Protection of an Unborn Child vis-a-vis Human Rights: A Case Study of Haryana (with Special Reference to MTP Act, 1971 and PNDT Act, 1994)

THESIS

SUBMITTED FOR THE AWARD OF THE DEGREE OF

Doctor of Philosophy

IN

LAW

BY

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UNDER THE SUPERVISION OF

DR. SHAKEEL AHMAD

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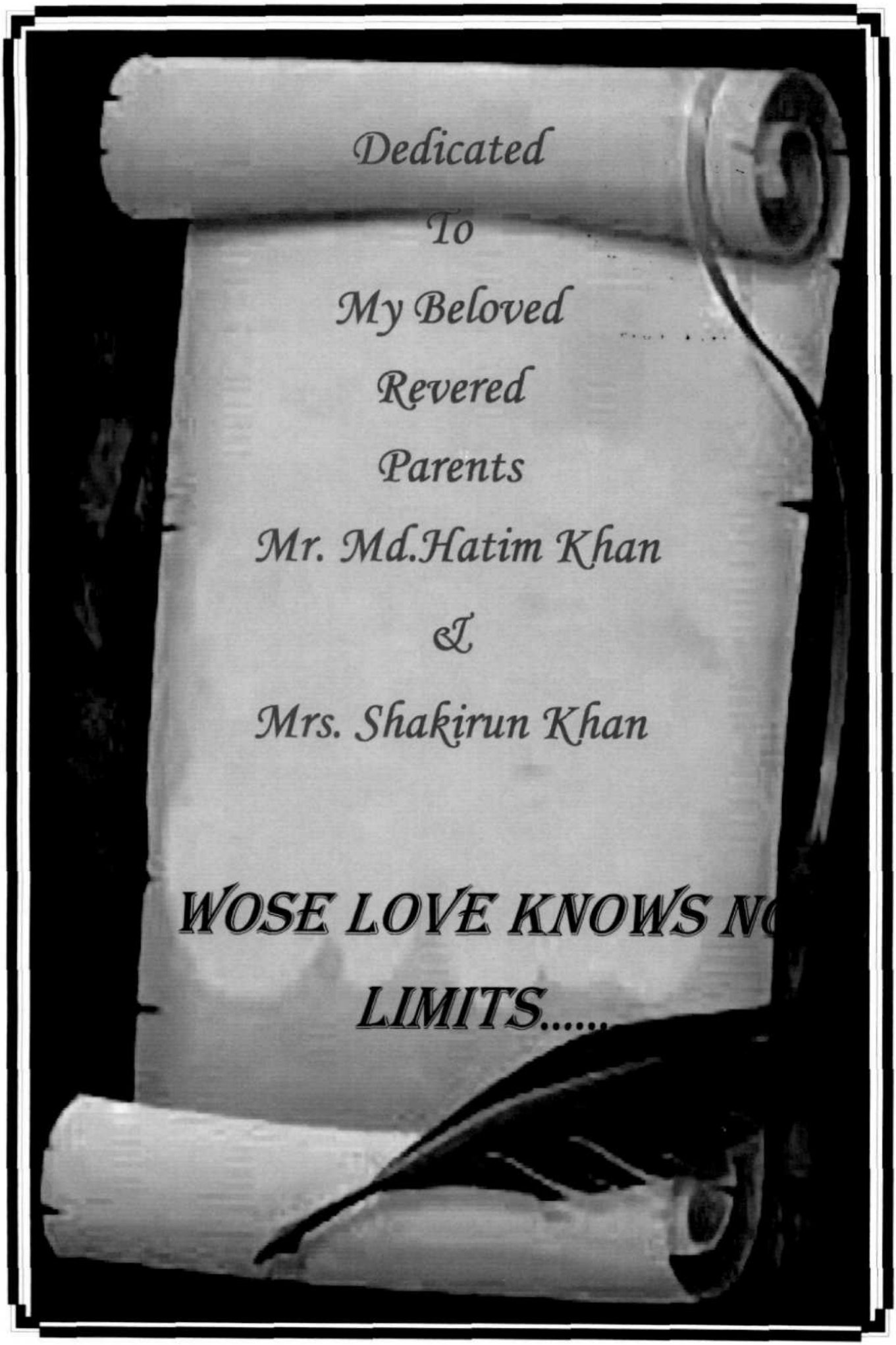
DEPARTMENT OF LAW

ALIGARH MUSLIM UNIVERSITY

ALIGARH - 202002 [INDIA]

2012


Dedicated
To
My Beloved
Revered
Parents
Mr. Md.Hatim Khan
&
Mrs. Shakirun Khan
WOSE LOVE KNOWS NO
LIMITS.....

Dr. Shakeel Ahmad
Assistant Professor

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Date:……

Certificate

It gives me immense pleasure to certify that **Mrs. Husna Ara,** Research Scholar, Department of Law, A.M.U., Aligarh has completed her **Ph. D. thesis** entitled **"Protection of an Unborn Child Vis-à-Vis Human Rights: A Case Study of Haryana (With Special Reference to M.T.P Act,1971 And PNDT Act,1994)"** under my supervision. The data materials, incorporated in the thesis have been collected from various sources. **Mrs. Husna** has used and analysed the aforesaid data and material systematically and presented the same with pragmatism.

To the best of my knowledge a faithful record of original research work has been carried out and this work has not been submitted in part or fully for any degree or diploma of Aligarh Muslim University or any other University.

I wish her all success in life

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Acknowledgements

In the Name of Allah, the Most Gracious and the Most Merciful

Praise is to Allah, Lord of the Universe, Who gave me the blessings and strength to complete this thesis. Peace and Prayers be upon His Final Prophet and Messenger Muhammad (SAW), the ideal role model for human beings.

It is indeed, pleasant duty of mine to acknowledge my debt of gratitude to my erudite supervisor ***Dr. Shakeel Ahmad****. I would like to express my sincere gratitude, reverence and utmost regards for his illuminating, scholarly guidance and creative supervision right from the inception to the culmination of this work. He has been a source of strength, inspiration and confidence to me.*

I would like to express my heartfelt gratitude to Prof. Mohammad Shabbir, Chairman, Department of Law, A.M.U., Aligarh, who has always guided me throughout my research which made me realise of the wallowing nostalgia of my budding days of under-graduation at the Department of law. I would also not miss this opportunity to pay my sincere thanks to Prof. Saleem Akhtar, Dean, Faculty of Law, A.M.U., Aligarh. His unshattered and significant expertise on various fields of law has always motivated me to achieve my goals at various juncture of life. I would be failing in my duties if I fail to acknowledge Prof. Iqbal Ali Khan (Ex.Dean & Chairman), Prof. Akhlaq Ahmad (Ex.Dean & Chairman), Dr.Javed Talib,Dr.Zaheeruddin, Dr.Zubair Ahmad Khan, Dr.Shakeel Samdani, Dr. Mohd. Ashraf, Dr. Md. Zafar Mahfooz Nomani,Dr.Badar Ahmad, Dr. Wasim Ali, Mr. Hashmat Ali,Mr.Iqbal Hadi Rizvi, Dr. Zafar Eqbal, Dr. Nafees Ahmad, & Dr.Tanzeen Fatima for their valuable suggestions, inspiring attitude and constant encouragement ever since my B.A. LLB days.

The unfathomable blessing, good wishes and Dua of my parents are the spiritual strength with which I have pursued this work. At equal footing stand my father-in-law Mr. (Late) Md. Wasi Akhtar, Senior Advocate, Patna High Court and Mother-in-law Mrs.

Zareena Khatoon, who provided me needed support and encouragement at every stage of my carriers.

I am also indebted to my brothers and sisters Dr. Akhlaq Ahmad Khan, Mr. Ashfaq Ahmad Khan, Mr.Asrar Ahmad khan, Miss Saman Khan and Miss Kausar Jahan whose everlasting love and affection have provided me enough mental and moral strength to accomplish this task successfully. Moreover,their blessings have been the source of encouragement throughout my career.

I could not forget the love and encouragement of my Sister-in-laws Mrs. Shaheedun Ashfaq and Mrs.Shabeena Akhlaque whenever I needed they stood behind me. Moreover, I could not forget to mention my nice the chubby, perky and spunky little stars Maheen and Anam whose hugs, chats and chirps exalted my heart and body, mind and soul to complete this research work.

I would like to use this opportunity to say thanks to my Brother-in-law and Sister-in-laws Dr. Md.Rayees Akhtar, Mrs.Anjum Akhtar, Mrs.Hena Akhtar and Sufiya Akhtar for their affection and encouragement.

I express my sincere thanks to my friends Dr. Azwar Khan, Dr. Roshan Ara, Mrs. Nooreen Zaidi, Dr. Tbbassum Choudhry, Dr. Nagma, Dr. Saista, Dr. Arshad Hussain, Dr. Farha Deeba, Dr. Md Junaid Mr. Dinesh Sharma, Mr. Uzair Iqbal, Mr. Muhammad Rauf and Miss.Nidhi Yadav for their co-operation, help, inspiration and continued encouragement.

