“There is no freedom, no equality, no full human dignity and personhood possible for women until they assert and demand control over their own bodies and reproductive process………. The right to have an abortion is a matter of individual conscience and conscious choice for the women concerned.”\textsuperscript{1}

4.1 Introduction

The Universal Declaration of Human Rights was the first major international human rights instrument to explicitly recognize economic, social and cultural rights. The most important human right being the right to life, is the supreme human right and the absence of this right renders all other rights useless, worthless and meaningless. When the one is deprived of the right to life one is also automatically deprived of all other human rights. It is in fact, true that these rights are available to all human beings. But the issue here is whether the human embryos and foetuses also qualify for this right. The other controversial issue related to this basic right is that of right to abortion. So the abortion issue is just like two sides of the same coin. One side concentrates on women’s freedom, choice, dignity and privacy. The other focusses on the right of the unborn to live and to liberty. Both the sides are justified in their own ways.\textsuperscript{2}

Now-a-days it is considered that women emancipation is not possible unless women are given ample liberty and discretion in matters of procreation, abortion and sterilization. However, conceding any such right to women also affects the right of the unborn to live. Hence, there is a need to resolve the conflict between the two i.e. a pregnant woman’s personal liberty and right to destroy foetus in her womb under any circumstances at any time. The other being the claim of the state to protect the right to life of the unborn

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\textsuperscript{2} S.N. Parikh, “Right to Life and Unborn Person” 11 (3) \textit{IBR} 287 (1984).
on the basis of the growth of scientific knowledge and recognition of the foetus as a living person within the womb. In this chapter we will study the legal provisions which affect the right of a woman to abort the child and the right of an unborn child to birth.

4.2 Right to Abortion

The most liberalizing aspect in the administration of gender justice is access to hygienic and safe abortion. Abortion once opposed legally as well as religiously, appears to be one of the necessary requirements for female emancipation. It is a woman’s individual right, right to her life, to her liberty, and for the pursuit of her happiness, that sanctions her right to have an abortion. To force a woman to continue an unwanted pregnancy is not only an attack on her personal autonomy but also infringes her sense of right to privacy, bodily integrity and religious liberty. Laws that force women to bear children not only rob women of their bodily integrity but make women, as a class, involuntary servants to foetuses.

Forced pregnancy resembles in many ways with the slavery as pregnancy is a burden which she has to bear for many months. Once the child is born, the new roles and responsibilities of irrevocable nature are attached with the woman as a mother. After the birth the child’s needs become greater than the personal needs of the woman. This responsibility continues for the best years of her life. Forced pregnancy is not advantageous even from the child’s perspective. Studies in the west have shown that, children born when their mothers were refused abortions were more likely to be picked up for drunkenness, drug abuse, antisocial or criminal behaviour. In contrast, a planned child may have greater advantage and receive more individual attention from the parents. Parents may take great pride in watching the development of their planned child, or feel great disappointment or perhaps

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3 Ibid at 295.
guilt if their son or daughter does not live up to planned expectations.\(^8\)

As the government cannot force a relative of a child suffering with cancer to donate bone marrow or an organ to the child, even if the child is sure to die without the donation. Similarly the government cannot compel an individual to use his or her body as an instrument for preserving people who are already born, much less for preserving a foetus in the womb. In the same way how can the government force a woman to continue a pregnancy that might entail great health risks for the sake of a foetus? Surely a foetus cannot have rights superior to those of a person who has already been born.\(^9\)

Recognizing that the sanctity of life has a supreme value in the hierarchy of values, it is nonetheless, true that the human foetuses cannot claim any rights superior to that of born persons because of following reasons:\(^10\)

(a) A foetus is not a person;

(b) The court does not know 'when life begins'; it does know that 'the unborn have never been recognized in the law as persons in the whole sense;

(c) We do not agree that life begins at conception and is present throughout pregnancy.

Abortion is a highly charged emotional subject which involves some highly controversial issues of law, medicine and morality.\(^11\) According to WHO estimates at least 70,000 women die from complications related to unsafe abortion every year.\(^12\) Worldwide, unsafe abortions account for 13 per cent of all maternal deaths, but in some countries up to 60 per cent of all maternal deaths are due to unsafe abortion. WHO estimates that more than half of the deaths caused by induced abortion occur in South and South-East Asia, followed by sub-Saharan Africa.\(^13\) Hence illegal abortion is the cause of

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10 *Jane Roe v. Henry Wade*, 410 U.S. 113 (1973); 35L.Ed. 2d. 147.
13 Ibid.
serious health complications and even death of women the world over. Legal abortion services are not easily available and it is scandalous that such a basic right as the right to help with planning or preventing the birth of a child has been denied to women.\textsuperscript{14}

4.2.1 Meaning of Abortion

Abortion or miscarriage means the spontaneous or induced termination of pregnancy before the foetus is independently viable, which is usually taken as occurring after the 28\textsuperscript{th} week of conception. Children born a few days before the 28\textsuperscript{th} week are known to have survived with modern care. Medically, abortion means the expulsion of the ovum within the first three months of pregnancy; miscarriage, the expulsion of the foetus from 4\textsuperscript{th} to 7\textsuperscript{th} month; and premature delivery, the delivery of a baby after 7 months of pregnancy and before full term. Legally, miscarriage, abortion and premature labour are now accepted as synonymous terms, indicating any termination of pregnancy at any stage before confinement.\textsuperscript{15} Abortion may be classified 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.\textsuperscript{16}

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 foetus. This may happen because of metabolic circumstances or accumulation of poison which

\textsuperscript{14} \textit{Supra} note 7.

\textsuperscript{15} K. Mathiharan and Amrit K. Patnaik (eds.), \textit{Modi's Medical Jurisprudence & Toxicology} 1013 (Lexis Nexis Butterworth, New Delhi, 2006).

interferes with the development of embryo and advancement of pregnancy.\textsuperscript{17}

Criminal abortion is destruction and expulsion of the foetus 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.\textsuperscript{18} 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.\textsuperscript{19}

\textbf{4.2.2 METHODS OF ABORTION}\textsuperscript{20}

The forms of abortion include the following:

- **The Abortion Pill**- This drug (mifepristone) is taken in early pregnancy and procures a miscarriage by blocking the hormone needed to enable a fertilized egg to implant.

- **Vacuum Aspiration Abortion**- A tube is inserted through the cervix up into the womb. The tube is used to suck out the contents of the womb, thereby destroying the foetus.

- **Evacuation and Curettage**- Here the woman’s cervical canal is enlarged and the womb then emptied by suction or scraped out with a curette.

- **Intact Dilation and Extraction (‘partial birth abortion’)** - The foetus is extracted into the vagina and the contents of the skull are sucked out. This kills the foetus. The body is then removed.

