various authorities, Governmental as well as public, on the references and the question was considered at the Central Family Planning Council at their fourth meeting. The Medical Termination of Pregnancy bill was presented in the Rajya Sabha on Nov 17, 1969 and referred to the Joint Select Committee where it was considered in aspect. The bill was passed by the Rajya Sabha and the Lok Sabha on May 27, 1971 and August 2, 1971 correspondingly and became an Act after President's acquiescence on Aug 10, 1971. The Medical Termination of Pregnancy Act has been enforced from 1st April 1972. The Act encompasses to the whole of India except to the State of Jammu and Kashmir.

According to above mention *Shah Committee report*, in a population of 500 million the number of abortions per year will be 6.5 million, 2.6 million natural and 3.9 million induced. The involvements of other countries after liberalization of abortion law exposed that there was a spectacular increase of legal abortions throughout Eastern European Community, predominantly in *Czechoslovakia* and *Hungary*. In *Czechoslovakia* it reached a peak in 1961 where there were 29 abortions per thousand women which throw down to 22 in 1964. In Hungary liberalization of abortion was followed by continuous increase of legal abortions which stretched its maximum in 1964 with 75 abortions per 1,000 women. In Japan also the number get up from 2, 46,000 in 1949 to 1,170,000 in 1965 corresponding to annual rate of 11.1abortions per 1000 population. In the first twelve months of liberalized law approximately 40,000 legal abortions were performed in England, Wales and Scotland giving a rate of 0.77 per 1000 population. In California there was an eight fold increase after the change of law and the rate increased from 1.6 abortions per 1000 live births to 500 per 1000 live births in some hospitals. Even though enthusiasm amongst our women to have their pregnancy terminated may be high, considering that 80% of women live in villages, it was felt that most women either through ignorance or fear may not come to the hospital to receive medical assistance. It was estimated that coarsely 1 to one-half million women may take advantage of the facilities provided during the earlier years.[10] The reports received from the States and Union Territories in the first twenty months show an entirely different image. A total of 48,242 terminations have been performed from 1st April 1972 to 30th November 1973. In April 1972, Terminations were performed and after six months the number was

[10] *Ibid.*

nearly tripled to 2031 and it increased to 3305 i.e. more than four times by 12 months. Though the trend is towards steady progress still the numbers of terminations performed throughout the country are much below anticipation. The reasons are not known at present, but lack of facilities, lack of awareness, reservation in the minds of medical practitioners and underreporting may be contributing factors. 550 institutions have been approved in the country for doing termination. The Act has so far been implemented in all the States except in the States of Bihar, Assam, Nagaland, Meghalaya and Union Territory of Mizoram. State-wise, Maharashtra and Tamil Nadu take the lead with 15325 and 8131 termination, respectively. Delhi is next with followed by West Bengal with 3977 and Kerala and Gujarat 3062 and 2238 respectivel1y.[11]

### 5.4 Position of Abortion Law in India

Indian people are known for nurturing and incorporating traditional social values. Motherhood has been an essential function of a woman and being a mother of a child is a great honour for an Indian woman. The abundance of resources in India, which was once known as *Golden Bird*, was a factor which made possible the continuance of the dogma that a woman must bear as many children as possible. However, the birth of a son was more prestigious matter for a woman. The abortion was considered a heinous "crime or sin".[12] Our Apex Court explained Right to Privacy in Article 21 of the Indian Constitution. Its provision says that "No person shall be deprived of his life or personal liberty except according to procedure established by law." It means that Mother and her fetus have equal right to life for both. On the one hand, we have incorporated in 1976 with grand fanfare a fundamental duty under *Article* 51A(e) of the Indian Constitution "to renounce practices derogatory to the dignity of women, on the other, we have explored and designed a new derogatory practice of sex determination and killing of a female fetus".[13]

[11] *Available at*: https://jogi.co.in/articles/files/filebase/Archives/1975/oct/1975_588_592_Oct.pdf, *accessed on* Feb 12, 2019.
[12] Subir K. Bhatnagar, "Abortion Law and Social Behaviour: Past and Present Law, Justice and Social Change" *Deep and Deep Publications Pvt. Ltd. New Delhi* (Reprinted edition, 2008).
[13] *Ibid.*

In India, abortion is only valid up to twenty weeks of pregnancy in specific conditions and conditions, which are broadly defined:[14]

1. The endurance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury of bodily or mental health, or
2. There is extensive risk that if the child were born, it would grieve from such physical or mental deviations as to be extremely handicapped.

Recently, the Supreme Court allowed termination of her pregnancy at 24th weeks to avoid a rape, which is beyond the permissible 20-week limit prescribed under the Medical Termination of Pregnancy Act, 1971. An adult woman does not require the consent of another person. In many parts of India, daughters are not preferred and therefore sex-selective abortions are commonly practiced, resulting in millions of girls before birth is intended for termination. The gender hierarchy, cultural norms, values and image of women in society are particularly important factors in Indian culture and the subject of abortion is considered very personal. In India, the case for termination of pregnancy is often not based on a woman's own perceptions, but rather plays an important role in influencing her decision of cultural, religious, socio-economic and social pressures. In India, abortion laws were introduced to curb the issue of migrants. Unlike most Western countries, they were the result of a feminist struggle. Abortion became an issue for feminists in the early 1980s due to the alarming increase in abortions of female fetuses. India is one of the few countries where legislative reforms related to abortion were brought without any protest and without the influence of pro-life, pro-election groups. *Dr. Chandrasekhar* argues that "although Hindu texts condemn abortion, the state did not experience as much religious conflict as it did in the US, as the issue of overpopulation changed religious arguments". Despite the existence of major religions that explicitly oppose abortion, the reforms did not experience any form of public outrage.[15]

In 1965, following the recommendations of the United Nations commission, India appointed *Shantilal Shah Committee* on 29 September 1964 to study and make recommendations on the issue of abortion. Considering the increasing illegal and

[14] Punam Kumari Bhagat and Pratish Sinha, "Abortion law in India: The debate on its legality" 4 *International Journal of Law* 272-276 (2018) *accessed on* March 25, 2018.
[15] *Ibid.*

unsafe abortions, the committee recommended legalizing abortions. The committee felt that if the reforms are done only for the purpose of family planning, it may fail to achieve the desired results. They were completely denying family planning as a goal behind reforms. The committee played smart and focused on access to critical health and safe abortion. As per the recommendations of the committee, The Medical Termination of Pregnancy (MTP) Act, which was enacted by the Indian Parliament in the year 1971 with the detached of reducing the occurrence of illegal abortion and consequential maternal mortality and ethics. The MTP Act came into force from April 1, 1972 and was amended in the years of 1975 and till 2002[16] to year of recent in MTP (Amendment) bill, 2020. A pregnancy beyond 12 weeks cannot be terminated based on an opinion designed in good faith. In the event of more than 12 weeks of pregnancy but less than 20 weeks, termination requires the opinion of two doctors. And the objects of this act are-

1. To help unfortunate women who are victims of forcible sexual acts.
2. To help women who become pregnant as a result of failed contraception.
3. To reduce the risk of crippled children (eugenic).
4. To help Women who is physical and/or mental health were endangered by the pregnancy.
5. Women facing the birth of a potentially handicapped or malformed child.
6. To manage Pregnancies in "lunatics" with the consent of a guardian.
7. To mitigate Pregnancies that is a result of failure in sterilization.

Commenting on the hidden goal of population control, *Savitri Shyam* said that the failure of contraception as a basis for abortion can be justified in the context of population control. Advocates of pro-choice, like *Nandkishore Singh* and *Vikram Chand Mahajan*, felt in Parliament that Parliament should make abortions available to every woman who wants to exercise for a just cause. Even though the bill did not allow abortion on social causes, *Lakshmitamma* supported the bill on the grounds that it is the only remedy available to pregnant unmarried women to avoid social stigma. This amounts to murder, apart from two Member of Parliament opposing the bill on the ground, the pro-life debate did not bite once. The MTP Act passed easily without any protest or public outrage.

[16] The Medical Termination of Pregnancy (Amendment) Bill, 2002 s.2.

Under the MTP Act, abortion rights were made available at the discretion of medical practitioners. Permission is granted if the pregnant woman succeeds in satisfying her that the conditions of abortion given in the Act are met. Termination during the first 12 weeks requires a certificate by a registered gynaecologist or obstetrician. From 12 to 20 weeks, termination is permitted only if there is a risk to the prenatal woman's life or if it will cause grave injury to her bodily and rational health, or otherwise, there is a extensive risk that a harshly disabled child will be born. Expiration during this period requires certification from two registered gynaecologists or obstetricians. The immediate need to save the life of a pregnant woman allows for termination after 20 weeks with the certification of two registered gynecologists or obstetricians. Contraceptive failure in the case of a married woman and rape as explained under the Act fall within the scope of injury to mental health. Prenatal abortion pre-diagnosis techniques such as medical ultrasonography can determine the sex of the fetus. In many parts of India, daughters are not liked and therefore sex-selective abortions are commonly practiced, a form of gendercide that results in millions of developing girls being terminated before birth.[17]

Medical practitioners are given wide discretionary powers, which leads to the possibility of misuse of the Act. The decision to abort ultimately rests with medical professionals rather than with the pregnant woman. On the issue of liberal interpretation, *Jessani and Iyer* point out that "the act has the potential for liberal interpretation, which could be the reason for the imposition of external sanctions in the future of abortion, resulting in regulations that prove harmful to free practice". Freedom to choose Pro-choice groups are of the opinion that advocating the need for new laws may backfire. The new laws will advance categories, regulate and regulate behavior. Apparently, the major plan of the state in the implementation of the MTP Act was to achieve population control. Family planning, protection of women and emancipation were the only means to avoid obstacles in the implementation of this Act. The feminist struggle for free selection began in the 1980s as a result of an alarming increase in the incidence of sex selective abortion. He feared that the demand for legislation on sex-selective abortion could lead to further restrictions on the practice of abortion rights in India. Nivedita Menon has shown this fear in her book *'Recovering Subversion*'-

[17] *Supra* note 11 at 590.

First, the underlying assumptions of feminist demand to curb sex determination tests lie behind the justification for the ban on abortion. In other words, arguments deployed to support a ban on sex determination tests can also be used to support a ban on abortion. This can give rise to profoundly serious political contradictions.

Second, the context of the right of women to control their bodies involves arguing for abortion and at the same time a profound philosophical inconsistency, demanding that women should be specifically prohibited by law from choosing female abortions. It is essential that feminists control their bodies to avoid being forced to counter the rights of future women, to be born against the rights of current women. The outline of the PNDT, Act in 1994[18], resolved the contradictions which the feminist's groups faced.

Even though abortion reforms have been introduced in this country without hindrance, religious and cultural norms serve as a hindrance to their effective implementation. The preference for a strong son and other structural facts of patriarchy limit women's "freedom" to exercise choice, even if it appears that they are doing so. In 1983, Delhi High Court ruling held that abortion without the husband's consent is "cruelty" within the meaning of the Hindu Marriage Act[19]. The husband was therefore granted a divorce as, in the words of the judgment, the wife refused to "satisfy a husband's natural and legitimate craving for a child". The judgment goes further, "It is more… where the parties to the litigation are Hindus. In such a case the court has to give due weight to the Hindu law of marriage and sonship and the general principle connected with the doctrine of spiritual benefit of being a son."

Hence the pro-life effects of religious groups are inherent in the implementation of the Act, the need of the hour is to sensitize the judiciary. When every petty decision in a woman's life is made subject to the consent of her husband, family and society, it is exceedingly difficult for her to control her womb. Although in ancient and primitive times there were widespread practices of vandalism, miscarriage, and child slaughter among the semi-civilized and even sophisticated races, the latter period gave better status to unborn children. This is evident from the

[18] The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, s.1.
[19] The Hindu Marriage Act, 1955 s.13(1)(i) (i a).

punishment and compensation given in the old testament for hurting a pregnant woman. The unborn was considered equal to a human, at least for the purposes of his protection. But as revolutionary changes have occurred many times, every person has the right to physical sovereignty and the means of human rights protect such rights internationally. Thus, it becomes important for every woman to secure the right to abortion.

In its current form, the MTP Act[20] allows abortions after consulting a doctor for up to 12 weeks. Between 12 and 20 weeks, a woman seeking an abortion requires the medical opinion of at least two doctors. But such problems solve in recent amendment bill in MTP act, 2020[21]. Exceptions are made on the 20-week ceiling if continuing the pregnancy threatens the life of the mother or child, but only after approval from the courts. It is commendable that India was one of the first countries in the world to legalize abortion to encourage family planning and population control. Usually, the reason for the relatively short time frame was to protect the girl child by preventing sex-selective abortions. While it is a noble intention, women who detect abnormalities in the womb or cause complications later in their pregnancy, and rape victims, especially younger women, suffer the brunt. The court was compelled to note that due to advances in medical technology, post-birth defects may be revealed even after 20 weeks. And because the MTP Act is outdated and does not consider these incidents, women are forced to go to court. As a result, the decisions that are made vary considerably due to individual interpretations of the law.

In July 2017, a Kolkata woman could terminate her 26-week pregnancy by the Supreme Court because the fetus suffered from cardiac ailments. In January, it allowed a Mumbai based woman to terminate her 24-week pregnancy as the fetus was suffering from anaesthesia a condition in which it could only survive inside the uterus.

[20] The Medical Termination of Pregnancy Act, 1971, s.3.

[21] The Medical Termination of Pregnancy (Amendment) Bill, 2020, section 3: In section 3 of the principal MTP Act, for sub-section (2), the following sub-sections shall be substituted, namely:— (2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,— (a) where the length of the pregnancy does not exceed twenty weeks, if such medical practitioner is, or (b) where the length of the pregnancy exceeds twenty weeks but does not exceed twenty-four weeks in case of such category of woman as may be prescribed by rules made under this Act, if not less than two registered medical practitioners are, of the opinion, formed in good faith, that— (i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or (ii) there is a substantial risk that if the child were born, it would suffer from any serious physical or mental abnormality.

But in February, the same the Supreme Court denied "a woman's plea to abort a 26-week-old fetus who would be born with Down syndrome, as they treated that the baby may be suffering from severe abnormalities". Correspondingly in 2008, when a couple petitioned the Bombay High Court to have "an abortion at 26 weeks, when the fetus was diagnosed with a heart defect, they were turned down". This was one of the first cases in which the court was forced to note that due to advances in medical technology, postpartum defects can still be revealed even after 20 weeks, and perhaps this may be due to MTP and it was time to re-evaluate. It is noteworthy that the girl's family lost valuable time of 8 weeks in the long running legal proceedings.

Another thing that the law fails to keep in mind is that often, especially in the case of fewer rape victims, pregnancies are discovered too late. Due to the stigma associated with rape and the silence of victims, young pregnancies are often discovered when the child develops health issues and eventually calls for medical intervention. In many cases, by the time they come to light, the baby is either very close to the 20-week mark or has passed. As a result, there is a condemnation of cases with young girls and women who plead before the courts to allow them to terminate unwanted or unwanted pregnancies that exceed 20 weeks. In the case of a 14-year-old girl from UP, 'advanced pregnancy' (32 to 33 weeks) was the court's reason for refusing to allow abortion. However, it is worth noting that the girl's family lost 8 weeks of precious time in a long-drawn-out legal proceeding. Today, ending the economic circumstances of her family, which has made it impossible for her and her child to support, has forced her to marry her rapist with impiety from society. All this could have been avoided had the law acted in favour of the victim rather than against him.

All these events make it clear that until alternative provisions are made, the courts will continue to be forced to evaluate and rule on individual cases. This can serve as a stop-gap arrangement, but is clearly not a possible solution to the problem in the long term. Slow legal machinery is another loophole in the female feticide system in India, despite these significant inspections in law, they are just part of the problem. The problem becomes further complicated when our grinding slow legal machinery makes it medically dangerous to safely terminate pregnancy, rendering the entire process of seeking a legal intervention in futility.

In January, a 35-year-old HIV-positive woman from Bihar was forced to bear a child because her paperwork was stuck in a government hospital for 4 weeks and crossed the 20-week mark. A long legal battle ensued, with both the High Court of Bihar and the Supreme Court dismissing her abortion petition in May. Reason: she was 26 weeks pregnant by then and miscarriage was a risky proposition. Since the state is responsible for the realization of the right to abortion through institutional and medical assistance, it also has the right to regulate it by banning it. Therefore, it is an accepted reality that neither absolute blame nor complete state regulation is beneficial to society. Time is needed to ensure that abortions are made available to women who want it, while selective abortions of female fetuses must be stopped. The current abortion deliberation is more than just pro-life and pro-choice. Clearly, the law is currently on cross-purposes with the need of the hour. While its original purpose was to prevent sex-selective abortions, this line of reasoning is no longer true after medical advances. While opinions range from the time of conception (pre-lifetime) to the time when the fetus becomes viable (able to survive beyond the time of birth) there is no single benchmark at birth, which is used globally. Is their law. By making abortion a worthy right, the law does not recognize women as individuals with autonomy over their bodies, a sinister mistake by all accounts.

India, despite its liberal abortion law, does not count 'choice' as a factor for abortion. A lesser-known fact about the MTP Act is that a woman cannot choose not to be a mother only; Abortion is conditional and carried out on reasons such as the physical or mental health of the mother, potentially disabled or deformed child, rape, under-conception, conception in women with low mental capacity and failure of contraception. By making abortion a worthy right, the law does not recognize women as individuals with autonomy over their bodies, a sinister mistake by all accounts. Nevertheless, it is commendable that India's abortion law of 46 years ago is still more liberal than the laws of many countries. More clearly, it is a secular law; It does not hold for any religion’s beliefs about when the life begins and the fetus' right to life. At the time of the enactments, it was practical, and it really served the mother's best interests. Therefore, in keeping with the spirit of thought behind the original law, it now needs to be amended.

"This is an age-old law that needs to be reviewed and strengthened," said Dr. *Rishma Dhillon Pai* President of the Federation of Obstetric and Gynecological Societies of India (FOGSI), an organization representing 34,000 gynecologists in the country. *Rishma Dhillon Pai* said that "aims are given more attention than what is done in the best interests of the mother and the child". You cannot say that abortion is safe at 19-and-a-half weeks but is unsafe at 20- and one half a week.

**5.5 The Indian Penal Code, 1860**

The Indian Penal Code, 1860 which is the basic criminal law of the country, keeping in view the religious moral social and ethical background refers to spontaneous abortion, whereas voluntarily causing miscarriage, which constitutes an offence under the Code, stands for criminal abortion. of the Indian community, made induced abortion a criminal offence, under Sections 312 to 316 of the Code. Section 312 reads:[22]

*Causing miscarriage* —Whoever voluntarily causes an abortion with a child, if such abortions are not caused by good faith for the purpose of saving a woman's life, they should be punished with imprisonment of any description which may extend to three years, or with fine, or with both and if the woman dashes with the child, she shall be punished with imprisonment of either description which may extend to seven years, and for fine. It will also be responsible for fine.

*Explanation*— A woman who causes herself to have an abortion is within the meaning of this section. It is important to note that the framers of the Code have carefully avoided use of the word 'abortion' in Section 312,which relates to an unlawful termination of pregnancy. This was perhaps done with a view to avoiding injury to sentiments of the tradition bound Indian community. The section speaks of 'miscarriage' only, which term has nowhere been defined in the Code. However, miscarriage, in its popular sense, is synonym with abortion, and means expulsion of the immature fetus at any time before it reaches full growth.[23]Miscarriage technically

[22] The Indian Penal Code, 1860, ss. 312 to 316.
[23] Modi's, 319 *Medical Jurisprudence* (1886).

