

CHAPTER 12

RIGHT OF MOTHER TO ABORT VIS-À-VIS RIGHT OF UNBORN CHILD: A CRITICAL ANALYSIS

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I. INTRODUCTION

Abortion is one of the subjects that have been discussed extensively in both national and international level. It has become a controversial issue all over the world. Everybody is in dilemma whether a mother has a right to terminate her pregnancy at any time she wishes or an unborn child has a right to life. The problem arises in the fact that there is a conflict between women's right to abort and right of unborn to take birth. It becomes more significant in a country like India where the sex ratio is deteriorating day by day. This papers aims at identifying dichotomy between the right of women to abort as well as right of unborn.

This research article is limited to the study of analyzing the right of women to abort vis-à-vis right of unborn to take birth with the help of various case-laws and legislation made by the government to regulate the procedure of abortion.

In every democratic society, it is essential that the the people shall get some basic and intrinsic rights without which the life can not be imagined. These righth are cocommonly referred as "human rights" in various legal documents such as Universal Decleration of Human Rights 1948, The Constitution of India 1950, International Covenant on Civil and Political Rights. It is the responsibility of every State that it's citizen as well as individuals shall be able to enjoy theses fundamental rights without any hinderance or any kind of discrimination. Respecting the dignity of every human being has been considered as one of the fundamental right under Article 21 of Indian Constitution. Right to life has been considered as the most supreme human right of an individual which can not be compromised in whatsoever situation. It is inalienable right. **The International Covenant on Civil and Political Rights clearly mandates that every human being has inherent right to life which shall be protected by law and a person shall not arbitrarily deprived of his life¹.** However there are some issues involved within the ambit of right to life. One of such issue "**Right to Abortion**". As per the notion of Article 21 of Indian Constitution, it is presumed that every human being has a soverign right over one's body. Similarly it is presumed that the women shall also have a soverign right over her body and hence she must get the right to decide whether she wants to abort the child at any stage of pregnancy. But at the same time if we thing from the prespective of that unborn child, there shall be some say on the part of such unborn child. That is why there is a need to strike a balance between the right of women/mother to abort and the right of the unborn.

The concept of right to life is most significant and fundamental right among all human rights. In India, right to life has been recognized under the Constitution, which says that "**No person shall be deprived of his life and personal liberty except according to procedure established**

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1. UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 174, available at: <https://www.refworld.org/docid/3ae6b3aa0.html> [accessed 1 October 2021]

by law". The term "person" covers the aspect of human being on the basis of gender as well as on the basis of nationality. Article 21 of Indian Constitution talks about the aspect of right to life. Among various rights, which are available to a woman, the right to abortion is also believed to be one of the most essential and fundamental right. Right to abortion has been recognized under right to privacy which is a part of right to personal liberty and which emanates from right to life. But this notion of Right to abortion always contradicts with the right of unborn person. The question always arises that "whether an unborn child should be considered as a human being and be given the status of a person or not" and if the answer is in affirmative than we have to keep in mind the rights of unborn person also while granting right to abort.

Earlier the right to abortion was not permitted and it was strongly opposed by the society. The termination of pregnancy was termed to be a murder of the foetus. But due to the change in time and technology, nowadays this right has been legally sanctioned by most of the nations after the famous decision of *Roe Vs Wade*³ by the US Supreme Court. Nevertheless, the oppositions are still present and people do believe that it should be legally prohibited.

II. MEANING & DEFINITION OF ABORTION

Abortion is the termination of pregnancy by any method (spontaneous or induced) before the foetus is sufficiently developed to survive independently (foetus less than 20 weeks of pregnancy). Abortion is defined as the termination of pregnancy by the removal or expulsion from the uterus of a foetus or embryo before it is viable. An abortion can occur spontaneously, in which case it is usually called a miscarriage, or it can be purposely induced. The term *abortion* most commonly refers to the induced abortion of a human pregnancy. Abortion, when induced in the developed world in accordance with local law, is among the safest procedures in medicine. However, Women seeking to terminate their pregnancies sometimes resort to unsafe methods, particularly when access to legal abortion is restricted. They may attempt to self-abort or rely on another person

2. Article 21, The Constitution of India, 1950

3. *Roe V. Wade* 410US 113(1973)

who does not have proper medical training or access to proper facilities. This has a tendency to lead to severe complications, such as incomplete abortion, sepsis, hemorrhage, and damage to internal organs.⁴

