Chapter – III

LEGAL STATUS OF FOETUS, RIGHT TO ABORTION AND FEMALE FOETICIDE
There is only one species on this earth which can also save the other species and that is, human being. To become a good human being, a person has to be healthy in mind as well as in body that means the physical and mental growth of a person should be perfect. Regarding the development of mind and body of a person, we have the misconception that it starts when a child takes birth or we can say when a child comes out of the womb of his mother. But we should not forget that the womb of a mother is a very important place where a being originates. Womb is like an earth and foetus is like a seed in the earth, if we take proper care of the seed by providing good fertilizers, then it will grow into a good tree, otherwise not. Similarly, by providing nutritious food to the foetus, it will develop into a healthy baby, otherwise the foetus will be malnourished which will hamper the growth of the foetus. Thus, the development of a person starts when the mother conceives and not when the child is born. If we don't take care of the foetus, then the foetus may develop some deformity which may last for his whole life. The surrounding environment of the pregnant woman also affects the foetus like violence, abusive language, reciting of shlokas. These facts have been scientifically proved (foetus learns many things while in the womb of his mother).\(^1\) Similarly any effect caused to the mother by natural calamities, scientific experiments, medicines and disaster like gas leak, also affects the foetus, which may sometimes result in life long disability to the child.

Children are the assets of a nation. It is the most important obligation of the state to nourish them since their conception and birth in nurseries of the State equally, to whatever families high or low they belong.\(^2\) The life of a person

\(^1\) The best example of it in our Indian History is that of Abhimanyu who learnt the art of 'Chakravyuh' while he was in the womb of his mother.

starts not from the birth, but from the time of conception. This fact is evident from the development of a child in the womb of mother. The life journey of unborn baby starts long before birth i.e. at conception, when the sperm and egg meet. Genetic instructions from both parents interact to begin a new and unique individual - no bigger than a grain of sugar. Here is the day to day development of an unborn baby inside the womb, which some of us are not aware of.

<table>
<thead>
<tr>
<th>Age</th>
<th>Description</th>
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<tbody>
<tr>
<td>1&quot; day</td>
<td>The first cell divides into two, the two into four and so on.</td>
</tr>
<tr>
<td>5-9 days</td>
<td>The new individual burrows into the wall of the womb.</td>
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<tr>
<td>18 days</td>
<td>Heart is forming, soon eyes start to develop.</td>
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<tr>
<td>20 days</td>
<td>Foundations of brain, spinal cord and nervous system are laid.</td>
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<tr>
<td>24 days</td>
<td>Heart begins to beat.</td>
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<tr>
<td>28 days</td>
<td>Muscles are developing along the future spine. Arms and legs are budding.</td>
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<tr>
<td>35 days</td>
<td>Pituitary gland in brain is forming, mouth, ears and nose are taking shape.</td>
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<tr>
<td>8 weeks</td>
<td>Child is well proportioned. Every organ is present. Stomach produces digestive juices. Liver makes blood cells. Kidneys begin to function. Taste buds are forming.</td>
</tr>
<tr>
<td>12 weeks</td>
<td>Vigorous activity shows distinct individuality. Child can kick, turn feet, curl and fan toes, make a fist, move thumbs, bend wrists, turn head, open mouth and press lips tightly together.</td>
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<tr>
<td>5 months</td>
<td>Sleeping habits appear, but a slammed door will provoke activity. Child responds to sounds in frequencies too high or low for adults to hear.</td>
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<tr>
<td>7 months</td>
<td>Eyes, teeth are present, Eyelids open and close, eyes look around, Mother's voice is heard and recognized. Leads an active emotional life and can even learn things.</td>
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9 months - Child triggers labour and birth occurs usually 255-275 days after conception.

The problem of female foeticide can partly be attributed to the fact that a child in womb has not been granted legal status under majority of laws. On the other hand liberalization of abortion may be required for the protection of certain rights of a pregnant woman. In this chapter some related discussion has been made with a view to harmonize all these three.

A. LEGAL STATUS OF FOETUS

Foetus means a human organism during the period of its development starting from 57th day following fertilization or creation, excluding the time in which its development has been suspended till birth. Human organism developing till 56th day from fertilization is termed as 'Embryo'. According to this legal definition, it is called embryo till 56th day and after that it is called foetus till birth. Now, whether the life is said to begin when embryo is formed or when body parts of the foetus starts forming or when pregnant woman starts feeling quickening or when child takes birth. The question when life starts according to law is unanswered as yet, because our law makers are somehow scared from this question, that's why even after more than 50 years of making of our Constitution, the legal status of foetus is uncertain. Until this question is answered, the future of our nation is in dark because the future development of nation depends upon the development of a child which further depends upon the growth of the foetus in the womb of a pregnant woman. But now the question arises whether the foetus has life or not because the life of a child depends upon the life of a foetus. Though, it is a well known fact that age of the child is counted from the birth of the child. But at what stage can a new human life is said to start. Commonly this is

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2 Section 2(bc), The Pre-Natal Diagnostic Techniques (Amendment) Act, 2002.
3 Id., Section 2 (bb).
4 It connotes the peculiar perception felt by a pregnant woman when the foetus in the womb begins to move.
identified with fertilization (conception), though some prefer implantation
(about 7th day of pregnancy). During about the 9th week of conceptus, though
rather less than two inches long, begins to look like a prospective human
being. According to Dr. Bhavani Prasad Panda, biologically from the
moment of conception, the life starts. Earlier to this thought of Dr. Panda,
the court also tried to give importance to the life of foetus when it charged a
woman for causing herself to miscarry, though she had been pregnant for only
one month and there was nothing which could be called as foetus or child.
The court emphasized that it was the absolute duty of a prospective mother to
protect her infant from the very moment of conception. The time of
conception is a crucial time and from this point of time only, the foetus
should be taken care of. In this regard, the foreign courts have also given
remarkable judgements. In 19th century in 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. In
Webster v. Reproduction Health Services, the Supreme Court of America
upheld a Missouri Statute which declared that the life of each human being
begins at conception and that unborn children have protectable interest in life,
health and well-being. In Davis v. Davis, the Judge concluded that as a
matter of law, human life begins at conception. In one case, the European
Court of Human Rights held that the right to life begins at conception, but it
is subject to the implied restriction to permit abortion in order to protect the
mother's life of health. So, if we say that life starts from the time of
conception, then can we interpret from the above cases that foetus is person
under law. To know this, we must find out what our legislature says about it
and how our courts interpret such laws.