I fall short of words to express his ungrudging love, support, cooperation and encouragement whereunder my pains and pleasures have got meaning and worthiness in an ambience of care and concern. Therefore, I deem it my pleasant duty to express my sincere gratitude towards my partner Md. Anis Akhtar who sacrificed his precious time during the compilation of this research work in its present visage.

I am also thankful to the Librarians and Staff World Health Organization, Ministry of health and Family Welfare G.O.I and Indian Law Institute, New Delhi. My sincere thanks are due to the staff of Seminar, Department of Law, A.M.U, Aligarh, Maulana Azad Library, A.M.U, Aligarh and Staff of Centre for Women Studies. A.M.U, Aligarh.

Last but not least I am grateful to all those who helped me directly or indirectly in completing this thesis.

Husna Ara

Husna Ara

PROTECTION OF AN UNBORN CHILD VIS-A-VIS HUMAN RIGHTS: A CASE STUDY OF HARYANA (WITH SPECIAL REFERENCE TO MTP ACT 1971 AND PNDT ACT 1994)

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ABBREVATIONS

A.C.	:	Appeal Cases
All	:	Indian Law Reports Allahabad Series
All E .R	:	All England Reports
AIR	:	All India Reporter
AMA	:	American Medical Association
CEDAW	:	Convention on Elimination of All Forms of Discrimination
CEHAT	:	Centre for Enquiry into Health and Allied Theme
CMO	:	Chief Medical Officer
CMR	:	Child Mortality Rate
CRC	:	Convention on the Rights of Child
CSB	:	Central Supervisory Board
Ch. D	:	Chancery Division
CVS	:	Chorionic Villus Sampling
DLR	:	Dominion Law Report
FASDSP	:	Forum Against Sex Determination and Sex Pre selection
FMR	:	Female-to-Male Ratio
G.O.I.	:	Government of India
H.L	:	House of Lord
ICCPR	:	International Covenant on Civil and Political Rights
ICESCR	:	International Covenant on Economic, Social and Cultural Rights
Ibid	:	Ibden; in the same place or work
I.C.M.R	:	Indian Council of Medical Research
IACHR	:	Inter-American Commission on Human Rights
I.L.R	:	Indian Law Review
IMR	:	Infant Mortality Rate
Infra	:	Below
IPC	:	Indian Penal Code
IVF	:	In-Vitro fertilization

K.B.	:	King Bench
OAS	:	Organization of American States
MASUM	:	Mahila Sarvangeen Utkarsh Mandal
M.L.R	:	Modern Law Review
MTP	:	Medical Termination of Pregnancy Act
NHRC	:	National Human Rights Commission
NHFS	:	National health Family Survey
NGO	:	Non-government organisation
PBE	:	Pre-Birth Elimination of Females
P.C	:	Pleas of the Crown
PD	:	Probate Division
PGD	:	Pre-implantation Genetic Diagnosis
PIL	:	Public Interest Litigation
PNDT	:	Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex selection) Act
RGI	:	Registrar General of India
SCC	:	Supreme Court Cases
SRB	:	Sex Ratio at Birth
SRC	:	Sample Registration System
SCB	:	State Supervisory Board
Supra	:	Above
TFR	:	Total Fertility Rate
USG	:	Ultrasonography
UDHR	:	Universal Declaration of Human Rights
UN	:	United Nations
UNICEF	:	United Nations International Children Emergency Fund
UT	:	Union Territory
UTSB	:	Union Territory Supervisory Board
W.L.R	:	Western law report (Canada)

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Indian Succession Act, 1925

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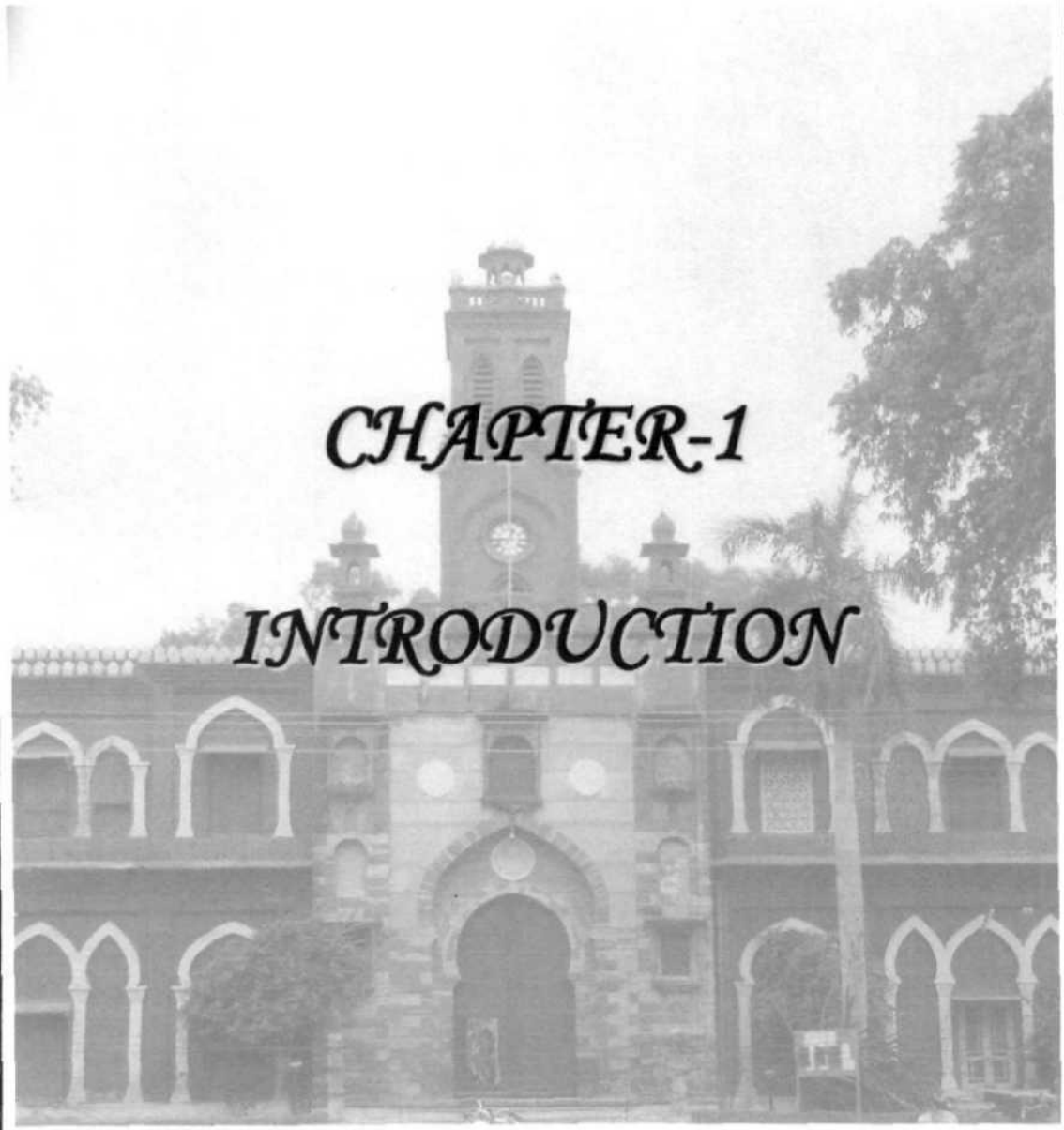

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INTRODUCTION

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INTRODUCTION

Statement of Problem

Children are the greatest gift to the humanity. They are the potential human resources for the progress of any society. In order to enable them to develop as responsible and productive members of the tomorrows society, conductive environment has to be created for their all round development. Every Nation links its future with the status of the child and neglecting children would result in a loss to the society as a whole.

Abortion as a term and as an idea permeates many fields, be it human rights, medical, law, technology. A subject that has found its place in numerous discussions worldwide, be it in human rights forums, in women's group discussions, in the recent US Presidential campaign, the list is endless. Simply put, abortion is the termination of pregnancy.

And this much debated topic is still an issue in controversy, with the opinions of the world divided into various camps. While some countries absolutely ban abortion, terming it as taking away the life of an unborn, others are more liberal towards it, upholding the basic idea of abortion, while still others openly accept and promote the idea. While countries like Ireland fall into the first category, India and the United States are examples of members of the second and third category.

Pregnancy is an extraordinary and beautiful relationship involving two bodies, two lives cannot be easily suppressed. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock shall enjoy the same social protection.

But problem of the protection of the rights of unborn child is not a social issue; rather, it's an issue about life and death. It's an age old problem and so attempts have been made since past to protected the legal rights of unborn child. Protection of an unborn child is a topic of debate that has concerned

various disciplines. An unresolved question in medical ethics, theology and philosophy and all have wondered when life begins.

If the society accepts that unborn Childs are human beings then it follows that they are entitled to the protection afforded by this right. Personal choices about behavior should never be legislated, until and unless they infringe the equal rights of other persons. The problem in the case of abortion is that the disagreement about whose rights is being infringed. Those opposed to abortion claim that they are protecting the rights of unborn child from the infringement of having its life terminated.