Unsafe abortions are a major cause of injury and death among women worldwide. Although data are imprecise, it is estimated that approximately 20 million unsafe abortions are performed annually, with 97% taking place in developing countries.⁵ Unsafe abortions are believed to result in millions of injuries⁶ and approximately 37,100 deaths annually as of 2010, accounting for 13% of all maternal deaths. This is down from 56,100 deaths in 1990., Groups such as the World Health Organization have advocated a public-health approach to addressing unsafe abortion, emphasizing the legalization of abortion, the training of medical personnel, and ensuring access to reproductive-health services.⁷

The legality of abortion is one of the main determinants of its safety. Countries with restrictive abortion laws have significantly higher rates of unsafe abortion (and similar overall abortion rates) compared to those where abortion is legal and available. For example, the 1996 legalization of abortion in South Africa had an immediate positive impact on the frequency of abortion-related complications,⁸ with abortion-related deaths dropping by more than 90%. In addition, a lack of access to effective contraception contributes to unsafe abortion. It has been estimated that the incidence of unsafe abortion could be reduced by up to 75% (from 20 million to 5 million annually) if modern family planning and maternal health services were readily available globally.

4. Okonofua, F., "Abortion and maternal mortality in the developing world. *Journal of obstetrics and Gynaecology Canada* 28(11):974-979. (2006).

5. Grimes, D.A.; Benson, J.; Singh, S.; Romero, M.; Ganatra, B.; Okonofua, F.; Shah, I.H., "Unsafe abortion: The preventable pandemic". (2006) http://www.who.int/reproductivehealth/publications/general/lancet_4.pdf

6. *Ibid*

7. Berer, M., "Making abortion safe: a matter of good public health policy and practice". *World Health Organ* (2000) <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2560758/pdf/10859852.pdf>

8. Jewekes, R., Rees, H., Dickson, K., Brown, H., Levin, J., "The impact of age on the epidemiology of incomplete abortions in South Africa after legislative change". (2005) <http://www.ncbi.nlm.nih.gov/pubmed/15713153>

Forty percent of the world's women are able to access therapeutic and elective abortions within gestational limits, while an additional 35 percent have access to legal abortion if they meet certain physical, mental, or socioeconomic criteria. While maternal mortality seldom results from safe abortions, unsafe abortions result in 70,000 deaths and 5 million disabilities per year.⁹ Complications of unsafe abortion account for approximately an eighth of maternal mortalities worldwide, though this varies by region. Secondary infertility caused by an unsafe abortion affects an estimated 24 million women. The rate of unsafe abortions has increased from 44% to 49% between 1995 and 2008. Health education, access to family planning, and improvements in health care during and after abortion have been proposed to address this phenomenon.

III. HISTORICAL BACKGROUND OF ABORTION

The practice of abortion, the termination of a pregnancy so that it does not result in birth, dates back to ancient times. Pregnancies were terminated through a number of methods, including the administration of abortifacient herbs, the use of sharpened implements, the application of abdominal pressure, and other techniques. Abortion laws and their enforcement have fluctuated through various eras. In many western nations during the 20th century various women's rights groups, doctors, and social reformers successfully worked to have abortion bans repealed. While abortion remains legal in most of the West, this legality is regularly challenged by pro-life groups.

Prehistory to 5th century

The first recorded evidence of induced abortion, is from the Egyptian Ebers Papyrus in 1550 BCE.¹⁰ According to Chinese folklore, the legendary Emperor Shennong prescribed the use of mercury to induce abortions nearly 5000 years ago. Many of the methods employed in early and primitive cultures were nonsurgical. Physical activities like strenuous labour, climbing, paddling, weightlifting, or

9. Shah, I.; Ahman, E., Unsafe abortion: global and regional incidence, trends, consequences and challenges" (2009) http://www.jogc.com/abstracts/full/200912_WomensHealth_1.pdf

10. Potts, M.; Campbell, M., History of Contraception, Vol. 6, Chp. 8, Gynecology and Obstetrics. (2002)

diving were a common technique. There were various other methods as well such as using irritant leaves, fasting for long hours, pouring hot water on the abdomen and lying on a heated coconut shell¹¹. In primitive cultures, techniques developed through observation, adaptation of obstetrical methods, and transculturation¹².