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9 O V Ademma (1886) ILR 9 Mad 369.
12 (1989) 15 FLR 2097.
13 v. United Kingdom (8416/780) DR 19, 244.
First of all, we must find out the definition of the word 'person', whether it includes foetus or not. According to Indian Penal Code, 1860, it includes any company or association or body of persons, whether corporated or not.\(^\text{14}\) Commentary to this section says that, this term includes both natural person as well as artificial person and an unborn child within the mother's womb is a person for the purposes of section-11 of this code. It's the commentary of section -11 and not the section itself, which includes foetus in the definition of person, so its open for the Judge either to consider a foetus as person or not. That is the main drawback of this code. On the other hand, the definition of man and woman under this code includes a living human being of any age and not one in the womb.\(^\text{15}\)

According to dictionary meaning, the word 'person' means living body of human being.\(^\text{16}\) Under General Clauses Act 1897, the word person has been defined [Section-3 (42)] in the same way as under section-11 of Indian Penal Code 1860. In neither of these legislations, the foetus is considered as a person. This step – motherly treatment is the reason for the denial of rights to an unborn child. According to some jurists,\(^\text{17}\) the word person under section-11 of IPC has to be defined in a wider sense so that it includes a child whether born or unborn. Our legislature has not cleared out the status of the foetus, which has made its position very obscure, but our courts (Indian as well as foreign) have gone a step further and have given the status of personhood to the foetus. In *Tagore v. Tagore*,\(^\text{18}\) the Supreme Court observed that an infant in womb is a person in existence for the purpose of making a gift to unborn person. In another case,\(^\text{19}\) the court observed that the term 'person' would include an unborn child in the mother's womb after seven months of pregnancy, that means it is capable of being spoken of as a person, if its body is developed sufficiently. Though in these two cases, the status of

\(^{14}\) Section 11. Indian Penal Code 1860.

\(^{15}\) Id., Section 10.


\(^{18}\) (1872) 1 IA Suppl. 47.

\(^{19}\) *Jhabbar v. State* AIR 1966 All 590.
personhood granted on the foetus by the court is restricted. In the first case, this status is only for making gift and in the second case, it is given only when the foetus has completed its seven months. In USA, foetus has been considered as a living person in cases of unlawful death and unlawful life cases. In *Commonwealth v. Cass*, the Massachusetts Supreme Judicial Court held that foetus was person within the meaning of State vehicular homicide statute. The word 'person' under Article 21 of the Constitution has the same meaning as under Indian Penal Code and General Clauses Act. That means foetus is not included under Article-21 so the right to life is not made available to the foetus under our Constitution which has complicated the position of legal status of foetus. Right to life is a right which is available to all persons whether citizens or non-citizens, but what about the foetus? Now, we have discussed the legal status of personhood is not granted to the foetus directly, but some protection is given to an unborn child under certain legislations. We will discuss these legislations one by one and after that we will discuss the right to life of a foetus under the Constitution.

a) **Under Various Legislations:**

(i) **Transfer of Property Act:**

This Act defines the words 'transfer of property' as an act by which a living person conveys property to other living person. But there are certain exceptions to it where an interest in the property can be created in favour of an unborn person though subject to some conditions. It will be a vested interest acquired by the foetus on his birth, although he may not be entitled to the enjoyment thereof immediately on his birth. Even this Act has not

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21 467 NE 2d 1324 (Mass 1984).
22 Article 21 of the Constitution. "No person shall be deprived of his life and personal liberty except according to procedure established by law".
created the right of conveying the property to unborn person, but only an interest in property can be created in favour of them.

(ii) **Hindu Law:**

Hindu law also contain certain provisions which are related to an unborn person. Law of partition has given a special place to unborn child. A son who was in his mother's womb at the time of partition is entitled to a share, though born after partition. He is entitled to have the partition reopened if no share is reserved for him at the time of partition. Where the father has reserved a share to himself, a son who is begotten as well as born after partition is not entitled to the partition reopened. Where the father has not reserved, then such a son is entitled to have the partition reopened. A gift can also be made in favour of an unborn person. This Hindu law is discriminatory in nature, it gives the right of partition only to male foetus and not to the female foetus (but now after the Hindu Succession Amendment Act 2005, the daughter of Coparcener has a right to partition). According to the Hindu Succession Act, a child who was in the womb at the time of 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.

(iii) **Labour Laws:**

In the previous legislations, protection to the foetus is directly given and whereas under labour legislations it is given indirectly. These labour laws have been enacted keeping in mind the health of the mother and not of the foetus. The Maternity Benefit Act 1961 provides that pregnant woman shall not do any work which interferes with her delivery or the normal

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26 Section 20, *The Hindu Succession Act 1956*. 
development of the foetus or which affects her health. Maternity leave shall be given to her preceding and including day of her delivery and for six weeks following that day.

(iv) Criminal Laws:

According to Criminal Procedure Code if a woman, to whom death sentence has been given, is pregnant, then the High Court shall postpone the execution of the sentence and may commute the sentence to imprisonment for life. This code directly protects the foetus by postponing the death sentence, but this power is only vested with the High Court. There are some provisions under the Indian Penal Code 1860 which protects the foetus indirectly through mother, which we will discuss later on.

(v) Law of Tort:

Under this category whether under Indian Law or Foreign Law, a child can file a case for his pre-natal injuries. Even a case can be filed on the parents if due to their negligence, injury has been caused to an unborn child, for example, if a mother is used to smoking or has taken drugs or has done hazardous work during pregnancy.

After discussing all these legislations we come to know that though some protection has been afforded to the foetus either directly or indirectly, but the objective of giving such protection is not that the foetus is considered as a human being or as a person, but it is due to the caring attitude towards the mother because if some injury is caused to the foetus, that will affect the health of the mother. And the property rights which are available to the foetus, they are also subject to one or other conditions. No doubt these protective legislations are made keeping in view the health of the mother, but

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28 Id., Section 5.
now we have to analyse these legislations from different perspectives also. May be our legislature had some other objective also in mind while framing these laws i.e. giving right of life to the foetus. Now we will see whether this right to life is specifically given to the foetus in our law or not.

b) Jurisprudential Aspects of Right to Life of Foetus:

(i) Under The Constitution of India:

In India right to life is enshrined under Article-21 of the Constitution which is available to all the persons. This right to life revolves around the word 'person' which, has the same meaning as under IPC and General Clauses Act. That means even our Constitution which is considered as the mother of all laws, has excluded foetus from the ambit of its provisions. That's why there is so much of uncertainty relating to the status of the foetus. According to some scholars, the State should not discriminate between persons who have taken birth and persons who are still in the wombs of mothers. The State is under an obligation under Article-21 not only to protect the life of unborn child from arbitrary and unjust destruction, but also not to deny it equal protection under Article-14. Article-21 may be interpreted to mean that the word 'person' applies to all human beings including the unborn offsprings at every stage of gestation. What is the fun of protecting foetus through various legislations when right to life or we can say right to birth is not made available to the foetus. By giving protection, we want an unborn child to take birth, but why this right to birth is nowhere mentioned under law? The health is important for the socio-economic development of the nation, especially the health of the child who is going to be the future of the nation. Health of a child depends upon the health of the foetus. Right to be born fit is the next most important right which should be made available to the foetus because right to life means right to healthy life. In this direction England has done a

\[^{30}\textit{Supra} \text{note 8 at 140.}\]
commendable work by passing Congenital Disabilities (Civil Liability) Act in 1976. This Act recognizes an action in case of children born disabled due to some person's fault. Under this Act, even parents can be made liable if due to their negligence, child is born disabled. This is a welcome legislation which permits an action for pre-natal injuries, but in India no such legislation is there which is the need of our present time. Even though so many incidents have occurred in our country where number of children got disabled e.g.: Bhopal gas disaster, but there are certain foreign cases where courts have allowed an action for pre-natal injuries. In *Montreal Tramway v. Leveille* (1933) *IDLR* 337, the Supreme Court of Canada allowed an action by a child born with club feet two months after an injury to its mother by the negligence of the defendants. Under our Constitution, there are certain Articles like Article 39 and 47 which imposes a duty upon the State to secure the heath of men and women by raising the level of nutrition. But these articles also do not talk about the health of the foetus. It is the right of an unborn child to grow and develop with heath and in unpolluted environment. The solution to all these problems will be found only if our legislative body recognizes the right to life or right to birth of the foetus under the Constitution. As we know Article –21 is a very wide Article which includes all the rights which are essential for any person to live like right to health, right to pollution free environment, right to medical care, right to nutritious food and so on. So, if right to life under Article-21 is made available to the foetus, then all other rights will also be available to the foetus. This is the position under Indian laws, now let's us see what is the status of the foetus regarding right to life under the laws of foreign countries. Under the United States Constitution, the word 'person' is not used, it states that, nor shall any State deprive any life, liberty or property without due process of law. Thus, the foetus enjoys a greater degree of protection under the American Constitution. Article-2 of the *European Convention* for the Protection of Human Rights and Fundamental Freedom provides that everyone's right to life shall be protected.

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by law. But the court refused to include unborn life in its definition of the term 'Life' because some member states did not recognize a right to life for beings not yet born, and held that it is limited to born human beings. The Constitution of Ireland\textsuperscript{31} recognizes the right to life of the foetus specifically. So, it seems that even in foreign countries there is no unanimity in relation to the right to life of foetus, as some have recognized it but some have not. The Preamble of Declaration of the Rights of the child provides that the child, by reason of his or her physical or mental immaturity, needs special safeguards and care including its appropriate legal protection before as well as after birth.\textsuperscript{34} Why we are stressing on the right to life for the foetus because this right is the basis of all the rights, all other rights culminate from it. There are certain reasons why there is need for right to life for the foetus. These are as follows: Physical reason, mental reason, legal reason, social reason or moral reason.

As we know health of the child depends upon the health of the foetus. If right to life will be given to the foetus, that means medical aid will also to be given to it. It will be compulsory for the parents to get the foetus checked up regularly so that it does not get any physical deformity.

As discussed above, a healthy foetus will give rise to a healthy child. And for that proper medical facilities should be given to the foetus, which will be provided by guaranting right to life to the foetus. For proper growth and development of mind of the foetus, nourished food is required in addition to proper medical care. Otherwise, the foetus will have underdeveloped brain and child will be mentally retarded.

As we know, the legislations which provide protection to the foetus, they are restricted to some conditions or are made keeping in view the health of the mother. These legislations can be made stronger by giving right to life

\textsuperscript{31} Supra note 29 at 212.
\textsuperscript{34} Kameswari G. "Basic Rights of a Child-Born and Unborn", AIR 2002 Journal Section, p.141.
to the foetus under our Constitution. It will further provide equality between persons born and persons unborn. It will also provide the status of personhood to the foetus which will be the greatest achievement in the field of the rights of the foetus.

In the eyes of our society, a person who is not yet born is not a human being. So, the society don't care much about an unborn person due to which crimes against the foetus are on the rise like abortion, female foeticide, sex determination. By giving right to life to unborn child, the society will realize the importance of the foetus which is the future of our nation.

Our morals and ethics are decreasing day by day. For our future generation, it will be something exceptional thing to be find out, because of them life will have no value or respect. Our morals says that live and let other also live, but if we will not respect our lives then how will we respect other's lives, that means we will not be careful for other person's life also. For this, right to life should be given to the foetus from the time of conception only, so that no body dares to violate this right and in this way we will be able to protect our morals to some extent.

It is only an escapist view to deny right to life to a foetus by saying it is not a person. The State is evading the crucial issue of right to life of a foetus by giving such frivolous reasons, although it indirectly recognizes, this right through various legislations which we have discussed earlier.35

Our legal system historically has treated the foetus as part of the woman bearing it and has afforded it no rights as an entity separate from her. A few exceptions to this general rule have been created where it is necessary to protect the interests of born individuals. In recent years, however, courts and state legislatures have increasingly granted foetuses rights traditionally enjoyed by persons. Some of these recent fetal rights differ radically from the

35 Supra note 29 at 214.
initial legal recognition of the foetus in that they view the foetus as an entity independent from the pregnant woman with interests that are potentially hostile to hers. In extreme cases, the state has curtailed the autonomy of women during pregnancy to further what were perceived as adverse fetal interests. For example, women have been compelled to submit to surgery in the form of cesarean sections although they preferred to deliver their children through vaginal childbirth. The social determination of how the legal system should view the foetus should be informed by a careful consideration of all potential implications. Although the desire to provide legal protection to the foetus often reflects a number of important concerns, the recent expansion of fetal rights has not been accompanied by careful consideration of how best to address those concerns. Most ominously, this expansion has ignored the far-reaching implications for women as the bearers of foetuses.36

The current rhetoric against abortion stresses the fact that the genetic make-up of the foetus is determined at conception and the genetic code is incontestably human. Lest there be any doubt about the humanity of the foetus, there are photographs of foetuses at various stages of development demonstrating the early appearance of recognizably human characteristics eg. - eyes, fingers, toes. The fact that the foetus in its early stages is microscopic, virtually indistinguishable from other primate foetuses to the untrained eye and lacking in the capacities that make human life meaningful and valuable is not deemed relevant by the self appointed defenders of foetuses. The anti-abortion campaign is directed at evoking sympathetic attitudes towards this tiny, helpless being whose life is threatened by its own mother, it urges us to see the foetus as entangled in an adversarial relationship with the woman who carries it.37