- **The ‘Morning after Pill’ and Intra Uterine Device**- They are sometimes listed in medical writings as forms of abortion, but under the law they would be contraception rather than abortion.

\textsuperscript{17} R.M. Jhala and V.B. Raju, \textit{Medical Jurisprudence} 426-28 (Eastern Book Company, Lucknow, 1990).
\textsuperscript{18} See \textit{Supra} note 15 at 1022.
\textsuperscript{19} \textit{Ibid}.
\textsuperscript{20} Jonathan Herring, \textit{Medical Law and Ethics} 286-287 (Oxford University Press, New York, 2010).
4.2.3 Abortion as a Human Right

Globally, both in terms of human rights and concern for women’s health, reproductive right is the greatest need of the human society.\textsuperscript{21} Without reproductive freedom, including the right to abortion, women will never achieve equality with men and will be deprived of benefits regarding their health, employment, education and their roles in family affairs. Reproductive rights are internationally recognized as critical both to advancing women’s human rights and to promoting development.\textsuperscript{22}

Since its inception the UN has maintained that reproductive freedom is a basic human right. In 1968, UN Conference on Human Rights, Tehran recognized the family planning as a basic human right. The Plan of Action in Bucharest Conference on World Population, 1974, again established basic human right of the couples to decide freely number of children. Promotion of women’s reproductive rights has recently gained momentum 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 Beijing.\textsuperscript{23} The consensus statements created at these conferences touched on women’s right to abortion, and thus, provides additional support for the notion that women’s reproductive rights are human rights. Treaty – monitoring bodies’ interpretations and jurisprudence have also played a large role in advancing women’s reproductive rights.\textsuperscript{24} Similar to the UN system, regional human rights treaties like European Convention on the Protection of Human Rights and Fundamental Freedoms, Inter-American Commission, African Commission on Human and Peoples’ Rights focused on the right to abortion. While international and regional human rights treaties and treaty – monitoring bodies have yet to directly address the issue of abortion on request, there is strong textual and interpretive support for the above-listed rights which have been used by national legislatives and courts around the

\textsuperscript{21} Supra note 7 at 134.
\textsuperscript{22} Supra note 5.
world to guarantee a women’s right to abortion, and which can be used by advocates to promote women’s right to abortion on request.\textsuperscript{25}

The vast majority of governments world-wide theoretically recognize this right but in the absence of political will it has yet not been accepted as a part of constitutional law. However, some have taken steps to include the right to abortion in their Constitution.\textsuperscript{26} 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 woman has an absolute right to have control over her body, most often known as bodily rights.\textsuperscript{27}

4.2.4 Legalization of Abortion in other Countries

Despite moral dissension, the 20\textsuperscript{th} century has seen a considerable liberalization of abortion laws.\textsuperscript{28} Due to harmful consequences of illegal abortions and also more liberal attitude towards sex and individual freedom, laws have been amended in most countries to allow late abortions. The U.S.S.R. legalized abortion in 1920, Japan legalized it after World War II. Abortion was legalized throughout much of Europe, Asia and the United States in the 1960s and 1970s.\textsuperscript{29} In England, Abortion Act, 1967 legalized termination of pregnancy on certain situations followed by the Human Fertilization and Embryology Act, 1990. It allows abortion in cases where pregnancy would involve risk to the life of the pregnant woman or injury to her physical or mental health or where there is a substantial risk if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.\textsuperscript{30}

In Africa, abortion ordinarily is not permitted, except in some cases where the mother’s life is in danger or pregnancy is the result of a rape. But abortion is widely practiced in unhygienic conditions in backstreet where

\textsuperscript{26} Supra note 7 at 131.
\textsuperscript{27} Supra note 5.
\textsuperscript{28} Kamaljeet Singh and Bhumika Sharma, “Issue of Legalization of Abortion” 116 Cri L J 201 (2010).
\textsuperscript{29} Ibid.
\textsuperscript{30} Infra note 36 at 469.
many patients die. In a Report from Nairobi, a street hawker (34), hardly able to maintain her five children, each fathered by different persons, when became pregnant for the sixth time, decided to break the law and induce an abortion using a length of wire. She was bleeding when she came to the population health service where abortion was completed in Kenyatta National Hospital. 31

In America, liberalization has been affected by the judicial pronouncement in *Roe v. Wade*. 32 The court held that the Texas criminal abortion statute restricting legal abortion without regard to: (i) pregnancy stage, and (ii) other interest involved, is violative of the due process clause of the Fourteenth Amendment to the United States’ Constitution, which protects against state’s action the right to privacy, including a woman’s qualified right to terminate her pregnancy. 33

The judgment in *Roe v. Wade* 34 has been reaffirmed by the Court in 1985 and 1986 when the Reagan administration sought its reversal. The debate, however, continued unabated and President Bush (Sr.) was committed against liberalization of laws. To some extent, the administrations’ stand was vindicated in the judgment given by the Supreme Court in 1989 in *Webster v. Reproduction Health Services* 35 which provides enhanced power to the state against abortions. 36

The laws in Scandinavian countries, Finland and Iceland have been so much liberalized as to permit abortions in a large number of situations including for the prevention of foetal deformity and even for such categories as “worn-out mothers” and “anticipated weaknesses.” 37

Sweden introduced abortion in 1938 for health grounds and Japan legalized abortion in 1938 for medical, eugenic and economic reasons.

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34 Supra note 32.
37 Ibid at 469.
Maximum western countries recognized abortion on humanitarian grounds.\textsuperscript{38} In Catholic countries, such as Ireland, abortion per se is a deeply controversial concept.\textsuperscript{39} Ireland's tough abortion laws came under fire following the death of 31 year-old Indian dentist Savita Halappanavar, who was 17 weeks pregnant and suffering a miscarriage and septicaemia at University Hospital Galway in Ireland. She requested the doctors for a medical termination as she was miscarrying. But the doctors allegedly refused her a termination because the foetal heartbeat was still present and the couple was told, “This is a Catholic country”. Abortion is illegal in Roman Catholic-dominated Ireland except when it is necessary to save the life of the mother. The Irish Supreme Court had in 1992 ruled that abortion was allowed if there was a threat to the mother's life. The facts of this case i.e. \textit{Attorney General of Ireland v. X} \textsuperscript{40} are very pathetic. In this case a fourteen year old school girl discovered that she was pregnant as the result of an alleged rape by the father of her friend. She was not permitted under the Irish law to get her pregnancy terminated. Rejecting the defence plea that psychological damage to the girl of carrying a child would be considerable and that the damage to her mental health would be devastating, if the termination of pregnancy is not allowed, the High Court granted permanent injection. A reference was made to Sub-Section 3 to Section 3 of Article 40 of the Constitution to vindicate the right to life of the unborn. The girl and her parents accordingly decided to obtain an abortion in UK. But in the meantime the Attorney General obtained an interim injunction in the High Court restraining the girl and her parents from, (i) interfering with the right to life of the unborn, (ii) leaving the jurisdiction for nine months, and (iii) procuring or arranging an abortion within or outside the country.