5th century to 18th century

Various Sanskrit texts show that during 8th Century, women used to sit over the pot of steamed or stewed onions¹³. Application of pressure on the abdomen of pregnant women was the practice prevalent in various parts of South-East Asia¹⁴. In Japan, practice of abortion started as early as 12th Century. During Edo Period, it was more practiced among the people who were largely affected by famines. One of the temples in Yokohama had the statue of Boddhisattva Jizo. It is considered that such temple having status of Boddhisattva Jizo was constructed in the memory of an abortion, miscarriage, stillbirth, or young childhood death. Physical means of inducing abortion, such as battery, exercise, and tightening the girdle—special bands were sometimes worn in pregnancy to support the belly—were reported among English women during the early modern period. During the time of colonization in New Zealand, Native people followed the practice of pregnancy termination through miscarriage by using drugs, ceremonial methods, and girding of the abdomen with a restrictive belt¹⁵.

19th century to present

In 19th-century with the emergence of medical knowledge and advancement in the field of surgery, anesthesia and sanitation. Societal attitude towards abortion changed. Women started raising their voices

11. In *Abortion in America: medical, psychiatric, legal, anthropological, and religious considerations*. Boston: Beacon Press.
12. Devereux, George *A Study of Abortion in Primitive Societies*. International Universities Press. (1976).
13. London, Kathleen "The History of Birth Control", *The Changing American Family: Historical and Comparative Perspectives*. Yale University. (1982).
14. Potts, M, Campbell, M, *Glob. libr. women's med.*, Available at <https://www.glowm.com/section-view/item/375#>.
15. Hunton RB "Maori abortion practices in pre and early European New Zealand". *The New Zealand Medical Journal*. 86 (602): 567-70 (December 1977)..

against unregulated and widely practiced exercise of abortion. The English speaking states started passing laws against abortion at all stages of pregnancy¹⁶. Various factors contributed for this constant shift regarding abortion in the early 19th century. Various physicians were extremely vocal for abortion criminalization laws, some of them argued that advances in medical knowledge showed that quickening was neither more nor less crucial in the process of gestation than any other step, and thus if one opposes abortion after quickening, one should oppose it before quickening as well¹⁷. Several practical issues were also considered as instrumental in imposing anti-abortion laws. One of such issue was that mostly abortion providers were untrained and were not belonging to medical fraternity. When medical practitioners were trying to regulate the practice of abortion, the untrained abortion providers were considered as danger for public health¹⁸.

During the latter half of the 19th century in France, social perceptions of abortion started to change. Initially abortion was widely seen as a last resort for unmarried pregnant women, however in 19th century when many writers started writing about abortion as a tool for family planning for married couples, the practice of abortion was reconceptualized as a logical solution to unwanted pregnancies resulting from ineffectual contraceptives. The formulation of abortion as a form of family planning for married women was made "thinkable" because both medical and non-medical practitioners agreed on the relative safety of the procedure¹⁹.

In the United States and England, the latter half of the 19th century saw abortion become increasingly punished. In the United States, these laws had a limited effect on middle and upper class women who could, though often with great expense and difficulty, still obtain access to abortion, while poor and young women had access only to

16. Reagan, Leslie J., *When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867-1973*. University of California Press. (1997).

17. James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy*. pp. 35-36, Oxford University Press. (1978).

18. James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy*, p. 34 (Oxford University Press 1978).

19. McLaren, Angus "Abortion in France: Women and the Regulation of Family Size 1800-1914". *French Historical Studies* 10 (3): 461-484 (Spring 1978)..

the most dangerous and illegal methods. After a rash of unexplained miscarriages in Sheffield, England, were attributed to lead poisoning caused by the metal pipes which fed the city's water supply, a woman confessed to having used diachylon — a lead-containing plaster — as an abortifacient in 1898²⁰. Women of Jewish descent in Lower East Side, Manhattan are said to have carried the ancient Indian practice of sitting over a pot of steam into the early 20th century²¹. Dr. Evelyn Fisher wrote of how women living in a mining town in Wales during the 1920s used candles intended for Roman Catholic ceremonies to dilate the cervix in an effort to self-induce abortion. Similarly, the use of candles and other objects, such as glass rods, penholders, curling irons, spoons, sticks, knives, and catheters was reported during the 19th century in the United States²².