Under Different Laws of Some of the Countries:

The limited contexts in which courts first recognized the foetus involved rights that were granted to children. These rights of children were unique in that they required acknowledging a child's prior existence as a foetus in her or his mother's womb. Yet because they contained a live birth requirement, these narrow exceptions were consistent with the prevailing view of the foetus as part of the woman. The foetus was not given any rights independent of its mother, rather it was only after the foetus became a person at birth that it acquired legal rights as a separate entity. One of these first instances of legal recognition of the foetus involved the right of inheritance. Where a foetus existed at the time of death of the testator, the foetus was granted the status of a person for the limited purposes of the inheritance, provided that it was subsequently born alive. Before 1946, courts refused to recognize tort claims brought by children for injuries inflicted prior to birth. Today, however, virtually all American jurisdictions allow tort claims for prenatal injuries if the child is subsequently born alive. The purpose of tort law is to provide compensation to victims of tortuous conduct and, to a lesser extent, to deter such harmful acts. It is consistent with these purposes to allow a child to recover against third parties for afflictions she or he presently suffers as a result of tortuous conduct inflicted on the pregnant woman. In recognizing born plaintiff's rights to sue for injuries suffered prenatally, tort law provides a means of compensating children and their parents. The law of foetal rights in its first phase thus did not afford rights to the foetus qua foetus. Since, the Roe decision, the law increasingly has recognized the foetus in contexts that are not contingent upon subsequent live birth. The majority of states now consider foetuses that have died in utero to be persons under wrongful death statutes. The World Conference was organized on Faith, Science and the Future, it was not a professional conference. It did not attempt to deal with the whole spectrum of issues in medical and biological ethics. It focused instead on 'Theological and Ethical issues in the Biological Manipulation of Life'. Some of the theological issues that underlie the debate
were (1) Do we take normal decisions about Prenatal abortion of defective embryos in terms of a cost benefit analysis? (2) Do embryos have rights like right of life? Are these rights ad judicable or merely moral? When they come in conflict with the rights of mother, how do we make decisions? These were some of the questions which were raised in the Conference. According to traditional common law, the destruction of a foetus in utero is not a homicide, the alleged victim must have been born alive. The Supreme Judicial Court of Massachusetts recently became the first American court to break with this long line of precedent. It held that a foetus was a person for purposes of the Massachusetts vehicular homicide statute and thus a potential homicide victim. In addition, number of states have adopted legislation imposing criminal sanctions for the destruction of a foetus that are identical to those imposed for the murder of a person. The law no longer recognizes the foetus only in those cases where it is necessary to protect the interests of the subsequently born child and her or his parents. Rather, the law has conferred rights upon the foetus qua foetus. Conceptualizing the foetus as an entity with legal rights independent of the pregnant woman has made possible the future creation of fetal rights that could be used against the pregnant woman. In one such case, a Michigan court held that a child could sue his mother for taking tetracycline during her pregnancy, allegedly resulting in the discoloration of the child's teeth. Another court has suggested that a woman may be sued by her child for not preventing its birth if she had prior knowledge of the probability of its being born defective. California's criminal child abuse statute, which requires a parent to furnish necessary food, clothing, shelter or medical attendance, extends to fetuses and imposes a criminal penalty of up to one year in jail and a two thousand dollar fine. Perhaps most alarmingly, states have taken direct injunctive action against pregnant women. Courts have seized custody of foetuses (i.e. of pregnant women) in order to enjoin women from taking drugs that are potentially harmful to fetuses. They have ordered women to submit to blood transfusions to benefit the fetus and have even compelled women against their wishes to

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undergo cesarean sections instead of vaginal delivery. A woman could be held civilly or criminally liable for foetal injuries caused by accidents resulting from maternal negligence, such as automobile or household accidents. She could also be held liable for any behaviour during her pregnancy having potentially adverse effects on her foetus, including failing to eat properly, using prescription, nonprescription and illegal drugs, smoking, drinking alcohol, exposing herself to infectious disease or to workplace hazards, engaging in immoderate exercise or sexual intercourse, residing at high altitudes for prolonged periods or using a general anesthetic or drugs to induce rapid labour during delivery.39

An examination of human rights agreements discloses no provision which explicitly says that the foetus has a right to life. This raises the issue of whether such a right implicitly exists in these agreements or in International Law. Both the Universal Declaration on Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms provide that everyone has a right to life and that no one shall be subject to cruel, inhumane or degrading treatment. To determine whether the terms everyone and no one refer to the foetus, one must look to the practice of states which are parties to the agreements as well as to the language of the entire agreement and determine whether such an interpretation was intended by the parties. Article-1 of the Universal Declaration on Human Rights provides "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." This provision indicates that the Universal Declaration was intended to protect only born human beings since only born human beings can exercise reason and conscience and act towards one another in a spirit of brotherhood. The proposition that mere possession of these traits by the foetus would make human rights provisions applicable to the foetus is inconsistent with the first line of Article 1 which grants freedom, equality, dignity and rights only to born human beings. In 1974, the

39 Supra note 36 at 333.
Austrian Constitutional Court determined whether the European Convention for the Protection of Human Rights and Fundamental Freedoms recognized the foetus right to life. The Court refused to include unborn life in its definition of the term 'everyone' because some member states did not recognize a right to life for beings yet born.\(^{40}\)

But there are various international conventions and instruments which provide for the right to life, survival, health etc. in favour of women and children and thus implicitly recognize the right of an unborn child. There is, however, no explicit recognition. Article 1 of the U.N. Convention on the Rights of the Child 1989, gives the definition of the age of the child: "For the purpose of the present Convention, a child means every human being below the age of 18 years unless under the law applicable to the child, majorities attained earlier." No minimum age is defined. This was done to avoid debate over abortion, which could have threatened the acceptance of the Convention.\(^{41}\) Like International Conventions, very few countries explicitly recognize the right of a foetus. Article 40(3) of the Irish Constitution recognizes the right to life of the unborn. It was added vide Amendment to the Constitution in 1982. It says: the State acknowledges the right to life of the unborn, and with regard to the equal right to life of the mother, guaranteed in its laws to respect and as far as practicable by its laws to defend and vindicate that right". In USA, foetus is a person within the language and meaning of the 'due process clause' of the Fourteenth Amendment to the United States Constitution. Like Indian Constitution (Article-21 - Right to Life) there is however, no explicit recognition.\(^{42}\) Significantly, Paton (a noted jurist) does not recognize a child in the mother's womb as a legal person because he is without rights. In his view, legal personality is conferred on a child only after he is born alive and completely separated from his mother's womb. It is, however, submitted that this view is