If the zygote/embryo/fetus is not yet a person, then of course it has neither moral standing nor the capacity to have right that can be infringed and so the issue becomes moot. But even if the unborn child were fully endowed human person, with all the rights of personhood, the crux of the legal question becomes "who has the rights to control the body, the zygete/embryo/fetus or the women?" The fact that human fetus is weak, vulnerable and inconspicuous, is no reason to ignore or override his or her right to life. A failure to protect a person in these circumstances would demonstrate that right for individuals are only acknowledged for those who exercise power or who are visible. The right to life is for all not just for those who have some tangible utility the society.

Abortion is the process in which the developing child is removed from a mother's womb. Keeping all situations and instances in mind, abortion was and still stays an act of violence against the unborn child as well as the women about to have a baby, apart from being a moral crime in itself. Abortion is a highly controversial and debatable subject involving religious, moral and social issues on which opinions strongly differ. Almost all religions consider abortion a sin, an immoral or at least a highly undesirable act and women in whom a sense of morality and propriety has been in grained over generations are scared of breaking the accepted code. In modern times, India's greatest apostle of non-violence, Mohandas Gandhi, has written; "it seems to me clear as day light that

abortion would be a crime that is to say the unborn child must not be destroyed except for the purpose of preserving the yet more precious life of the mother".

The right to conception, the right to abortion and right to birth are very much conflicting rights and become controversial subject matter in law and procedure of the time..There involved many questions of value, moral ,ethical, sociological and legal grounds Any rigid Statute to regulate these rights will pose critical problems and challenges both to the well being of a woman and unborn child. An ideal situation however may crop up when there is a conflict between the pregnant women's right to termination of pregnancy and the right of the unborn to life, if there is to be any such right in law. None but the carrying mother or the state is expected to be the guardian of the unborn. If the former is so freedom drunk that her freedom takes away the interest of the unborn, there is a justified state concern to regulate or restricts the freedom of woman to terminate pregnancy by the use of legislation. It is that none but else but the supporting mother is the best guardian of the unborn unless she is not ordinary human sense and prudence.

There are other issues which call for the attention presently. For some, does our law recognize life in the fetus and taken effective steps to consolidate its legal status? Has the fetus been provided with sufficient protection? Will it be righteous to think for a perfect society, or a unisexual society? There are many questions incidental to it life or say whether mother's interest override fetus interest, and many more. It is unfortunate that legislative exploration on this count has been lamentably inadequate.

A fetus or a child in the mother's womb is not a natural person within the meaning of I.P.C. In all jurisprudential jurisdiction, however, a child en venture sa mere is recognized as a legal persons, capable of inheriting or otherwise acquiring and holding property and also others rights. A non-natural person but legal person, being thus undoubtedly a person within the meaning and protection of the life liberty and the equability clauses of the constitution, can not be deprived of life without due process. It can accordingly be urged

that since a fetus of child in the mother's womb, even though a non-natural person, would nevertheless be a person within the meaning of Article 21 of the constitution, it cannot be deprived of its life, without reasonable, right, left and fair process.

In the debate on whether International law upholds an unborn Child's right to live or conversely, a pregnant woman's right to abort but the weight of the evidence in the relevant Universal and regional legal instruments support the former view. In addition to direct references to unborn life in some agreements, several instruments also call far certain kinds of State action that by their nature provide practical protection for the unborn child's life. This is true of both Universal agreements and Conventions that the available evidence points more often, more clearly, and with more weight to a preference for life.
Abortion was not a major political or legal issue in 1948, and very few countries allowed it on any but the most serious grounds notably when necessarily to prevent the death of the mother. In 1959, the U.N General Assembly formally declared that the UDHR recognized "whereas the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth".
Although the drafters of the Declaration decided not to deal directly with the unborn, they opted for the broadest and most inclusive language possible to describe the subjects of human rights. Like the Covenant, the Convention on the Rights of the Child (CRC) was preceded by a Declaration, the Declaration of the Rights of the Child (1959), which includes in its preamble a significant affirmation of the rights of the unborn. The Convention defines a child as "every human being below the age of eighteen years unless under the laws applicable to the child majority is attained earlier". Although but more than that in the 1940's when the UDHR was being drawn up until the 1960's,abortion was almost universally condemned and was against the law in most western Countries.

In early English law abortion was generally prohibited. Although the common law offered protection to an unborn child, the degree of protection varied from period to period. The Offences Against Person Act, 1861, which removed any distinction as to the fetal age and made procuring or attempting to procure abortion an offence (section 58& 59 of the above-mentioned Act). This was followed in 1929 by Infant Life (Preservation) Act. The Act 1929 puts emphasis on the protection of "the life capable of being born alive". It made a willful and intentional act of causing death of a child to be born a felony. The Infant Life Preservation Act of 1929 was passed to protect the interest of the foetus and which created the offence of child destruction. Only to save the life of the mother in good faith, abortion was allowed.

But the strict provision of the law of abortion contained in section 58 and 59 of the Act of 1861 was doing more harm than good. As a result, most of the women would go to 'back street abortions' leading to a great risk to their life. Consequently, at times unwilling mothers used dangerous methods on themselves or committed suicide. One particular instance which brought public opinion in open support of abortion law reforms is known as Bourne case. Inspite of the restriction on abortions in England it was estimated that 10,000 to 25,000 illegal operations were performed in a year. A strong opinion grew both in social reform and legal reform circles that a woman has a right to control her own fertility and that the abortion should be legalized. Consequently liberalized by passing of the Abortion Act, 1967.

The 1967 Act was intended to provide a specific defence against the provisions of the 1861 Act. In its original form, the 1967 Act did not provide protection against killing a child capable to being born alive, this protection was provided in the amendment of the 1967 Act by the Human Fertilization and Embyology Act 1990.

This is done due to the recent and political developments in medicine and science related to Human fertilization and embryology, the Warnock committee was established in 1982. The committee agreed that the status of the embryo is

a matter of fundamental principal which should be enshrined in legislation that the embroye of the human species should be afforded same protection in law. On the basis of the recommendation of the Warnock Committee, the Human Fertilization and Embryology Act, was passed in 1990.

Amongst the Western countries, America presents a heterogeneous picture of the abortion laws and practices. Abortion being not a federal subject under the United States constitution, the states has enacted their own laws until the mid-nineteenth century. The laws of abortion in most parts of the United States was pre-existing English Common Law. By 1950 a large majority of the States banned abortion except when necessary to save the life of the mother.

But the validity of the abortion laws has been assailed on the ground of constitutionality of 'right to life of unborn vis-à-vis right of the mother to bear or not to bear a child'. The issue of abortion, therefore, has become one of the most important issue on which the last presidential election in the USA was fought. Heated debates, massive demonstrations and often open class have between the prolifers and those upholding the right to abortion has rocked America.

In this connection, the court declared most existing state abortion laws unconstitutional. The constitutional basis for the decision was the fourteenth Amendment right to the personal privacy. Although the right to privacy is fundamental and conditionally protected, it is not absolute, it follows that the right to decide whether or not to terminate a pregnancy is also not absolute. Nevertheless, because the right is fundamental, any regulation which limits the right must meet certain constitutional standards i.e. the state may limits that right only through regulations that can be justified by a "compelling state interest".

In relation to the right to abortion, the court found that the state has two legitimate and important interests, one is to preserve and protect the health of the pregnant woman and other is to protect the potential human life embodies in the fetus. The court determined that these interests grow as the pregnancy

develops and at different points in time during the terms of pregnancy, each interest becomes 'compelling'. During the first trimester, the responsibility for the abortion decision rests with the pregnant women's attending physician. The states interest in the material health of the pregnant women becomes compelling at approximately the end of the first trimester. While the states interest in potential life becomes compelling at the point when the fetus reaches viability approximately at the end of the second trimester. This is when the foetus has the capability of surviving outside the women's womb. At such a time, the state can even prohibit the abortion accept when it is necessary to protect the life or health of the pregnant women.

The Casey case brings some new refraction. It adopted a new analysis "Undue burden". It was defined as a "substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus''. Thus the recent judgments of the U.S Supreme Court which deals with the legal protection of human life before birth led to the enactment of statutory restriction on the right to abortion. These enacted statutes protect the interest of unborn child. These are Partial-Birth Abortion Ban Act, 2003, Unborn Victims of Violence Act, 2004 and the Unborn Child Pain Awareness Act, 2005.

The Preamble of the Convention refers to safeguarding the 'care of the child' before as well as after birth", the meaning of whether a child can constitute an unborn child was left open to individual state parties for fear of the impossibility of consensus in a particular on the issue of abortion under the Convention on the Rights of the Child, 1989.