While referring to the above constitutional provisions the court observed that the right to life of the unborn is guaranteed under the Constitution and that it was the duty of the various organs of the government including judiciary to defend and vindicate the right. However, the Supreme Court of Ireland by a majority of 4 to 1 allowed the appeal against the order

\textsuperscript{38} W. Friedmann, \textit{Law in a Changing Society} 263-266 (Universal Law Publishing, Delhi, 2008).
\textsuperscript{39} “Abortion Laws More Relaxed Abroad” \textit{The Times of India}, New Delhi, Aug. 8, 2008 at 8.
\textsuperscript{40} (1992) 1 I.R. 1: The Times, 7 March 1992 (Lond.).
of the High Court and discharged the injunction issued against the defendants. The court observed that the Constitution requires that its provisions be interpreted harmoniously and that the rights thereby given to the unborn and the mother be interpreted in concert. Since there was a real and substantial risk to the life of the mother by self-destruction as depicted by her suicidal tendency, which can only be decided by termination of her pregnancy, the court observed that the defendant is permitted to obtain abortion in Ireland.\textsuperscript{41}

However the judgment of the Supreme Court setting out its reasons for lifting the injunctions granted by the High Court have not set the law of abortion in Ireland in a satisfactory state. However, this remained a matter of jurisprudence, and the government never amended the law and no legislation has been passed to reflect this. As the circumstances that warrant an abortion have not been spelled, it remains up to the doctors to decide who may be swayed by personal belief or be so wary of the law and social sanction as to delay the termination till it is too late, as in the case of Savita.\textsuperscript{42}

Ireland has been subject to criticism from international human rights bodies for its failure to bring domestic legislation in line with international human rights principles, including a very clear ruling from the European Court of Human Rights. According to Amnesty International Irish government have failed in their duty to provide the necessary clarity on how this right is protected and vindicated, leaving women in Ireland in a very vulnerable position. This incident has reignited the debate over right to abortion in case of risk in Catholic country.\textsuperscript{43}

Hence the difference in approach among countries is widely on account of differences in the attitude of the people, influence of religion and various other social; cultural disparity, economic and moral factors that influence the law makers in a country to permit or not to permit abortion with qualifications, etc. On these bases of the abortion laws, the state approach towards the issue can broadly be classified into four categories, viz:

1. **Conservative Approach**: Countries that do not permit abortion under

\textsuperscript{41} Ibid at 12.
\textsuperscript{42} “Reasons Aborted” \textit{The Tribune} November 17, 2012 at 10.
\textsuperscript{43} “Irish govt must clarify on abortion issue: Amnesty” \textit{The Tribune}, Nov 18, 2012 at 20.
any circumstances are Indonesia, Philippines, and Ireland where termination of pregnancy is illegal and punishable under law.

2. **Limited Approach**: Countries like Bangladesh, Pakistan, Sri Lanka, and Malaysia permit abortion only to save the life of the mother.

3. **Liberal Approach**: Countries like India, the United Kingdom, and the United States of America permit induced abortion under prescribed conditions as provided under the abortion legislations of the concerned country; and

4. **Complete Freedom to Choose**: Countries like Singapore which permits abortion at the discretion of the woman with no restriction of any sort except that it should be performed by a registered medical practitioner in a hospital or a clinic approved by the government.

### 4.2.5 Indian Legal Scenario

In India Central Family Planning Board, a policy making body, appointed an 11 members committee under the leadership of Shantilal Shah, health minister of Maharashtra, in 1964 and committee report submitted in 1966 supported the legal abortion. In 1967 Central Family Planning Council under Ministry of Health and Family Planning, consisting health ministers from 17 states, accepted the recommendation of the committee with some modifications. Then with the model of the Abortion Act, 1967 of England, the Medical Termination of Pregnancy Bill, 1969 was passed in parliament followed by the assent of president in 1971 and the Medical Termination of Pregnancy Act, 1971.

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44 Penal Code of Indonesia, Article 346-9.
45 Penal Code of Philippines, Article 256-9.
46 Abortion Act, Section 7 (2).
47 Bangladesh Penal Code, Section 312.
48 Pakistan Penal Code, Section 312.
49 Penal Code of Ceylon, Section 303.
50 Malaysia Penal Code, Exception to Section 312.
51 Medical Termination of Pregnancy Act, 1971, Section 3.
52 Abortion Act, 1967, Section 1.
54 Termination of Pregnancy Act (Ch. 324), Section 3 (1).
Pregnancy Act, 1971 was enforced from 1st April, 1972.\textsuperscript{56} Implemented rules and regulations were again revised in 1975 to eliminate time consuming procedures for the approval of the place and to make services more readily available.

Though the idea of liberalizing the law of abortion came from family planners as a measure to check unprecedented rise in population, the government, while introducing the Bill in Parliament, cautiously denied it’s having any connection with the family planning programme so as to avoid the risk of its opposition from the fundamentalists and religious fanatics, mullas and pandits.\textsuperscript{57}

4.2.5.1 Grounds for Termination of Pregnancy

The MTP Act, 1971 guarantees the right of a woman in India to terminate an unintended pregnancy and thus, empower a woman to decide whether to continue her pregnancy or to terminate it and thus, sparing many women from ‘forced motherhood’ and ‘inflicted pregnancy’.\textsuperscript{58}

The Act authorizes a registered medical practitioner to terminate the pregnancy of a woman on the prescribed grounds when pregnancy does not exceed a period of twelve weeks. However, in case of a pregnancy exceeding twelve weeks but not exceeding 20 weeks the concurring opinion of at least two registered medical practitioners who are of opinion formed in good faith that:

- The continuation of the pregnancy would involve a risk to the life of the pregnant women, or
- A risk of grave injury to her physical or mental health; or
- If the pregnancy is caused by rape; or
- 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

\textsuperscript{57} Supra note 16 at 216.
\textsuperscript{58} K. Kannan and Karunakaran Mathihran (eds.), Modi Textbook of Medical Jurisprudence and Toxicology 718 (Lexis Nexis Buttersworth, Nagpur, 2012).
- Failure of any device or method used by the married couple for the purpose of limiting the number of children; or
- Risk to the health of the pregnant woman by the reason of her actual or reasonably foreseeable environment.\textsuperscript{59}

In 2002 and 2003, the Indian Parliament passed the Medical Termination of Pregnancy (Amendment) Act and amended the Rules and Regulations to strengthen the MTP Act and improve the availability of abortion services. Most significantly, the amended MTP Rules sanctioned medical abortion.\textsuperscript{60}