\(^{42}\) Jain Ashok K., The Saga of Female Foeticide in India, Socio Legal Offshoots, New Delhi, 2006, pp.72, 73.
not tenable, as many legal systems of the world have incorporated provisions in their laws extending legal protection and safeguarding the contingent rights of an unborn child. When making laws that involve foetus and pregnant women, courts (as well as legislatures) have felt constrained by the existing law as developed for born persons and have considered the granting of foetal rights an all or nothing proposition. They have mistakenly viewed their options as being limited to either granting the foetus personhood status without regard to either the context or the parties involved, or denying the very existence of the foetus. It is thus not surprising that these lawmakers have extended the rights of persons to foetuses when faced with instances of clear harm and injustice, such as when an assailant negligently or willfully destroys a foetus through violence to a pregnant woman. The foreign courts have also employed unnecessarily simplistic reasoning when adopting the other extreme and refusing to recognize the existence of the foetus. For example, in denying a wrongful death action by a foetus, one court stated that it was incongruous to allow a woman the constitutional right to abort and yet hold a third party liable to the foetus for unintended but merely negligent acts. Another court denied a child's wrongful life claim against a physician out of fear that allowing it would necessitate holding liable for wrongful life women who had knowledge of probable fetal defects yet choose not to abort. Similarly, in limiting a foeticide statute to the destruction of viable foetuses the California Supreme Court stated that if destruction of a non-viable foetus was susceptible to classification as the taking of human life and therefore murder, then the mother no more would have the right to take human life. In thus treating the foetus, courts have glossed over crucial differences between foetus and person and have lost sight of the interests that narrow legal recognition of the foetus traditionally has attempted to protect. They have ignored alternatives to equating the foetus with a person that would have more appropriately served their goals. To the extent that the expansion of fetal rights is the result of inadequate attention to the particular contexts in

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42. Supra note 36 at 610.
which those rights are granted, courts and legislatures should take strict care to ensure that the interests of pregnant women are not impaired by enhancing the legal status of the foetus. Given the physical reality of the foetus as part of the pregnant woman, there exists an inherent potential for conflict between the autonomy of pregnant women and any right granted the foetus qua foetus. The law should continue to recognize the existence of the foetus insofar as is necessary to protect the interests of the subsequently born child and in consistent with the pregnant woman's interests.

(iii) **Under the Perspectives of Morality:**

Most people assume that the great, divisive abortion argument is at bottom an argument about a moral and metaphysical issue, whether even a just-fertilized embryo is already a human creature with rights and interests of its own, an unborn child helpless against the abortionist's slaughtering knife. The 'human life' amendment that anti-abortion groups have tried to make part of the United States Constitution declares, "The paramount right to life is vested in each human being from the moment of fertilization without regard to age, health or conditions of dependency." The 'pro-choice' world defends abortion by claiming that an embryo is no more a child than an acorn is an oak. Theological, moral, philosophical and even sociological discussions of abortion almost all presume that people disagree about whether a foetus is a person with a right to life from the moment of its conception or becomes a person at some point in pregnancy or does not become one until birth. And about whether, if a foetus is a person, its right to life must yield in the face of some stronger right held by pregnant women. Throughout the Western World, even where church and state are normally separated, the battle over abortion has often had the character of a conflict between religious sects. In the United States, opinions about abortion correlate dramatically with religious belief. The question which we must answer in order to produce a

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satisfactory solution to the problem of the moral status of abortion is how are we to define the moral community, the set of beings with full and equal moral rights, such that we can decide whether a human foetus is a member of this community or not. The term human has two distinct but not often distinguished senses i.e. (1) it is wrong to kill innocent human beings (2) fetuses are innocent human beings (3) it is wrong to kill fetuses.47

Instruction Rules on Respect for Human Life in its Origin and on the Dignity of Procreation was published in 1987 by the Vatican’s Congregation for the Doctrine of Faith which declares that every human being has a right to life and physical integrity from the moment of conception until death.48 Some conservative theologians and religious leaders have also explicitly said that the crucial question about abortion is not whether a foetus is a person, but how best to respect the intrinsic value of human life.49 The status accorded to the embryo is of major concern to those who see it either as potential life or merely as a fertilized egg, positions central to the abortion issue. To offer significant protection to the embryo in respect, say, of research, is to make a step towards recognition of the claim that it is a human life with the rights, which are generally attributed to such a status. The implications for the abortion question are obvious and potentially dramatic. Indeed, in the recent decision in Tennessee concerning the disposal of embryos in a divorce action the court made it quite clear that it viewed these embryos as human beings. Their view that life begins at conception does not merely affect the decision about what is to be done with these particular embryos, but also had profound implications for the abortion debate.50 The outcome is a setback for the pro-choice lobby whose case inevitably becomes more difficult every time courts pronounce in this way, particularly so in the USA where Court gave the judgement in Webster case.51 People who believe for whatever reason, that a

47 Supra note 37 at 321.
48 Supra note 45 at 216.
49 Id at 215.
51 Webster v Reproductive Health Services. SC. 1989, USA.
foetus is a person from the instant of its conception are free to argue that even early abortion is the murder of an unborn child. This argument is related to Declaration by the Sacred Congregation which emphasized that the life of the child takes precedence over all opinions, one can't invoke freedom of thought to destroy this life, it is at all times the task of the State to preserve each person's rights and to protect the weakest. Doctrine of immediate ensoulment claims that a conceptus has a divine soul from the time of conception only, though a sperm or an ovum does not.52

Both proabortionists and anti-abortionists have tended to abstract the question of whether abortion is wrong to that of whether it is wrong to destroy a foetus, just as though the rights of another person were not necessarily involved. This abstraction has led to the almost universal assumption that if a foetus is a human being, with a right to life, then it follows immediately that abortion is wrong. John Noonan is correct in saying that the fundamental question in the long history of abortion is, how do you determine the humanity of a being? He summarizes his own antiabortion argument, which is a version of the official position of the Catholic Church, as follows: it is wrong to kill humans, however poor, weak, defenseless and lacking in opportunity to develop their potential they may be, it is therefore morally wrong to kill embryos.53 Within anti-abortion arguments, foetuses are identified as individuals, in our culture which views the individual as sacred, foetuses qua individuals should be honoured and preserved. Extraordinary claims are made to try to establish the individuality and moral agency of foetuses. At the same time the women who carry these foetal individuals are viewed as passive hosts whose only significant role is to refrain from aborting or harming their foetuses. Physicians have also joined with anti-abortionist activists in fostering a cultural acceptance of the view that foetuses are distinct individuals who are physically, ontologically and socially separate from the women whose bodies they inhabit and who have