In India, the interest of the unborn is protected by the strict provisions of the Indian Penal Code which provides that abortions or miscarriages are criminal unless undertaken to save the life of the pregnant woman. The provisions of the Indian Penal Code, 1860, which criminalize abortion, are curbed by medical Termination of pregnancy Act, 1971 (MTPA), which set forth the grounds for obtaining a legal abortion and the rules regarding where abortion may take

place and who may perform them. The MTPA softened the rigours of the laws of abortion contained in the code.

The proposed measure which seeks to liberalize certain existing provision relating to termination of pregnancy has been convinced (1) as a health measure when there is danger to the life or risk to physical or mental health of the woman (2) on humanitarian grounds- such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman etc. and (3) eugenic grounds- where there is substantial risk that the child, if born, would suffer from deformities and diseases the scope of the MTPA is very limited. All pregnancies are not terminable under the Act. The Act provided for termination of pregnancy by a registered medical practitioner where the pregnancy does not exceed 12 weeks and by two medical practioners in case the pregnancy exceed 12 weeks but not exceed 20 weeks, if he is or they are, of opinion formed in good faith that (i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health or (ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. The law itself is value laden. We are, perhaps, trying to structure a perfect society, free from any form of the principles of equality, of which India is a great champion, is a moot point. Another consideration arises, who we are to decide for the quality checking? Here comes the crucial role of PNDT Act. Now we have technology to assist us in knowing what sort of fetus we hold. The weak fetus shall be lawfully eliminated to yield for the healthy ones.

Why the defective children should be treated as a burden not only on parents but also on the society is another issue involved here. It then becomes incumbent upon the state to take up measures to mitigate such maladies. Providing compensation can also be a measure provided as a right to the child born in case of any negligence during his prenatal state.

But, recently, a unique case that made it to the front pages of the newspaper on the medical Termination of pregnancy Act. The Bombay High Court on the

August 2008 rejected the petition filed by Niketa and her husband Haresh Mehta, along with their doctor Nikhil Dator, seeking permission to terminate her pregnancy now in the 26th week. The foetus was diagnosed with a complete heart blockage when she was in the 24th week of pregnancy. The couple wanted to abort the child for fear it would suffer for life. The court held that medical experts did not express any "categorical opinion that if the child is born it will suffer from serious handicaps". Once there is life can you ask for it to be killed now? Is it any different from mercy killing?" Thus the Bombay High Court has saved the life of a potential Human being.

The legal trend to upheld laws that discourage abortion and readiness of the courts to extend legal protection to the unborn child against physical injury are appreciable development. All these need to be extended sincerely so that life and health of the unborn child is protected.

Scientific development and technological advancements are expected to be pursued by man for general human good, but unfortunately in present times, some specific technological knowledge is leading to greater abuse on humanity. One such case is the sex determination through scientific methods resulting in female foeticide. This is commonly known as sex-selection.

These techniques were integrated to help the Doctors in diagnosis of congenital diseases and sex-linked disorders unfortunately in India and same other countries these tests and procedures were used to determine sex of the foetus which led to elimination of female fetuses by medical termination of pregnancy.

Such development in medical science have resulted in sex-determination and sex pre-selection techniques such as sonography, fetoscopy, chronic villi biopsy (CVB) and the most popular amniocentesis and ultrasound.

Daughter dispreference, dispersed in (several) practices such as "fatal neglect" atonement or sale of infant girls\girl children, also has two condensed or precipitous form-female infanticide and pre-birth elimination of the female fetus following a sex-determination test(sex-selective abortion).This sex-

selective abortion was at first a middle and upper class phenomenon. It began as a "prosperity effect" and has spread "below" to dalit and to a lesser extent, tribal groups. It across religions (Hindu,Jain,Buddhist,Sikh,Muslim,Christan) in many regions.

Sex ratio is an important social indicator to measure the extent of equality between the male and female members of society at given point of time. Preference for sons has been a norm since time immemorial. The prevailing socio-cultural and religious norms and practices view a girl child as a liability, a curse. In the 65th years of independence still the right to life of the girl child is not protected. How can we claim to be independent civilized and honouring the right to the life of a girl child guaranteed under Article 21 of the Indian Constitution.

These biases towards girl's child have had serious implications which are evident from the provisional result of Census 2011 that were released.

Recognizing the misuse of pre-natal diagnostic tests leading to female facticide which rapidly declining sex-ratio's turning into a demographic nightmare of frightening proportions, the Pre-Conception and Pre-natal Diagnostic Techniques (Prohibited of Sex Selection) Act, 2003 was passed by the parliament of India, as the original Pre-Natal Diagnostic Techniques Act, 1994, does not specify the pre-conception sex selection even though it refers to pre-natal sex-determination.

Despite the direction of the Supreme Court of India and the amended Act of the PC and PNDT Act, 2003, sex selection and subsequent abortion of female fetuses continues. The most dismal data revealed by the result of the 2001 census of India relate to the low child sex ratio (girls per 1000 boys in the age group 0-6 years) in almost all the states of India. This could not have happened without the widespread use of pre-birth sex determination tests, followed by sex selective abortion in case of female fetuses. This is what Ashish Bose called it a system of civilizational collapse.

Census Report 2011 also reffirms a fact so disturbing that it could cast a shadow on the positive developments. It's this: girls seem to have no place in India's growth story. The data shows that the sex ratio for children below 6 years has dropped from 927 to a dismal 914 for every 1000 males. The gender has bias yet again draws attention to a lingering societal flow that economic growth is not being able to correct.

Whatever measures that have been put in place over the last 40 years have not had any impact on the child sex ratio. Society is in a continuous process of evaluation. It will take several decades for these imbalances to be rectified. Education of both men and women will lead to change in attitudes and perceptions. Breaking the cycle of imbalance will require concerted collaboration and action between governmental and non-governmental actor, including educators, health-care authorities, legislators, the judiciary and the mass media.

Willful interruption with pregnancy means a lot many denials and deprivations of the rights of unborn child vis-à-vis woman's liberty and morality. The question is often asked "when does human life begin"? One of the issues that bear very prominently in the domain of law of abortion restrictive or liberal is when does life begin? Roe Vs Wade recognized that fetus/unborn represented only the potentiality of life and not a person in law. Later, in, 1989, the Supreme Court modified its stand taken in Roe in Webster Vs Reproductive Health Services. Here a Missouri Statute provided that the life of such human begins at conception and an unborn child has protectable interest in life, health and well-being. The Supreme Court held that it was constitutional for a state to declare an interest in human life at all stages of pregnancy. This shifting point of jurisdiction from the women to state as the foetus develops is blurred by Webster. While for Roe, it was uncertain as to when life begins, Webster unequivococally found that life begins from conception itself. With regard to protect the life of unborn child, the American Congress introduced the Human Life Bill in 1981, which states "the life of each human being begins at

conception and also that Fourteenth Amendment to the US constitution protects all human beings".

Article 21 of our Constitution may be interpreted that with respect to life, the word 'Person' applies to all human beings. The State cannot discriminate against persons who are foetus by offering them less or no protection than other persons.

Whatever theory of life a state accepts, the state's interest to be weighed against the individuals privacy interest is its 'interest' in protecting the potentiality of human life.

Significance of the study

It is in this content with the introductory background that the researcher had tried to explore the status of unborn child in India, USA and UK with legal and judicial perspectives. This study is a compilation of data, collected from literature on current facts and findings which can be used any other researcher for future research. The findings and the suggestions of this study can be used by the law making bodies, law implementing officers and researchers for their respective purposes. The findings and the suggestion of this study are significant as they provide measures regarding protection of unborn child.Hence, the research with the vision.

Having been a student of law, I have great interest in issues related to protection of unborn child vis-à-vis abortion, a topic of debate that has concerned social, legal, medical, religious and psychological factors. Further, interaction between the various disciplines involves which is needed to fill up the lacuna that prevails in the National as well as International scenario. Therefore, this topic was selected for research.

Objective and Scope of the Study

The present research study tends to achieve the following objectives and puts forward an agenda for academicians, policy makers and highest legislative establishments to incorporate there of in their pursuit for making available protection to unborn children.

1. To Study the problem of disagreement about whose rights are being infringed of course with emotional touch as is generally done but with due scientific methods to find out its real root.
2. To analysis the concept of protection of unborn child at all conceivable stages such as conferring status of personhood.
3. To investigate a woman's legal rights to kill a foetus which is a part of her without killing herself?
4. To develop a theoretical prospective on the status/position of unborn child in the era of human rights, a factor responsible for their recognition.
5. To enquire into the causes and factors leading to denial of their rights with special reference to right to be born in the name of right to privacy.
6. To study the development of relevant case law in India, U.K. and U.S.A. on protection of unborn.
7. To evaluate the past & existing legal measures and to asses the impact of different laws in U.K., USA and India.
8. To study the changes in the rate and incidences of abortion through medical termination of pregnancy.
9. To review the role of enforcement agencies dealing with the problem of sex-selective abortion leading to gender influence to female unborn child i.e. female feticide.
10. To draw inferences and conclusions and to put forward suggestions for appropriate amendments in the present legislation in order to provide greater protection to unborn.