\textbf{4.2.5.2 Is Right to Abortion available to each Spouse/Partner Unilaterally?}

Under the Medical Termination of Pregnancy Act, 1971 in certain circumstances a woman can get her pregnancy terminated without the consent of her husband, consent of the guardian is needed in those cases where the girl is below eighteen years of age or a lunatic.\textsuperscript{61} According to the revised rules, a woman desiring to abort an unwanted pregnancy can walk into a hospital or recognized institutions offering the facility and after filling a form, get the pregnancy terminated even without her husband’s consent.\textsuperscript{62}

But so far, in the family law area, the main question is: Whether the prevention of childbirth by the use of contraceptives, sterilization surgery or termination of pregnancy by a spouse without the consent of the other amounts to invasion of the right of the latter to have a family, and does the consequential mental, physical or psychological strain and injury to health amount to cruelty so as to entitle the other spouse to seek termination of the marriage?\textsuperscript{63} In an English case \textit{White and White}\textsuperscript{64} a husband insisted on a particular sexual practice, which would ensure that the wife would not get pregnant, the court held that it amounts to cruelty on his part, as the wife was very anxious to have a child. But in \textit{Paton v. British Pregnancy Advisory

\textsuperscript{59} Supra note 16 at 217-218.
\textsuperscript{60} Supra note 28 at 203.
\textsuperscript{61} Section 3(4) (a) of Medical Termination of Pregnancy Act, 1971.
\textsuperscript{62} Supra note 16 at 221.
\textsuperscript{63} Paras Diwas, \textit{Dr. Paras Diwan on Hindu Law} 843 (Orient Publishing Co., Delhi, 2006)
\textsuperscript{64} (1948) 2 All ER 141.
Services Trustees\textsuperscript{65} case English Court said that the Abortion Act 1967 did not give any right to a father to be consulted in respect of termination of pregnancy.

But the decision of Fowler v. Fowler\textsuperscript{66}, pertaining to the issue of deprivation of either of the spouse, the opportunity of becoming either a mother or a father to the other is very relevant. In that case the court observed whereas in the man's case, the refusal would amount to infliction of cruelty, in the woman's case her refusal might be due to the fear of labour pain and sufferings. This situation, though unnatural and unfortunate does not amount to cruelty unless she has deliberately intended to inflict injury on her husband.

In Smt. Satya v. Shri Ram\textsuperscript{67} 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. In its judgment, the High Court referred to the judgment in English case, Forbes v. Forbes\textsuperscript{68}, and remarked as under:

If the wife deliberately and persistently refuses to satisfy the desire of her husband and his family members to have a child in the family and dashed their hope by resorting to termination of pregnancy, the conduct of the wife undoubtedly amounted to infliction of mental cruelty and the husband is entitled to a decree of divorce.

Further in Sushil Kumar v. Usha\textsuperscript{69}, where wife got her very first pregnancy terminated without the consent of the husband and for no valid reason. It was held that she was guilty of cruelty and the husband was granted divorce holding that abortion in the very first pregnancy without the husband’s consent amounts to cruelty. This implies that a wife cannot undergo abortion without her husband’s consent.

In contrast, what if a husband demanded that his wife should have an abortion? In terms of the “woman’s right” argument, which would leave the

\textsuperscript{65} 1978, 2 All ER 987.
\textsuperscript{66} (1952) 2 TLR 143 (CA).
\textsuperscript{67} AIR 1983 Punjab & Har. 252.
\textsuperscript{68} (1955) 2 All ER 311.
\textsuperscript{69} AIR 1987 Del 86.
decision solely up to her, he would not have the right to make such a demand. But there are many family situations in which it would be the husband who would have to bear the economic support of the child to which she gives birth. It is a fundamental principle of a free society that those who will be affected by the actions and decisions of others ought to have a voice in the making of those decisions. If a woman ought not in justice be forced to have an unwanted child, on what basis is to be claimed that a father ought to be compelled to stand passively during his wife’s pregnancy? Knowing that he will be the one, as much or more than she, to bear the burden of raising and supporting the child. Once again it is a question of pointing out some of the insufficiently explored problems in the abortion-on-request position.\textsuperscript{70}

A woman has an absolute freedom to conceive or not to conceive. Complying with the requirements of MTP Act, a woman who is a major can terminate the pregnancy, but a minor girl cannot approach a doctor for abortion on her own. The consent of parent or guardian or husband is required. But when the minor girl chooses to complete the full term and give birth to a child then the consent of the father is immaterial. Madras High Court delivered a landmark judgment\textsuperscript{71} and upheld the validity of minor girl’s consent in the matter of retaining pregnancy. In this case, the father of a minor girl filed a writ petition before the Madras High Court for a direction from the court to terminate the pregnancy of his minor daughter. The High Court dismissed the writ petition and held that abortion cannot be forced on a minor girl against her desire when she is willing to bear the child. So under the Medical Termination of Pregnancy Act, 1971 the father’s consent is essential only when the minor girl decides to terminate her pregnancy but when the minor girl decides to complete the full term and to give birth to a child than the consent of the father is immaterial. This decision of the court might be disturbing for some fathers who will find themselves helpless in such situations and want the law to be changed so as to give them some powers to control the reproductive functions of their minor daughters.\textsuperscript{72}


\textsuperscript{71} G. Krishnan v. G. Rajan alias Madipu Rajan, (1994) 1 LW (Cri.) 16 (Mad) (DB).

\textsuperscript{72} See Supra note 7 at 130.
The United States Supreme Court in the year 1976 in *Danforth Planned Parenthood of Central Missouri Re* held that states might not constitutionally require a married woman to have her husband’s consent to abortion nor might they impose a blanket prenatal consent requirement for unmarried minors. The state does not possess any authority to give a third party an absolute authority, and possibly arbitrary, to terminate the pregnancy.

Thus the sensitive issue of denial of parenthood and sentiments associated with it is in conflict with the right of woman to autonomy and freedom over her own self in spite of the fact that there are no statutory provisions which cast a duty on her to consult her husband and get his concurrence before undergoing an abortion.

### 4.2.5.3 Can Husband Compel the Wife to Bear the Child?

In a welcome landmark judgment, The Punjab and Haryana High Court have categorically ruled that a husband cannot compel his wife to conceive and give birth to his child. While making it amply clear that such relationships that know no limits too have boundaries, the High Court was unequivocal in asserting that intimacy is one thing, giving birth to a child another and she cannot be coerced to experience it unwillingly. Justice Jitendra Chauhan of the Punjab and Haryana High Court unambiguously said that, “mere consent to conjugal rights does not mean consent to give birth to a child for her husband…. The wife is the best judge and is to see whether she wants to continue the pregnancy or to get it aborted.”