Section 312 makes voluntarily causing miscarriage an offence in two situations, namely, when a woman is with child and quick with child. As per judicial interpretation, a woman is in the former situation as soon as gestation begins and is in the latter situation when the motion is felt by the mother. In other words, quickening is a perception by the mother that movement of the fetus has started. It obviously refers to an advanced stage of pregnancy. Considering the nature and gravity of the offence in the latter case, the section has prescribed punishment in the form of imprisonment of either description which may extend to seven years and fine, whereas in the former punishment may go up to three years of imprisonment or fine or with both depending upon the nature of the offence in question.[24]

The explanation clause attached to Section 312 makes it clear that the offender could be a woman herself or any other person. As early as 1886 a woman was charged for causing herself to miscarry, though she had been pregnant for only one month, and there was nothing which could be called as a 'fetus' or 'child'. The lower court acquitted the woman taking a lenient view of the matter. But the High Court held the acquittal bad in law emphasizing that it was the absolute duty of a prospective mother to protect her infant from the very moment of conception. A person who aids and facilitates a miscarriage is liable for the abetment of the offence of miscarriage under Section 312, read with Section 109 of the Code, even though the abortion did not take place.[25]A person is also liable for attempt to commit a criminal abortion under Section 312 read with Section 511[26], even if he fails in his endeavor. For instance, in *Queen Empress v. Arunia Bewa*[27], where the term of pregnancy was almost complete, and an attempted abortion resulted in the birth of the child a conviction under Section 312 was set aside and one under Section 511 for attempt to bring about miscarriage was maintained. Section 52[28] of the Indian Penal Code defines "good faith". It lays down "Nothing is said to be done believed in 'good faith' which is not done or believed without due care and attention." It will be noticed that the definition is negative in

[24] *Supra* note 22 at s. 312
[25] *Supra* note 22 at s.109, explanation 2.
[26] *Supra* note 22 at s. 511.
[27] (1873) 19 W.R. (Cr.) 230.
[28] *Supra* note 22 at s. 52.

terms. It merely states that an act is not done in good faith if itis not done with due care and attentions. As observed by *Dr. Gour*:[29]

"Miscarriage is punished in law, both because it involves the performance of an operation dangerous to life of the mother and because it arrests the growth of the population which is necessary for the existence and welfare of society. At the same time, circumstances arise when performance of operation above can save the life of the mother. In that case its performance becomes justifiable, and the law then allows the sacrifice of one rudimentary life to save life of another comparatively more valuable."

### 5.6 Offence Against the Persons Act, 1861

The Section 58 of aforesaid act makes an attempt to procure abortion by administering drugs or using instruments to obtain abortion and Section 59 for procuring drugs, etc., to cause abortion publishable with imprisonment for life and up to five years, respectively. Indian law of abortion has been demonstrated on Sections 58 and 59 of the Offences against the persons Act 1861, with certain modifications.[30]

### 5.7 The Report of Family Planning Commission (1951-1956)

In the First Five-Year Plan (1951–1956), a family planning program was launched to improve the health of women and children. It should be noted that the International Planned Paternity Association's Fertility Regulation Program was designated as a birth control program. However, Indian planners had family welfare in mind and hence the program was called family planning. The program was a part of Maternal and Child Health (MCH) under the Ministry of Health. Since the Third Plan (1961–1966) was established due to pressure from international agencies, the objective of the program has been to decrease the birth rate. The year 1965 saw a nationwide famine. There was also a shortage of rain in the following year. India experienced a severe food crisis, and the United States government discussed the lack of food in the country. The Census of 1961 showed that the growth rate of the Indian

[29] Dr. Hari Singh Gour, 2569 *The Penal Law of India* (1972).

[30] The Offences against the Persons Act, 1861, ss. 58, 59; Section 58 makes "an attempt to procure abortion by administering drugs or using instruments to procure abortion" and Section 59 for procuring drugs, etc. "to cause abortion publishable with imprisonment for life and up to five years respectively". The Indian law of abortion has been modelled on Sections 58 and 59 of the Offences against the persons Act 1861, with certain modifications.

population remained constant and it was believed that the distribution of contraceptive methods by family planning clinics such as a diaphragm and jelly, foaming pills, and other precautions was not effective in reducing. Birth Rate. Hence discussions between the Indian government and United States officials introduced methods such as the IUD, the use of which was unrelated to the sexual act, the provider controlled, and was expected to be more effective in bringing down the birth rate. People who accepted these methods, as well as staff members who served, received financial incentives. The impetus to the participants of the camps was large. Group pressure and collective motivation worked in these camps.[31]

### 5.8 Medical Termination of Pregnancy and its Implementation

Indian MTP Act is founded on the ideologies of the British Act passed by Parliament in 1967. As the initial paragraph states, the MTP Act has provided termination for certain pregnancies by registered physicians and for interrelated cases or accidental therapy. In short, it seeks to liberalize and in relation to abortion regularize medical practices and institutions and, as a result, allow medical liberalization to eradicate medical criminalization.[32]

Clearly, the MTP Act does not comprise a fundamental right to induced abortion but is limited to the liberalization of conditions under which women may have access to abortion services, provided by approved medical practitioners. Therefore, there is a need for medical liberalization of the liberalized conditions given in the Act. This is done by extending the first medical indication to protect a pregnant woman, to include medical and psychological morbidity, or the possibility of such morbidity if the woman is to carry an unwanted pregnancy for a full period. Is forced. Thus, from a medical angle, termination of pregnancy becomes a medical intervention, rather than a right. liberalized law provides a status of prominence to medical practitioners, who cannot terminate women's access to abortion services—pregnancies to mediation centers unless they are authorized by doctors. The two ideas that are brought into play are the length and type of pregnancy. According to the Act,

[31] Shweta Rana Chauhan, "Induced Abortion in India" *Uttarakhand Judicial & Legal Review available at file:///F:/ABORTION%20IN%20INDIA%20%20ART/INDUCED%20ABORTION%20IN%20 INDIA .pdf, accessed on* Jan 16, 2019.

[32] Amar Jesani and Aditi Iyer "Abortion: Who is Responsible for Our Rights?" Kulkarni Sudha*: Claiming our Sexuality. In: Our Lives Our Health.* Edited by Dr. Malini Karkal, *Co-ordination Unit. World Conference on Women, Beijing, 1995* 76-82 (1995) *accessed on* Jan 25, 2019.

termination of pregnancies up to 12 weeks can be authorized by a physician, while the opinion of two doctors between 12 and 20 weeks is required. The act also connects doctors to take cognizance of "real or reasonably foreseeable environments" that run the risk of injuring a pregnant woman's health. In this regard, rape after one pregnancy marital rape is not included or failure of contraception for married women are mentioned as distinct indicators in two separate explanatory notes. Other health conditions that have been conceived are "physical or mental abnormalities" that can "severely hinder" the unborn child.[33]

Apparently, a pregnant woman seeking an abortion cannot avoid giving an explanation. To say that the pregnancy was desired at the time of conception, but is now unwanted, disqualifies her. He is required to submit an explanation, which is broadly liberal, though restrictive terms, are listed in the Act. This situation leaves the Act open to various interpretations. The prevailing bias, with some questionable motivations of population control and the medical profession, is, ironically, a liberal interpretation of the law. However, the threat of this rhetorical interpretation can become a deterrent, without changing even a single word of the text. This can easily occur under various socioeconomic and demographic compulsions. The Act also requires that abortions are legally performed only by a registered physician, who has such experience or training in 'gynecology and obstetrics', and it should be conducted only where approved by the appropriate authority if the standards in the facilities available follow the rules of the Act. This stipend is necessary and appreciated. However, liberalized legislation matters little to many women who want to terminate their pregnancy in the absence of a developed network of abortion facilities. The MTP Act fails in relation to the right to use as a justifiable right and is, therefore, ineffective in curbing incidents of illegal abortions.[34]

Section 3 of MTP:[35] When commencement can be terminated by registered physicians:

(1) Notwithstanding anything contained in the Indian Penal Code, a registered medical practitioner shall not be guilty of any offense under that Code or under any

[33] *Ibid.*
[34] *Ibid.*
[35] The Medical Termination of Pregnancy Act, 1971, s.3.

law for the time being in force if a pregnancy terminates in accordance with the provisions of this Act.

(2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered physician-

a. Where the length of pregnancy does not exceed twelve weeks, if such physician, or
b. Where the length of pregnancy is more than twelve weeks but not more than twenty weeks, if not less than two registered medical practitioners, the opinion is formed, in good faith, that-
    i. Continuation of pregnancy would involve a risk to the life of a pregnant woman or serious injury to her physical or mental health; or
    ii. There is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as if severely handicapped.

Explanation I- Where any pregnancy has been alleged to have been caused by rape by a pregnant woman, the suffering caused by such pregnancy shall cause serious injury to the mental health of the pregnant woman.

Explanation II- Where pregnancy occurs as a result of the failure of any instrument or method used by any married woman or her husband for the purpose of limiting the number of children, the pain caused by such unwanted pregnancy may result in serious injury can be considered. For the mental health of a pregnant woman.

(3) In determining whether there is a risk of health injury from continuation of pregnancy, as noted in subsection (2), the actual or reasonable environment of the pregnant woman may be considered.

(4)(a) A woman who has not attained the age of eighteen years, has no pregnancy, or who has attained the age of eighteen, is a lunatic, terminated except with the consent of her guardian in writing will go.

(b) Save as given in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman.

### 5.9 Critical Analysis of MTP Act, 1971

In India, up to 20 weeks of gestation can be terminated under the Medical Termination of Pregnancy Act, 1971. Afterward, either one has to go for an illegal abortion or one has to force a child. The *Nikita Mehta* case is one of the best examples to discuss, citing the forecast of women in India, wherever women have the right to abortion, but to an extent, not only grave social, legal but reproductive health is also giving birth. It is specifically about their right to safe abortion in women.[36]In most cases of pregnancy, it is initiate that any abnormalities related to the fetus are seen after 18 weeks. And some tests such as triple marker tests that are steered during 15 to 20 weeks of pregnancy to detect any genetic abnormality of the fetus before and not even after 20 weeks of pregnancy. The abnormality seems and sometimes it is not possible to treat the fetus, and then in that case, abortion is not just for the benefit of the fetus, but for the termination of pregnancy for the family and society.[37]

And if the mother is obligatory to carry the fetus, she will not only be psychologically pretentious, but she may face serious health complications in the future. Reproductive health issue of a woman where abortion is required as a protective measure for the health and welfare of her and her family.[38]

### 5.10 Characteristics of Women Who Terminate Unwanted Pregnancies

Indian women cause the termination of unwanted pregnancy. Conditions that may make pregnancy unwanted include financial reasons; There are already too many children or too many female children; Being pregnant after the interval of birth; Experiencing health problems during pregnancy; Getting pregnant at an early age; Getting pregnant soon after marriage; Suspecting husband's infidelity; Getting pregnant as a result of an extra-marital pregnancy and rape are all conditions that can lead to unwanted pregnancy in India. For most of these conditions, a more proximal determinant of unwanted pregnancies is the lack of access to appropriate contraception. For some women, contraception is not an option due to family pressures. Other women may not use the appropriate contraceptive method for them.

[36] Pyali Chatterjee, "Medical Termination of Pregnancy Act: A Boon or a Bane for a Woman in India-A Critical Analysis" 5 *IJSR* 236-240 (2016) *accessed on* Jan 20, 2019.
[37] *Ibid*.
[38] *Ibid.*

For unmarried adolescents, contraception is usually not available. In such cases, abortion can be a major means of birth control. Contraceptive failure and user failure can lead to unwanted pregnancies that can be legitimately aborted in the Indian system of medicine.[39]

### 5.11 The Medical Termination of Pregnancy (Amendment) Bill, 2002

The purpose and objectives of the above amendment are mainly to make the MTP Act, 1971 more relevant to the present scenario of India, to remove provisions which were discriminatory against women, strict and enhanced punishment for violation of the provisions of the provisions Act to provide, to protect RMP from the purview of IPC and to legalize termination of pregnancy on various socio-medical grounds.[40]

These amendments are included in Sections 2, 3, 4, and 5: For the necessary amendment regarding the substitution of the word "adulteress" with "mentally ill person" regarding "mentally ill person" goes, corresponding to which the recent law on mental health before its substitution, section is read as 2(b): "Secular of the old law on mental health" has its meaning assigned to it. "Mentally ill person" means a person who is in. Thus, the need for treatment due to any mental disorder other than mental retardation, gives the term wider meaning.[41]

### 5.12 The Medical Termination of Pregnancy (Amendment) Rules, 2003

In the year 2003, the government made another amendment to the MTP rules, which rationalized the physical standards of abortion facilities setting different criteria for the operation of first trimester and second trimester abortions. While operation tables and equipment such as equipment to perform abdominal or gynecological surgery, and equipment for anaesthesia, resuscitation, and sterilization are the minimum requirements for centers offering second trimester abortions, a gynecology rather than MTP rule 2003 or a labor table requiring an operation table and revitalization and sterilization equipment but not anaesthetic equipment for centers offering first trimester abortions. These rules also allow a registered medical

[39] *Supra* note 31 at 3.
[40] *Available at*: http://medind.nic.in/jal/t05/i1/jalt05i1p46.pdf (last visited on Feb 15, 2020).
[41] *Ibid.*

practitioner to provide medical abortion services up to seven weeks in termination of pregnancy, provided that the physician has access to medical abortion in the event of a failed or incomplete therapeutic abortion.[42]

### 5.13 The Medical Termination of Pregnancy (Amendment) Bill, 2014

This amendment Bill seeks to amend section 3 of the MTP Act, 1971. The MTP Act, 1971 delivers that "in the decision to terminate the period of abortion of the fetus," the period of pregnancy shall not apply "substantial fetal abnormalities may be determined". In this definition of termination of pregnancy "registered the words "registered health care providers" have been added and replaced in place of "registered medical practitioners".[43]

### 5.14 The Medical Termination of Pregnancy (Amendment) Bill, 2017

The Sub-section (2) of Section 3 of the fundamental Medical Termination of Pregnancy Act, 1971, permits abortion of inauspiciously ill fetuses up to twenty weeks of gestation. During the intervening period after the enactment of the Act, there have been several substantive cases where the mother was seen after twenty weeks of physical and mental risk, with a serious risk to the fetus, with severe risk to the fetus. Consequently, many women were obligatory to go to the Supreme Court for agreement to terminate their pregnancies beyond twenty weeks, causing much mental and financial adversity to such pregnant women. The bill intends to increase the permissible period for abortion from twenty-four weeks to twenty-four weeks if doctors believe that the pregnancy comprises substantial risk to the mother or child or if there are fetal abnormalities. The Bill also intends to amend the provisions of sub-section (3) of Section 6 relating to the lie of rules and their notification etc. before each the House of Parliament.[44]

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[42] *Supra* note 29 at 2569.
[43] *Available at*: https://www.prsindia.org/uploads/media/draft/Draft %20Medical%20Termination %20of% 20 Pregnancy%20Amendment%20Bill%202014.pdf (last visited on Feb.15, 2019).
[44] Dr. Kanwar Deep Singh, "The Medical Termination of Pregnancy (Amendment) Bill, 2017", *Introduced in the Rajya Sabha*, August 4, 2017.

### 5.15 The Women's Sexual Reproductive and Menstrual Rights Bill, 2018

The Congress Party Member of Parliament in year of 2018 introduced a Bill in the Lok Sabha for the Sexual Reproduction of Women and Menstrual Rights Bill, 2018, which objectives follows:[45]

- To criminalizing Marital Rape.
- To free access of Sanitary Pads to women.
- Amending in Medical Termination of Pregnancy to Legal termination of Pregnancy.

Alternative amendment to this bill proposes legal termination of pregnancy by medical as well as surgical methods. The justification behind this amendment is that women have reproductive rights, they should be given the right to terminate their pregnancy as a norm and not as an exclusion. It ensures that women can terminate their pregnancy even in rural areas, where medical practitioners avoid termination of pregnancy under Section 312 of the Indian Penal Code, 1860.[46]

This amendment will be implemented considering the right of termination of pregnancy for married as well as unmarried women. It also comes, however, with two exceptions, one, that it will not be allowed as a method for feticide, another when the fetus has developed the right to life. This change is proposed to give rape victims the chance to terminate their unwanted pregnancy any time after 20 weeks, which the current law holds. Additionally, if it is made a right, social stigma associated with termination of pregnancy can be curbed. This part of the bill itself comes with both positive and negative aspects. The positive side is that it gives women the right to terminate their pregnancy like any other right and thus her body has additional autonomy to make decisions. But if looked at broadly, how can one identify whether the termination is done as a normal action or as a female feticide? It is also overwhelmed by the notion that women in rural areas and surrounding areas can absorb such modifications. For example, consider an unmarried girl from Haryana who develops pregnant and wants to end her pregnancy, would society welcome such a move by her or be eaten alone by the stigma around her? To bring this bill in a proper direction, there should be uniformity across the country regarding the

[45] *Available at*: https://blog.ipleaders.in/womens-sexual-reproductive-and-menstrual-rights-bill-2018 (last visited *on* Feb 15, 2019).
[46] *Ibid*.

understanding of unexpected pregnancy. The most traditional parts of India should be pushed into the light of education and slowly these changes should be brought. To accomplish, it can be broadly assumed this bill in fact ensures justice and equality in relation to women and should be brought mostly under the system, but firstly systematic groundwork should be done for the same. It needs to be understood that the struggle any urban woman must go through is limited by the face of the struggle of the rural woman. One cannot enact urban women as the center of their proposals. It will be fruitful if people, particularly rural women, are brought equal to the rest of the country.[47]

### 5.16 The Medical Termination of Pregnancy (Amendment) Bill, 2020

This amendment act delivers the various areas decided by Hon'ble the Supreme Court and High Court in many cases. Things that look at the proposed amendments propose the need to present two providers 'opinions for 20 weeks' gestation and one provider's opinions for 20 to 24 weeks for a provider's opinion for termination of pregnancy. Increase the limit of upper pregnancies from 20 to 24 weeks for special categories of women, which will be defined in the amendment to the MTP rules and include 'vulnerable women such as rape victims, rape women and other vulnerable women', minors etc. will go. The upper fetal limit does not apply in cases of a sufficiently fatal abnormality diagnosed by the Medical Board. The composition, functions and other particulars of the Medical Board to be laid down in the rules under the Act. The name and other details of the woman whose pregnancy has ended shall not be disclosed to any person authorized under any law, when applicable.[48]

The Medical Termination of Pregnancy (Amendment) Bill, 2020 is for increased access to safe and legal abortion services for women on medical, eugenic, human or social grounds. Anticipated amendments include the substitution of certain subclasses under the existing Medical Termination of Pregnancy Act, 1971 to increase the upper pregnancy limit and strengthen access to termination of pregnancy under certain conditions. Inclusive abortion care, under strict conditions, without negotiating about service quality and safe abortion. This is a step towards the safety and welfare of women and many women will benefit from it. Recently several petitions were received by the court for permission for abortion at a gestational age beyond the

[47] *Ibid.*
[48] *Available at*: https://7thpaycommissionnews.in/medical-termination-of-pregnancy-amendment-bill-2020 (last visited on April 13, 2020).

current permissible limits based on fetal abnormalities or pregnancies due to sexual violence faced by women.[49] The proposed increase in gestational age will ensure dignity, autonomy, privacy and justice for women who need to end pregnancy.

### 5.17 Objects and Reasons of MTP

The Medical Termination of Pregnancy Act, 1971 (34 of 1971) was suggested by registered physicians for the termination of certain pregnancies and for cases connected with or incidental treatment. It follows:[50]

1. The Act recognized the position of safe, accessible, affordable abortion services to women who are required to terminate pregnancy under certain detailed conditions.
2. With the development of time and medical technology for safe abortion, there is scope for termination of pregnancy, particularly for helpless women, with enough fetal irregularities to raise the upper gestational threshold and delay pregnancy. In addition, there is a need to increase women's access to a legal and safe abortion service to reduce maternal mortality and morbidity caused by unsafe abortion and its difficulties. In view of the need and demand for increased gestational limit under certain stated conditions and to ensure the safety and welfare of women, it is anticipated to amend the said Act. In addition, several petitions have been filed before the Supreme Court and various High Courts looking for permission for abortion at gestational age beyond the current permissible limits based on fetal abnormalities or pregnancies due to sexual ferocity by women.
3. Accordingly, the Medical Termination of Pregnancy (Amendment) Bill, 2020 provides, inter alia, for - (a) the obligation of the opinion of a registered medical practitioner for the termination of commencement up to twenty weeks after origin; (b) the obligation of the opinion of two registered medical physicians for the termination of the pregnancy from twenty to twenty-four weeks of gestation; (c) raising the upper gesture limit from twenty to twenty-four weeks for such category of woman as may be prescribed by rules in this regard; (d) Non-suitability of provisions relating to the duration of pregnancy

[49] *Ibid.*
[50] *Available at*: file:///C:/Users/Dell/Desktop /The%20Medical%20Termination%20of%20Pregnancy %20(Amendment)%20Bill,%202020.pdf (last visited on April 15, 2020).

in cases where termination of pregnancy is necessary for diagnosis of any significant fetal abnormality diagnosed by the Medical Board Protection of the privacy of the woman whose pregnancy has been terminated.