Methodology

Law is a normative science, that is, a science which lays down norms and standards for human behavior in a specified situation or situations enforceable through the sanction of the state. What distinguishes law from other social sciences is its normative character.This fact along with the fact that stability and certainty of law are desirable goals and social values to be pursued, make doctrinal research to be of primary concern to a legal researcher. Doctrinal research of course. involves analysis of case law, arranging, ordering and systemizing legal propositions and study of legal institutions, but it does more it creates law and its major tool (but not the only tool) to do so is through legal reasoning or rational deduction.

The present study is based on the doctrinal method of research.

This research work is base on doctrinal and non-doctrinal methodologies and relied on primary and secondary source. Primary sources include-

1. Statutory Enactments.
2. International Conventions
3. Judicial pronouncement;
4. Reports

Secondary Sources Include

1. Official Documents
2. Books and other published and unpublished works.

Scheme of Chapterization

Under this back-drop the researcher has conveniently designed the scheme of research *"Protection of an Unborn Child vis-à-vis Human Rights: A Case Study of Haryana with Special Reference to MTP Act, 1971 and PNDT Act, 1994"* under following nine chapters.

The ***First Chapter*** has been titled as Introduction where under the entire research study with its collaterals has been prefaced. In order to avoid abruptness the chapter of the research deals with statement of problem, the

choice of topic the need for present study, objectives and scope of the study and research methodology.

The ***Second Chapter*** of the research deals with the protection of unborn child under different religions which does not permit killing at any stage in any form except to save the life of the mother.

The ***Third Chapter*** details International conventions. This chapter elaborately discusses the protection of unborn child under various International Conventions.

It also mentions the concept of legal protection for the child before birth has a long tradition established and maintained with consistency and unbroken continuity throughout the entire body of international human rights and humanitarian foundation instruments. In every premeditated abortion, deprivation of life is the intended outcome for the child. Despite the current ideologically driven campaign to decriminalize abortion, arbitrary deprivation of life, under modern international human rights law, is still strictly prohibited.

The ***Chapter Fourth*** discuss the position of unborn child under different laws, like property law, criminal law, law of torts and law of constitution. This chapter elaborately discusses the child in the womb is given better protection where its interest are required.

The ***Chapter Fifth*** dewells upon position of unborn child under different legal system especially United Kingdom and United State of American. The chapter discusses in details the problem of the protection of unborn child, legal status of the unborn child, termination of pregnant law and provisions of existing laws prevent in UK and USA. The chapter also offers a critique to existing laws along with an analytical appreciation of salutary protection to unborn.

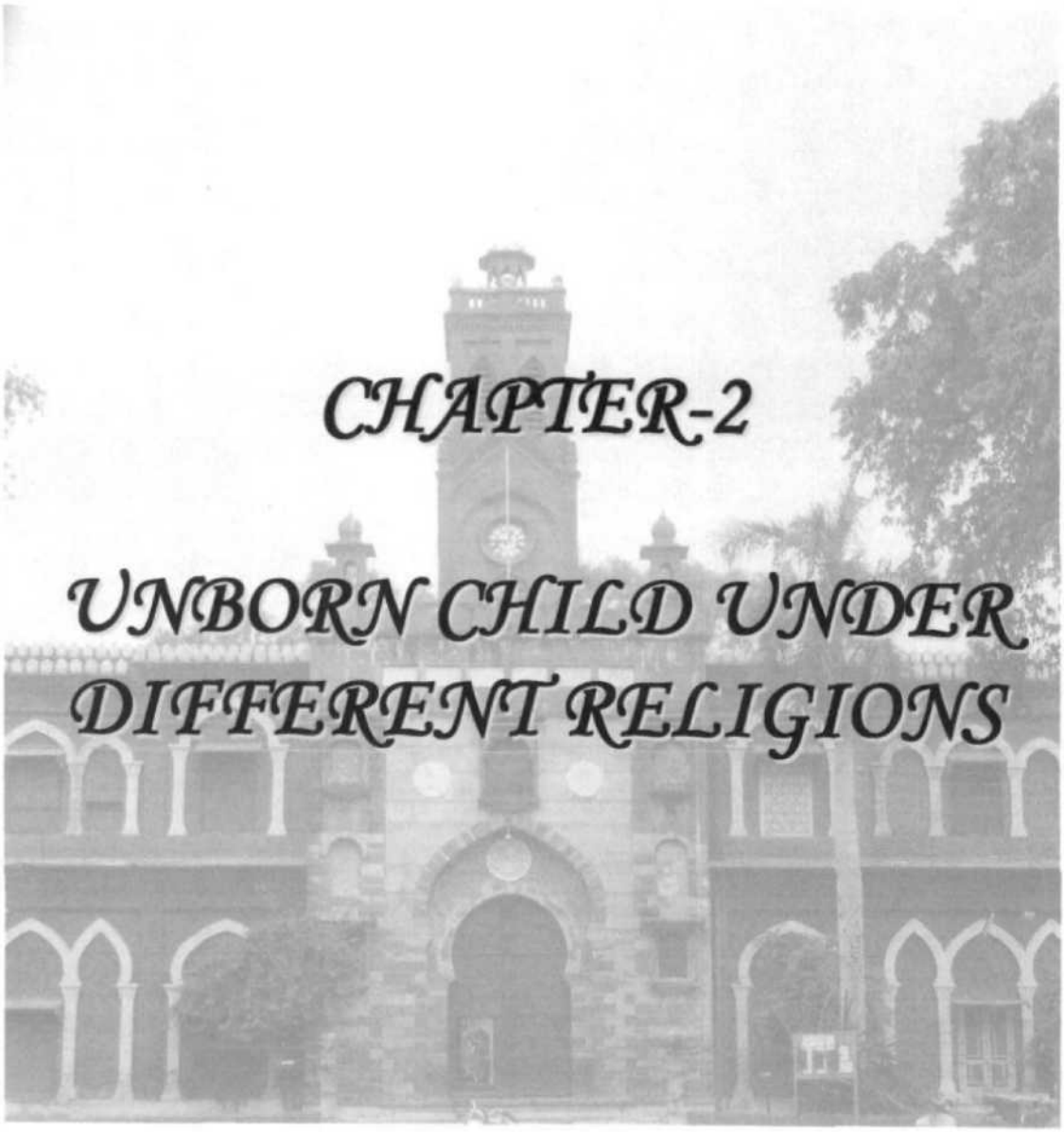
Medically terminated pregnancies have been discussed in ***Chapter Sixth***. The medical termination of pregnancy Act, 1971 has been discussed in depth. It also envisages the provisions of the Indian penal code, 1860, which criminalize abortion, are curbed by the MTPA, which set forth the grounds for

obtaining a legal abortion and the rules regarding where abortion may take place and who may perform them. The MTPA softened the rigors of the law of abortion contained in the code. It also discusses the liberalization of the abortion law to ensure better health and avoidance risk to the life of pregnant woman. The chapter also offers a critique.

The misuse of the liberalized abortion law has been disused in ***Chapter Seventh***. The Pre-Natal Diagnostic Techniques (Regulation and Prevention of misuse) Act, 1994 amended in 2002 has been discussed in depth. It is the irony of the fate that scientific and technological advancement in the field of medicine are meant for the sustainable human development but, unfortunately, this scientific gadgets and innovations are being flagrantly employed for dehumanizing the half of the humanity. The chapter also reflects upon the serious problem of declining sex ratio with analysis of laws and judicial responses to the right to life of the female.

A Case study of Haryana with special reference to MTP Act, 1971 and PNDT Act, 1994 has been discussed in ***Chapter Eight.*** This Chapter deals with the reporting case laws and a comparative study of child sex-ratio in the state of Haryana as per Census 2001 and provisional figure released by Census 2011.The most alarming findings of the 2001 census is the sharp decline in the sex-ratio among the children in the 0-6 years age group. Haryana a prosperous state of India has the dubious distinction of ranking at the bottom of the scale amongst the Indian States in respect of Sex-ratio. Behind this the fact lies on sex-selective discrimination by active elimination through abortion of the female fetus and passive elimination of girl child in different socio-economic conditions as a life course approach. Besides this Haryana witnesses the country's first conviction for using sex determination technologies for revealing the sex of the unborn child. As per the Provisional data of Census 2011, the State of Haryana reported a rise in the Sex-ratio-877 female per 1,000 males, the best figures in the last 110 years due to the consistent efforts of the government in implementing the PNDT Act.

The ***Chapter Nine*** entitled conclusion and suggestions. In this chapter some suggestions for the protection of the rights of unborn child have been evaluated either incorporate in the ousting laws or to adopt a new legislation in future, so that unborn child can be given overall protection from conception to birth.