### 4.3 Right to be Born

Every woman has the right to control her own body, but the key question is whether she has the right to control the destiny of another human being i.e. the baby in the womb. According to the pro-life advocates, God is the giver of life and death, not the pregnant mother of an unwanted child.

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73 49L. Ed. 2d. 788.
75 *Dr. Mangla Dogra and others v. Anil Kumar Malhotra and Others*, C. R. No. 6337 of 2011.
76 *Available at*: http://www.christianet.com/abortionfacts (visited on April 2, 2010).
grounds. Each, they say, is unnatural and frustrates God's plan for humanity. In their view, every life, potential or actual, is sacred. To take a life before or after birth dishonours God. According to them abortion also contributes to the breakdown of marriage and thus of society. It permits men to avoid their responsibilities and to force women to kill their children.\textsuperscript{77} Hence it can be argued that a foetus cannot be deprived of its life. Any deliberate destruction of human life is considered as ethically and morally wrong.\textsuperscript{78} Therefore, abortion is an act of violence that kills a baby who cannot protect or defend itself. According to Sir William Blackstone, "Life is the immediate gift of God, a right inherent by nature in every individual, and it begins in contemplation at law as soon as the infant is able to stir in its mother’s womb."\textsuperscript{79}

4.3.1 Abortion through the Ages

According to Hinduism, abortion or killing of foetus is considered a sin. Thus, the destruction of a foetus is condemned as a heinous offence equal to Brahmahatya. In this condemnation, no distinction appears to have been made between different stages of gestation. The Garbhaponishad, which gives a meticulous account of the development of the foetus from the moment of conception of the mother, states that from the second day after the entry of the male semen into the female uterus, the semen gets thickened and from the 8\textsuperscript{th} day it takes the shape of a ball which is transformed into a lump after 15 days, leading to the creation of the head and the legs after two months. It follows that it would be an offence if the embryo is destroyed even at the nascent stage.\textsuperscript{80}

According to Islam after a foetus was completely formed and given soul, abortion was “haram” (forbidden). The Buddhists, who condemned the destruction of life, laid down that the bhiku “who intentionally destroys a human being by way of abortion, is no Samana and no follower of Sakeyaputta.” The Holy Quran prohibits the killing of a child, “Astray have

\textsuperscript{77} Alexander Sanger, \textit{Beyond Choice: Reproductive Freedom in the 21\textsuperscript{st} Century} 80 (Public Affairs, New York, 2004).
\textsuperscript{78} Available at: http://en.wikipedia.org/wiki/Pro-life (visited on April 26, 2010).
\textsuperscript{79} Lord Denning, \textit{The Closing Chapter} 44 (Aditya Books, New Delhi, 1993).
gone those who stupidly kill their children without knowledge and deny to themselves of what Allah has blessed them with. The Didache, an authoritative source of Christian law considered abortion, as a grievous sin and was included in the Ten Commandments which contain the forbidden acts. Every human being including the unborn child in the womb of its mother receives the right to life directly from the Almighty God but not from parents, society or any other authority.  

Abortion continues to be completely illegal or severely restricted by law in almost every country but; whether and to what extent abortions should be permitted, encouraged, restricted or severely repressed, is a social issue that has divided theologians, philosophers, legislators and general public. Those who advocate abortion on demand, are implicitly valuing the claim to life of a foetus as less important than the claim of a women to choose the size of her family, pursue an uninterrupted educational and service careers or avoid bringing up an unwanted child.

In the 19th century, in the United States of America, many state legislations came into force providing for the protection of the foetus from the moment of conception through the entire period of gestation. The American Supreme Court for the first time in Roe v. Wade recognized woman’s right to terminate her pregnancy. The court found this right to be rooted in the Constitutional right to privacy. The right to privacy has been held to be “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” “Jane Roe”, which is a pseudonym used to cloak the identity of the woman, who wanted at the age of about 21 years to terminate her pregnancy less than three months old, because of economic hardship and because of social stigma of bearing illegitimate child, but could not, because the Texas Criminal Abortion Statutes made performing an abortion a crime, except where necessary to save the woman's life, asked a District Court of the United States issue a declaratory judgment holding the Texas anti-abortion statute unconstitutional. It was argued in defence of the Texas Statutes that

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82 Supra note 7 at 129.
the Statutes were intended to prevent the deprivation of life of the child in the womb in accordance with the mandate of XIV Amendment. The argument was repelled and Justice Blackmun, delivering the majority judgment (7:2), held that “the unborn are not included within the definition of 'person' as used in XIV Amendment.” It was further ruled that - (i) prior to the end of first trimester of pregnancy, the state may not interfere with or regulate an attending physician's decision, reached in consultation with his patient, that the patient's pregnancy should be terminated; (ii) from and after the end of the first trimester, and until the point in time when the foetus becomes viable, the state may regulate the abortion procedure only to extent that such regulation relates to the preservation and protection of maternal health; (iii) from and after the point in time when the foetus becomes viable, the state may prohibit abortions altogether, except those necessary to preserve the life or health of the mother. In other words, according to the majority decision, a foetus is not a person whose life is guaranteed by the Life/Liberty clause of the XIV Amendment and the state can prescribe a woman's right to terminate pregnancy only when foetus reaches the stage of viability and may allow termination even thereafter when necessary to preserve the life or health of the woman concerned.84 But in the latter case Webster v. Reproduction Health Services85, the Supreme Court of America reversed its earlier judgment and upheld a Missouri Statute which declared that ‘the life of each human being begins at conception and that unborn children have protected interest in life, health and well-being.’ Prior to Webster, the foetus had no ‘protectable interest’ until it had reached viability. Thus the American Supreme Court recognized the right of a foetus ‘to grow and born’. A critical question is ‘does the abortion of a foetus amount to taking the life of a human being’? There is no satisfactory answer to the question, that when does the life comes into being.86

4.3.2 When does the Life Begin?

The crucial issue in the debate has quite often been regarding the point of time when life is supposed to commence. Technically, by definition, abortion is destruction of life after conception and before birth. Between these two points of terminus, life must have begun. However, literature reveals that life sciences have not offered any well laid guidelines to determine these crucial questions. According to some biologists, life certainly commences with fertilization, that itself is the beginning of human life. Therefore, they argue that foetal personhood begins when sperm and egg join no matter how that is done. According to some others, life definitely begins in the eight week when the embryo is undergoing the transition to a foetus and is definitely recognizable as a human being. Another view denies any belief in a fertilized ovum being a human life in the common sense meaning of the term. According to this view, human life begins at birth. Or more technically, when a foetus is sufficiently developed to be capable of living if removed from the mother’s womb. That human life begins at the moment of conception is a religious tenet that makes no claim whatsoever to scientific truth. Dr. Norman Fost of the Medical School of the University of Wisconsin sums up the position thus as follows:

“The question is unreasonable. It is not a question that doctors or religious authorities can be helpful because it is not certifiable. It is just a matter of individual opinion.”