52 Supra note 45 at 222.
53 Supra note 37 at 318.
their own distinct interests. Concern for the well being of the foetus is taken as licence for doctors to intervene to ensure that women comply with medical advice. Courts are called upon to enforce the doctor's orders when moral pressure alone proves inadequate. Some states have begun to imprison women for endangering their foetuses through drug abuse and other socially unacceptable behaviours. An Australian state recently introduced a bill that makes women liable to criminal prosecution if they are found to have smoked during pregnancy, eaten unhealthy foods or taken any other action which can be shown to have adversely affected the development of the foetus.54

B. RIGHT OF ABORTION

The right of an individual to bodily self-determination and integrity forms part of the liberal philosophical tradition in which feminism has its roots. If women are to have equality with men and participate as fully in society, they must have autonomy over their bodies, especially in terms of sexuality, conception and pregnancy. Rather than their bodies being passive chambers for sex and for reproduction, women must have rights, choices and autonomous control. This includes the right not to have sex, the right to have heterosexual sex without fear of pregnancy and the right to end an unplanned and unwanted pregnancy, via abortion. The feminist position on abortion can therefore be understood in terms of it being a pre-requisite for women's social equality. The issue of control over women's bodies is at the heart of a much wider struggle between women and men involving ideas about sexuality, family roles, the succession of generations, paternity and motherhood.55

a) Meaning of Right of Abortion:

Industrial revolution ushered in a new era for economic, scientific and technological development. More and more women started coming out of

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54 Id., at 348.
their houses to join the labour force. These developments had social implications also and set a pace for equality of sexes, as the economic disability was the essence of dependency. In the meantime women liberation movement gained ground. This movement emphasises that women are human beings like men. They are not second sex, chattels or child producing machines. They have the equal right to develop their personality fully and freely. An offshoot of women liberation movement is the 'freedom of womb' or 'reproductive right i.e. the right to chose whether to have a baby or not. by using various methods of family planning. The last resort in this regard is to demand for the abortion of unwanted pregnancy. This right is based on the plea that a woman is the master of her own body. She should have the right to prevent the unwanted from happening to her body in the way she likes most. This right to abortion cannot be absolute in view of the fact that such a right can be misused and would encourage female foeticide. Therefore it is subject to the restrictions imposed keeping in view the right of a foetus also. Hence right to abortion simply means justified abortions.

b) Liberalization of Right of Abortion:

The 'Freedom of Womb' has been strongly advocated by many sections of the society such as women liberalization movement, legal, medical and demographic experts, for various reasons. Firstly, from the point of view of the woman, her mental and physical health, freedom and above all life. Emancipation of woman shall not be complete unless she shall be treated as a full human being and not a mere human incubator. For this it is necessary that she should not be compelled to suffer from ageless bondage of unwanted child, rather she should be given a right not to have a baby, she does not want. Her mental and physical faculties should not be subjected to the rights of unborn. Thus 'the right to life' for a woman must include the right to choose whether to have a child or not. Of course, it may be argued that such

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a freedom will imbalance the whole social structure, as it would frustrate husband's lawful aspiration to have a child. But the counter question is whether the husband has a fundamental right to have a child? Certainly not. At the most unilateral decision by the wife to abort the foetus would entitle the husband to divorce. Secondly, from the point of view of unborn child, who may be born as a physically handicapped or mentally retarded child. Or even if physically and mentally fit, being an unwanted child, if he remains unloved for or uncared for, there is every possibility that he would become a delinquent child. The daily newspaper and magazine reports on rising level of child delinquency are perhaps an index of the problem faced by unwanted children. Such a child becomes a burden upon himself, his family and the society. Arguments by Garrett Harding are worthy of consideration at this point. "In this day of population explosion, society has no reason to encourage the birth of more children, but has tremendous interest in encouraging the birth of more wanted children. Critics of abortion, generally see it as an exclusively negative thing, a means of non-fulfilment only. What they fail to realise, is that abortion, like other means of birth control, can lead to fulfillment in the life of a woman. A woman who aborts this year because she is in poor health, neurotic, economically harassed, unmarried, on the verge of divorce or immature, may well decide to have some other child years from now – a wanted child. The child that she aborts, is always an unwanted child. If her need for abortion is frustrated, she may never know the joy of a wanted child." Freedom of womb implies that legally abortion should be available on demand whenever wanted by a pregnant woman. It is advocated from the point of view of the State also because the gravest problem today is man's uncontrolled fertility. The Government of India in its draft on population policy states that if the Indian population policy goes wrong nothing else will have a chance to go right. A proper approach to control

population should firstly aim at increasing awareness among and improving the status of women. The women liberation movement, legal, medical and demographic experts are agitating for the broader freedom of womb. They plead that such a policy will serve three broad purposes. First, it will boost the status of women from child producing machines to full human beings, having their own wishes and aspirations. Second, it will remarkably reduce the number of maternal deaths caused by illegal abortions, as clinical abortion shall be available to pregnant women, without any legal hassles. Last but not the least, abortion would become a strong weapon in the armoury of the state for controlling human breeding.\textsuperscript{61}

Now the question arises can a mother abort her child even when she has no ground available under law? This is a very serious issue because life and death of a foetus depends upon the mother. It is the mother only who takes care of the child after birth as well as before birth because it's she only through whom a foetus gets nourishment while in womb of the mother. Before becoming a mother, a female has to be physically prepared as well as mentally prepared because gestation period is not an easy one. A pregnant lady has to face so many problems and complications during her pregnancy and delivery of a child. So, it is a something inborn feeling which makes the pregnant woman a successful mother and for this, acceptance of the foetus as her own child is very important. For this she must have the liberty to decide at what time she wants to get conceived.

c) **Right to Privacy and Abortion:**

The topic of abortion has emerged as an issue in International Law also by relating it to the right to privacy of woman, its expression in various human rights documents and its application to woman's right to decide

\textsuperscript{61} \textit{Supra} note 62 at 304.
whether to terminate a pregnancy, without outside interference in her decision.