CHAPTER-2

UNBORN CHILD UNDER DIFFERENT RELIGIONS

CHAPTER-2

UNBORN CHILD UNDER DIFFERENT RELIGION

Religions have played a very great part in the evolution of human civilization and culture.The importance of religion as a system of faith and ethics, and above all as a structure of meaning, have often been acknowledged. Because religions seek to create order and purpose by relating human beings to wider associations such as families and social collectives, as well as the natural and supernatural worlds.[1] They evolved as a set of beliefs concerning the cause, nature and purpose of the universe and grew as an organized system of beliefs that bound people to become close knit society. Very often the religions spread out from the lands of their origin.[2]

The appeals that religions make to various dimensions of extra human reality function as a source of legitimating in which religious constructions of sexuality, the family or gender are posited as natural, sacred, transcendent.[3]

India is the world's most complex and comprehensive pluralistic society. harboring a vast variety of races, tribes, castes, communities, religions, languages, customs and living style. Indian constitute on guarantees equality in the matter of all individuals and groups irrespective of their faith emphasizing that there is no religion of the state itself.[4]

A religion has its basis in "a system of beliefs or doctrines which are regarded by those who prefers that religion as conducive to their spiritual well being". A religion may only lay down a code of ethical rules for its followers to accept. It might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral part of religion. Religion is thus essentially a matter of personal faith and belief. Every person has right not only

[1] Stephen Ellingson and M Christian Green, "Religion and Sexuality in Cross-Cultural perspective". Routledge Taylor and Francis Group, New York (2002) p.1

[2] Sharma Anurag, "Religious Freedom, Conversion and Indian Constitution- A Study (1999) p.1.

[3] Supra Note 1, p.3.

[4] Articles 25-28, Indian Constitution (Guarantees Right to Freedom of religion).

to entertain such religious belief and ideas as may be approved by his judgment or conscience but also exhibits his belief and ideas by such overt acts which are sanctioned by his religion.[5]

Alternatively, religious theories of fertility and conception may place responsibility for desired birth outcomes on women and their purity, and thus may develop practices such infibulations and possession cults in order to ensure purity and account for stillbirths. All of these ideas have important consequences for social and religious lives of men and women as they define the sexual roles for individuals and thus channel reproductive behavior.[6]

Religion which is a vehicle of social control can determine their fertility and family planning behavior.[7]

Most religions consider abortion a sin, an immoral or at least a highly undesirable act and women in whom a sense of morality and propriety has been ingrained over generations are scared of breaking the accepted code.[8]

The Indian society in its early days did not suffer either with economic pressure or with such conservative and rigid sex taboos as later developed. The country enjoyed for long the aphorism "*the golden bird*". On the flame of morality first, the unwanted pregnancy is one arising outside the wedlock. But for people living simple lives such pregnancies were rare. Moreover, the Muslims made marriage only a contract with some consideration and less tedious recession, while for Hindus it was a sacrament which could not be dissolved. However the Hindus recognized several forms of marriages presumably with a view to validate various sexual relations entered into under a

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[5] Dr. Pandey J. N. "The Constitutional Law of India" 46th ed. 2009, p.310.
[6] Stephen Ellingson and M Clristian Green "Religion and sexuality in Cross-cultural perspective" Routledge Taylor and Francis Group, New York (2002) p.8.
[7] Dr. Reddy M.M. Krishna, "Fertility and Family planning Behaviour in Indian Society", Ist ed.1996, Kanishka Pub. & Distributors, New Delhi, p. 68.
[8] Mankekar Kamla, "Abortion A social Dilemma," 1973, p.17.

different set of circumstances.[9] The social, cultural and religious under currents of these predominant Hindu and Muslim religious groups certainly influence the sexual practices, behavior and reproductive performance of these social groups.[10]

A. Hindu Views

Indian culture is another name to Hindu culture; it is taken as a mixture of different cultures of different communities of different parts of India. The excessive reliance on God and in other world, subordination of materialism to spiritualism, the importance of adhering to *Ashram, Vayavastha* and *Varna vayavastha*, the strong son preference, belief on fate, the values attached to different *prushdharam* with an emphasis on *Dharma* and *Moksha*.[11]

In ancient India abortion was denounced as a sin of the highest order, thereby recognizing the legitimacy of protecting the unborn. The oldest reference to abortion in the *Aryan scriptures* in the *Vedas*; where it says:

"Whpe off, a pushan [Lord], the sins of him that practiseth abortion". (Sacred Books of the East, 42:165).[12]

The *Atharva Veda* composed between 1500 and 1000 BC is the earliest available document on Indian medicine. Ayurveda is the name given to an upanga (sub or supplementary veda) of Ahtherva veda by susruta, one of the founders of the Hindu system of medicine.[13] Atherveda, one of the original sources of Hinduism, denounces that *"beyond him who committed an abortion (or brunhan) the sin does not pass".*[14]

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[9] Singh S.K. and Raizada R.K. "Abortion Law in India, Past and Present", pub. By Family Planning Association of India, Haryana Branch, Bal Vikas Bhawan, India, 1976, p.6.
[10] Supra note 7.
[11] Supra Note 7 p.7.
[12] http://www.agelfiriri.com/no.bahal/hinduism.html
[13] Smt. Andhare Archana, "How for is the Medical Termination of Pregnancy Act 1971 Constitutional"? Gujart Law Harald Vol. 22, 2002 p.16.
[14] 'Hymn of the Atherveda' 42 sacred Book of the East 165 521 (F. Max Muller ed; Metilal Banarsidas Delhi 1897) Quoted in Singh S.K. and Raizada R.K., "Abortion Law: Past and Present",1976 p.8

Feticide was forbidden and classified as murder, equivalent to neglect of the Vedas, incest and drinking of spirituous liquors.[15]

Manu, the major law giver, dismissed abortion as a cause of impurity. According to him, libations should not be offered to women who drink alcohol, like with many men, kill their husbands or have abortions.[16] Kautilya prescribed differing penalties for abortion; depending upon have it was procured. The highest punishment was allotted for the abortion caused by physical assault, the middle most for one by drugs and the lowest for one by rigorous labor. While prescribing penance for the slayer of a Brahmin, the same has been prescribed for one whom destroyes embroyo of a non-Brahmin woman slays a *Kshtriya* or a *vaishya* or a Brahmin woman in the menstruation period.[17]

According to *Susruta*: "Any menstrual flow in the second and third months of pregnancy should be considered as an abortion". The limbs of the fetus gain in firmness in the fifth and sixth months of pregnancy and its issue at this time is called garbhapata.[18]

According to *Vishnu Smriti*, "the destruction of embryo is tantamount to killing a holy or learned person". Yagnavalkya recognized garbhapathana (being guilty of abortion) as one of the valid reasons for abandoning ones wife. In *Charaka samhita* and *Susruta samhita* certain obligations are imposed on pregnant woman so as to prevent induced abortion. According to *Garbha Upnishad*, the soul remembers its past lives during the last month the fetus spends in the womb (these memories are destroyed during the trauma of birth). The Mahabharata (which includes *Bhagwat Gita*) refers to a child learning

[15] "Sacred Laws of Aryas", quoted in Singh S.K. and Raizda, "Abortion law: past and present", 1976, p.8

[16] Hinduism and Abortion, http://www.agelfiriri.com/no.bahai/hinduism.html

[17] Sharma Sastry, Kautilya's Arthsastra, 1967, 259

[18] Sasruta Sanhita II89.

from its father while in the womb and abortion is referred to as embryo murder.[19]

The *Avesta* states that bachelors were inferior to married men who, if childless, were definitely inferior to those who had children. The important aim of marriage is praja, i.e. progeny or procreation. Procreation is essential for the continuance of the family live.[20] An incantation for ritual coition, to be chanted by the husband to his wife in the *Brihadaranayak-Upnishada*:

"I am the samon thou the Rig!

I am the heaven, thou the earth!

Come, let us together clasp!

Together let us semen mix!

A male, a son to produce"

(VI: 4:2 Hume 1949:171)[21]

The Hindus tradition demands a son in every family. The traditional Hindu blessing to a bride "Be the mother of eight-sons". The Hindu customs like universality of marriage, early childhood age at marriages, the strong desired for sons to continue the family line and to perform rituals for the salvation of departed souls have a strong pronatalist orientation.[22] That may be a reason why *bhrunahan* (abortion) was more disapproved than infanticide. In joint Hindu family a male child in womb, is entitled to share the family property on birth which adds to the sanctity and importance of an embryo.[23]

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[19] Religious and Ethics-Abortion: Traditional view
http://www.bbc.uk/religion/religious/hinduism/hind/ethics/abortion-1.shtml/

[20] Basu Monmayee "Hindu women and Marriage law from Sacrament to Contract",2001, pub. by Oxford University Press, New Delhi, p.25

[21] Sharma R.P. "Women in Hindu Literature",1995,Gyan Publishing House,Delhi, p.60.

[22] Dr. Reddy Krishnan M.M. "Fertility and Family Planning Behaviour in Indian Society",1996,Kanishka publishers,p.66.

[23] Singh S.K. and Raizda R.K. "Abortion Law in India: Past and Present", 1976,p.11.