Abortion remained a dangerous procedure into the early 20th century; more dangerous than childbirth until about 1930. Out of the estimated 150,000 abortions that occurred annually in the US during the early 20th century, one in six resulted in the woman's death.

IV. CONCEPT OF ABORTION

It is true that the Matrimonial Laws also recognized the right of unborn child to birth. Where a woman becomes pregnant during the period of wedlock, she cannot terminate her pregnancy at her will.

In *Satya (Smt.) vs Shri Ram*²³, the High Court of Punjab and Haryana held that termination of pregnancy at the instance of wife but without the consent of her husband amounts to cruelty.

Similarly in *Deepak Kumar Arora vs Sampuran Arora*²⁴, a division bench of Delhi High Court has observed that "..... if a wife undergoes abortion with a view to spite her husband it may, in certain circumstances, be contended that the act of getting herself aborted resulted in cruelty".

20. Potts, M.; Campbell, M. *History of Contraception*, Vol. 6, Chp. 8, Gynecology and Obstetrics. (2002)

21. London, Kathleen "The History of Birth Control". *The Changing American Family: Historical and Comparative Perspectives*. Yale University. (1982).

22. King, C.R. *Abortion in nineteenth century America: a conflict between women and their physicians*, Women's Health Issues. (1992).

23. AIR 1983 P&H 252

24. 1983 1 DMC 182

In *Sushil Kumar vs Usha*²⁵, the Delhi High Court held that aborting the foetus in the very first pregnancy by a deliberate act without the consent of the Husband would amount to cruelty. So, after going through the foregoing cited cases, it can be said that if the women would have obtained the consent of her husband then the act of abortion would have amounted to cruelty. A women have the right to abortion. But the act of abortion can only be performed by the collective decision of both the husband and wife. However, such collective decision is also subject to the provisions of Indian Penal Code and the Medical Termination of Pregnancy Act. When there is no possibility of begetting a living child with all human potential it is better to prevent such child to be born and thereby save it from earthly miseries. However, the right to abortion and right to birth should be decided on the merit of each independent case. Any rigid principle in this concern would lead to unnecessary ailment to the mother and to the child in the womb. Society as a whole has not been very sensitive or responsive to its female members. Women's perspective and realities have too often been ignored. The low status of women, cultural barriers and low political commitment hinder the recognition of abortion right as a part of women's rights. Because of the backwardness of education in abortion matters caused by long taboo and totalitarian pro-nationalism, it appears that the future battle for gaining this right would be waged through the courts rather than the parliament or the state legislature. Sooner or later right to life and liberty as guaranteed by Article 21 of the Constitution would be interpreted in such a way as to include the "Right to Abortion."

a) Abortion as A Human Right

Abortion is one of the most debating topic across the globe. The real question that appears from time to time is "*Whether the mother has a right to abortion or the unborn child has a right to life*". Right to abortion has been considered as an essential right under Right to privacy and which emanates from Right to life.

Earlier abortion was not at all acceptable in the civilized society in almost every nation. Abortion was considered as nearly a murder of fetus. However Ronal Dworkin gave a very balanced approach to this issue of abortion and its legality through his extensive work on

25. AIR 1987 Del. 86

abortion. He opposed this extreme view that prohibition of abortion. According to him fetus has no vested interest before third trimester. Hence, right to life in the favour of fetus can be claimed only on the completion of third trimester.

It is a woman's individual rights, right to her life, to her liberty, and to the pursuit offer happiness, that sanctions her right to have an abortion. A women's reproductive and sexual health and shape her reproductive choices. Reproductive rights are internationally recognized as critical both to advancing women's human rights and to promoting development. In recent years, governments from all over the world have acknowledged and pledged to advance reproductive rights to an unprecedented degree. Formal laws and policies are crucial indicators of government commitment to promoting reproductive rights. Each and every women has an absolute right to have control over her body, most often known as bodily rights. The African Women's Protocol is the only legally binding human rights instrument that explicitly addresses abortion as a human right and affirms that women's reproductive rights are human rights²⁶. The HRC has expressed concern regarding the criminalisation of abortion when the pregnancy is the result of rape, Promotion of women's reproductive rights has recently gained momentum, in large part, due to the 1994 International Conference on Population and Development (ICPD) held in Cairo, and the 1995 Fourth World UN Conference on Women, held in Beijing²⁷. Commentators consider that 'these two conferences led to the recognition that the protection of reproductive and sexual health is a matter of social justice, and that the realization of such health can be addressed through the improved application of human rights contained in existing national constitutions and regional and international human rights treaties'²⁸. The consensus statements created at these conferences touch on women's right to abortion, and thus provide additional support for the notion that women's reproductive rights are human rights.