4. The proposed Bill is a stage on the way to safety and well-being of women and will increase the ambit and access of women to safe and legal abortion without compromising on safety and quality of care. The proposal will also confirm autonomy, dignity, discretion and justice for women who essential to terminate pregnancy.
5. The Bill seeks to obtain the above items. The major drawback of the Medical Termination of Pregnancy Act is that although it allows women to have abortions under certain special circumstances, it does not provide an option for abortion. More importantly, it does not grant abortion as its right, monopolizes medical opinion without regard for the opinion of the woman who should be given a significant right to make choice.[51]

### 5.18 The Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994

Prejudiced practices against women in India are widespread and widely rooted in cultural norms that give importance to men over women. Sons are expected to bring in family income and dowry, while daughters are families to pay for dowry and other marriage expenses and less likely to help their parents in old age Is considered Although the average family size has decreased over time, the pressure to bear at least one son remains. The introduction of technologies in the 1980s that allowed parents to determine the sex of the fetus before birth assured both to have a small family and to have at least one son. The widespread use of this technique has led to public concern over discriminatory abortions of female fetuses and the resulting sex imbalances in the population. To address this issue, the government passed a law in 1994 with the goal of ending prenatal sex determination and associated gender-selective abortions and arresting the declining sex ratio in India. The Pre-conception and Pre-Natal Diagnostic Techniques (Restrictions on Gender Selection) Act, amended in 2003, prevents the misuse of prenatal diagnostic tests for the purpose of sex determination. The Act also prohibits the advertisement of such tests, requiring the registration of all

[51] Dr. Nitu Nawal, *Human Rights and Women Justice International and National Perspectives* 156 (Regal Publication New Delhi, 2015)

facilities that use them and prohibits those organized tests from revealing the sex of the fetus to the restricted parent.[52]

Amendments have also been introduced in the Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) (PNDT) Act of 1994. This was necessitated as the PNDT Act had failed to curb the practice of testing for sex determination and consequent sex-selective abortion in the country. With the recent amendment to the PNDT Act, preconception and pre-implantation procedures for sex selection are banned in the country. The Amendment stipulates compulsory maintenance of written records by diagnostic centers/ doctors offering sonography service.[53]

According to the 2011 census in India, there were 940 females for every 1,000 males, a slight increase from the 933 recorded in the 2001 census. But, the sex ratio in the age group of 0–6 declined from 945 in 1991 to 927 in 2001 and 914 in 20- the lowest since independence. The declining child sex ratio to such an extent has sparked an intense debate in political, legal, administrative and even academic circles as to how to incorporate it more strictly in the coming years. In India, the main reasons for low child sex ratio are female infanticide, neglect of girls, female morality at an early age, female feticide, son preference, dowry, insecurity in old age, excess of male bias. Population and so on.[54]

It is against this backdrop that the PNDT Act was enacted in 1994 and came into force from 1 January 1996. To make it more comprehensive and rigorous, it was revised in 2003 and is now known as pre-conception and pre-natal diagnostic. Techniques (PCPNDT) Act. Its purpose is:[55]

- Prohibiting sex selection before or after conception.
- Regulation, although not ruled out, the use of prenatal diagnostic techniques including ultrasonography to detect genetic abnormalities or other sex-related disorders in the fetus; and

[52] Melissa Stillman, Jennifer J. Frost, Susheela Singh, Ann M. Moore and Shveta Kalyanwala, "Abortion in India: A Literature Review" *New York: Guttmacher Institute* (2014), *accessed on* Nov. 20, 2019.
[53] *Supra* note 32 at 80.
[54] S.G. Kabra, *Abortion in India Myth and Reality* 83 (Rawat Publication, Jaipur, 2013).
[55] *Ibid.*

- Use of prenatal diagnostic techniques including ultrasonography only at registered locations and by qualified persons as defined in law.

### 5.19 The Protection of Children from Sexual Offenses Act, 2012

The Protection of Children from Sexual Offenses Act, 2012 lay down the age for sexual intercourse in the "Eighteenth year". As a result, POCSO treats all pregnant women under the age of eighteen as rapists and expresses gratitude to the provider for reporting abuse. This obligation to report is contradictory to privacy and confidentiality protections under the MTP Act. This mandatory reporting requirement may serve as a deterrent for women under the age of 18, where abortion status arises from marital or non-marital sex. As stated in the section on rape, courts unanimously allow minor rape survivors to be terminated and even express their frustration with doctors, police and magistrate judges who create unnecessary delays. While the pregnancy of a rape survivor has exceeded the 20-week limit under the MTP Act, courts have traditionally been divided.[56]

However, in 2015 the Supreme Court permitted termination after 20 weeks. Where a team of doctors determined that the pregnancy would harm the girl's mental and physical health setting. This is an important illustration to increase access to safe abortion services for minor rapists.[57] The POCSO Act, although passed more than a decade later, is a violation of the Convention and retrograde is insulting because it criminalizes all sexual activity between children, not accepting consensual sexual activity among adolescents. Adolescent sexual activity as a result of an unwanted pregnancy is also seen as a result of sexual violence. Therefore, the POCSO Act requires immediate amendments to allow consensual sexual activity between minors with sufficient secrecy to terminate teenage pregnancies with minimal legal resistance.[58]

### 5.20 Abortion and Sex-Determination: Different Issues

The Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act (PNDT Act), 1994 which has amended by the Pre-Conception and Pre-Natal Sex

[56] *Available at*: http://www.legalserviceindia.com/legal/article-724-abortion-laws-in-india.html (last visited on Feb 20, 2019).
[57] *Ibid.*
[58] Justice J.S. Verma Committee, "Report of the Committee on Amendments to Criminal Law" 443-444 (2013) *accessed on* Feb 25, 2018.

Selection and Determination (Prohibition and Regulation) Act, 2002, which provides for prenatal clinical Prevents misuse of tests. Female fetuses may be miscarried for the purpose of sex determination. These Acts also prohibit the advertisement of such use of these tests; They require all facilities to be registered and individuals conducted such tests to reveal the sex of the fetus. Although the objectives of the PNDT laws (prohibiting sex determination) and the MTP Act (ensuring safe abortion) are different, they were almost inappropriately linked in 2000 against the Government of India for failure to implement the PNDT Act. Following a PIL filed in the Supreme Court by Sabu George and NGOs CEHAT and MASUM, a policy review meeting discussed amending the MTP Act to prevent sex-selective abortion after sex determination.[59]

One recommendation was to only allow abortions until 12 weeks of pregnancy, to prevent sex-selective abortions after amniocentesis or sonography in the second trimester of pregnancy, which could identify the sex of the fetus. Other suggestions included identifying any woman seeking an abortion, as well as reporting the sex of the fetus. However, the experts resolved that there was no need to amend the MTP Act, as strict implementation of the PNDT Act was required. Reporting a woman's identity would be a breach of privacy. Banning legal abortions for 12 weeks of pregnancy would force women over 12 weeks to seek illegal abortion services, regardless of the cause of abortion, with obvious health consequences. Recording the fetus's sex would not only be unethical, but would cause abortions if suspected for other reasons, and indirectly may make it more difficult to access safe abortion services.[60]

### 5.21 Relation Between the PNDT Act and the MTP Act

Although the two legislations are independent of each other, qualitative studies show that this difference in actual behavior is difficult to maintain. The wider campaign around the PNDT Act has led to a higher awareness of it in the community, although the legality of abortion services and knowledge of the MTP Act is still lacking. While abortion is the right of a woman in India who can access it on

[59] Siddhivinayak S Hirve, "Abortion Law, Policy and Services in India: A Critical Review" *available at*: https://www.tand-fonline.com/action/journalInformation?journalCode=zrhm21, *accessed on* Feb 19, 2019 .
[60] *Ibid.*

economic or social grounds, there is some evidence that abortion is equated with a ban on gender screening and murder of girls. In addition, the PNDT Act is interpreted to mean that all abortions, whether sex is selective or not are now outlawed. Providers often combine the provisions of two acts. It shows, the most common cause of miscarriage in women is still to limit and place their children regardless of sex composition, and if there is a clear distinction between these two issues and the obvious reasons cannot be maintained The PNDT Act has been made very clear, the effort to expand access to safe abortion will receive a setback in the coming years. Concentrated effort and correct messaging are particularly important to clear up confusion.[61]

### 5.22 Unsafe Abortion in India

Due to unsafe abortion, many women have died. A methodical analysis of 2014 worldwide data evaluations that approximately 8% of all maternal deaths are attributable to unsafe abortions and related complications. Unsafe abortion is defined by the WHO as "the process of terminating an unwanted pregnancy either as individuals lack the essential skills or the environment lacks minimum medical standards or both." In India, complications of unsafe abortion account for an estimated 9% of all maternal deaths, according to the latest government report on causes of death since 2010. While maternal mortality has declined, the proportion of maternal deaths due to these complications has remained relatively constant for the past decade.[62]

Therefore, the total number of deaths due to unsafe abortions is likely to decrease with maternal deaths possibly up to 28–40%, based on which maternal mortality is estimated. Unsafe abortions in India are usually performed by self-administered non-authorized and usually ineffective drugs or incorrectly approved drugs by women; These types of abortion attempt often have incomplete abortions and further complications. Providers who have medical training but lack specific training in the abortion process are another source of unsafe abortion. Additionally,

[61] Leela Visaria, Vimala Ramachandran, Bela Ganatra and Shveta Kalyanwala, "Abortion in India: Emerging Issues from the Qualitative Studies" 39 *Economic and Political Weekly* 5044-5052 (2004) *available at* jstor.org/stable/4415809, *accessed on* Dec 15, 2019.

[62] Melissa Stillman, Jennifer J. Frost, Susheela Singh, Ann M. Moore and Shveta Kalyanwala, "Abortion in India: A Literature Review" *Guttmacher Institute* (2014) *available at*: http://www.guttmacher.org, *accessed on* Feb 15, 2020.

traditional providers without medical training may use sticks, roots, herbal medicines or other unsafe and ineffective means to terminate pregnancy, but the prevalence of these methods has declined significantly in recent years. D&C is a common abortion method in India, although EVA, MVA and medical methods have experienced an encouraging transition in recent years. If performed in an untrained individual or in unhygienic conditions, ensuing D&C is more likely to result in post-abortion complications than these less invasive methods. It is important to note that abortion protection does not directly coincide with its legal status: while most legal abortions performed by certified providers at approved facilities are potentially safe, illegal abortions are either safe or can be unsafe, depending largely on the provider. Training and where abortions are performed.[63]

After few studies precise to unsafe abortion and its consequences have been conducted in recent years. Such a study conducted at a tertiary rural hospital in North Bengal between 2005 and 2008 found that among patients seeking services related to any abortion, about 12% of women were caring for complications related to unsafe abortion was a woman. Most of these women (63%) reported that they had an abortion by an unproven provider; A significant minority (28%) reported receiving services from certified providers in a lower-level facility. Complications in this study were severe, in part because this level feature only handles the most severe cases thus the experience of women in the study is not generalizable to a large population. Nearly one-fifth (17%) of women with complications experienced multiple organ failure, and 22% of those presenting with septic miscarriage died. Another study conducted in Madhya Pradesh in 2007 focused on 381 women treated for abortion related complications in 10 government medical colleges and district hospitals that year. Women experiencing complications make up 29% of all women attending abortion-related service. Some 53% had previously attempted abortions at home using traditional medicines. Eighteen percent of women did not receive any advice before correcting for abortion; Of those who consulted, the majority depended on friends or 14 Guttmacher Institutes, 15 families (38%) or drug stores (17%). Nearly all women who had self-induced termination (95%) experienced some post-abortion complications, and most self-induced (78%) experienced an incomplete abortion.[64]

[63] *Ibid.*
[64] *Supra* note 58 at 445.

Safe abortion is a new category. Reliably safe and effective abortion became a medical option in the 1900s after advances in surgical and antiseptic techniques. Surgical abortion was the first type of safe abortion procedures that end pregnancy by putting medical instruments inside the uterus. Today the most common method of surgical abortion is vacuum aspiration (suction), which can end a first trimester pregnancy in five minutes.[65]

The study shows that many women caring for post-abortion complications do not initially reach a qualified physician: Sixty-eight percent of women who have had complications previously received post-abortion care from an ineligible provider. About half of the women (47%) first went to a chemist or drugstore, while the other fourth (23%) went to a private doctor. Women's reasons for choosing providers included proximity, perceptions that were no other option, and recommendations by friends or family members. Sixty-three percent of the women seeking care for complications did not state whether the provider had the training or qualifications to provide an abortion service. The profile of women diagnosed with post abortion complications in the Madhya Pradesh study considers the fact that unsafe abortion can affect all sections of the population, not just the poorest and most vulnerable: most were aged 25–30 and married, 74% lived in urban areas, and 43% had a secondary or higher education level.[66]

### 5.23 Abortion Law and Policy: Potential and Actual Abuse

Abortion discourse was largely influenced by medical and demographic concerns in the 1960s. The human and reproductive rights agenda took ICPD after the center stage. India's National Population Policy, 2000 encourages the advancement of family planning services to prevent unwanted pregnancies, but at the same time recognizes the importance of the provision of safe abortion services that are affordable, accessible and acceptable to women who are terminated need to have an unwanted pregnancy. In India, although abortion is legally acceptable in many circumstances, the doctor says that a woman must tell whether her pregnancy happened despite her attempts to stop it or that it was her intention, but later

[65] Watson Katie, *Scarlet A The Ethics, Law and Politics of Ordinary Abortion* 2 (Oxford University Press, London, 2018)
[66] *Supra* note 58 at 446.

circumstances changed or made her unwanted. The reality may be that the pregnancy was unwanted from the beginning, but to justify abortion within the legal framework, the woman may have to feel that she had contraceptive failure, creating an environment of lies.[67]

Abortion law is always opened to differing interpretations and although the current socio-political environment allows for more liberal interpretation in most cases, the theoretical threat of more restrictive interpretations under various socio-political and demographic compulsions without a single word of text always lives. The law is being changed. Even today, although Section 3 of the 1971 Act does not contradict abortion care for unmarried or detached women or widows, the use of the phrase "where the failure of a device or method used by any married" occurs as a result. Woman or her husband for the resolve of limiting the number of children. Unmarried women may be mistaken for refusing abortion services or needing the consent of the married woman's husband. Although activists have argued for replacing "married women" with "all women", this recommendation has not yet been made by the government, as it recognizes sexual relations between unmarried or those and will provide approval. Already married another area of potential abuse of a woman's reproductive rights is the mandatory reporting of post-abortion contraceptive use required by MTP regulations, which states can use to force abortion providers to achieve family planning goals. Such surveillance leads to women seeking abortions, as well as in the public sector, especially abortions.[68]

Recent legislation and policy reforms, although not radical, still represent a step forward towards ensuring a woman's right to safe abortion care. It is only in recent years that many national level consultancy efforts have involved 43-46 policy makers, professional bodies such as Federation of Obstetrics and Gynecology Societies of India (FOGSI) and Indian Medical Association (IMA), NGO (Institute of Family Services, CEHAT, Health Watch and the Family Planning Association of India) and health activists have supported improving access to safe and legal abortion services in India. Many of his recommendations are in line with the objectives and strategies outlined in India's National Population Policy, 2000 action Plan. They

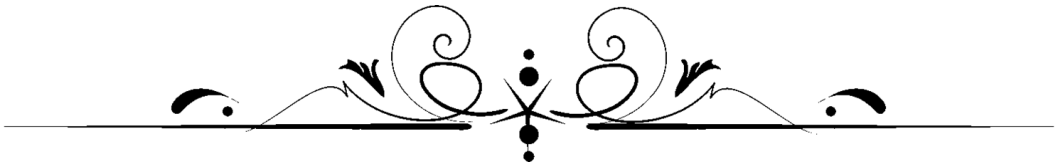
[67] *Supra* note 44 at 2.
[68] *Supra* note 35 at s.3.

include increasing availability and access to safe abortion services, more qualified provider including mid-level providers facilities, especially in rural areas, simplifying the certification process, certifying clinics and providers, with technology and research adding policy and implementing a uniform standard for good clinical practice, both private and public sectors, and ensuring quality of abortion care. The rising awareness and misconceptions about abortion law among providers and policy makers is a step towards this. There is a essential to raise consciousness of both contraceptive and abortion services within the larger situation of sexual and reproductive health, integrating approaches and interferences between value systems and family and gender relations, predominantly among adolescents. To implement these policies effectively, they need to be supported with social inputs based on the needs of women, with adequate political apportionment and commitment for adequate resource allocation, training and infrastructure support. Advocacy and action at both the central and state levels are required to implement operational strategies related to abortion, as detailed in the National Population Policy, 2000.[69]

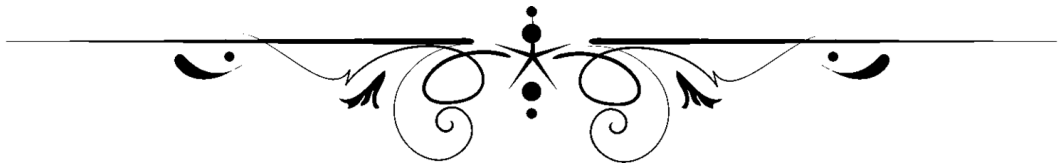
**5.24 Conclusion**

Subsequently the State is accountable for obtaining the Right to abortion through institutional and medical assistance, it also has the right to regulate it by banning it. Therefore, it is an accepted reality that neither absolute blame nor complete state regulation is beneficial to society. Time is needed to ensure that abortions are made available to women who want it, while selective abortions of female fetuses must be stopped. The current abortion debate is more than just pro-life and pro-choice. Clearly, the law is currently on cross-purposes with the need of the hour. While its original purpose was to prevent sex-selective abortions, this line of reasoning is no longer true since medical advances. While opinion is from the time of conception to prenatal when the fetus becomes separable to survive to the time of birth, there is no such criterion at birth that applies their laws globally is used. By making abortion a worthy right, the law does not recognize women as individuals with autonomy over body.

[69] *Supra* .



# Chapter Sixth
# Judicial Response



# *Chapter Sixth*

# *Judicial Response*

*"Justices in the United States believe that their duty is to uphold the Constitution, but if they do not understand that the authority of the Constitution itself rests upon the inalienable natural rights of all human beings, then they not only undermine the Constitution, which they are sworn to uphold but also turn themselves into wielders of arbitrary power. Regrettably, this misuse of power occurred in both the Dred Scott decision and in the Roe v. Wade decision and its subsequent interpretation in cases such as Planned Parenthood of Southeastern Pennsylvania v. Robert P. Casey."*

*— Robert J. Spitzer, Ten Universal Principles: A Brief Philosophy of the Life Issues*[1]

## 6.1 Introduction

Medical termination of Pregnancy is a controversial topic under Medical law. Foreign Judiciary and our Indian Judiciary have enunciated many rights and vital role play just like Right to Abortion, Reproductive rights and Right to Privacy. The Judiciary has explained that what the social and moral value of Fetus. Famous and leading Case in *Roe v. Wade*[2], the Supreme Court said that a fetus is not a person but 'potential life' and so does not have constitutional rights of its own. The Supreme Court and Foreign court have declared that the right to privacy. It's Right enshrine in Article 21 of the Indian Constitution and the right to abortion can be read from this right also.