Each of these two views standing at the extremes, creating a dilemma for the lawmakers. If one were to go by the first view that life begins at the moment of conception then interference with the foetus at any stage of its foetal existence could be seen as unethical unless one could take the stand that the rules of the ethics do not recognize the right to life. On the other hand, the other extreme stands at the view that, life begins only on birth. This creates a dilemma of a different type. One may then argue that if there was no

88 Supra note 36 at 468.
89 Supra note 87.
90 Quoted in Time, April 6, 1981.
life before birth, then all sorts of legal restrictions and sanctions dealing with
the interference of the foetus become unnecessary except to the limited extent
of preventing such interference in the interest of health of the mother. On
this logic whether or not a mother should be free to abort belongs almost
entirely to the category of the individual therapeutic questions. It ceases to
have any ethical or legal relevance.\textsuperscript{91}

4.3.3 Whether a Foetus or an Unborn Child is a Person?

Globally, Constitutions recognize the sanctity of life, yet have failed to
adequately protect the life of foetus. There are different cases on the point to
answer the question whether the foetus may be termed a human being. In
\textit{Dietrich v. Northampton},\textsuperscript{92} in the year 1884 a women who was in the second
trimester of pregnancy was injured by a fall from a highway which was
negligently defective. The child was born prematurely and died within a few
minutes of birth, and the casual connection between the fall and the death of
the child was established directly. It was the plaintiff’s contention that, given
Lord Coke’s dictum that if a woman be quick with child and the child is born
alive and subsequently dies as a result of prenatal poisoning or battery, the act
of causing such poisoning or battery would amount to murder, the defendants
were liable for the death of the child in the instant case. However, Justice
Holmes dismissed this contention as being applicable solely in criminal
actions and not to civil actions or tort. Failing any precedent that conferred
upon the child a prenatal cause of action in tort, it was held that it was a clear
and incontrovertible principle of common law that the unborn child was not a
‘person’ under the law but a part of the mother with no separate entity or
existence before birth. Further, this strict principle in the above said case was
further extended by Justice Holmes in a dictum that stated that an infant, even
if it survived, could not maintain a cause of action in respect of a prenatal
injury. This existence was consistent with the absolute denial of any form of
existence under law to the unborn person.

In an English case \textit{R v. Tait},\textsuperscript{93} the Court of Appeal quashed the

\textsuperscript{91} \textit{Supra} note 87.
\textsuperscript{92} 138 Mass 44, 52 Am. Resp. 242.
\textsuperscript{93} (1989) 3 WLR 891.
conviction of a burglar on the ground that ‘threat to kill a foetus’ is not an
offence directed against the ‘another person’. The foetus in utero was not in
the ordinary sense ‘another person’ distinct from its mother. In another case
\textit{R. v. Sullivan}^{94}, midwives who attended the delivery of a foetus that failed to
survive birth were charged with the offence of criminal negligence of causing
death to another person (foetus). The conviction by the trial Court was set
aside by British Columbia Court of Appeal on the ground that a foetus that
was not living on complete removal from its mother’s body was not a ‘person’
but the court substituted a verdict of guilty of criminal negligence causing
bodily harm to another person namely the pregnant woman. The foetus in the
birth canal was found to be part of the mother, so that injury to the foetus
constitutes injury to her.\textsuperscript{95} The American Supreme Court in \textit{Roe v. Wade}\textsuperscript{96}
held that the foetus is not a ‘person’ within the meaning of the fourteenth
amendment. It follows that the right to life does not begin from the
conception. The Supreme Court held that a woman’s right to terminate her
pregnancy is such that the state may not prohibit abortion until the foetus
reaches viability. This approach is based on the unstated assumption that
human life does not commence until viability.

In the above discussion, we were discussing whether the foetus is a
person or not? But now the same question may be put other way round
whether or not a foetus has a right to be born alive and as such possess
independent identity different from its mother? This question was thoroughly
looked into by the Ontario High Court in \textit{Medhurst v. Medhurst} and the court
observed that an unborn child was not a person and that any rights accorded
to the foetus are held contingent upon a legal personality being acquired by
the foetus on being born alive subsequently.\textsuperscript{97} In conformity with the
principles of common law jurisprudence the courts in England have held that:
foetus has no right of action, no right at all, until birth. The succession cases
have been mentioned, there is no difference from conception of the child who
may have succession rights by what has been called a ‘fictional construction’

\textsuperscript{94} (1988) 43 CCC 3d 65.
\textsuperscript{95} \textit{Dietrich v. Northampton}, 138 Mass 14, (1884).
\textsuperscript{96} 410 U.S. 113 (1973).
\textsuperscript{97} Bonda, “The Impact of Constitutional Law on Protection of Unborn Life: Some Comparative
In India, the right to life is guaranteed to every person under the Constitution of India. But the concept of personhood complicates the position of legal status of foetus. As it is well known fact that the age of the child is counted from the birth of the child, moreover, Indian Penal Code defines, “man as male human being of any age and woman as female human being of any age.” The unborn child is not included while defining person under Indian Penal Code, 1860 as well as Indian Constitution. The moment the child is born it becomes a personality and comes under legal protection. Question has arisen whether the unborn has the same rights as those of a born child. It means whether an unborn child can inherit or sue or more basically whether it can claim protection of life as provided for in the Constitution. But the answer is that they do not enjoy the rights directly though in few circumstances they derive rights indirectly through their mother. Although there are number of statutes that indirectly provide protection to the life of foetus like under Hindu law, a son is entitled to have reopened the partition of the ancestral property taking place while he was in the mother's womb without keeping any share reserved for him. Section 20 of the Hindu Succession Act, 1956 also recognizes the rights of a child in the womb. According to Section 20 “A child who was in the womb at the time of the death of an intestate and who is subsequently born alive shall have the same right to inherit to the intestate as if he or she had been born, before the death of the intestate, and the inheritance shall be deemed to vest in such a case with effect from the date of the death of the intestate.”