26. Article 14, African Women's Protocol

27. Cook, Dickens and Fathalla, *Reproductive Health and Human Rights: Integrating Medicine, Ethics and Law* (Oxford: Oxford University Press, 2003)

28. Council of Europe Parliamentary Assembly, Resolution 1607 on access to safe and legal abortion in Europe <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/ERES1607.html>.

b) Abortion as a part of Fundamental Right u/a 21

The Right to Abortion is an attribute of the Right to Privacy. But the Indian Constitution does not grant in specific and express terms any right to privacy as such. Right to Privacy is not enumerated as a Fundamental Right in the Constitution. However, such a right has been culled by the Supreme Court from Article 21 and several other provisions of the Constitution read with the Directive Principles of State Policy.

For the first time, as early as 1963 in *Kharak Singh case*²⁹, a question was raised whether the right to privacy could be implied from the existing Fundamental Rights, such as, Article 19(1)(d), 19(1)(e) and 21. The majority of the judges participating in the decision said of the right to privacy that "our constitution does not in terms confer any like constitutional guarantee". On the other hand, the minority opinion (SUBBA RAO, J) was in favour of inferring the right to privacy from the expression 'personal liberty' in Article 21. In the words of SUBBA RAO, J: "It is true that our constitution does not expressly declare a right to privacy as Fundamental Right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life...."

In *R. Rajagopal vs State of Tamil Nadu*³⁰, the Supreme Court has asserted that in recent times the right to privacy has acquired constitutional status; it is "implicit in the right to life and liberty guaranteed to the citizens" by Article 21. It is a "right to be let alone". A citizen has a right to "safeguard the privacy of his family, marriage, procreation, motherhood, child bearing and education among other matters".

The right to privacy has several aspects. One such aspect is the right to procreate. This is also known as "the right of reproductive autonomy". The right of a woman to abort falls within the ambit of the Right to privacy³¹.

The Andhra Pradesh High Court has observed in *B.K. Parthasarathi vs State of Andhra Pradesh*³² that: "The right to make a decision

29. AIR 1963 SC 1295

30. AIR 1995 SC 264

31. *Supra* 2

32. AIR 2000 AP 156

about reproduction is essentially a very personal decision either on the part of the man or woman. Necessarily, such a right includes the right not to reproduce. The intention of the state in such a decision making process of the individual is scrutinised by the constitutional courts in the country and in America with great care".

So from the above cited cases it can be concluded that a woman has right to abortion under Article 21 of the Indian Constitution. Although such right is not expressly provided as a fundamental right of a woman.

V. STATUS OF RIGHT TO ABORTION UNDER INTERNATIONAL LAW

Article 1 of the American Declaration of Rights and Duties of Man and the Inter American Commission of Human Rights say that abortion is legalized until the end of the first trimester. Right to life is protected from the moment of its conception by Articles .

The International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) does not explicitly confer the right to life, but the Committee on Economic, Social and Cultural Rights (CESCR) has repeatedly expressed concern regarding the relationship unsafe abortions. The CESCR has thus called upon States Parties to permit or consider permitting abortion for therapeutic reasons and when pregnancies are life threatening or a result of rape or incest.

International treaties such as the American Declaration of Rights and Duties of Man, the Inter American Commission of Human Rights, European Convention of Human Rights, African Charter of Human and People's right, the International Covenant on Economic, Social and Cultural Rights 1966 have safeguarded various rights and thus can be relied upon when attempting to secure women's right to abortion on request or for socio-economic reasons.

VI. LAW RELATING TO ABORTION IN INDIA

Abortion under MTP Act, 1971

India was a pioneer in legalizing induced abortion, or Medical Termination of Pregnancy (MTP) in 1971. Yet, after three decades, morbidity and mortality due to unsafe abortion remain a serious problem. Abortion continues to be a sensitive, private matter, often with

ethical/moral/religious connotations that sets it apart from other reproductive health-seeking behaviour. Although abortion is legal, it is estimated that four million Indian women a year still resort to illegal abortions because of social taboos, misconceptions about the law, and the lack of skilled practitioners and medical facilities. The Medical Termination of Pregnancy (MTP) Act, 1971, primarily aimed to make it possible to use abortion as a mechanism of family planning. This law stipulates that if certain conditions are fulfilled, an abortion can lawfully be done. Abortion was being practised earlier by many. Because it was illegal, it was practised in a clandestine manner. The passing of the Act made medical termination of pregnancy legal, with certain conditions for safeguarding the health of the mother.