## 6.2 Reproductive Right of a Woman

In this famous Case *Rex v. Bourne*[3], indicated that "an abortion carried out in good faith to preserve the mother's life was lawful". In *Suchita Srivastava v. State (UT of Chandigarh)*[4], the Apex Court has expressed the view that a woman's right to have a reproductive option is an inseparable part of her personal freedom, as envisaged under Article 21 of the Constitution.

[1] *Available at*: https://www.goodreads.com/author/show/5822446.Robert_J_Spitzer (last visited on Dec 20, 2018).
[2] (1973) 410 U.S. 113.
[3] (1939) 1 K. B. 687.
[4] (2009) 14 SCR 989.

*Chief Justice Balakrishnan* held that "the reproductive choice of the woman should be respected having regard to the mandate of Section 3". In the view of the Court: "There is no doubt that a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India. It is important to recognize that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth control methods such as undergoing sterilization procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a "compelling State interest" in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.[5]

He has the right to his physical integrity. The case, as we find, until the termination of pregnancy is allowed, will be very threatening to the mother's life as well as the birth of the child. Such a situation cannot be considered in court. From the conspiracy of the Supreme Court decisions, it is quite clear that the Supreme Court has narrowed the provisions in Section 5 of the MTP Act, not by adopting the principle of lexical construction, but by adopting the principle of liberal constructive purpose. The Supreme Court has allowed medical termination of consecutive pregnancies that exceeded the 20-week limit, where medical opinion established that continuation of pregnancy caused serious injury to a pregnant woman's mental health or where children were born but there was substantial risk, it would suffer from physical or mental abnormalities such as being severely handicapped. This was even though there was no immediate danger to the expectant mother's life. Therefore, the Supreme Court read the provisions of Section 5 of the MTP Act, which are the contingencies mentioned in clauses (i) and (ii) of Section 3 (2) (b) of the MTP Act, no

[5] *Ibid.*

doubt, satisfaction. The risk involved in spontaneous delivery at the end of the full term of such pregnancies. In *Anuj Garg v. Hotel Assn. of India*[6], the Supreme Court of India, when dealing with the defense of the "purpose of a compelling state", observed that "the level of investigation in such cases" is the ideal threshold for judicial review. The Supreme Court stated that it is to be borne in mind that legislation with clear "protective discrimination", such as this one, possibly acts as a double-edged sword. A strict scrutiny test should be employed assessing the implications of these different types of legislation. Legislation should not only be evaluated on its proposed objectives, but also on the implications and implications. The affected law stereotype suffers from incurable determination of morality and conception of sexual role. The perspective thus exposed is different in content and predominant in means. No law in its ultimate effect should end harassment of women. Personal freedom is a fundamental principle that cannot be compromised in the name of expediency unless there is a compelling state objective. In such cases the high level of inquiry for judicial review is the judicial limit.

### 6.3 Right of Fetus

In *Colautti v. Franklin*[7], the Apex Court repealed a Pennsylvania statute that would require doctors to protect the life of a fetus "both before and after an abortion". It ruled that only the doctor allowed abortion, not the court or legislature, is able to determine the probability. The legislative definitions were unclear. In *Webster v. Reproductive Health Services*[8], the Apex Court upheld a Missouri statute that denied state funding and state employee involvement, counseling for or counseling for abortions, but a fetus at 20$^{th}$ weeks of gestation or older before aborting refused to uphold the provision of the Doctor stow test for feasibility. In Webster, Four Injustice *Roe v. Wade*[9], the Apex Court urges reconsideration. The Supreme Court of America upheld a Missouri Statute which declared that the life of each human being begins at conception and that unborn children have protectable interest in life, health and well-being.

[6] (2008) 3 SCC 1.
[7] (1979) 439 U.S. 379.
[8] (1989) 492 U.S. 490.
[9] *Supra* note 2 at 2.

*Vo v. France*[10], the European Court of Human Rights in Strasbourg has confirmed that 'everyone' in Article 2 ECHR does not include the unborn child. Remarkable though, is that this case was not about whether abortion is compatible with the right to life. In *Tagore v. Tagore*[11], the Supreme Court observed that an infant in womb is a person in existence for the purpose of making a gift to unborn person. In another case, 'the court observed that the term 'person' would include an unborn child in the mother's womb after seven months of pregnancy, that means it is capable of being spoken of as a person, if its body is developed sufficiently. Though in these two cases, the status of personhood granted on the fetus by the court is restricted. In USA, fetus has been considered as a living person in cases of unlawful death and unlawful life cases. In *Commonwealth v. Cass*[12], the Massachusetts Supreme Judicial Court held that fetus was person within the meaning of State vehicular homicide statute. The word 'person' under *Article* 21 of the Constitution has the same meaning as under Indian Penal Code and General Clauses Act. That means fetus is not included under Article 21, so the right to life is not made available to the fetus under our Indian Constitution which has complicated the position of legal status of fetus. Right to life is a right which is available to all persons whether citizens or non-citizens, but what about the fetus? Now, we have discussed the legal status of personhood is not granted to the fetus directly, but some protection is given to an unborn child under certain legislations. In the case of *Nand Kishore Sharma v. Union of India*[13] the Apex Court had to decide the validity of the Medical Termination of Pregnancy Act and the time for the fetus to enter life? In this case the court refused to comment on the cause of the "person" status to the fetus; however, it declared that the Act was valid. In *Mrs. X v.. Union of India*[14], the Supreme Court allowed the termination of a 22-week pregnancy. This was done after being determined by a 7-member medical board that allowing the pregnancy to continue could threaten a woman's physical and mental health. The Court stated that "a woman's right to make reproductive choices is also a dimension of her 'personal freedom' under *Article* 21 of the Constitution and her right to physical honesty allows her to terminate her pregnancy". Similar decisions were passed by the Supreme Court in other cases where the conception was over 20 weeks and the fetus

[10] (2004) ECHR (Appl.No.53924).
[11] (1872) I l A Suppl.47.
[12] (1984) 467 NE 2d 1324 (Mass).
[13] (2006) WLC Raj UC 411.
[14] (2017) W.P. (Civil) No.81.

had various medical conditions and anomalies, resulting in high risk to the fetus and mother. In all these cases, the Supreme Court referred the cases to the Medical Board and gave its decision based on the opinion of the Medical Board. However, in *Savita Sachin Patil v. Union of India*[15], the Apex Court terminated the 27-week pregnancy. The medical board found that there was no physical danger to the mother, but the fetus had severe physical anomalies. The court then did not allow the land to be terminated based on the medical board report. In *Tapasya Umesh Pisal v. Union of India*[16]*, the* Supreme Court in the interests of justice allowed the petitioner to undergo MTP, which was in its twenty-fourth week that "but for a period of time, it appears that the case is less than 3 (2) (B) of the MTP Act." The Medical Board, in the said case, had proposed that if alive, the child would have to undergo several surgeries after birth, which is of high morbidity and Linked to mortality. On the basis of such material, the Supreme Court placed that it would be difficult to deny permission to terminate the pregnancy medically, because it was certain that the fetus was allowed to give birth, there would be a limited life span with severe disabilities that could not be avoided. In *A v. Union of India*[17], the Supreme Court was concerned with pregnancy which proceeded until the 26th or 27th week. Postnatal ultrasonography revealed a single living intrauterine fetus at 26 weeks and/or 7 to 10 days. Anesthetically there was an absence of fetal brain and skull locker. Cardiothoracic surgeons have reported that the fetus has anesthesia and polyhydramnios. He further stated that this discrepancy was not favorable to life. The pediatrician has reported that the survival rate post-delivery was less than 10 to 20%. He adds that most of those who can survive have a severe form of morbidity and hours of birth. The Medical Board/ Committee on Evaluation had reported that continuation of pregnancy could cause serious mental injury to the petitioner and did not involve any additional risk to the life of the petitioner if she could terminate her pregnancy.

In the above circumstances, the Supreme Court allowed termination of pregnancy which was advanced in the 26th or 27th week; however, there was no threat to the life of the petitioner. Termination was allowed on the grounds that the fetus was not in a life-friendly situation, a contingency referred to in clause (ii) of section 3 (2)

[15] (2017) W.P.(Civil) No.121.
[16] (2018) 12 SCC 57.
[17] (2018) 14 SCC 75.

(b) of the MTP Act. Termination was also allowed because the continuation of the pregnancy gave the petitioner a 'serious mental injury', a contingency referred to in clause (i) of section 3 (2) (b) of the MTP Act. The Supreme Court, therefore, reads the provisions of section 5 of the MTP Act, the contingency referred to in clauses (i) and (ii) of section 3 (2) (b) of the MTP Act. In *Mamta Verma v. Union of India and Ors*[18], the Supreme Court concerned a pregnancy that proceeded on the 25th week. The medical board had said that "the patient wants the pregnancy to be terminated as the fetus is unlikely to survive. This is causing extreme mental pain for her. After going through the ultrasonography report, the committee is of the view. That means nothing continue the pregnancy because the fetus which is non-compatible with life and the continuation of the pregnancy is subject to severe mental injury."

The Supreme Court, in the above facts, allowed medical termination of pregnancy by observing as follows:

We have been informed that the fetus is without a skull and therefore will not be able to survive. It is also submitted that the petitioner considers that her fetus is abnormal, and the risk of fetal death is high. She also has the support of her husband in making her decisions. On the evaluation of the petitioner, the above medical board has concluded that her current pregnancy is 25 weeks and 1 day. The condition of the fetus is not favorable to life. Medical evidence clearly states that there is no point in allowing a pregnancy to run its full course because the fetus would not be able to survive outside the uterus without a skull. Crucially, it has been reported that continuation of pregnancy can cause serious mental injury to the petitioner and does not involve any additional risk to the life of the petitioner if she can terminate her pregnancy. In the circumstances, we consider it appropriate in the interests of justice and to allow the petitioner to terminate her pregnancy under the provisions of the Medical Termination of Pregnancy Act, 1971.

In *Mamta Verma*[19], there was no threat to the expectant mother's life. Nevertheless, the termination of pregnancy was permitted primarily on the grounds that the fetus was unlikely to survive and was causing severe mental injury to the expectant mother. This means that the termination of pregnancy was allowed under

[18] (2018) 14 SCC 289.
[19] *Ibid.*

section 5 of the MTP Act by reading into the provisions of section 5 of the MTP Act, the contingencies referred to in clause (i) of sections 3(2) and 3(ii) (b) of the MTP Act.[20] In *Meera Santosh Pal*[21], the Supreme Court allowed an MTP of approximately 24 weeks based on medical pregnancy that the fetus was without a skull and would not be able to survive outside the uterus. The Medical Board was formed specifically for the purpose that continuation of pregnancy could endanger the physical and mental health of the mother. In such circumstances, the Supreme Court, noting that the critical consideration was that 'the right to physical integrity asks her to allow her pregnancy to be terminated allowed the termination of the pregnancy, although it advanced until the 24th week. Mr. *Vagyani and Ms. Kantharia*, the learned governmental party, based on the instructions, have assured this Court that a medical board will be established on a permanent basis in hospitals established or maintained by the Government to the extent possible. In relation to the escalation of such cases and the fact that resolution of such cases is not delayed, we direct the state to permanently establish a medical board in at least one major city in each district of the state of Maharashtra. Such medical boards should be established as soon as possible, if not already established, but in any case, within a period of two to three months from today. To set up such medical boards on a permanent basis, the state will have to constitute a medical board on an ad-hoc basis to examine pregnant mothers. Affidavit of compliance to be filed by Secretary (Health), Government of Maharashtra, on the aspect of establishment of permanent medical boards in each district of Maharashtra State.

In the context of this Court, the Medical Board should examine the pregnant mother as soon as possible and in any case within 72 hours from the date of referral. Thereafter, within a period of 48 hours, the Medical Board should submit a report to this Court in a sealed cover indicating the interim status with reference to the fetal status in the pregnant mother's womb her pregnancy. However, in *Savita Sachin Patil v. Union of India*[22], the Apex Court terminated the 27th week pregnancy. The medical board found that there was no physical danger to the mother, but the fetus had severe physical anomalies. The court then did not allow the land to be terminated based on

[20] *Ibid.*
[21] (2017) W.P. (Civil) No.17.
[22] *Supra* note 15 at 2.

the medical board report. In *Davis v. Davis*[23] the Judge concluded that as a matter of law, human life begins at conception. In *Circulate this Judgment in the Subordinate Judiciary v. State of Gujrat*[24], the High Court observe that:

1. Everyone in the Article 21 of Indian Constitution, 1950.
2. Human life exists in Embryo from the fourteenth day of the Conception.
3. It is the duty of the state to protect and promote the life of the fetus and defend it from unlawful interference by other person.

In *Ms. Chanchala Kumari v. Union of India & Others*[25], the Apex Court ordered multiple medical examinations of the petitioner after the first was not clear, explaining, "The initial report was not specific and thereafter this Court on 18th September 2017 passed the following order…" The Court order for the medical board stated, "When we say medical termination of pregnancy, we mean to convey all the factors including the factor of life of the fetus." In *Maher v. Roe*[26], the Supreme Court held that a woman has at least an equal right to choose to carry her fetus to term as to choose to abort it. In *X v United Kingdom*[27]case, the European Court of Human Rights held that the right to life begins at conception, but itis subject to the implied restriction to permit abortion in order to protect s mother's life of health. In *XYZ v. Union of India and Others*[28], the apex Court held that "If a child is born alive despite attempts at the medical termination of pregnancy, the parents as well as the doctors owe a duty of care to such child. The best interest of the child must be the central consideration in determining how to treat the child. The extreme vulnerability of such child is reason enough to ensure that everything, which is reasonably possible and feasible in the circumstances, must be offered to such child so that it develop into a healthy child."

## 6.4 Right of Abortion

In *Roe v. Wade*[29], this leading case, the Chief Court making Current Abortion Laws in America. In this 1973 decision, the Supreme Court held that women had a

[23] (1989) 15 FLR 2097.
[24] (2018) R/SCR.A/585.
[25] (2017) W.P.(C) 871.
[26] (1977) 432 U.S.464.
[27] (1978) 8416/780 DR 19, 244.
[28] (2019) 3 Bom.(CR) 400.
[29] *Supra* note 2 at 1.

Constitutional Right to abortion, and this right was built on the inherent right to personal privacy arising from the Ninth and Fourteenth Amendments. And the Court held that a fetus is not an individual, but a "Potential life" and thus does not have its own constitutional rights. The Court also established a framework in which the right to protect a woman's abortion and the right to protect her life expectancy: During the first trimester of pregnancy, a woman's right to privacy is strongest and the state cannot regulate abortion for any reason is; During the second trimester, the state can only control abortions to protect a woman's health; During the third trimester, the state may regulate or prohibit abortion to promote its interest in the fetus's potential life, except where abortion is mandatory to preserve the life or health of the woman. In *Doe v. Bolton*[30], *Roe* case was adapted from another case decided on the same day: Doe v. Bolton. The Court said that if the right to abortion cannot be limited by the female state Abortion was done for reasons of maternal health. The Court defined health as "all factors emotional, emotional, psychological, family, and woman's age that are relevant to well-being Patient." This health exception extended the right to abortion to all for whatever reason three trimesters of pregnancy. In *H. v. Norway*[31], the Supreme Court held that a woman has as much special right to abortion as any other drug. The prospective father has no right to consult for the same. In the case of *Babla Rai v State of Chattisgarh*[32], the Apex Court stated that in the result, the case law states that a woman has full right to abortion, and no one can take away this right from her. The judiciary is playing an important role in giving women these rights. The right to abortion is a fundamental right to privacy. The Supreme Court thereafter cited its decision in *Meera Santosh Pal v. Union of India*[33] and the petitioners could undergo medical termination of their pregnancies. In the case of *Shri Bhagwan Katariya and Others v. State of M.P.*[34], the woman was married to Navneet. The applicant is the younger brother of Navneet. After the complainant conceived, the husband and other family members made an exception, took her for an abortion and had an abortion without her consent. In *Sarmishta Chakrabortty and Ors v. Union of India and Ors*[35], the Supreme Court was concerned about a pregnancy that had been

[30] (1973) 410 U.S. 179.
[31] (1992) 73 DR 155.
[32] (1999) Criminal Appeal No.1156.
[33] (2017) 3 SCC 462.
[34] (2001) 4 MPHT 20 CG.
[35] (2018) 13 SCC 339.

progressing beyond about 20th weeks. The medical board had said that the pregnant mother is at risk of serious mental injury if the pregnancy continues. It also stated that if the child is born alive, it requires complicated cardiac corrective surgery by stage after birth. But there is high mortality and morbidity at every stage of this staged surgery.

The Supreme Court, in the above facts, allowed medical termination of pregnancy by observing as follows:

In the instant case, as the Medical Board report, which we have fully produced, clearly shows that the mother will suffer a mental injury if the pregnancy continues and there will be many problems if the child is alive. Furthermore, the Medical Board has clearly concluded that in a particular case of this nature, pregnancy should be allowed to end after 20 weeks. However, in *Tapasya Pisal*[36]**,** austerity grounds, the Supreme Court used the expression "in the interests of justice" in the concluding part of its ruling, suggesting at bar that it was likely a case of the Supreme Court exercising its powers in India. *Article* 142 of the Constitution of India, which undoubtedly has powers, is not with this Court. Therefore, it was suggested that other decisions as to austerity grounds cannot also be considered a binding precedent, especially when it comes to this Court exercising its jurisdiction under *Article* 226 of the Constitution of India.

According to us, there is no basis for such doubt. In the first place, none of the decisions, including the decision in austerity grounds, makes any specific reference to the exercise of powers under *Article* 142 of the Indian Constitution. Secondly, the reference to rulings also does not indicate that the powers under Article 142 of the Constitution were being exercised. Third, the Supreme Court in *Sonali Gaikwad* issued the following important clarifications in its closing paragraph. In *R (Quintavalle) v. Secretary of State for Health*[37]*,* **Lord Bingham** of Cornhill stated that "the basic function of the court is to find out what law the Parliament has made that makes sense. But this is not to say that attention should be limited, and a literal interpretation should be given to particular provisions that give rise to difficulty." Such an approach not only promotes excessive probability in drafting, as the

[36] (2017) W.P.(Civil) No. 635.
[37] (2003) UKHL 13.

draftsman would feel obliged to provide explicitly for every contingency that could possibly arise. This under the banner of allegiance to the will of the Parliament can also lead to desperation of that will, as unjust concentration may lead to the court ignore the purpose which Parliament enacted when it enacted the law. Every statute, other than a pure consolidated statute, is, after all, enacted to make some changes, or to address some problem, or to remove some defect, or to affect some improvement in national life. The function of the court, within the permissible limits of interpretation, is to give effect to the purpose of Parliament. So, the controversial provisions should be read in the context of the statute, and the statute as a whole should be read in the historical context of the situation due to which it was enacted. In *Seaford Court Estates Ltd. v. Asher*[38], **Lord Denning** considered that "a judge, himself believed by the rule that he should look at the language and nothing else, laughed that the draftsman had not provided for this or that, or something or the other is guilty of ambiguity. This would certainly save the judges trouble if the Acts of Parliament were drafted with divine presence and perfect clarity." In the absence of this, when a defect appears a judge cannot simply twist his hands and blame the draftsman. He must work on the constructive task of ascertaining the intent of Parliament, and he must consider not only the language of the law, but also the social conditions which gave rise to it, and the legends were passed to remedy this was, and then he should supplement the written word to give "force and life" to the intent of the legislature. "The mere literal construction of the statute", **Lord Selborne** *in Caledonian Railway v. North British Railway*[39], said that "if the intentions of the legislature were opposed, it should not apply and if the term was sufficiently flexible to be accepted some other constructions by which that intention may be better influenced." One of the rules of interpretation is that the courts are competent, in exceptional circumstances, to give full effect, the meaning of the expression in the statute may be enlarged. The intent of that statute, as manifested by the various provisions contained therein, if the purpose for which the statute is invoked is brought Tit may be prank to him or impose restrictions on it with the intention to curb this. In *Abhiram Singh v. C.D. Commachen*[40], the Supreme Court has held that a conflict between a literal interpretation or a purposeful interpretation of a statute or a provision in a statute is perennial. This can only be dealt with when the

[38] (1949) 2 KB 481 (CA).
[39] (1881) 6 AC 114, 122.
[40] (2017) 2 SCC 629.

draftsman makes a lengthy interpretation of drafting legislation, but this will lead to a strange draft that may well turn out unknowingly. The interpreter has, therefore, to consider not only the text of the law, but also the context in which the law was made and the social context in which the law should be interpreted. The Supreme Court has a sanctioned *R (Quintavel)* case, which observed that the pendulum has moved towards purposeful methods of construction. To put it in *Lord Millet's* words, "Now we are all purposeful builders".