The doctrine of Niyoga was practiced in Hinduism. The advocates of the Niyoga telling man that in the absence of a male offspring the wife should pollute herself with a stranger, so that she may give birth to a son. The importance of child to keep the family line was so great that resort to Niyoga was reported in ancient Hindu literature. Under this practice a woman, who was unable to get a child from her husband was permitted to conceive outside the wedlock. But the child so born carried the live of her mother's husband. The practice of adoption of child also shows that a child was a must for a Hindu family.[24] Hindu medical ethics stem from the principle of ahimsa of non-violence. When considering abortion the Hindu way to choose the action that will do least harm to all involved: the mother and father, the fetus and society. Hinduism is therefore generally opposed to abortion except where it is necessary to save the mother's life. The soul and the mother which form the fetus are considered by many Hindus to be joined together from conception. By the nine month the fetus has achieved very substantial awareness.[25]

The doctrine of reincarnation, which sees life as a repeating cycle of birth, death and rebirth, is basic to Hindu thinking. If the fetus is aborted, the soul within it suffers a major *karmic* setback. It is deprived of the opportunities its potential human existence would have given it to earn good karma, and is returned immediately to the cycle of birth, death and rebirth. Thus abortion hinders a soul's spiritual progress. Ahimsa-non violence teaches that it is wrong not only to kill living beings, but also to kill embryos.[26]

a. Buddhism Views

The Hindu faith in ahimsa (non-violence) which was many times strengthened by Buddhism and Jainism, worked against any recognition of abortion. Buddhism which denounces any destruction of life, ordains that the bhikhu "*who intentionally kills a human being, driven to procuring abortion,*

[24] Singh S.K. and Raizda R.K. "Abortion law in India: Past and Present" ,1976,p.6.
[25] http://www.bbc.co.uk/religion/religious/hinduism/hinduethics/abortion-1.shtml.
[26] BBC-Religion and ethics-Abortion: Reincarnation at http://www.bbc.co.uk/religion/religious/hinduism/hinduethics/abortion-2.shtml.

is no samana, and no followers of the sakayaputter.[27] The main tenet of Buddhism is ahinsa (non-violence) which does not permit killing at any stage, in any form.[28] The Buddha's rules for his community of monks also forbade anyone from recommending abortion. In Buddhism there is no central authority on ethical matters but the Dalai Lama has spoken in favor of abortion under certain circumstances. In 1993 he said: Of course, abortion from a Buddhist view point is an act of killing and is negative, generally speaking but it depends on the circumstances. If the unborn child is retarded or if the birth will create serious problems for the parent, these are the cases, where there can be an exception. Buddha advised against the lacking of conscious life, as the identified such activity as causes of suffering. Buddhism generally asserted that conscious life begins before birth. Therefore many Buddhists consider abortion to be equivalent to infanticide.[29]

b. Jainism Views

The Jains who even screen the air and water that they take in for fear that the smallest life in form of bacteria or insect may not be killed, can not think of destroying a human embryo.[30] Jainism generally protects the life of a human being.

c. Sikhisms Views

Abortion is generally forbidden in Sikhism, as it interferes in the creative work of God who created everything and is present in every being. Most Sikhs accept that life begins at conception. So if conception has taken place it would be a sin to destroy life and hence deliberate miscarriage or abortion is forbidden. The Sikh Code of Conduct does not deal with abortion (or indeed many other bioethical issues). Despite this the original view point

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[27] Sacred Books of the East, Vinaya Texts, 1881, 235 quoted in Singh S.K. and Raizda R.K. "Abortion Law in India: Past Present", 1976, p.11.

[28] Mankekar Kamla "Abortion: A social Dilemma",1973,pub.By Vikas Publishing House Pvt. Ltd.Delhi,Bombay,Banglore,Kanpur,London,1973 p.25.

[29] http://www.bbc.co.uk/religion/ethics/abortion/relig-buddhism1.shtml.

[30] Supra note 25, p.11.

abortion is not uncommon among the Sikh community in India, and there is concern that the practice of aborting of female embryos because of a cultural preference for sons is growing.

In modern times, Mahatma Gandhi perhaps the most respected Hindu said: "It seems to me clear as days light that abortion would be a crime."[31]

The Hindu scholars S. Chandrasekhar in his book "*Abortion in a crowded world*" writes that not only do the most ancient Hindu scriptures condemn abortion, but so do the books of laws which were formulated from these scriptures:

> "*Hindu scriptures apart, the Hindu law givers of the later age treated abortion as a crime and ranked it among either crime such as murder, incest, adultery with the wife of a guru etc.*"[32]

It is clear from the above mentioned scriptures that the Hindus were, however, aware that whatever are the social or moral precepts, the occurrence in society of *brunahan* or abortion could not be ruled out. The earliest texts attest that the embryo in the womb is specially deserving of protection and that, indeed abortion is morally intolerable act. In the *Rig Samhita*, the deity Vishnu is referred to as '*Protector of the child to be'*. The Vedas expresses the same attitude towards the unborn child, with the added implication that abortion counts amongst the most heinous crimes.

Thus from the earliest times both in the canonical and collaborative orthodox Hindu literature, abortion at any stage of pregnancy, has been morally condemned as violating the personal integrity of the unborn except for preserving the life of mother. No other consideration, social or otherwise, seems to have been allowed to override this viewpoint.

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[31] www.legalservice in India.com/article/1384.legalizeabortion-in-India-html.
[32] Hinduism and Abortion at http://www.agelfirire.com/no/baha/hinduism.html

B. Islamic Views

Islam is the natural way of life: it is a natural religion for man. All the rules laid down by it, individual as well as collective, are based upon a fundamental principle: *that man should behave and act in consonance with natural laws that he finds working in this universe; and that he should retrain from a course of life that might force him to deviate from the purpose for which nature is operating. The Holy Qur'an* informs us that God Almighty has not only created everything that we find in the universe but has also endowed it with an instinctive knowledge of the ways by which it can most suitably perform the tasks assigned to it in the general scheme of things:

> *"Our lord is He who gave every thing its peculiar form and nature, then guided it aright(i.e. showed it the way following which it can fulfill the purpose for which its creation was due).*[33]

Everything that is there in universe is engaged in the performance of its duty in complete submission to the will of God. That is how they must behave. No one has the power or capacity to go against the prescribed course. Only man is exception in this regard. He has the freedom to choose a course different from the one set forth by nature. He can refute to submit and obey and conform. With the help of his intellect and the faculty of reason he can carve out new ways and forms of behavior and may tread them to his discretion. The freedom is there, but a misuse of this freedom is bound to produce bad results. If man chooses to violate the laws of nature and the Guidance the God has given for individual and social life, this is bound to lead him astray from the right course and produce disturbing consequences here and hereafter. *The Holy Qur'an* says:

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[33] Al-Qur'an, 20:50.

"*And who is more earring than he who follows his desires (and caprices) without any guidance from Allah*".[34]

This deviation from the right course may on the face of it seem quite attractive and fascinating and advantageous. But the fact is that straying away from the path laid down by the creator and violating the limits set by Him, is bound to be harmful to man. Every transgression of the limits laid by the Lord and every act of irresponsible behavior must eventually be to the detriment of man and greater the violation greater the penalty. Wages of sin is destruction. *The Holy Qur'an* says:

"*And whoever transgress the limits of Allah he indeed does injustice to his own self*".[35]

The *Qur'an* says there is a definite law of universe- a universal divine Government or will of God or 'Sunnat-ul-Allah- governing and supporting the multitudinous objects, forces and creatures in the universe. God is omnipotent and everything is utterly dependent upon Him. Yet in His infinite Mercy He has endowed man with a free personality and created everything for the service of man.[36]

Man enjoys a unique position among God's creations. In his nature, mental make up and attitudes, he is different from the rest of the creations. He enjoys the highest position among God's creations – a position not only to creator himself.[37] The pattern of life that Islam builds can have no place for birth control as a national social policy. The Islamic culture strikes at the roots of the materialistic and sensate view of life and eliminates the motivating

[34] Al-Qur'an 28:50.
[35] Maulana Madudi, Syed Abul Ala: "Islam and Birth Control", 1987, pp. 73-75.
[36] Hussain Athar "The message of Qur'an", 1977, p.19.
[37] Maulvi Ahmad C.N. "Religion of Islam; A Comprehensive study", 1976, p.1.

forces that make man abstain from fulfilling one of the most fundamental urges of human nature, that is, of procreation.[38]

The most fundamental doctrine of the *Qur'an* is belief of oneness of God. The *Qur'an* says that belief in the existence of God is ingrained in man's very nature. The first vision afforded to man was the vision of God. Man was also made conscious of the purpose of creation and of the 'names' or meaning of things and of the laws of their existence. It is against his nature that he should reflect over the working of the universe and yet deny the existence of an all-embracing providence.[39]

Islam attaches great importance of protecting the life. Islam forbids celibacy and enjoins upon the followers to find suitable partners to get married and have offspring.[40] The mandate however, is conditional.