The Medical Termination of Pregnancy (MTP) Act, 1971, primarily aimed to make it possible to use abortion as a mechanism of family planning. Any indirect protection it gains under the Act is only a by-product resulting from the protection of the woman. The rights provided as well as the restrictions imposed under the statute show that the very purpose of the state is to protect a living woman from dangers which may arise during an abortion process. It is the protection to the mother that protects the unborn. The Act was made to facilitate abortion for birth control, considered a national priority then, and not quite the 'enlightened legislation' one hoped for. It is believed that every mother has a right to abortion, it is a universal right. But the rights of the mother are to be balanced with the rights of the unborn. Earlier the right to abortion was not permitted and it was strongly opposed by the society. The termination of pregnancy was termed to be a murder of the foetus. But due to the change in time and technology, nowadays this right has been legally sanctioned by most of the nations after the famous decision of *Roe Vs Wade*³³ by the US Supreme Court. An important feature of the Act is to encourage reduction in the rate of population growth by permitting termination of an unwanted pregnancy on the ground that a contraceptive device failed. The MTP Act lays down the condition under which a pregnancy can be terminated, the persons and the place to perform it.

The reasons, for which MTP is done, as interpreted from the Indian MTP Act, are:—

- (i) A risk to life of a pregnant woman; or
- (ii) A risk of grave injury to her physical and mental health; or
- (iii) If the pregnancy is caused by rape; or
- (iv) There exists a substantial risk that, if the child were born, it would suffer from some physical or mental abnormalities so as to be seriously handicapped; or
- (v) Failure of any device or method used by the married couple for the purpose of limiting the number of children; or
- (vi) Risk to the health of the pregnant woman by reason of her actual or reasonably foreseeable environment.

Moreover section 4(2) of the said act states that no pre-natal diagnostic techniques can be conducted except for the purposes of detection of any of the—

- 1) chromosomal abnormalities
- 2) genetic metabolic diseases
- 3) haemoglobinopathies
- 4) sex-linked genetic diseases
- 5) congenital anomalies
- 6) any other abnormalities or diseases as may be specified by the central supervisory board.

Thus the enactment permits such tests if they are necessary to avoid abnormal child from coming into existence. The MTPA as well as the PNDTA are central acts and if by one statute certain rights are conferred upon a prospective mother, the same cannot be denied to a prospective mother by another statute emanating from the same source and the same was observed by the Hon'ble Supreme court in *State of Tamil Nadu and Ors. v. Ananthi Ammal & Ors.*³⁴ So from this case it is a clear picture that the state permits pre-natal diagnostic techniques before undergoing abortion which is another way by which the right of abortion is protection over the right of an unborn child.

Finally, it may be noted that the M.T.P. Act does not protect the unborn child. Any indirect protection it gains under the Act is only a by-product resulting from the protection of the woman. The rights

33. 410 US 113 (1973)

34. AIR 1995 SC 2114

provided as well as the restrictions imposed under the statute show that the very purpose of the state is to protect a living woman from dangers which may arise during an abortion process. It is the protection to the mother that protects the unborn.

VII. LEGAL STATUS OF UNBORN UNDER INDIAN LAW

A child in mother's womb is regarded³⁵ as born and treated as person for many purposes. A direct can be made to a child in womb. Under Hindu Law, the proprietary rights of an unborn child are recognised and it is governed by the rule of perpetuity. But all such rights are contingent upon the birth of an unborn child and the ownership of contingent rights are sufficient to sustain legal personality. The Constitution of India does not define the word person. But under IPC³⁶ the word person includes an unborn child. A child in womb can be regarded as a living entity with a life of its own. As Art 21 is available to a person so sections 312, 313, 316 of IPC has by implication recognised the right to life of an unborn child. Under the Criminal Law, an injury to a child in the womb is a punishable offence. Causing death to a child in the womb and causing abortion or miscarriage are made punishable under section 312, 313 and 316 of IPC. So from this foregoing statement it can be inferred that a child in mother's womb have rights protected by law and have legal personality. The Indian Legislature has enacted the M.T.P. Act under which abortion is allowed under certain specified conditions laid down in section 3 of the M.T.P. Act, 1971. We can not deny that abortion is an act that causes the death of an unborn child and it accordingly made punishable by law. But the enactment of the M.T.P. Act has superseded the protection given to an unborn child by the Indian Penal Code. When there is a risk to the life of the pregnant woman or there is a grave injury to her physical and mental health, at such circumstances the law allows the unborn child to be get killed to protect the pregnant woman.