In *Abhiram Singh*[41], the Supreme Court has held that another aspect of purposeful interpretation of a statute is related to social contexts. It has been the subject of consideration and encouragement by the Constitution Bench of this Court in *Union Court of India v. Raghubir Singh*[42] in that decision, this Court approved the idea proposed by the justices. *Julius Stone* and *Dean Roscoe Pound* are of the view that "the law should not remain static but should move with time, keeping in mind the social context." It was said that like all theories developed by man for the regulation of social order, the principle of binding precedent is a restitution of legal, perceptual boundaries in its governance, boundaries that arise in the context of the need for oppression in a changing society. The norms sought by a changed social context. The need to adopt law to new urges in society brings home the truth of *Holmesian aphrodisiacs* that 'the life of the law has not been the argument, it has been the experience', and then when he declared in another study that "the law Always adopting new principles from life" at one end, and "old off" at the other. Clarifying the conceptual import of what *Holmes* had said, *Julius Stone* elaborated "that this was the beginning of new extra-legal proposals emerging from experience to serve on campus, or import competing arguments between existing legal proposals, rather than experience-guided choice between legal propositions, that the development of law is determined the breakfast." In *Raghubir Singh*[43], the Supreme Court further noted that not usually, the nature of things has a gravity-heavy inclination to follow the grooves laid down by the preceding law. Yet a sensitive judicial conscience often persuades the mind to search for a different set of more sensitive criteria for a changed social context. The dilemma before the judge works to find a new balance, which is rarely

[41] *Ibid.*
[42] (1989) 2SCC 754.
[43] *Ibid.*

motivated by the desire to contain opposition to mobility. Competitive goals, according to *Dean Roscoe Pound*, invest the judge with the responsibility to prove to mankind that the law was fixed and fixed, whose authority was beyond question, while at the same time constantly reading it and occasional fanatics enable to create. The change in pressure of infinite and changing human desires. The reconciliation suggested by *Lord Reid* in the "Judge as a Law Maker lies in keeping with both the motives, that the law will be certain, and it will be just and move with time". In *Maganlal Chhaganlal (P) Ltd. v. Municipal Corporation of Greater Bombay*[44], *H.R. Khanna, J.* has observed rather practically that in "life as in law, things are not stable". The law, if it must meet human needs and meet the problems of life, has to adapt itself to deal with new situations. No one is given the gift with foresight to divine all possible human events in advance and write appropriate rules for each of them. However, there are certain definitions that are the essence of the rule of law and no law can afford to do away with them. At the same time, it must be recognized that the process of growth of law is on and one can only dim it at the risk of separating law from life. In *Badshah v. Urmila Badshah Godse*[45], the Supreme Court reaffirmed the need to shape the law according to the changing needs of time and circumstances, stating that the law governs relations between people. It determines the pattern of behavior. It reflects the values of the society. The role of the court is to understand the purpose of law in society and to help law achieve its purpose. But the law of a society is a living organism. It is based on a certain factual and social reality that is constantly changing. Sometimes a change in law precedes social change and is also done to encourage it. In most cases, however, a change in law is the result of a change in social reality. Indeed, when social reality changes, the law also must change. Just as change in social reality is the law of life, similarly accountability for change in social reality is the life of law. It can be said that the history of law is the history of the adoption of law for the changing needs of society. In both constitutional and statutory interpretation, the court must exercise discretion in determining the proper relationship between the subjective and objective purposes of the law.

[44] (1974) 2 SCC 402.
[45] (2014) 1 SCC 188.

In *K.S. Puttuswamy v. Union of India*[46], *Dr. Chandrachud, J.* speaking for a majority of the Supreme Court that "Life is precious in itself. But life is worth living because of freedom which enables every person to live life as he should live. The best decision is given to the person on how to live life. They are consistently shaped by social milestones in which individuals are present. It is the duty of the state to preserve the individual's ability to make decisions of autonomy rather than to decide those decisions. "Life" within the meaning of Article 21 is not limited to the integrity of the physical body." Right makes someone feel in its full sense. That which facilitates the perfection of life is under the protection of the guarantee of life. To live is to live with dignity. The draftsman of the constitution defined his vision of society in which constitutional values would be attained by emphasizing, among other freedoms, liberty and dignity. So fundamental is the dignity that it allows the origin of the rights guaranteed to the individual by Part III. Dignity is the core that unites fundamental rights because fundamental rights seek to achieve the dignity of existence for every person.

Therefore, when it comes to interpreting the expression "life" in section 5 of the MTP Act, we cannot be limited to mere physical existence or mere animal existence or the survival of an expectant mother. Manifestation cannot be confined only to the integrity of the physical body, but it will force it to occur in its entire meaning. The one who facilitates the perfection of life within the security of guarantee of life. The expression would include the right to live with dignity and not only to live with indolence, not to mention the lifelong physical and mental trauma that such episodes always produce. In the aforesaid relationship, we refer to the decision of the Supreme Court in *Parmanand Katara v. Union of India*[47], where it is held that there can be no other opinion that the preservation of human life is paramount. This is because once life is lost; the status quo cannot be restored because resurrection is beyond man's capacity. Article 21 of the constitution places an obligation on the state to preserve life. The provision given in the marks of the rulings was emphasized by this Court and was gradually repeated, exacerbating this situation.

[46] (2017) 10 SCC 1.
[47] (1989) 4 SCC 286.

The Supreme Court has further stated that there is a doctor in the government hospital deployed to fulfill the obligation of this state, so it is obliged to provide medical help to protect life. Every doctor, whether in a government hospital or otherwise, has the professional obligation to extend her services with the appropriate expertise for lifesaving. No law or state action can interfere with members of the medical profession to avoid delay the discharge of paramount liability. The obligation is absolute, absolute and paramount, the rules of procedure whether those in law or otherwise interfering with the discharge of this obligation cannot be upheld and, therefore, they must give way. As far as this duty of the medical profession is concerned, it is a duty associated with human instinct and hence, it needs neither a decision nor a code for compliance. In any case, item 13 of the Medical Code of Conduct prepared by the Medical Council of India specifically provides for this. In *Janak Ramsang Hanzariya v. State of Gujarat*[48], the High Court examined the MTP Act and jurisprudence and held that to preserve the "right to life and liberty which includes right to live with dignity under Article 21 of the Constitution," the Sessions Judges' order refusing the termination should be set aside because "the Court below failed to appreciate the fact about continuance of pregnancy would cause and constitute a grave injury to the mental health of the pregnant woman coupled with the fact that bearing and rearing of a child in the womb would create a great mental agony of the victim for her entire life and may invite other socio-economic problems." Furthermore, the High Court distinguished the facts in the current case from Srivastava because here the rape survivor wanted a termination. The High Court ordered a government hospital to conduct the testing and termination as per the MTP Act. The High Court held that a women's fundamental right to make reproductive choices is an essential component of their rights to privacy, dignity, and bodily integrity. In *A v. Union of India*[49], the Supreme Court "permitted termination" in a case where the Gestation age was 25-26 weeks. In *Neethu Narendran v. State of Kerala*[50], the High Court "permitted for termination of Pregnancy" when gestation age crossed 23 weeks.

## 6.5 Right of Safe Abortion

[48] (2010) Crim. App.702.
[49] (2018) 4 SCC 75.
[50] (2020) 3 KHC 157.

In *Rex v. Bourne*[51], this famous Case, indicated that an abortion carried out in good faith to preserve the mother's life was lawful. In the leading case of *Morgentalor Smoling and Scott v. R*[52], the Apex Court considered the physical safety of the pregnant woman. The country's criminal code is required for a pregnant woman who wanted an abortion to apply to a medical committee, which caused delays. The Supreme Court found that the process attacked the guarantee of a person's safety. This subjected the pregnant woman to psychological stress. In *Maher v. Roe*[53], the Apex Court held that a state "has the right to determine the price in favor of the birth of a child on abortion and to write that decision by allocation of public funds." Therefore, it may refuse to pay for a nonmedical abortion, even if it funds medical expenses related to conception and delivery under the state's Medicaid program. In *Harris v. McRae*[54] the Apex Court upheld the federal "Hyde Amendment", which then halted the lack of funding for only those abortions because the mother's life was in danger, assuming that there is no constitutional right to abortion at public expense for a woman. Since 1994, the *Hyde Amendment* has allowed funding for abortions where the pregnancy was the result of rape or incest. In *Thornburgh v. American College of Obstetricians and Gynecologists*[55], the Apex Court invalidated a Pennsylvania statute that required, inter alia, consenting development, abortion options, and medical risks of abortion, reporting abortions and using a method of abortion by a physician the requirement is most likely. In *Rust v. Sullivan*[56], The Court upholds federal rules prohibiting family planning clinics that are receiving Title X funding in consultation or refer clients for abortions. In *Hill v. Colorado*[57], Colorado law prohibited pavement counseling within 100 feet of a "health care facility", including an abortion clinic, making it illegal for a person to approach within 8 feet, educate, show a sign or Passing a sheet. In a complete reversal of First Amendment case law, the constitutional was found to protect the audience from unsolicited communication, being content neutral and a reasonable restriction on time, place, and manner. In *Stenberg v. Carhart*[58], the Apex Court ruled Nebraska's ban on partial abortion. The

[51] (1939) 1 K.B. 687.
[52] (1988) 1 SCR 30.
[53] (1979) 432 U.S. 464.
[54] (1980) 448 U.S. 297.
[55] (1986) 476 U.S. 747.
[56] (1991) 500 U.S. 173.
[57] (2000) 530 U.S. 703.
[58] (2000) 530 U.S. 914.

court cited two grounds for violating Nebraska's law and, according to more than two dozen similar state statutes: the lack of an exception to the ban for "mother's health" and because the court found it partial the birth abortion process to be "unclear" and potentially including other mid and late abortion procedures. In *Nikita Mehta case***,** is aware of a woman being pregnant for twenty-five weeks that can paralyze the baby and the doctor has indicated a hole in the children's heart. But Indian law does not allow abortion after twenty weeks, body parts develop in their shape, so it is also considered cruel by the society. Nikita Mehta and her husband approached the court seeking permission for abortion, but the petition was rejected as the court showed an inability to amend the laws as its job is to pass orders only. If this order were passed, it would have brought a huge change in the legal system as well as the world of medical history. Now is the time to think.

If we consider this issue deeply, we are unable to blame anyone. If we look at the law, it is correct because there are not many serious issues that anyone can approach. If we look at society, the rising rate of life in relationships and escalating conflicts in married relationships can have consequences and, finally, if we see depressed couples facing Nikita and Haresh, they do not even seem to there are defaulters. In *Sonali Kiran Gaikwad v. Union of India*[59], the Supreme Court the case where the pregnancy had extended beyond twenty-eight weeks. The Medical Board, which was constituted, examined the mother and indicated severe fetal abnormalities, substantial risk of severe physical obstruction and a high probability of morbidity and death in the new birth. However, the mother's life was not in any danger, as the report indicated that the termination was not more dangerous than spontaneous delivery, the Supreme Court stated that "continuing the pregnancy would cause more mental anguish to the petitioners". In *X and ors. v. Union of India and ors*[60], the Supreme Court was concerned with a pregnancy that proceeded on the 24$^{th}$week. The Medical Board was formed, stating that the fetal position outside the womb was inconsistent with extra uterine life, as pulmonary hypoplasia results from prolonged absence of amniotic fluid, which is severe respiration of insufficiency at birth. This was primarily a case in which there was a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be severely impaired. Nevertheless,

[59] (2017) W.P. (C) No. 928.
[60] (2017) 3 SCC 458.

the Supreme Court cited dictatorship in *Suchita Srivastava v. Chandigarh Administration*[61], stating that a woman's right to make reproductive choices is also a dimension of 'personal freedom' as in Article 21 of the Constitution Understood, allows termination of pregnancy by looking at the expectant mother as follows:

Although petitioner's current pregnancy is approximately 24 weeks and there is a risk of life and death of the fetus outside the womb, we consider it appropriate to allow petitioner to terminate her pregnancy under the provisions of the Medical Termination of Pregnancy Act, 1971. In *Sarmishta Chakrabortty and Ors v. Union of India and Ors*[62], the Supreme Court concerned a pregnancy that had progressed beyond 20 weeks. The medical board had said that the pregnant mother is at risk of serious mental injury if the pregnancy continues. It also stated that if the child is born alive, it requires complicated cardiac corrective surgery by stage after birth. But there is high mortality and morbidity at every stage of this staged surgery. In *Laxmi Mandal v. Deen Dayal Hari Nagar Hospital*[63], the Delhi High Court ruled that preventable maternal death represents a violation of Article 21 of the Constitution. The High Court required the NCT of Delhi to implement the service guarantees in the National Rural Health Mission, including safe abortion services, to prevent maternal deaths. This landmark judgment created a state obligation to take steps to end preventable maternal death, including deaths caused as a result of inadequate access to safe abortion.

### 6.6 Right of Abortion of Rape Victim

In *Dr. Rajeshwari v. State of Tamil Nadu*[64], the Court held that 18-year-old unmarried girl from Tamil Nadu, who is praying to issue a direction to terminate the child's pregnancy in her womb, on the basis that the child's unwanted pregnancy had the effect of three months. Made mentally ill and the continuation of the pregnancy caused a lot of pain in her mind, resulting in severe injury to her mental health, because the womb arrangement was due to rape. The court allowed the termination of pregnancy. In case of *Dr. Nisha Malviya and Others. v. State of M.P.*[65], the Apex

[61] (2009) Civil Appeal No.5845.
[62] (2018) 13 SCC 339.
[63] (2008) W.P.(C) NO.8853.
[64] (1996) Cri LJ 3795.
[65] (2000) Cri LJ 671.

Court held that the accused had raped a minor girl of around twelve years and made her pregnant. It is alleged that two other co-accused took the girl, and they terminated her pregnancy. So, the accusation on them firstly leads to an abortion without the consent of the girl. The court convicted all three accused for termination of pregnancy, which was not agreed to by the mother or the girl. In, *Murugan Nayakkar v. Union of India & Ors*[66], the apex court allowed the termination of the 32-week-old pregnancy of a 13-year-old rape victim, "given the age of the petitioner, the sexual abuse she suffered due to her and the constitution by this court" On top of all the reports of the Medical Board and going through that suffering, we consider it appropriate that pregnancy should be allowed to end. In *Alakh Alok Srivastava v. Union of India*[67], where the petitioner did not allow termination, along with a 32-week pregnancy with a 10-year-old pregnant rape victim. The Medical Board stated that continuation of pregnancy was no less dangerous for the petitioner than termination at that level. During the proceedings, the Court directed the Center to set up permanent medical boards in the states, to expeditiously examine the termination requests after 20 weeks of pregnancy and the Center issued instructions for the same. In the High Court of Gujarat, *Aastanaben Sattarbhai Jumabhai v. State of Gujarat*[68], the Court evaluates medical opinion and weighs the societal circumstances per the "victim's best interest" test developed by the Supreme Court in *Chandrakant Jayantilal Suthar* as per the Supreme Court's *Srivastava* judgment, the Court ensured that the survivor here consented to the abortion. Satisfied on all counts, the Court found that this pregnancy would cause mental anguish for the survivor per Section 3 of the MTP Act and ordered a government hospital to terminate the pregnancy. The law does not allow abortions after twenty weeks. In a recent case, a couple had approached the court seeking permission to abort their child as she had a hole in her heart. The petition was dismissed by the court for its inability to amend the laws. In fact *Z v. State of Bihar*[69], the Supreme Court dismissed the writ petition by the High Court seeking permission to terminate her pregnancy, which was advanced on the 23rd or 24th week on that basis. She was a rape victim and was also found to be HIV positive. The High Court had refused permission for medical termination of pregnancy, relying on the principles "parens-patriae" and "forced state interest" which had by then

[66] (2017) W.P. (C) No.749.
[67] (2017) W.P. (C) No.565.
[68] (2016) R. SCR. A 1084.
[69] (2017) 11 SCC 572.

advanced to the 23rd or 24th week. However, the Supreme Court hit back at the High Court, terming the approach of the High Court as "completely wrong". In *Mehmood Nayyar Azam v. State of Chhattisgarh*[70], the Court has observed that the word "in its malicious concept includes mental and psychological oppression". It has the potential to create a crisis and affects the dignity of a citizen. Under the current Act, the appellant is covered. In such a situation, there was no justification for pushing him back into the dark to push his rights back and endangering his self-respect and personal concerns. She had decided to exercise her statutory right, being a victim of rape, more so as not to bear a child, so that when the child was more likely to suffer from HIV positive, state officials were more equipped Should have assisted the appellant instead of laying the procedure. Further, as seen, the state in a way fought the case before the High Court on the foundation of state interest. The principle of state interest is not applicable at all to the present case. Therefore, the concept of grant of compensation under a public law measure emerges. In Delhi High Court, *Km. Mahima v. State & Others*[71], the High Court agreed with the Magistrate's decision regarding "permission" for an abortion. However, the High Court found fault with the Magistrate's refusal to hear the woman's arguments regarding preservation of evidence. The Court stated, "merely by saying that the petitioner has an independent right of getting her pregnancy terminated was not sufficient as her main object was not only to get her pregnancy terminated but also preserve the fetus for conducting DNA test. The time wasted in not giving such direction by the Courts below may cause a situation resulting in injury to the mental health of the complainant as the termination of the pregnancy exceeding 20 weeks may prove dangerous to her life because of which she would suffer the mental agony and torture of giving birth to a child of rape". In *Kamla Devi v. State of Haryana & Others*[72], the High Court expresses its extreme frustration with the state authorities for repeatedly forcing minor rape survivors to petition the High Court for termination. The Court stated, "Even apart from a direction that the order of this Court should be circulated to all the jurisdictional police to assist a victim of rape in securing an immediate attention for medical termination of pregnancy, if a petition seeking for termination of pregnancy is filed, the matter does not appear to have sunk in the manner that it should have been

[70] (2012) 8 SCC 1.
[71] (2003) VIAD Delhi 510, 106 DLT 143.
[72] (2015) WP (C) 2007.

done. There is an urgent call to the police operating within the State of Punjab and Haryana to sensitize the investigating officers to play a positive role and secure full emotional support to relieve the trauma for a rape survivor the victim. exhortation of Court falls on deaf ears and this is yet another case which spells out utter insensitivity to respond to the wailings of a woman who is already traumatized by the act of rape on her. In *Vijender v. State of Haryana & Others*[73], the Apex Court stated that "It was, no doubt, not necessary for the petitioner to apply to the Court for permission. All the law requires in a case where a person is a victim of rape is to secure the decision of two doctors committee if the pregnancy is more than 12 weeks." Further, it held that "A rape victim shall not be further traumatized by putting through a needless process of approaching courts for taking permission. The Medical Termination of Pregnancy Act does not contemplate such a procedure at all and the medical personnel before whom the person shows up is bound to respond to an information regarding the complaint of rape...the medical personnel will take the decision regarding the termination and carry out the procedure." In *Kavita v. State of Haryana & Others*[74], the Court did not allow for the abortion, but did express its great sympathy for the rape survivor. In the light of this forced pregnancy, the Court ordered the hospital to provide her with a private room, free health care, mental health care services, and Rs. 2 lakhs to support her child. In recent judgment *ABC v. State of Kerala*[75], the High Court of Kerala "allowed for the Medical Termination" of a 23 weeks pregnant "minor rape victim". The Court recorded that continuation of Pregnancy is contrary to the safely and interests of the victim, who is only 15 years old. *Justice P.V. Asha* held that "as per section 5 of the Medical Termination of Pregnancy Act, 1971 it is allowed to terminate pregnancy beyond the gestation period of 20 weeks". Where it is necessary to save the life of the pregnant woman. In *Jyoti v. Government of NCT of Delhi*[76], the Delhi High Court recent judgement on Jan 4, 2021 allowed a woman's plea for medical termination of her 25 weeks pregnancy, taking note of a report by AIIMS that survival of the fetus, suffering from serious abnormalities, was unlikely. *Justice Navin Chawla* said, "I see no reason to deny permission for medical termination of pregnancy. The petition is therefore allowed."