(i) Under International Law:

The right of individuals to privacy is the subject of several international human rights agreements such as the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights. The right to privacy is also found in regional human rights agreements such as the European Convention for the protection of Human Rights and Fundamental Freedoms and the American Convention on Human Rights. All these agreements express the right to privacy in general terms. The agreements simply state that individuals have a right to privacy or a right to a private life. In recent years, the United Nations General Assembly has attempted to define the scope of the right to privacy. These efforts indicate that the General Assembly considers that the right to privacy encompasses the individual's freedom from state surveillance. Such a restrictive view of the right to privacy excludes woman's right to decide whether to terminate her pregnancy. One case in International Law has arisen in which the applicants, who filed the complaint with the European Commission on Human Rights, claimed that the scope of the right to privacy includes the right of the woman to decide whether to terminate her pregnancy. The Commission considers that pregnancy and the interruption of pregnancy are part of private life and also in certain circumstances of family life. It further considers that respect for private life comprises also to a certain degree, the right to establish and to develop relationships with other human beings, especially in the emotional field, for the development and fulfillment of one's own personality. Right to Privacy synonymous with right to be let alone is becoming heart beat of human rights movement - both at national and international level. With

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62 Right to Privacy means no one shall be subject to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.
64 Supra note 39 at 243-249.
reference to right to privacy the Indian courts have banked upon American case law. The two significant American cases *Roe v. Wade* and *Doe v. Balton* settled inter-alia the questions of constitutionality of the abortion laws of the two American states. In the first case the constitutional validity of Texas abortion statute was challenged on the ground of privacy, which provides abortion only when the life of the pregnant woman is threatened by the continuation of the pregnancy. Roe was an unwed mother and wanted pregnancy terminated under safe clinical conditions that the state of Texas denied. In the second case, the plaintiff, a poor married citizen of the State of Georgia, sought abortion because she apprehended her disability to care for the unborn child. Her poverty had forced her to keep her earlier issues in a foster – home. But state of Georgia required some procedural condition for the abortion that the plaintiff failed to satisfy. She challenged these procedural requirement as unconstitutional. Justice Blackman held these abortion statutes as unconstitutional. The tenor of the judgement is that the right of privacy, though not explicitly mentioned in the Constitution, is protected by 'due process clause' of the Fourteenth Amendment and that the right to an abortion is fundamental and can therefore be regulated only on the basis of compelling state interest. The same question of right to privacy came before the U.S. Supreme Court in *Griswold v. Connecticut*. The issue was whether it is constitutional for a state to make it a crime for a married couple to use a contraceptive device. Justice Douglas, speaking for the court, held that this law interfered with the right to privacy. The right asserted, which exists alongwith fundamental rights specifically mentioned, was of the privacy of the married couples in their bed rooms.

(ii) **Under Indian Law:**

Now we come to the Indian position. Precisely there is no direct case law on the point, perhaps this may be either the abortion law of India is a

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381 U.S. 497 (1965).
constitutionally perfect law or because supervening period between its enactment and its enforcement has been short and there seems to be a little interaction of the law and the people to give rise to constitutional problem. However, the Indian Courts have tried to recognize the right to privacy not only as a civil right but also based on social customs. There are various High Court and Supreme Court decisions like *Nihal v. Chand Bhagwan Dei* or *Kharak Singh v. State of U.P.* and *Gobind v. State of M.P.* where the court showed its awareness of individual autonomy to be of central concern of any system of limited government. The court also held that the concept of privacy must be based on a fundamental right implicit in the concept of liberty. The Supreme Court after referring to the views of American judges on privacy observed that as such our Constitution does not confer any right to privacy, but recognized that an unauthorised intrusion into persons home and disturbance caused to him thereby is as it were the violation of common law rights of man, an ultimate essential of ordered liberty, if not of the very concept of civilization. Of course, the right is not absolute, the Court accepts the right to privacy encompassing and protecting the personal intimacies of the family, marriage, motherhood, procreation and child bearing. International peace and security are recognized goals of the world community. International peace and security depend on the favourable status of the individual because systems which fail to respect the individual are not stable. Thus, the primary goal of human rights is to establish maximum respect for the individual. It is in the context of this premise that the right of a woman to choose to have an abortion should be analyzed. Autonomy, including the right to privacy, is an element of respect for the individual. For a woman, autonomy is closely related to the ability to decide for herself whether she wishes to bear and rear children. The right approach to advocating legal abortion argues that, independently of the public health issues involved, women are entitled to control their own reproduction. Some

*67 AIR 1935 All 1002.*  
*68 AIR 1963 SC 1295.*  
*69 AIR 1975 SC 1378.*  
*70 Kharak Singh v. State of U.P.*
progressive human rights scholars and activists argue a position entirely
different from the privacy or bodily integrity rationales. They assert that
human rights entitlements are not just morally defined in the abstract, but
must be grounded in cultural, social and political conditions. However,
applying this rationale alone, independent of an absolute concept of
individual rights, runs the risk of effecting a definition of rights that is
mutable, subject to change as a consequence of historical developments. This
line of reasoning, then represents a slippery slope, as it may be applied to
relativize all human rights demands/violations as culturally defined. In order
to extend the struggle for abortion rights beyond the boundaries of the
feminist movement, women must engage allies in dialogue to define advocacy
strategies appropriate to diverse cultural and political contexts. In many
settings the women's movement has opted to pursue the health rationale,
viewing it as more morally compelling than the rights argument in their
particular context. The two rationales should not be seen as opposing
alternatives, but rather as lines of reasoning and argument that converge upon
the same goal, women's access to safe, legal abortion.\(^1\)

Vesting foetuses with rights that are assertable against the women
bearing them would create an unprecedented intrusion on women's bodies and
personal lives. The magnitude of the intrusion on women's rights threatened
by the current expansion of foetal rights implicates basic constitutional
liberty and privacy interests that have been recognized by the Court in Roe &
in other cases. The court has long held that the Constitution protects certain
aspects of personal autonomy from state intervention. The Court has
described the 'right to be left alone' as the most comprehensive of rights and
the right most valued by civilized man. This right is particularly important
when the state intervention involves a physical intrusion on an individual's
body. No right is held more sacred or in more carefully guarded than the right
of every individual to the possession and control of his own person. The
\(^1\) Sonia Correa, *Population and Reproductive Rights: Feminist Perspectives from the South*,
right to be free from government control of one's physical person has been described as the right to personal privacy and dignity, personal security and bodily security. The Court in the long line of cases has affirmed as part of the Constitutional right of personal privacy, an individual's right to independence in making certain kinds of important decisions at the very heart of which lie decisions in matters of child bearing. Because the Court has emphasized that the right of privacy is the right to make decisions free from state intrusion, not only is the state prohibited from infringing directly on the protected right, but it also may not act in any way to interfere with the individual's decision-making autonomy. For example, although there is no independent fundamental right of access to contraceptives, state restrictions on access to contraceptives must be narrowly drawn to serve a compelling state interest, because they infringe on the exercise of the constitutionally protected right of decision in matters of child bearing just as the state may not force a woman to bear a child against her will, it may not act to penalize her for deciding to bear a child.