It is clear from the above discussion that there is a duality of law, i.e., the law on one hand protects the life of an unborn child and on the other hand has suppressed such protection of life of an unborn child by enacting the M.T.P. Act, 1971.

35. K. B. Agarwal, *Family Law in India*, 23 (Kluwer law International 2010).

36. K.D.Gaur, *Indian Penal Code*, 68 (LexisNexis, 2016).

VIII. ARGUMENTS IN FAVOUR OF & AGAINST ABORTION

Following are the arguments in favour of legalizing abortion:

1. The first argument is of Bodily Sovereignty. Each woman has the sole right to make decisions about what happens to her body - no one should force her either to carry or terminate a pregnancy against her will. Most abortions are carried out on the grounds of safeguarding the woman's mental health.
2. Other are situations where abortions is done to safeguard the life of a foetus, as it would involve risk if pregnancy is carried, it might damage the foetus resulting in danger to the life of the mother.
3. If abortion is banned, or just more restricted, we would return to the days of 'back-street abortions'. In the past this has been accompanied by wild claims of the risk to women's health from these procedures. The women resort to some unhygienic measures to abort the foetus.
4. Act of performing an abortion to save the mother's life when occurs, however, the rationale is not that the foetus is seen to have less value than the mother, but that if no action is taken both will die. Aborting the foetus at least saves the mother's life.
5. If suppose abortion is banned, a woman does not want to carry her pregnancy, she would carry it and then abandon the new born child. This would be more dangerous to the life of the baby. Thus, it is better to terminate the pregnancy at an earlier stage.

Although in ancient and primitive times there were widespread practices of abortion and infanticide among savage, semi-civilized and even sophisticated races, the later period provided a better status to the unborn children. This is evident from the punishment and compensation provided in Old Testament for hurting a pregnant woman. The unborn was treated as equal to human being at least for the purposes of its protection. But as times have brought about revolutionary changes, each person has a right to bodily sovereignty and Human rights instruments protect such rights internationally. Thus it becomes important to secure the right to abortion to every woman.

Following are the arguments which favour prohibition of abortion by the pro-life activists:

1. The issue of the foetus' life, which raises the question of whether one person's desire for autonomy can extend to ending another's existence.

2. The killing of innocent is a crime and the foetus is also an innocent life.
3. Many women suffer significant emotional trauma after having an abortion.
4. There is also some evidence that having an abortion may increase a woman's risk of breastcancer in later life. Some other complications include damage and/or infection to the uterus and the Fallopian tubes making a woman infertile. Menstrual disturbances can also occur.
5. Aborting fetuses because they may be disabled sends an implicit message of rejection to people with disabilities.
6. Another argument is that an embryo (or, in later stages of development, a foetus) is a human being, entitled to protection, from the moment of conception and therefore has a right to life that must be respected. According to this argument, abortion is homicide.

IX. CONCLUSION

I would like to conclude by saying that it is true that a mother has got a natural duty to provide the maximum best possible to her offspring. But situations may arise where she indulges in activities, which injuriously affect the foetus. It may be due to ignorance, carelessness or acts done wilfully. Abortion is an issue to be left to the decision of the mother. However, taking viability of a legal standard, necessary protection should be provided to the unborn. It is also beneficial to the mother, where the state or voluntary organizations are ready to take care of the unborn. There is no meaning in conferring a right to the mother to destroy the foetus. Her right is limited to have a termination of pregnancy. It is also said that delivering 20 million babies annually would be a greater strain on the nation's medical services and economic resources than, say, performing one to five million abortions a year.

The law has to take care of the liberty of the mother as well as the unborn. So by analyzing and comparing the Constitutional provisions of India and law relating to abortion, I found that a woman has a right to choose to have abortion and her right prevails over the right of an unborn.