Similarly in the Law of Wills, both in India and in England, a child in the mother's womb is considered to be in existence and Section 99(i) of the Indian Succession Act, 1925, clearly provides that “all words expressive of relationship apply to a child in the womb who is afterwards born alive.” Sections 13 and 20 of the Transfer of Property Act deal with situations in which on a transfer of property, an interest therein is created for the benefit of a person not in existence. First prior interest is created in favour of a living person and then

right is vested to unborn when is born alive. An unborn cannot take decision, as unborn lacks the capacity to choose. Therefore property right is a contingent interest upon unborn. As per Section 20, where on a transfer of property an interest therein is created for an unborn, he acquires on his birth, a vested interest. The distinction made in the Indian Penal Code (Section 312-316) child, and between the unborn child and quick unborn child, goes to show that a woman is with child during the entire period of her pregnancy, and lexically as well as logically, a child is a person having life. Some pro-life advocates argue that under law some protections are given to unborn while he is in the womb of the mother. For e.g. Section 416 of the Code of Criminal Procedure provides that the High Court shall order that execution of capital sentences on a pregnant woman be postponed or it may commute the sentence to imprisonment for life, thereby indirectly recognizing the right to life of foetus. But Section 5 of The Transfer of Property Act, 1882 provides that the transfer of property takes place only between two living persons. This means that transferee must also be in existence at the date of the transfer. There is a valid reason why property cannot be transferred directly to an unborn person. But it is doubtful whether Article 21 of the Constitution would include the life of foetus as the meaning is restricted by the use of the word ‘person’. Therefore, one cannot deny the fact that a foetus or a child in the mother's womb is not a natural person. Judicial pronouncements are also not conclusive and vary in different jurisdictions. Often Courts shy from answering this question due to complex issues that arise in determining this question - like when does foetus attain personhood? This question is baffling the Courts worldwide.

4.3.4 International Instruments relating to Right of Unborn

Various international conventions have categorically recognized the status of foetus and oblige state parties to enact laws for its protection. The child must be given the means requisite for its normal development, both materially and spiritually as per Geneva Declaration of the Rights of the

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100 Supra note 84.
Child, 1924 and must be protected against every form of exploitation. According to the United Nations Declaration on the Rights of Child, 1959, child needs special safeguards and care, including appropriate legal protection, before as well as after birth. Again Article 6 of the Convention of the Rights of the Child, 1990 says that every child has the inherent right of life and state parties shall ensure to the maximum extent possible the survival and development of the child.\textsuperscript{103}

Article 1 of the American Declaration of Rights and Duties of Man and the Inter American Commission of Human Rights provides that abortion is legalized until the end of first trimester. Likewise the International Covenant on Civil and Political Rights (ICCPR) rejects the proposition that the right to life, protected in Article 6(1), applies before birth. According to 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.’ From a further reading of the above article it can be clearly seen that adoption of foetus in the purview of human being was rejected. Right to life is protected from the moment of its conception by Article 2 of the European Convention on Human Rights and Article 4 of the African Charter of Human and People’s Right. But they are silent on the issue of when does life begin. At the same time, the interpretations have focused us to believe that the child is not to be protected from the time of its conception. The right to life of the foetus has to be balanced with the rights of the mother.\textsuperscript{104}

Article 3 of the Universal Declaration of Human Rights (UDHR, 1948) begins the articulation of the human values to be defended in terms of human rights. ‘Everyone has the right to life, liberty and the security of person.’ Thus, human life is held to be both inviolable and inalienable. But there is a controversy whether the right to life extends to the unborn. When Article 3 of the UDHR, 1948 was being drafted there were several proposals for the provision of an explicit protection for the unborn child. These proposals were certainly debated. In the event, none of the relevant proposals was pushed to a vote and the final text stated only that ‘everyone had the right to life.’ As

\textsuperscript{103} See \textit{Supra} note 56 at 253.
\textsuperscript{104} \textit{Supra} note 5.
there is no clear cut answer to the question as when actually life comes into existence therefore, even the text of UDHR clearly states that everyone has the right to life, and that what is meant by everyone is ‘every member of the human family’ that is all existing human beings. The European Commission recognized the Right to life of the foetus, however, it was of the opinion, that even if some protection were to be given, it would be limited to protecting the life and health of the pregnant, which must remain paramount. The court was confronted with the question as to whether Article 2 of the European Convention for the protection of Human Rights and Fundamental Freedom, which provides “Everyone’s Right to Life’ shall be protected by law, is applicable to ‘Unborn’ life or not. The court refused to include unborn life in its definition of the term ‘everyone’ as pleaded by the Austrian Government because some states did not recognize the Right to life for human beings yet unborn and held that the term ‘Everyone’ is limited to ‘born human beings’. It was illogical to include protection to unborn life in the Convention since it provides for the deprivation of life in certain specified cases. Further the highest courts in many countries have declared that legal protection of human beings originates at live birth. In the Anglo-Saxon common law tradition, a child does not become a human “in being” (that is, a “human being” or “person”) until it has completely proceeded in a living state from the body of its mother. In current medical practice, the age of viability is determined by the state of life support facilities available. It is twenty four weeks in the west and twenty eight weeks of intrauterine life in India.

4.4 Right to Abortion vs. Right to Life of the Unborn

According to Barbara Sykes Wright, a member of the National Organization for Women (NOW), “I and thousands upon thousands of women like me, believe that any law forbidding an abortion under good medical conditions is immoral and in addition unconstitutional, for it violates her right

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106 See Supra note 97 at 223.
108 Isidore Bernadotte Lyon, T.D. Dogra, et.al., Lyon’s Medical Jurisprudence and Toxicology 244 (Delhi Law House, Delhi, 2005)
to control her property, her body as well as her life, liberty and happiness.”

The validity of the abortion laws have been questioned on the ground of constitutionality of ‘right to life of an unborn vis-a-vis right of the mother to bear or not to bear a child. The position of the foetus and the pregnant woman is often presented as one of a conflict of rights – rights of the foetus and the rights of the pregnant woman. Ronald Dworkin describes the connection between a pregnant woman and her foetus in the following terms: “her foetus is not merely ‘in her’ as an inanimate object might be, or something alive 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.” Dworkin considers contraceptives and abortion to be issues of privacy and sovereignty over personal decisions. He argues that most people share the belief that human life is intrinsically valuable such that its destruction is always a very bad thing. However, it does not follow that all forms of human life should have rights. He argues that most people share a deep belief in the sanctity of human life and, therefore, always regard abortion as a morally serious matter. He identifies procreative autonomy – a freedom to make choices about reproduction – as a vital aspect of the concept of human dignity which is a feature of all democratic societies and as one of the “critical interests” of a person’s life.

The matter, therefore, has become a subject of debate among advocacy groups belonging to one of two camps. Those who are against legal restrictions on abortion describe themselves as pro-choice while those who are in favour of prohibition of abortion are considered as pro-life advocates. Pro-life individuals generally believe that human life should be valued either from fertilization or implantation until natural death. They consider abortion equivalent of murder as human embryo or foetus is an innocent human being and is entitled to be born. Hence, it is the God who is the giver

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109 Supra note 7.
111 Available at: http://en.wikipedia.org/wiki/Pro-life (visited on August 26, 2010).
of the life and death; and not the parents. On the other hand pro-choice means to be in favour of allowing women to decide whether to have a child or not. She should have the choice to be pregnant or not, and if she is pregnant, she should have the choice to decide whether to abort the child or not or to terminate the pregnancy. Therefore, according to “pro-choice” advocates individuals should have unlimited autonomy with respect to their own reproductive system as long as they do not breach the autonomy of others. Pro-choice individuals accept that woman should have complete control over the fertility and pregnancy. It is personal choice of a woman to have or not to have children as it affects her body, personal health and future. Therefore they are in favour of contraception and abortion being legally available and accessible to those who want to use them without any interference of other people or the government. These are two extreme views. One view opposes abortion and the other gives freedom to the expectant mother to terminate her pregnancy even after viability of foetus. It is ironical that the pro-life argument does not want to speak about the rights of the mother too. It is not just the question of a child to be born but the right of a mother too to have good health and enjoy the right to life.