[73] (2014) W.P. (C) 20783.
[74] (2015) LP Appeal No.538.
[75] (2020) W.P. (C) No.29209.
[76] (2020) W.P. (C) No.11248.

Thus, we see that the decisions of the Court depend on the recommendations of the Medical Board. This is the conclusion of the Medical Board on the continuation and termination of pregnancy, which becomes the determining factor for the court rather than the reproductive rights of the woman. Therefore, we need to ask the question whether the courts should be completely dependent on MBR? While medical boards can determine a woman's physical health, can it determine a woman's mental health and the conditions she may need to end her pregnancy? Ultimately the right to terminate a pregnancy should not be determined by the woman if her reproductive autonomy is to be protected?

### 6.7 Second Trimester Abortion

In *City of Akron v. Akron Center for Reproductive Health*[77], the Court has invalidated consent requirements that include information about abortion, fetal development, options for abortion, and a 24-hour waiting period. There were also provisions relating to parental consent without judicial bypass, provisions requiring abortions in hospitals only after the first trimester, and a requirement to be dealt with in a more "humane and sanitary" manner. In *Planned Parenthood of Southeastern Pa. v. Casey*[78], the Court stated that states may require parental consent for a minor's abortion (if a judicial post is available), require a waiting period between seeking and receiving an abortion, and abortion detailed "informed consent" is required, including medical information about. State does not require a signed statement from the woman she gave notice to her husband, if any, and before the procedure. Casey abandoned the trimester framework, substituting it with pre-post-feasibility tests for constitutionalism. *Roe* was reaffirmed-though "liberty" "let the decision go" based on the decision to stare based on alleged constitutional interest in place of "privacy", avoiding the appearance that the courts were vulnerable to political pressure was, and because they organized their organization intimate relationships and such choices, which define themselves… by failing to inconsistency on the availability of abortion in contraception of the event education should Four justices dissolved with "Casey's reevaluation of Roe". In *Sonali Kiran Gaikwad v. Union of India*[79], the Supreme Court, before this was the case where the pregnancy extended beyond twenty-eight

[77] (1983) 462 U.S. 416.
[78] (1992) 505 U.S. 833.
[79] (2017) SCC 928.

weeks. The Medical Board, which was constituted, examined the mother and indicated severe fetal abnormalities, substantial risk of severe physical obstruction and a high probability of morbidity and death in the new birth. However, the mother's life was not in any danger, as the report indicated that the termination was not more dangerous than spontaneous delivery, the Supreme Court held that "... Continuing the pregnancy would cause more mental anguish to the petitioners".

In such cases the writ petition, along with the proof of identity, should disclose the details of the petitioner. Other details such as medical termination of pregnancy in the petition consent for termination of pregnancy and request for hospital/clinic at which the termination is proposed to be taken and, in such cases, may be necessary. If the pregnant mother is a minor or mentally ill person, then the petition can always be filed through her guardian. Such a parent will have to comply with the requirements in Section 3 (4) of the MTP Act.

The expectant mother will then be sent for examination by a medical board, which should not include, but is not limited to, doctors of the following departments, other than the registered medical practitioners:

a. Obstetrics and Gynecology
b. Pediatrics
c. Psychiatry / Psychology
d. Radiology / Radio diagnosis / Sonography
e. The field of medicine related to the disease in which the fetus can be diagnosed.

### 6.8 Minors Abortion

In *Planned Parenthood v. Danforth*[80], the Apex Court invalidated sweeping parts of Missouri's abortion law, including expelling abortion by saline injection, allowing a married woman to seek her husband's consent before an abortion, and parents before an abortion Consent is required, in which an abortion may occur on their minor daughter. The court allowed in principle, but without explanation, the requirement for informed consent. In *H.L. v. Matheson*[81], the Court upheld a statute

[80] (1976) 428 U.S. 52.
[81] (1981) 450 U.S. 398.

requiring the doctor performing the abortion to notify one parent of a minor girl who is living at home with her parents, provided judicial bypass is available. In *V. Krishnan v. G. Rajan Alias Madipu Rajan & Others*[82], the Court said that for abortion, although parental consent is necessary, consent of minors is also important and should be taken. After making a strong case against abortion under any circumstances, the High Court held that women under 18 years must consent to termination of pregnancy and that this case represents an exception to the presumption of mental anguish caused by pregnancy in Explanation 1, Section 3 of the MTP Act. In case of *Dr. Nisha Malviya and Others v. State of M.P*.[83], the Apex Court held that the accused had raped a minor girl of around twelve years and made her pregnant. It is alleged that two other co-accused took the girl, and they terminated her pregnancy. So, the accusation on them firstly leads to an abortion without the consent of the girl. The court convicted all three accused for termination of pregnancy, which was not agreed to by the mother or the girl. In *Independent Thought v. Union of India*[84], the Supreme Court was considering a challenge to the exception- since Section 375(rape) of the IPC, the exception undermined the sexual relationship between a male and his minor wife (a girl aged 15 to 18 years). One of the defenses raised by the Union of India was "compelling state interest". It was elaborated by insisting that otherwise, the 'institution of marriage' could be destroyed. The Supreme Court emphatically rejected such a defense that early marriage snatches a girl's self-esteem and confidence and, in a sense, incites her to sexual abuse. Such a marriage severely reduces the reproductive choices of such a married girl however, documentary material suggests that girls are more likely to die during childbirth and more likely to die of a newborn. The Supreme Court also stated that the law can be fairly and reasonable at the time of enactment and that due to lack of time and/ or change of circumstances the principle of equality can be arbitrary, unfair and violent and irrespective of validity Such laws may be held at the time given above, the court may later be in litigation, strike under the same if it is found that the justification of the classification non-existent. Hence there is no doubt that the effect and effect of exception 2 of Section 375 of the IPC is considered not with the days being considered but with the social realities of today. Accepted traditions are not cast in

[82] (1994) (1) Mad LW(Cri)16.
[83] (2000) Cri. L J 671.
[84] (2017) 10 SCC 800.

stone at some historical points. If times and conditions change, then ideas, traditions and traditions should occur. In *Chandrakant Jayantilal Suthar & Others v. State of Gujarat*[85] the Supreme Court reviewed the medical opinion and allowed for termination if the girl consented. However, the Court noted that this was a particularly difficult decision because "Whatever be the circumstances in which the child was conceived, whatever the trauma of the young mother, the fact remains that the child is also not to blame for being conceived."

### 6.9 Right to Privacy

The concept of Privacy quickly changed form, however. In the case of *Eisenstadt v. Baird*[86], the Apex Court struck down a Massachusetts ban on the sale of contraceptives. Eisenstadt read Griswold to establish a right to contraception, and then ruled that the right must extend to unmarried persons as well. "If the Right to Privacy means anything, the Court wrote, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. But in India the Supreme Court has said that the right to privacy enshrined in Article 21 of the Constitution and the right to abortion can be read from this right. There are various High Court and Supreme Court decisions like *Nihal v. Chand Bhagwan Def*[87] or *Kharak Singh v. State of U.P*[88] and *Gobind v. State of M.P*.[89] where the Apex Court showed its awareness of 'individual autonomy' to be of central concern of any system of limited government. The court also held that the 'concept of privacy' must be based on a fundamental right implicit in the concept of liberty. The Supreme Court after referring to the views of American judges on privacy observed that as such our Constitution does not confer any right to privacy but recognized that an unauthorized intrusion into persons home and disturbance caused to him thereby is as it were the violation of Common Law rights of man, an ultimate essential of ordered liberty, if not of the very concept of civilization.' Of course, the right is not absolute, the Court accepts the right to privacy encompassing and protecting the personal intimacies of the family, marriage, motherhood, procreation and childbearing. International peace

[85] (2015) SLP Criminal 6013.
[86] (1972) 405 U.S. 438.
[87] AIR 1935 All 1002.
[88] AIR 1963 SC 1275.
[89] AIR 1975 SC 1378.

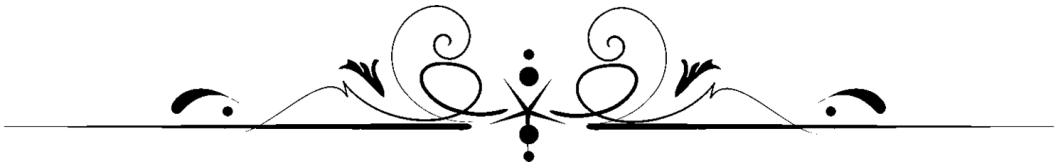
and security are recognized goals of the world community. *Eistenstadt v. Baird*[90] by the United States Supreme Court that "if the right to privacy means anything, it is the right of an individual married or single to befree from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether in the judiciary or in the legal fraternity".

**6.10 Conclusion**

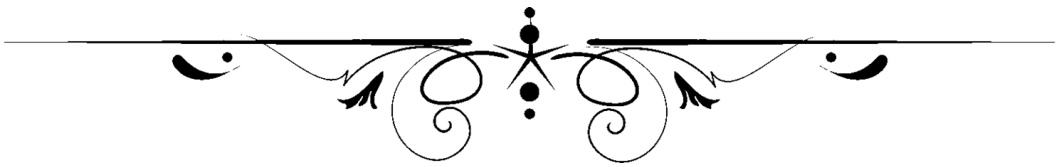
After discussion on the above matters we reach to the conclusion that the problem of abortion is very widespread. The MTP Act requires extensive reform, extending the abortion period to more than 20 weeks, and providing requirements for the same. Now, in setting up a medical board, it is necessary for the board to have guidelines, as the board has different views on recommending termination. In many cases difficult questions about the inability of the fetus and disqualify a woman's rights to reproductive autonomy and her rights to disability have been discussed. These are difficult issues and certainly cannot be resolved by relying on medical board reports. They need to talk about abortion after 20 weeks which puts women's choice at the forefront and needs to formulate specific legislation and procedure that supports women's reproductive choices. In the last few years, the Supreme Court has passed several decisions on reproductive rights. The MTP Act provides that a pregnancy may be terminated by a registered medical practitioner up to the 20$^{th}$ week of pregnancy, upon confirmation that the continuation of the pregnancy will either be a risk to the woman's life or gravely injurious to her physical or mental health or if there is substantial risk that the child may have serious physical or mental abnormalities when born. Pregnancy caused by rape or due to the failure of contraceptives would constitute grave mental health injury. Section 5 allows the termination of pregnancy beyond 20 weeks if it is immediately necessary to save the woman's life. In all cases of abortion after 20 weeks that have come before the Court, the Court constitutes a Medical Board, an expert committee of medical professionals that produces a report. The Report addresses whether, first, the continuation of pregnancy would cause grave physical or mental injury to the woman and, second, whether the child born would suffer from any mental or physical disabilities. Recently, Medical termination of Pregnancy (Amendment) Bill, 2020 have come. In

[90] *Supra* note 86 at 3.

this bill aforesaid problem in relation to time period extended from Twenty to Twenty-Four week. Most of cases in India have come from this side in The Supreme Court as well as the High Court also.



# Chapter Seventh
# Conclusion and Suggestions



# *Chapter Seventh*

# *Conclusion and Suggestions*

*"I contemplate the biggest destroyer of peace today is 'Abortion', because it is a war against the child ...the direct murder of the innocent child, the 'Murder' by the mother herself ... and if we can accept that a Mother can kill her own child too, how can we tell other people not to kill each other? How do we convince a woman not to have an abortion? As always, we must persuade her with love… and we remind ourselves that love means being ready until he hurts.."*

*— Mother Teresa*

My concluding overview on this topic is that from the primitive society to recent time many laws available in favor of Mother but there is no specific law for fetus and his life. Because importance of fetus is not necessary in current scenario in India and all over world. And there are so many guidelines for safe abortion, but death rate is increasing day by day cause unsafe abortion. The state should make specific Law in this issue for betterment of our society. Mother have a right to choose because mother body is own body, she can choose her right. But our MTP act says that mother have not a right to choose for her own body. Because self-determination and Autonomy is a personal right of woman, it should be available in every stage. Due to unsafe abortion many women have died with maternal death. So, we should apply better process for safe abortion like surgical abortion process. We should be aware of poor woman for matter of abortion law. Government should make rule and regulation for betterment of improvement in this matter. It is can be in medium of awareness Campaign. We should follow rule and regulation from International Convention and treaty also. There are so many Convention relating to woman and Right to life.

Unsafe abortion is a major and preventable cause of maternal death and ill health, which adversely affects poor, under-educated, rural and young women in low and middle income countries. Circumstances that facilitate unsafe abortions in a context-including legal restrictions, poor access to contraceptives, unavailable or poor-quality health services, and social stigma, regarding and fulfilling their

reproductive intentions on women's rights Includes informed and independent decision making. To achieve the Sustainable Development Goals related to women's health and gender quality, reducing the number of unsafe abortions globally is essential. Therefore, despite its challenges of measuring unsafe abortion, it is necessary to understand the magnitude of this problem and monitor progress at the global, national and sub-national levels.

From the Indian point of view, we find that our MTP Act, 1971 has not resolved such problem properly. Medical practitioners are solely in charge of the termination of pregnancy. The MTP Act does not allow termination for a period of 20 to 24 weeks. The judiciary has faced a lot of problems in recent times. After that the new amendment in Medical Termination of Pregnancy (Amendment) Bill, 2020 has come in the Parliament, but it is pending in the House of Parliament. Special provisions should be mentioned in the act that abortion should be easy with a safe procedure. In the abnormality of a fetal case, there is no law and regulation for the elimination of women's mental health.

The prevalence of the population problem will require greater cooperation between policy makers and social scientists than is currently happening. These efforts will require greater use of reproductive studies and similar research in the formulation of the requisite research "supply" and "demand" laws. If abortion laws are right to free women, these standards should be more comfortable than those socio-economic norms explicitly stated in the MTP Act. To safeguard the success of the law, a lot of financial provisions should be made by the Government of India. Education and communication must be established on a large scale to extend the benefits of the law to all areas of society. Finally, to encourage women to have abortions and to encourage doctors to perform these operations, the MTP Act must provide greater incentives. Greater governmental and collective organizational efforts can, over time, change the current social climate and ensure eventual acceptance of the abortion process in India. It remains to be seen whether such efforts will be undertaken. In general, the contribution of lawyers and legal scholars to the design and evaluation of population policies should be encouraged and strengthened through new programs in legal education. The emphasis in such programs should be on the one hand on the development of skills in methods of policy analysis, for example, planning techniques

that facilitate the forecasting of the results of legal proposals; And on the other hand skills in the contribution and use of empirical research in social sciences that investigates policy issues. In the discussion of population studies in India, *Clarence Dias* recently concluded: "The legal profession in India should also help implement the types of socio-social studies that are required before social legislation can be enacted". The research reported in this discussion has given hope for this goal and future work of a similar nature.

It may be significant that under the Convention on the Rights of the Child the description of the "child" rights of the unborn is indistinguishable. The decision of the Supreme Court of Roe v. Wade, regarding the granting of fetal rights under the Constitution of the United States is very significant. The United States makes it clear that the Fourteenth Amendment right is not up to a fetus, but the perception is a "compelling state" to protect the future baby's life as well as the pregnant woman's health after a certain point in pregnancy "Recognizes interest." Moreover, the law should be narrowly changed so that it minimizes the burden and interference of restricted rights.

Though, the law of India fluctuates from the law predominant in the United States, observing that the rights under Article 21 extends to the unborn fetus, which is subject to the rights of the pregnant woman. The law is also conflicting because law in the United States allows state intervention only after the point of vention is of compelling interest. Till then, the woman's right to take decisions in matters associated to childbirth is absolute. However, the right to comprehend a woman is forbidden under the Medical Termination of Pregnancy Act, 1971 and Prevention and the Pre-Natal Diagnostic Techniques (Prohibition of Sex-Selection) Act, 1994. The Parliament give the impression to have included MTPA in the exercise of its legislative jurisdiction under the concurrent list. In terms of bile and substance, the MTPA amends the provisions of the Indian Penal Code relating to abortion. Consequently, a challenge to its constitutionality based on a lack of legislative competence cannot be judicially upheld, although it affects public health that falls within the legislative sphere of states. The study suggests that the close cooperation and coordination between the Union and the states that existed at the beginning of the abortion law will continue in the implementation of the MTPA. The central

government has formulated rules under the MTPA and has also issued model rules to guide the states. Some states have started implementing the MTPA, but some are yet to be introduced. Till now the impact of the legislation is felt only in urban areas. This is understandable as there is a lack of basic minimum of statutory medical requirements for performing abortions in rural areas. To furnish to the needs of rural areas, the district headquarters government hospitals should be adequately equipped in terms of equipment and qualified personnel. This requires finances that states alone may not be able to provide. Therefore, the union should aid in the form of statutory grants under Article 275 and plan assistance in the form of centrally sponsored schemes with central monitoring that the funds are purposefully used and not sent to other heads of expenditure goes. It is necessary to ensure that legal abortions are performed in safer and more hygienic conditions than illegal ones.

Absolute justification of abortion which is an extreme form of social approval is not possible at the present time. Women's attitudes toward abortion reflect complex personal and moral choices with social stigma within which abortion decisions are made. To develop a pro-opt approach, life skills education for women, identifying safe spaces in which they can build social networks, and social support among peers, and question community stereotypes are needed. Creating a supportive family environment, sensitizing young men through widespread awareness campaigns and advocacy through health care providers can create a supportive attitude to abortion when needed.

Before concluding, it would be relevant to understand the basic motive behind making laws regarding abortion. One might say that the most important objective is to provide quality abortion care to all women, which is sensitive to their needs by increasing aspects such as easy access and affordability to safe abortion services. This can be done by mobilizing human, financial and material resources for the provision of care and protection in abortion procedures and increasing the number of trained persons and equipped abortion centers. Also increased efficiency and broadened ambition by integrating abortion services into primary and community health centers, increased investment in public facilities, broadening the base of abortion providers by training paramedics to perform first-quarter abortions created, simplified registration procedures, policy with linked up-to-date technology, legalizing abortion through the

MTP Act in India, addressing the need for appropriate post-abortion care in India, What was done in 1971 has not generated the expected results. Notwithstanding the existence of liberal policies, most women still choice to unsafe abortions. This donates significantly to maternal morbidity and mortality burden. The MTP Act now has an explanation in Section 3 asserting that termination for rape and contraceptive failure is acceptable because the suffering caused by each "reasons grave injury to her physical or mental health". The MTP Act should identify that a diagnosis of fetal encumbrance can cause serious injury to mental health and that such exceptions should exist during the entire pregnancy period as some fetal differences can be determined as early as the $20^{th}$ week can be detected within Pregnancy. The great Tamil *Saint Thiruvalluvar* said, "Children's touch is the joy of the body, the joy of the ear is the hearing of their speech". It is a natural duty of the mother to give the best to her children. Though, sometimes she is involved in activities that wounded the fetus. This may be outstanding to lack of information, negligence, or sometimes conscious acts. Abortion comprises various social, moral and fiscal issues. Therefore, the mother's right to terminate the pregnancy is imperfect. It is on the bears of the law to take care of the freedom and freedom of the mother as well as the life of the unborn. The medical community and civilization need to offer love and support to women with unintended gestations and help find genetic substitutions for abortions.