In one incident, a city court in Delhi summoned a widow of a Delhi policeman, along with her parents and brother, for having aborted her husband's only heir to be. According to the mother of the deceased policeman who was the complainant, the unborn foetus would have been the only heir of the deceased son, and the daughter-in-law (widow) had got the pregnancy terminated so that she could remarry. What is wrong about this? In a society where a woman's safety and happiness in the matrimonial home is not assured even while the husband is alive her fate is far worse as a widow so what is wrong if after husband's death she wants to remarry? Where remarriage for even an unencumbered widow is not an easy proposition, it would become all the more difficult if there is a child. Even from the perspective of the child, life without a father or with a stepfather may not be smooth and comfortable. There are cases of widows with children marrying again or children losing fathers but that is a difficult situation. When there is no child in existence yet, the widow should be within her rights to relieve
herself and the unborn child of the probabilities of insurmountable problems that invariably surface. The anguish of a pregnant widow is actual and reasonably foreseeable if she gives birth to the child. The fact of losing an heir is not as cruel as the hard realities of the life that a widow with an unwanted pregnancy might have to face. There are a large number of women, though who might decide in favour of continuing with the pregnancy so that they have someone of their own to live for but this is a personal choice/decision. This however, is not to plead for an unbridled right to abortion but for a need to maintain balance between the rights and interests of the family, the child to be born and the autonomy and practical situations of the woman. The interests of the woman should not be sacrificed at the altar of sentiments and emotions of those around her. For attaining economic independence what is needed is that the women must be free to work at careers and they must be freed from the bondage of domesticity. This however, is made difficult by their role in procreation and child rearing and thus they remain confined to their home. To eliminate the restrictive effect of these conditions on the mobility of women and their involvement in economic activities, what is needed is the abortion of notion of masculine and feminine responsibilities, control of reproduction and the specialization of child rearing and all domestic functions. Until a woman is able to control her own reproductive functions it is literally impossible for her to plan her life or career with any certainty. There are other presequisities for full female emancipation such as level of urbanization, industrialization and technology high enough to free women from traditional domestic duties and general immobility in a mobile society. These other prerequisites for complete emancipation however lose much of their significance if the women do not have freedom from unwanted and unplanned pregnancies. However, the idea of conceding the right to women to decide whether they would like to bear the burden of motherhood raises many problems. There are many conflicting interests which require to be reconciled and whether it is the legislator or the judge, he has to adopt a course of action which not only takes into account

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the interests of the different parties concerned but has also to see that the law of decision is in consonance with the current ideas of morality. Thus, apart from woman's interest of the autonomy of her person, the interest of the foetus is also involved. Legal right of Abortion means right of abortion available under law against which no legal action or proceeding can be taken. There are two laws under which right of abortion is available to mother, these are Indian Penal Code 1860 and the Medical Termination of Pregnancy Act. 1971, both these laws have been discussed in chapter – V.

If we say that this legal right of abortion must be widen up that means she must be free to conceive as well as free to abort at any time. But if such a liberal attitude will be shown towards rights to abortion of the mother, then what will happen of a right to life of a foetus which is not recognized anywhere under law. Thus, a balance has to be maintained between these two rights i.e. right to life of the foetus and right to abortion of the mother. This can be achieved by giving little freedom to the right of abortion and by recognizing the right to life of a foetus, but no doubt, this can be done within certain limits. The objectives of these two rights can be fulfilled if our legislature consider these rights as a bird, who is free to fly, but upto certain limit only because its feet have been tied up with a rope. Liberalization of right to abortion will help the poor who desire abortions for economic reasons and who, under the present law, cannot pay the price for an illegal abortion from a qualified doctor, but who will undertake an abortion if provided under Government Public Health Scheme. This way, the national economy and well being will be enhanced by reaching a group of people (from middle and lower strata) who could not afford to have an illegal abortion, but also can't very well afford more babies. Mental health of mothers will be affected positively for (a) there will be less psychological stress in seeking abortions (b) less guilt feeling because there will be legal and social approval of the act of abortion and (c) she will not have the burden of giving birth to and having to

rear undesired children. Besides this, Government can create a body which will help in maintaining a balance between the rights of foetus and the mother. Such body will ensure that no abortion is taking place due to the reason that foetus is female, or ground which is not reasonable and it can be comprised of Doctors and social workers as doctor can judge the physical and mental health of a mother and the health of a foetus, whereas social worker can understand the social and emotional problem which a mother has to face in case she is a widow or divorcee or unmarried or wants to pursue any job or a career.

C. CONCLUSION

Through this discussion we have come to know that whatever protection or rights are available to the foetus, they all are indirect like under IPC, Hindu Law or Labour Law or under various other legislations. This is because our law is silent about the status of the foetus. But now the time has come when our legislative body must start thinking in this direction by balancing the rights of the foetus as well as of the mother. The foetus must be given the status of person under law. Life of human being must be considered to start from the time of conception only and not from the time of birth. Right to life under Article 21 of the Constitution must also recognize the right of the foetus to take birth, but it should be a restrictive right keeping in view the health of the mother or other grounds of abortion mentioned under MTP Act of 1971. If this right to life is being made available to the foetus, then there is need of a legislation through which any person can be made liable if he causes per-natal injuries due to which a child is born disabled. Such legislation is required because right to life means right to healthy life. The necessity of recognition of such a right is felt in view of the reason that firstly, the present economic world recognizes economic relations more than the moral and spiritual relations, secondly, the recognition of independent rights to foetus would give a new direction to use of scientific research for the welfare of human being and thirdly, as is felt above, the healthy foetus
depends on health of mother, therefore the responsibility of mother towards the foetus requires to be more legal than social and moral. Right to life cannot be enjoyed unless life is not protected at its inception. Right to abortion of the mother should be made more liberal by including more grounds of abortion such as right of abortion to widow\textsuperscript{74} to unmarried woman, to working woman. But both these rights cannot be absolute, these have to be limited by imposing exceptions in order to give recognition to both. The path of progress of the nation starts from the womb of the mother which requires attention and not ignorance.

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\textsuperscript{74} Supra note 72 at 374.