4.5 Arguments against Abortion

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

• Unborn human is a person with a certain natural inherent capacity (i.e., her essence), she will function as a person in the near future, just as the reversibly comatose and the temporarily unconscious will likewise do because of their natural inherent capacity. The unborn are not potential persons but persons with much potential.

• Further abortion is not morally and ethical acceptable according to certain communities.

113 Vidya Bhushan Rawat, “Pro-Life’ Also Means a Mother’s Right to Life” 50 Mainstream 17 (Dec. 1, 2012).
114 Supra note 5.
115 Supra note 87.
• The killing of innocent is a crime and the foetus is also an innocent life and by undergoing abortion foetus feels immense pain. So it should not be allowed. But this argument does not hold good because now the doctors give an injection into the foetus to slow its heart until it stops so that the foetus would not suffer any pain.

• Many women suffer significant emotional trauma after having an abortion.

• There is also some evidence that having an abortion may increase a woman’s risk of breast cancer in later life. Some other complications include damage and/or infection to the uterus and the Fallopian tubes making a woman infertile. Menstrual disturbance can also occur.

• Aborting foetuses because they may be disabled sends an implicit message of rejection to people with disabilities.

• 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.\textsuperscript{116}

4.6 Arguments in Favour of Abortion

• Every woman is having the right to control over her own body; no one should be compelled to carry or terminate her pregnancy against her will. There cannot be any equality unless the woman has the right to control her fertility.

• Our right to privacy is vast enough to include right to marry, right to form a family, right to or not to have children, right to be or not to be a parent etc. without unnecessary government interference. Therefore abortion is a matter of personal privacy.

• If a woman is restricted from lawful aborting of the child then she will have to resort to illegal abortion, thereby, causing many deaths as they are frequently performed by those who are not competent to do so.

\textsuperscript{116} Supra note 5.
Compared to a married woman, an unmarried girl, in order to get rid of the product of conception from illicit intercourse, is even more exposed to this kind of risk as there is a compelling factor to abort the child even by a non-qualified person.\textsuperscript{117}

- If abortion is banned then the people get it done by paying hefty amount to medical practitioners which will give rise to the emergence of some kind of black market in medical services which is against medical ethics.

- Illegal services cause illegal organization of all those who are concerned with illegal abortions. It also promotes police corruption.\textsuperscript{118}

- 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 as if no action is taken both will die. Aborting the foetus at least saves the mother’s life.\textsuperscript{119}

- Where the woman is not allowed to abort the foetus and under coercion she has to give birth to the child and thereafter she abandons the new baby. So what is the fun of these laws which restrict abortion as they are more dangerous for the life of the child. Thus, it is better to abort at an earlier stage.

- If the abortion is legalized, then would be helpful in controlling population which is one of the problems which India is facing today.

4.7 Conclusion

After making a careful study of the pros and cons of the entire issue and taking a pragmatic view of the socio-economic and legal problems involved in the case, it may be argued that a pregnant woman should have “personal liberty” to destroy her foetus on her own if she finds it intolerable. To force a woman to continue an unwanted pregnancy is to impose a kind of slavery upon her or at least to infringe her sense of self-respect and dignity. The foetus may have a right to life, but not a right to be kept in a woman’s

\textsuperscript{117} Supra note 36 at 467.

\textsuperscript{118} Ibid.

\textsuperscript{119} Supra note 5.
body against her will. After all, foetus has fewer claims to life, than the host i.e. the mother. Hence, the foetus in utero is not in the ordinary sense another person distinct from its mother. The pregnant women, after all, are not two beings with equal rights; it is a unique entity that cannot conform to individualism- a life within a life, one reliant on the other. So the foetus is fully dependant on the mother and it is the mother who takes care of him on a minute-to-minute basis. Even if the foetus is a person, it might be argued that pregnant women have the right to use self-defence in order to protect them from the physical invasion of unwanted pregnancy. If mother does not want to give birth to the child then it’s her decision. If she considers herself that she cannot take care of child then it’s better to have abortion. Therefore, abortion is an issue to be left to the decision of the mother.

It is submitted that a mother is next to God who provides the maximum best possible to her child without any reciprocal favour. If she opts for an abortion there might be some reason either due to ignorance, carelessness or acts done wilfully. Nobody would opt for an abortion in a happy state of mind. It is her body and she has a right to secure herself first. Abortion is an issue to be left to the decision of the mother because it is the right of a woman to protect her life and it is only used in dire circumstances. It is further argued that if abortion is not allowed on demand, when a woman does not want to carry her pregnancy but if she is forced to carry it and then abandon the new born child leads to infanticide. This would be more dangerous to the life of the baby. Hence if 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. Therefore, it is argued that many social evils like infanticide and exposure of the new born infants can be minimized and prevented only by making abortion legal, safe and accessible to all. Thus, keeping in view the lesser evil, it is better to allow a woman to terminate the pregnancy at an earlier stage. But before allowing a woman to terminate her pregnancy it should be made compulsory for her to know the

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120 Supra note 2.
122 Supra note 86 at 139-140.
consequences of abortion by attending doctor's counseling.\textsuperscript{123}

Instead of aborting a foetus a women should be made well aware of various contraceptives means/methods available for avoiding pregnancy. If a woman will adopt either of these alternatives, there will be no need to subject her body to the burden of pregnancy. Further the state could prohibit abortion only if it is ready and competent to take complete responsibility of the child. But there is ample evidence on record to show that various policies and programmes are framed for the welfare of the child but these are not implemented whole heartedly and the child is not given equal opportunities for development. As the state cannot take care of the child and the child is often left to die on streets then it is better option to abort the unborn child as the word, “life” in Article 21 of the Constitution has been interpreted to mean “life with dignity”.\textsuperscript{124} The researcher is of the opinion that if the government is really worried for the welfare of the unborn, then the government can provide the appropriate means that can support the women in the process of bearing and rearing children and not by restricting their reproductive freedom.

\textsuperscript{123} K. Vijaya Lakshmi, “Women’s Rights are Human Rights” 96 AIR 26 (2009).