In India, although the laws recognize the existence of an unborn person as a legal person, they do not give rights until the birth of a child and can intervene only after the state has attained birth viability. Crimes against an unborn child are not recognized in this way and therefore make punishment impossible. For example, threatening death and even serious injury to a fetus is not a crime. The Constitution of India, 1950 has recognized the right to life in Article 21. Recognition has been given in many cases from *Maneka Gandhi* to *Francis Correlli*. There is no fundamental right to be born, although we can interpret it under Article 21. But it is hardly available for the unwanted girl. Although the right of girls can be interpreted from Article 21 of the Constitution, it can be interpreted in a comprehensive manner and should be inferred as (1). The right to be born and not only to have an abortion because she is a girl. (2). Right to survive after birth and to be killed at any moment after birth and (3). The right of the girl child, her body, the right to childhood and the right to a healthy family environment, which she is not able to bear. Apart from the

birth right, it is reiterated that together an unborn child has the right to healthy development in an illiterate environment. Regarding the rights of the unborn child within the purview of the trunks, the Civil Appreciation Disability (Civil Liability) Act, 1976 was passed by the British Parliament which may provide for action against a person or authority. Instead of blaming each other, we should take quick initiative without loss of time. Change must begin within each of us. Let bygones be bygones. The mistakes made by our ancestors should not be repeated by the present generation. Most of us and future parents are, and we have a responsibility to maintain balance with our society. At last, this research would like to be seen with a saying which was aptly pronounced by *Manusmriti*, the great sacred, the very first Smriti writer of Hindus "*Yatra Naryaste Pujante, Ramante Tatra Devta"*, which denotes that where ever women are worshipped and womanhood is honored, respected there the God resides, settles perpetually; and where the women are insulted, dishonored, degraded, battered and beaten cruelly, or harassed God does not come, and saintly moves away. Men cannot do anything without women. They need a mother to feed them, a sister to play with, in their youth seek a ladylove for romance, a wife to have a family with, but they do not expected a daughter born to them. These double standards and ingrained hypocrisy have made the girl child more vulnerable demographically and culturally as well. Men cannot do without women. These double standards and ingrained hypocrisy have made the girl child more vulnerable demographically and culturally as well. The son has an important place in Indian laws pertaining to inheritance and succession. Indian laws do not entitle an after-born son to reopen the position if he has got his share. If the father gets his share, the son becomes a coparcener with the father. He can entitlement his father's segment as well as his father's dispersed property. A child, who is born after the partition of the joint family, is not to be counted as a member of the joint family. The moment when you meet that one person that steals your heart. The first kiss, the first intimate moment when two bodies coming together in the procreation of another human being. Sound like the perfect love story and a happy ending. Partners want to be given a gift from God, where they can spend both their time and their life providing care and love. On the other hand, in another part of the world, there is someone being raped, either by someone she never met, or a family member; the moment of two bodies coming together, yet procreation of another human being has taken place. The time comes in every woman's life when she wonders what it would be like to have a child. In

scenario number one, both parents wanted the baby; however, and for health reasons, the doctor recommended an abortion. In scenario number two, the raped woman does not want the pregnancy, so she asked for an abortion. A child is a priceless gift from God. In my peculiar opinion, they dream of the things they hear, taste, and feel in their mother's womb. Not as we hear, taste and feel of course but as they do. I know babies can hear music and things around them. They also get to know the sound of their parents voices while in the womb. Obviously, they don't know who or what mom and dad are but they do remember the sounds of their voices at birth. They have the right to live on the earth. However, I have heard some issues here and everywhere that fetus in a mother's womb is not a human, so they are not bounded to have human rights. I am ridiculous and I believe that some people confuse the adjective "human" and the noun "human being" giving them the same meaning. I am struck by the question: "But isn't it human?", As if we secretly think a fetus is really a creature from outer space. If you point out that a fetus consists of human tissue and DNA so does it mean that he or she has a right to live? Moreover, the truth that life does indeed begin now of conception. All life is precious and should be encouraged and preserved. We have the duty to protect the life of an unborn child because we all know that babies are such a nice way to start people. As *Pope Francis* said, "The right to life is the first among human rights".

Since, the government is responsible for achieving the right to abortion through institutional and medical assistance, it also has the right to normalize it by banning it. Consequently, it is an accepted reality that neither full noninterventionist nor complete state regulation is beneficial to society. To safeguard that abortion is available to women, selective abortions of female fetuses should be stopped. The contemporary abortion discussion is more than just pro-life and pro-choice. Clearly, the law is currently on cross-purposes with the need of the hour. While its original purpose was to avoid sex-selective abortions, this line of reasoning is no longer true since medical advances. While sentiments date back to the time of conception (pro-lifers) when the fetus becomes viable at birth, there is no single criterion that is used to frame their laws globally. By making abortion a worthy right, the law does not diagnose women as individuals with autonomy over their bodies, a sinister mistake by all accounts. India, despite its liberal abortion law, does not count 'choice' as a factor for abortion. A lesser known fact about the MTP Act is that a woman cannot choose

not to be a mother only; Abortion is conditional and carried out on reasons such as the physical or mental health of the mother, a hypothetical disabled or deformed child, rape, young pregnancies, pregnancies in women with low mental capacity, and failure of contraception. By making abortion a worthy right, the law does not recognize women as individuals with autonomy over their bodies, a sinister mistake by all accounts. Nevertheless, it is admirable that India's abortion law of 49 years ago is still more liberal than the laws of many countries. Further clearly, it is a secular law; It is not for the beliefs of any religion to begin life and the right of the fetus to life. At the time of the enactments, it was practical, and it really obliged the mother's best interests. Therefore, in keeping with the spirit of thought behind the unique law, it now needs to be amended. The researcher has the following suggestions to submit:

1. Safe abortion is a Human Right of every women and it should be protected by Law. The MTP Law has not clearly mention for Safe Abortion Procedure. It should be clearly mentioned to save life of women.

2. MTP act says that mother have not a right to choose for her own body. Because self-determination and Autonomy is a personal right of woman, it should be available at every stage.

3. The state should provide quality abortion care to all women, which is sensitive to their needs by increasing aspects such as easy access and affordability to safe abortion services. This can be done by mobilizing human, financial and material resources for the provision of care and protection in abortion procedures and increasing the number of trained persons and equipped abortion centers.

4. Availability of abortion related facilities should be provided in primary health care centers across the country. The primary health care centers should also mention clearly for Abortion related facilities.

5. Informed consent should be obtained before the process of Medical Termination. It should be clearly mentioned that consent has given by mother and in the case of minor then consent should give by her guardian.

6. Minors, lunatics and rape victims should be given absolute right of abortion irrespective of the length of pregnancy. In this matter, It is a very critical situation for their health and the consent to abortion should be given by her legal guardian.

7. Every woman should know laws relating to Abortion. They should be aware about the Right of abortion.

8. To safeguard that abortion is available to women, selective abortions of female fetuses should be stopped.

9. Every woman have a right to personal Autonomy and Self-determination without any exclusion. Autonomy and self-determination is a part of personal liberty under article Twenty One of The Constitution of India.

10. Due to unsafe abortion many women have died with maternal death. So, we should apply better process for safe abortion like surgical abortion process. Abortion process should be quite easy and safe. In this matter Surgical Abortion process is very easy and safe recommended by many Gynecologists.

11. Government as well as non-governmental organizations should launch the campaign to make women aware about their Right of abortion. It should be promoted as a social welfare programme.

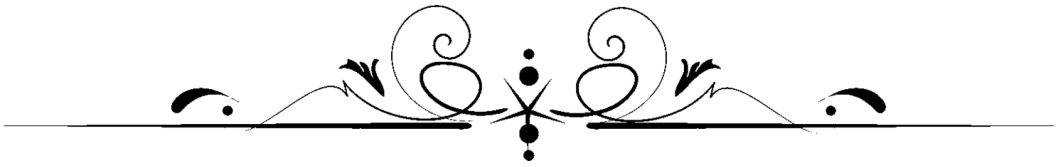
12. Every woman have a Right to marry and to find a Family because Reproductive Right is a human right. The Right to decide freely and responsibly on the number and spacing of Children should also be recognized.

13. Prohibition on Child Marriages and need to amend the Child Marriage Restraint Act, 1929 is also the need of hour. Because in case of minor safe abortion and reproduction are very critical issues.

14. Abortion should be allowed if the Child is to be born with Deformity. Physically and Mentally Deformity is a very critical problems in our society. If these problems are available in unborn child as well as fetus also, it should be eradicated for save life of mother.

15. There should be amendment in the Provisions of the Indian Penal Code,1860 as well to decriminalize abortion.

16. Measures to tackle Female Feticide should be clearly mentioned. In India PNDT Act, 1994 is available for prohibition of Sex-Selective abortion. Pre and Post Natal Care center should be clearly mention for that purpose and banned beyond act by PNDT Act, 1994.



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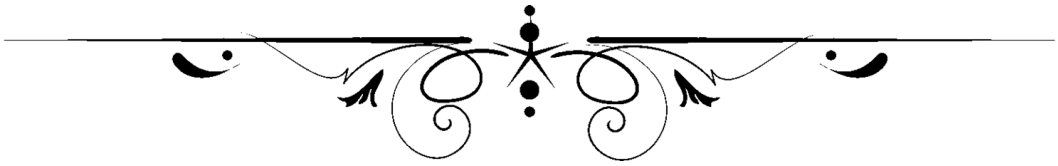

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27) World Summit for Children, 1990.

**National Instruments**

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4) Bihar Dowry Restraint. Act, 1950
5) The Indian Evidence Act, 1872.
6) The Indian Penal Code 1860.
7) Brahmo Marriage Act, 1872.
8) Code of Criminal Procedure, 1973.
9) Commission of Sati (Prevention) Act, 1987
10) Constitution of India,1950.
11) Civil Service (Conduct) Rules, 1964.
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29) Offence against the persons Act,1861
30) Protection of Human Rights Act, 1993
31) Protection of Women from Domestic Violence Act, 2005
32) Transfer of Property Act, 1882.
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34) The Juvenile Justice (Care and Protection of Children) Act, 2000.
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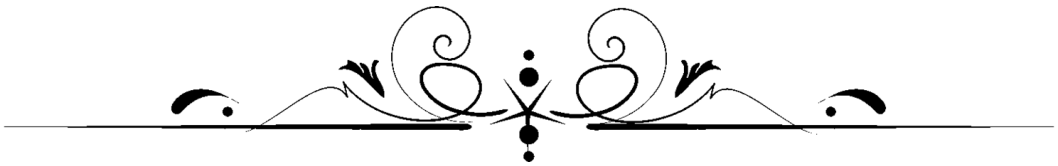
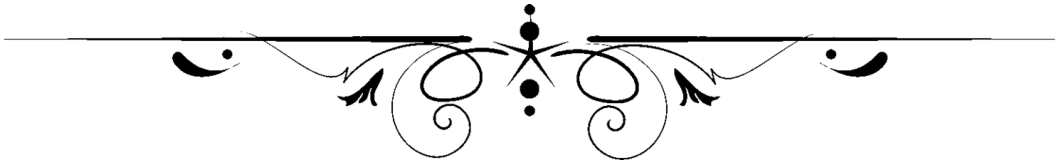
37) The Immoral Traffic (Prevention) Act, 1986.
38) The Protection of Children from Sexual Offenses Act, 2012.
39) Women's Sexual Reproductive and Menstrual Rights Bill, 2018.
40) The Medical Termination of Pregnancy (Amendment) Bill, 2020.



# Appendices



# LAW COMMISSION OF INDIA

## FORTY-SECOND REPORT

## INDIAN PENAL CODE

**JUNE, 1971**

GOVERNMENT OF INDIA, MINISTRY OF LAW

*Causing of miscarriage and injuries to unborn children.*

Sections 312 and 313 abortion.

16.37. Culpable homicide is causing the death of a human being. The offence would not be committed by an act which destroyed a life before it had separate existence from the mother. This gap is filled up in the Code by five sections,[1] 312 to 316, dealing with abortion. The main offence is described in section 312 as voluntarily causing a woman with child to miscarry. It is only when the miscarriage is caused in good faith for the purpose of saving the life of the woman it is not punishable.

The Medical Termination of Pregnancy Bill pending in the Rajya Sabha.

16.38. The movement for the reform of the law of abortion, which has been going on outside India for the last thirty years, has found official support in India. Some time ago, the Government of India appointed a Committee to study the subject, and in the light of its recommendations,[2] introduced a Bill[3] in the Rajya Sabha. Its provisions may be summarised:—

(1) A registered medical practitioner shall not be guilty of an offence under the Code or under any other law if a pregnancy is terminated by him in accordance with the provisions of the Bill.

(2) A registered medical practitioner can terminate a pregnancy if he is of opinion, formed in good faith, that

(i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of injury to her physical or mental health, or

(ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

(3) Where the pregnancy is alleged by the woman to have been caused by rape, "the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman."

(4) where a pregnancy occurs as a result of failure of any device used by any married woman or her husband for the purpose of limiting the number of children, "the anguish caused by such unwanted pregnency may be presumed to constitute a grave injury to the mental health of the pregnant woman."

(5) In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned above, account may be taken of the pregnant woman's "actual or reasonably foreseeable environment".

1. Section 315 punishes acts done with intent to cause an infant to die after birth, as well as acts done with intent to prevent an infant being born alive.
2. Report of the Committee to study Legislation of Abortion, (1966).
3. The Medical Termination of Pregnancy Bill (Rajya Sabha) (1969).

(6) If the length of the pregnancy does not exceed twelve weeks, the opinion of one registered medical practitioner is sufficient. If it exceeds twelve weeks, but does not exceed twenty weeks, the opinion of two medical practitioners is required. If it exceeds twenty weeks, the Bill does not apply.

(7) The termination of pregnancy must be with the consent of the woman.

(8) The operation is to be performed only at a Government hospital or other place approved by the Government.

The Statement of Objects and Reasons annexed to the Bill, first emphasises that (i) this very strict law has been observed in the breach in a very large number of cases all over the country; (ii) most of these mothers are married women, under no particular reason to conceal their pregnancy; and (iii) doctors have often been confronted with gravely ill or dying pregnant women "whose pregnant uterus have been tampered with." It then sums up the evil by stating that "there is, thus, avoidable wastage of the mother's health, strength and sometimes life".

It is then stated that the proposed measure, seeking to liberalise existing provisions, has been conceived (i) as a health measure, when there is danger to the life or risk to physical or mental health of the woman; (ii) as a humanitarian measure, when pregnancy arises from a sex crime; and (iii) as an eugenic measure where there is substantial risk that the child, if born, would suffer from deformities and diseases.

Position in England.

16.40. In this context, a scrutiny of the development of the law in other countries will be helpful. In England, abortion was not a common law offence, but was made an offence by statute. Until 1967, the statute law in England was very strict. There was no express immunity, not even for an act done to save the woman's life.[1] In the celebrated case of Dr. Bourne, a Harley Street specialist aborted a sixteen-year old girl who had become pregnant following rape. He reported his action to the police and successfully defended himself at his trial by claiming that the operation was, in his opinion necessary to the future health of the girl. His acquittal seems to have been based mainly on the view taken by the jury that the probable consequence of the continuance of the pregnancy would be to make the patient a physical and mental wreck and that consequently the operation was performed in good faith for preserving the life of the girl.

1. Section 58, Offences Against the Person Act, 1861 (English).
2. *R.* v. *Bourne*, (1938) 3 All E. R. 615.

But a substantial section of the public took the view that the immunity should be widened in its scope. The births of tragically deformed children as a result of mothers having taken thalidemide drug prior to the births had certainly contributed to this view. The Abortion Act was passed in 1967 by the British Parliament. The operative provision of this Act is as follows:—

> "1. (1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner, if two registered medical practitioners are of the opinion formed in good faith,—
>
> (a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical and mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated; or
>
> (b) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.
>
> (2) In determining whether the continuance of a pregnancy would involve such risk as is mentioned in paragraph (a) of sub-section (1), account may be taken of the pregnant woman's actual or reasonably foreseeable environment."

It will be noticed that in the English Act, risk to the life, or of injury to the health, of, the woman is not by itself conclusive: it must be greater than if the pregnancy were terminated. Secondly, there is no presumption relating to anguish caused by an unwanted preganancy, though the Act mentions injury to the existing children of the woman's family. At some stage, there was a proposal to take into account the fact that "the pregnant woman's capacity as a mother will be severely overstrained by the care of a child or of another child as the case may be". But the provision does not find a place in the Act.

Position in Sweden.

16.41. Sweden is a notable example where abortion has been allowed on what are now known as 'socio-medical' reasons. Under the Swedish law (as it stood in 1962), abortion is permitted in the following circumstances[2]:—

> (1) If due to a woman's illness, physical defect or weakness, child birth would entail serious danger to her life or health, i.e. on *medical reasons*;[3]

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1. (1966 May) 274 House of Lords Debates, 1201.
2. Extract from Report of the Committee to study the question of Legalisation of Abortion, (1966) pages 127-128.
3. This aspect is developed fully in a book by Professor Ekbald, Induced Abortion on Psychiatric grounds.

(2) If with regard to a woman's conditions of life and other circumstances there is reason to assume that her physical or phychic strength would be seriouly reduced through child-birth and child care, i.e. on *medico-social reasons*;

(3) If a woman has become pregnant as the result of rape, other criminal coercion or incestuous sexual intercourse, if she is insane or an imbecile, or under 15 years of age at the time of the fertilizing coition, i.e, on *humanitarian reasons;*

(4) If there is reason to assume that the woman or the father of the unexpected child would transmit to their offspring hereditary insanity, imbecility, a serious disease or a serious physical handicap; i.e. on *eugenic reasons.* An abortion for the reason of any such hereditary defect in the mother is contingent on sterilization simultaneously with the abortion unless sterilization appears risky or unnecessary (e.g. with regard to the woman's advanced age or because she is to be permanently committed to an institution).

(5) An abortion for reasons other than disease or physical defect in the woman may not be performed after the twentieth week of pregnancy, but the National Board of Health may make exceptions and authorise the performance of the operation before the end of the twenty-fourth week.

The procedure in Sweden appears to be dilatory. About 85 per cent of all legal abortions in Sweden are authorised by the Royal Medical Board in Stockholm, on the basis of written reports by physicians and social agencies throughout the country. Consequently, a substantial proportion of legal abortions is performed after the third month. These late abortions contribute heavily to the total number of deaths.[1]

Position in Soviet Russia.

16.42. The law of abortion in Soviet Russia has now (1965) been made liberal after undergoing major fluctuations during the last 50 years. Soviet women have been given freedom to decide, by themselves, the question of their motherhood. The abortion operation is allowed to all women wishing to undergo the operation, except where the pregnancy is over 12 weeks or there is inflammation of certain parts, or the existence of infectious diseases such as flue, quinsy, etc. and high temperature etc. If necessary a woman could be operated for abortion at a qualified medical institution that guarantees her the maximum innocuousness of the operation.

1. Report of the Committee on the Legalisation of Abortion (1966), page 21, paragraphs 2 to 32.

Position in Japan.

16.43. In Japan, the matter is regulated by the Eugenic Protection Law which is a very elaborate piece of legislation.[1] It is unnecessary to refer in detail to its provisions. The primary object of the law is to prevent the increase of inferior descendants from the eugenic point of view and to protect the life and health of the mother as well. Provision is made for what is known as " Eugenic Operaton' to be performed by a surgeon with the consent of the person concerned and his or her spouse. There is provision for artificial interruption of preganancy under various circumstances, including pregnancy caused by rape, and also where the mother's health may be affected seriously by the continuation of the pregnancy either from the physical, or the economic view point.

Position in the U. S. A.

16.44. The past few years have seen a definite trend towards liberalisation of the laws relating to abortion in the U.S.A. The position, however, varies from State to State. The New York law, which is the most radical, states that an abortion is justifiable when done with the woman's consent by a 'duly licensed physician, acting (a) under the belief that such act is necessary to preserve her life, or (b) within 24 weeks from the commencement of her pregnancy'. A woman performing abortion upon herself in similar circumstances is also justified. There is no residence requirement.

Liberalisation of the penal law proposed.

16.45. The penal prohibition of abortion seems to be based on four main grounds, (i) protection of the life of the unborn child, (ii) protection of the society's interest in the continuation of the race, (iii) sentimental objection to the destruction of a potential human life and (iv) protection of the life and health of the mother. On all these matters, opinion is sharply divided and no useful purpose will be served by any elaborate discussion of the various views. General opinion, however, is definitely in favour or attaching paramount importance to the life and health of the mother over all other considerations. It seems to us that the decision whether to bear a child or not must remain with the mother, but a distinction could be drawn between destruction of a nearly full grown child in the womb and termination of pregnancy at an early stage. As Lord Riddell said,[2] "the destruction of a full grown child is a revolting affair, whereas the abortion of an early foetus differs little from the removal of a uterine tumor." Abortion procured by a qualified physician within the first three months of pregnancy is attended with hardly any risk to the life or health of the woman. If the pregnancy is within this period, the woman must have full freedom to have it terminated by a qualified physician. If, however, the duration of the pregnancy exceeds three months, risk to the life and health

1. Japan's Law No. 156 of July 13, 1948, as extracted in the Report of the Committee to study the question of Legalisation of Abortion (1966), pages 102 to 106.

2. Lord Riddell, Medico Legal Problems (1929), page 35, cited by Williams, "Sanctity of Life", (1958), page 209.

of the woman is much greater, and termination of the pregnancy may justifiably be permitted only in the circumstances and under the conditions set out in the Bill now before Parliament.[1]

Section 312 to be amended.

**16.46.** We, therefore, recommend that, so far as the Code is concerned, a proviso may be added to section 312 as follows:

"Provided that it shall not be an offence under this section if the miscarriage is caused within three months of the commencement of pregnancy by a registered medical practitioner with the consent of the woman."

As a consequential amendment, the Explanation to the section may be modified to read:—

"*Explanation.*—A woman who causes herself to miscarry when she has been pregnant for more than three months is within the meaning of this section."

Section 313—punishment provision to be amended.

**16.47.** Section 313 rightly makes it a very serious offence to cause miscarriage in a pregnant woman without that woman's consent. The maximum punishment of imprisonment for life, however, seems to be excessive. We propose that the punishment provision should be modified to "rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."

Sections 314 to 316.

**16.48.** Sections 314 to 316 need no change.

Section 317—leaving child with a person.

**16.49.** Section 317 speaks of exposing a child or leaving it 'in any place' with the intention of abandoning it. It does not apply where the child is left with a person who is incapable of looking after it. We considered the question whether this restriction should be removed, in view of an Allahabad decision.

In that case,[2] the mother of an illegitimate child aged about six months left the child in charge of a blind woman in whose company she was, saying that she was going to get food and would return shortly. But actually the mother went to another village and did not return. The blind woman handed over the child at the police station. The mother was prosecuted under section 317, but acquitted. On appeal, Blair J. (with whom Aikman, J. concurred)[3] observed—

"It seems to me that the words of section 317 of the Indian Penal Code should be dealt with in the most literal sense.

1. One of us, Mrs. Anna Chandi, is of a different view set out in a Note appended to this Report.
2. *Q. E.* v. *Mirchia*, (1896) I. L. R. 18 All. 364, 367.
3. Knox J. dissented.

"To expose" literally means to physically put outside, so that such putting outside involves some physical risk to the person put out. Having reference to a child, it would mean putting it somewhere where it could not receive the protection necessary for its tender age; as, for instances, putting it outside the house, whereby it would be exposed to the risk of climate, wild beasts and the like. The exposure contemplated by the Act was one by which danger to life might immediately ensue. The explanation of section 317 seems to be to indicate with much clearness the scope and purview of the section and the nature of the evil against which it sought to provide. That explanation provides for the case of injuries actually ensuing that the guilty person shall be punished for the injury so inflicted according to the circumstances under which the injury is done, *i.e.* for murder or culpable homicide, as the case may be. It seems to me that, as the word 'leave' comes in immediate juxtaposition with the word 'expose', the word 'leaving' means leaving in a sense *ejusdem generies* as the exposure, and indicates an offence only slightly distinguishable from exposing. It cannot in my judgment mean leaving in the large sense of abandonment, but must be construed in strict connection with the word 'exposure'. The narrower construction of the words 'expose or leave' is much strengthened by the insertion of those striking words 'in any place'. I cannot conceive of any possible antithesis to those words unless it be 'with any person'. It seems to me manifest that if the framers of the Act had intended to include in the section a case like the present, they would have used after the expression 'in any place' the words 'or with any person', or some other words to that effect. I find myself wholly unable to understand where, upon any other construction but the one suggested, a line is to be drawn in cases of abandonment of children. I do not see how in point of law the abandoning of a child in the protection of a person able to take care of it, and willing, perhaps, from kindly motives to do so, but under no legal obligation to take care of it, is to be distinguished from leaving a child, as was done in the present case, in the protection of a blind woman who could and did afford some limited protection to the infant. I have yet to see upon what principle this conviction can be supported. Take the case of a person who leaves a child of eleven years of age at a hill school under the care and protection of a schoolmaster with intent to abandon. I am quite unable to see where a line can be drawn which would include the one case and exclude the other. Of course there may be cases, as my brother Knox pointed out, of much difficulty and requiring some discrimination. One would have to consider whether putting a child in physical possession of another child wholly incapable of protecting it would come at all within the meaning of the section; whether, for instance, leaving a child of eleven years under the care of another child of five years would fall within the

purview of the section. These difficulties do not arise in the present case. Here the blind woman was to some extent capable of protecting, and did protect, the child. She was a person with whom the child had been left."

Corresponding provision in England.

16.50. We note that the English section on the subject does not contain a limitation that the child must be left in a 'place'. Section 27 of the Offences against the Person Act, 1861, provides that "whosoever shall unlawfully abandon or expose any child, being under the age of two years, whereby the life of such child shall be endangered, or the health of such child shall have been or shall be likely to be permanently injured, shall be liable to imprisonment for any term not exceeding five years." It only emphasises the risk of danger to life or risk of permanent injury to health, and is, therefore, wider than the Indian section.

We do not, however, consider it necessary to expand the section in the Code. Cases not covered by the Code will be taken care of by the Children Act,[1] which punishes the act of neglecting or abandoning a child so as to cause unnecessary mental and physical suffering. Though the maximum punishment under that Act is not very high (six months' imprisonment), it should be adequate.

Section 317 to be revised.

16.51. In view of the severity of the punishment under section 317, we think it desirable that the offence should be more restricted in scope, and confined to exposure etc. of children below 5 years, and that the *mens rea* should be indicated more precisely, with reference to the risk of life or serious injury to health. The Explanation stating that the section does not prevent the trial of the offender for murder or culpable homicide if the child dies in consequence of the act appears to us to be unnecessary and could safely be omitted. The section may, accordingly, be revised as follows:—

> "317. *Exposure and abandonment of child under five years by parent or person having care of it.*—Whoever being the father or mother of a child under the age of five years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall, if such act endangers, or is likely to endanger, the life of the child or permanently injures, or is likely to permanently injure, the health of the child, be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both."

Section 318 (Concealment of birth)—Omission recommended.

16.52. Section 318 punishes concealment of birth by secret disposal of the dead body of a child. In our view, the Penal Code need not punish such concealment. For statistical purposes, concealment of birth can be punished under the law relating to registration of births and deaths. If the child is illegitimate, it is wrong to use the criminal law for the purpose

1. e. g. section 41, Children Act, 1960 (60 of 1960).

in modern times. If the child is legitimate, there would not, ordinarily, be any inclination to conceal the birth. The practice of killing female children has practically disappeared. If the child has been killed after birth, and then the crime is sought to be suppressed by concealing the birth, section 201 can be resorted to. This being the position, section 318 may be safely omitted.

New section to punish failure to provide necessaries of life.

16.53. Cases often arise where persons when legally bound to do so, fail without lawful excuse to provide the necessaries of life. Such illegal omissions ought to be punishable, and we recommend the insertion of a new section after section 317 in place of the present section 318. It may be as follows:—

"318. *Failure to provide necessaries of life.*—Whoever, being legally bound to provide the necessaries of life to any person, fails without lawful excuse to do so, knowing that such failure will endanger the life or seriously impair the health of that person, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

**Causing hurt**

Section 319.

16.54. Section 319 which defines causing hurt needs no change.

Section 320 to be revised.

16.55. The following changes are recommended in section 320 which defines grievous hurt:—

(i) The first clause may be omitted in view of the proposed widening of the fifth clause.

(ii) The second and third clauses may be combined and amplified to read "*deprivation*[1] *or impairment* of the sight of either eye or the hearing of either ear."

(iii) In the fourth and fifth clauses, the word "organ" should be added, since the reference to "any member or joint" is not comprehensive.

(iv) In the seventh clause, there is no need to mention "tooth" expressly.

(v) In the eighth clause, any hurt which causes the sufferer to be in severe bodily pain for a period of *ten* days should be regarded as grievous hurt. On the other hand, relating grievousness of the hurt to the injured person being unable to follow his ordinary pursuits for twenty days does not appear to be the right approach, and it certainly leads to abuse in the nature of false hospital certificates.

1. The word "privation" now used in these clauses is archaic.

# The Medical Termination Of Pregnancy Act, 1971

**(Act No. 34 of 1971)**

*An Act to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto*

Be it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:

**1**. **Short title, extent and commencement**.-

(1) This Act may be called the Medical Termination of Pregnancy Act, 1971.
(2) It extends to the whole of India except the State of Jammu and Kashmir.
(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette,
appoint.

**2. Definitions**.-In this Act, unless the context otherwise requires,-

(a) "guardian" means a person having the care of the person of a minor or a lunatic;
(b) "lunatic" has the meaning assigned to it in Sec.3 of the Indian Lunacy Act, 1912 (4 of 1912) ;
(c) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875), is to be deemed not to have attained his majority,
(d) "registered medical practitioner" means a medical practitioner who possesses any recognized medical qualification as defined in Cl.(h) of Sec. 2 of the Indian Medical Council Act, 1956 (102 of 1956), whose name has been entered in a State Medical Register and who has such experience or training in gynecology and obstetrics as may be prescribed by rules made under this Act.

**3. When Pregnancies may be terminated by registered medical practitioners**.-

(1) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.

(2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,-

(a) where the length of the pregnancy does not exceed twelve weeks if such medical practitioner is,

or

(b) where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are.

Of opinion, formed in good faith, that,-

(i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury physical or mental health ; or

(ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Explanation 1.-Where any, pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation 2.-Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

(3) In determining whether the continuance of pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or reasonable foreseeable environment.

(4) (a) No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a lunatic, shall be terminated except with the consent in writing of her guardian.

(b) Save as otherwise provided in C1.(a), no pregnancy shall be terminated except with the consent of the pregnant woman.

**4. Place where pregnancy may be terminated**.-No termination of pregnancy shall be made in accordance with this Act at any place other than,-

(a) a hospital established or maintained by Government, or
(b) a place for the time being approved for the purpose of this Act by Government.

5. **Sections 3 and 4 when not to apply**.-

(1) The provisions of Sec.4 and so much of the provisions of sub-section (2 of Sec. 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practioner, shall not apply to the termination of a pregnancy by the registered medical practitioner in case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.

(2) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), the termination of a pregnancy by a person who is not a registered medical practitioner shall be an offence punishable under that Code, and that Code shall, to this extent, stand modified.

6. **Power to make rules**.-4

(1) The Central Government may, by notification in the Official Gazette, make rules to carry out the provisions of
this Act.
(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or
any of the following matters, namely:

(a) the experience or training, or both, which a registered medical practitioner shall have if he intends
to terminate any pregnancy under this Act ; and
(b) such other matters as are required to be or may be, provided by rules made under this Act.

(3) Every rule made by the Central Government under this Act shall be laid, as soon as may be after it is made,
before each House of Parliament while it is in session for a total period of thirty days which may be
comprised in one session or in two successive sessions, and If, before the expiry of the session which it is so
laid or the session immediately following, both Houses agree in making any modification in the rule or both
Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form
or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without
prejudice to the validity of anything previously done under that rule.

7. **Power to make regulations**.-

(1) The State Government may, by regulations,-

(a) require any such opinion as is referred to in sub-section (2) of Sec. 3 to be certified by a registered medical practitioner or practitioners concerned in such form and at such time as be specified in such regulations, and the preservation or disposal of such certificates;

(b) require any registered medical practitioner, who terminates a pregnancy to give intimation of such termination and such other information relating to the termination as maybe specified in such regulations;

(c) prohibit the disclosure, except to such persons and for such purposes as may be specified in such regulations, of intimations given or information furnished inpursuance of such regulations.

(2) The intimation given an the information furnished inpursuance of regulations made by virtue of C1.(b)of Sub-section(1) of shall be given or furnished, as the case may be, to the Chief Medical Officer of the State..

(3) Any person who wilfully contravenes or wilfully fails to comply with the requirements of any regulation made under sub-section (1) shall be liable to be punished with fine which may extend to one thousand rupees.

8. **Protection of action taken in good faith**.- No suit for other legal proceedings shall lie against any registered medical practitioner for any damage caused likely to be caused by anything which is in good faith done or intended to be done under this act.

**Bill No. 55 of 2020**

# THE MEDICAL TERMINATION OF PREGNANCY (AMENDMENT) BILL, 2020

A

BILL

*further to amend the Medical Termination of Pregnancy Act,* 1971.

BE it enacted by Parliament in the Seventy-first Year of the Republic of India as follows:—

Short title and commencement.

**1.** (*1*) This Act may be called the Medical Termination of Pregnancy (Amendment) Act, 2020.

(*2*) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

Amendment of section 2.

34 of 1971.

**2.** In the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as the principal Act), in section 2,—

(*i*) after clause (*a*), the following clause shall be inserted, namely:—

'(*aa*) "Medical Board" means the Medical Board constituted under sub-section (*2C*) of section 3 of the Act;';

(*ii*) after clause (*d*), the following clause shall be inserted, namely:—

'(*e*) "termination of pregnancy" means a procedure to terminate a pregnancy by using medical or surgical methods.'.

Amendment of section 3.

**3.** In section 3 of the principal Act, for sub-section (*2*), the following sub-sections shall be substituted, namely:—

"(*2*) Subject to the provisions of sub-section (*4*), a pregnancy may be terminated by a registered medical practitioner,—

(*a*) where the length of the pregnancy does not exceed twenty weeks, if such medical practitioner is, or

(*b*) where the length of the pregnancy exceeds twenty weeks but does not exceed twenty-four weeks in case of such category of woman as may be prescribed by rules made under this Act, if not less than two registered medical practitioners are,

of the opinion, formed in good faith, that—

(*i*) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or

(*ii*) there is a substantial risk that if the child were born, it would suffer from any serious physical or mental abnormality.

*Explanation* 1.—For the purposes of clause (*a*), where any pregnancy occurs as a result of failure of any device or method used by any woman or her partner for the purpose of limiting the number of children or preventing pregnancy, the anguish caused by such pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

*Explanation* 2.—For the purposes of clauses (*a*) and (*b*), where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by the pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

(*2A*) The norms for the registered medical practitioner whose opinion is required for termination of pregnancy at different gestational age shall be such as may be prescribed by rules made under this Act.

(*2B*) The provisions of sub-section (*2*) relating to the length of the pregnancy shall not apply to the termination of pregnancy by the medical practitioner where such termination is necessitated by the diagnosis of any of the substantial foetal abnormalities diagnosed by a Medical Board.

(*2C*) Every State Government or Union territory, as the case may be, shall, by notification in the Official Gazette, constitute a Board to be called a Medical Board for the purposes of this Act to exercise such powers and functions as may be prescribed by rules made under this Act.

(*2D*) The Medical Board shall consist of the following, namely:—

(*a*) a Gynaecologist;

(*b*) a Paediatrician;

(*c*) a Radiologist or Sonologist; and

(*d*) such other number of members as may be notified in the Official Gazette by the State Government or Union territory, as the case may be.".

**4.** After section 5 of the principal Act, the following section shall be inserted, namely:— Insertion of new section 5A.

"5A. (*1*) No registered medical practitioner shall reveal the name and other particulars of a woman whose pregnancy has been terminated under this Act except to a person authorised by any law for the time being in force. Protection of privacy of a woman.

(*2*) Whoever contravenes the provisions of sub-section (*1*) shall be punishable with imprisonment which may extend to one year, or with fine, or with both.".

**5.** In section 6 of the principal Act, in sub-section (*2*), after clause (*a*), the following clauses shall be inserted, namely:— Amendment of section 6.

"(*aa*) the category of woman under clause (*b*) of sub-section (*2*) of section 3;

(*ab*) the norms for the registered medical practitioner whose opinion is required for termination of pregnancy at different gestational age under sub-section (*2A*) of section 3;

(*ac*) the powers and functions of the Medical Board under sub-section (*2C*) of section 3.".

## STATEMENT OF OBJECTS AND REASONS

The Medical Termination of Pregnancy Act, 1971 (34 of 1971) was enacted to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto. The said Act recognised the importance of safe, affordable, accessible abortion services to women who need to terminate pregnancy under certain specified conditions.

2. With the passage of time and advancement of medical technology for safe abortion, there is a scope for increasing upper gestational limit for terminating pregnancies especially for vulnerable women and for pregnancies with substantial foetal anomalies detected late in pregnancy. Further, there is also a need for increasing access of women to legal and safe abortion service in order to reduce maternal mortality and morbidity caused by unsafe abortion and its complications. Considering the need and demand for increased gestational limit under certain specified conditions and to ensure safety and well-being of women, it is proposed to amend the said Act. Besides this, several Writ Petitions have been filed before the Supreme Court and various High Courts seeking permission for aborting pregnancies at gestational age beyond the present permissible limit on the grounds of foetal abnormalities or pregnancies due to sexual violence faced by women.

3. Accordingly, the Medical Termination of Pregnancy (Amendment) Bill, 2020, *inter alia,* provides for,—

(*a*) requirement of opinion of one registered medical practitioner for termination of pregnancy up to twenty weeks of gestation;

(*b*) requirement of opinion of two registered medical practitioners for termination of pregnancy of twenty to twenty-four weeks of gestation;

(*c*) enhancing the upper gestation limit from twenty to twenty-four weeks for such category of woman as may be prescribed by rules in this behalf;

(*d*) non applicability of the provisions relating to the length of pregnancy in cases where the termination of pregnancy is necessitated by the diagnosis of any of the substantial foetal abnormalities diagnosed by a Medical Board;

(*e*) protection of privacy of a woman whose pregnancy has been terminated.

4. The proposed Bill is a step towards safety and well-being of women and will enlarge the ambit and access of women to safe and legal abortion without compromising on safety and quality of care. The proposal will also ensure dignity, autonomy, confidentiality and justice for women who need to terminate pregnancy.

5. The Bill seeks to achieve the above objects.

NEW DELHI;
*The* 14*th February,* 2020.

DR. HARSH VARDHAN

*ANNEXURE*

EXTRACT FROM THE MEDICAL TERMINATION OF PREGNANCY ACT, 1971

(34 OF 1971)

* * * * *

**3.** (*1*)* * * * *

When pregnancies may be terminated by registered medical practitioners.

(*2*) Subject to the provisions of sub-section (*4*), a pregnancy may be terminated by a registered medical practitioner,—

(*a*) where the length of the pregnancy does not exceed twelve weeks, if such medical practitioner is, or

(*b*) where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are, of opinion, formed in good faith, that—

(*i*) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or

(*ii*) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

*Explanation* I.—Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

*Explanation* II.—Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

* * * * *

LOK SABHA

A

BILL

further to amend the Medical Termination of Pregnancy Act, 1971.

(*Dr. Harsh Vardhan, Minister of Health and Family Welfare*)

MGIPMRND—5427LS(S3)—25-02-2020.