Islam prohibits contraception as it belays procreation, except when there are reasons to fear for the mother's life which are to be established by specialists. Abortion is only permitted in order to preserve the mother's life. Rather Islam decrees that children should be part of a population group with its own distinct identity really to meet the challenges of life, to walk a straight path, and to protect the honor and principles of Islam.[41] The Prophet has declared homicide as the greatest sin only not to polytheism. The tradition of the Prophet reads:

> *"The greatest sins are to associate something with God and to kill human beings"*

[38] Hussain Athar, "The Message of Qur'an", 1977,p.27.
[39] Hussain Athar, "The message of Qur'an",1977, p.17.
[40] Al-Qur'an, 7; 189; 25; 74. 30:21
[41] Husni Ronak and Newman Daniel L, "Muslim woman in law and society" Pub. By Routledge Taylor and Francis Grout- London & New York, 1st ed. 2007, pp.61-62.

The injunction applies to all human beings and the destruction of human life is itself has been prohibited.[42]

God is the only owner of life. Life is sacred in Islam and no one should take steps intentionally to end an innocent human life. *The Holy Qur'an* lays down:

> "*Whoever kills a human being (without any reason like) manslaughter, or corruption on earth, it is though he had killed all mankind*".[43]

To kill an innocent human life is like killing the whole of mankind and to save a human life is like the saving of all mankind and is highly rewarded by Allah. Killing any person is strongly condemned in the *Qur'an*. God has made life sacred. Killing the children is specifically condemned as they are the helpless victims in every society. *The Holy Qur'an* says:

> "*You shall not kill any (Nafs) person-for God has made life sacred-except in the course of justice...*"[44]

Islam was not opposed to family planning rather it supports it. Birth control is of course part of family planning. Once a couple decides on the number of children, they should 'space' their offspring, because this is essential for the health of both the child and mother.[45] For the ways and means to achieve proper planning of the family life Islam emphasizes the prophylactic measure of self control through fasting[46] and provides suitable rules and customs of social behavior and matrimonial relations.[47]

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[42] Maulana Madudi abu A'La; "Human Rights in Islam",1993, p.22.
[43] Al-Qur'an 5:32.
[44] Al-Qur'an 17:33.
[45] Ahmed Shakeel, "Muslim Attitude towards Family Planning", 1st ed. 2003, Pub. by Sarup & Sons, New Delhi, p.5.
[46] Bukhari, 67:2.
[47] During the Holy month of Ramdhan (the fasting days) coitus is disapproved. A gap of few months must elapse between divorce and remarriage (Dr. Khan I.A., Mohammadan Law p.122).

The followers of Islam are perceived as exhibiting a homogeneous fertility pattern under the influence of common universal faith. The issue of fertility control has been explained and debated in Islamic literature exhaustly. Islam has made a distinction in the fertility control and fertility regulation. Islam forbids fertility control of a woman for her whole reproductive period.[48] Children are among the richest blessing that Allah bestows. He will provide for the souls. He permits to come into world and therefore any attempt to curtail fertility is contrary to the wishes of God. The *Holy Qur 'an* says:

> *"Kill not your children for fear of want...we will provides sustenance for them as well as for you... verily- the killing of them is a great sin".*[49]
>
> *"Loosers are those who killed their children foolishly, due to their lack of knowledge, and prohibited what God has provided for them, and followed innovations attributed to God. They have gone astray, and they are not guided on the right path".*[50]
>
> *"Do not kill your children because of poverty- we will give provision to you and to them as well...and do not kill a person, whom Allah has given sanctity, except by right".*[51]

God is ordering, not to kill the born or the unborn children[52] because every child is considered a great gift from the creator.

Islam permits fertility regulation. Several Muslim jurists and scholars explained that the practice of Azl (coitus interrupts) is traceable to the

[48] Ahmed Iftikhar Shaik and Bhatia Manisha; "Exploring Fertility among Muslim Majority Countries; Islam and the Modern Age". Vol. XXXVIII, No.4, November 2007. Pub. By Zakir Hussain Institute of Islamic Studies, Jamia Millia Islamia, New Delhi, p. 104.
[49] Al-Qur'an, 17:31.
[50] Al-Qur'an, 6:140.
[51] Al-Qur'an, 6:151.
[52] http://www.epigee.org/guide/islamic.html/

prophet's times. This method of contraception was generally practiced by Muslims to regulate fertility.[53]

It is rule of cohabitation that the semen should not be thrown out of uterus as what God decreed must come to pass. The custom of Azl is lawful, but it is not commendable for the reason that the merits of throwing semen in uterus are given up. This is virtue in producing a child but it is given up in Azal. The prophet said: If a man cohabits with his wife, the reward of producing a child is written for him.

The birth-control by Azal is lawful is supported by Qiyas or inference from *Qur'an.* Though there is no clear verse regarding it, yet it can be gathered there from by inference.[54] There is a recorded reference, at which Hazrat Ali, Hazrat Zubair and other companions of the Holy prophet were sitting with Hazrat Umar. Hazrat Ali said: Life comes into being after seven stages, then he read this verse: I have created man from direct clay, then I placed it as semen in its resting place, then I created semen into clot of blood, then clot of blood into limb of flesh, then the lump of flesh into bones, then the bones covered with flesh and then I created it into another creation. In other words, I infused into it life.[55] Later in the fifth century hijrah, azal was a permitted practice[56] in view of certain social conditions necessitating avoidance of conception in different circumstances.

The majority of Muslim jurists adopt the view that abortion should be prohibited except where the continuation of pregnancy is likely to cause a risk to the life of pregnant woman or substantial risk to her health when dealing with abortion. Muslim scholars believe that human life begins soon after the fourth lunar month of conception when the fetus becomes viable, that is, fit to

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[53] Supra Note 52.
[54] Al-Haj Maulana Fazlul Karim, "Imam Ghazzali's Ihya Ulum-Id-Din," the book of religious learning, Vol. II 2003, Islamic Book Service, New Delhi, p.37.
[55] Ibid, p.39.
[56] Al-Haj Maulana Fazlul Karim, "Imam Ghazzali's Ihya Ulum-Id-Din," the book of religious learning, Vol. II 2003, Islamic Book Service, New Delhi, pp. 52-54.

live. Of particular significance there are certain associated events the Prophet Mohammad (PBUH) related:

The creation of each one of you is brought in the womb of his mother for forty days as a germ cell. Then for a similar period, he is an embryonic limp (hanging like leech, known as 'alaqah in Arabic). For another forty days, he is a mudghah (like a chewed-up substance, shape of a four-week old embryo); then angel is sent and he (the angel) blows in him,the ruh (soul). After this, the angel is ordered to write down four words. He is told to write down the child's (future) livelihood, his life duration, and whether he is to be miserable or happy. (Al-Bukhari)

One of the Prophet's companions and a renowned Muslim scholar, Ibn' Abbas, stated that the breathing-in process takes place within 10 days after the four-month period.[57]

Muslim jurists disagree with respect to abortion during the first four month of conception. Before animation, the Muslim scholar's views differ and vary in details concerning permissibility (Ibha), disapproval (Karaha) and prohibition (tahrim).

According to *Ibn of Hanfiyah School*, abortion during the first four month of pregnancy is an object of disapproval (makruh) if it is procured without a valid excuse. According to the *Malikiayah Islamic school of law*, abortion should be prohibited even during the first four months of pregnancy. The *Malikiyah Islamic school* is stricter on abortion than the *Hanafiyah school*. The jurists of *Shfiyah Islamic of law* adapt the view that abortion should be prohibited unless there is a necessity for performing it. Ibn Qudama of the *Hanabilah school of law* argued that if abortion occurs when the organism is still in the gastrula stage and if expert midwives testify that it has appearance of human shape, then the expiation will be in the form of ghura or an indemnity

[57] http://www.readingislam.com/servlet/satellite?c=Article_C&cid=1154235122976 & pagename=zone-english-discover_islam%

and where the organism has not acquired shape, abortion, at this stage, as the stage of clot is not liable for indeminity.[58]

Some Islamic scholars believe that ensoulment occurs when an embryo has implanted itself into the womb. Others say it occurs much later, anywhere from 40 days after fertilization to 120 days after fertilization.[59] While the various Islamic Schools of law may have differing opinions as to when ensoulment occurs but they are unanimous in forbidding abortion after animation i.e. after the completion of the first four months of pregnancy unless abortion is necessary for saving the life of the mother. The right to life is a fundamental and compelling interest under Islamic law. Hence life should be given legal protection in all its forms and that includes the developing fetus. Certainly, if women were given an ultimate right of privacy to terminate pregnancy whenever they wish to do so such right if exercised electively by the women could effectively threaten the life of unborn child and societal interest in procreation, therefore, abortion should not be recognized as a matter of personal privacy and must be prohibited unless there is an urgent necessity. Abortion on any ground is forbidden in the Islamic Holy Book *Al Qur'an.*[60]

In the matter of observance, Islam is not a religion of rigidity. It adapts a policy of flexibility in deserving cases.[61] Recently many fatwa's have appeared in favor of family planning. Almost all forms of birth control are thought to be permissible in Islam. Those that are not accepted include surgical sterilization (unless it is medically necessary), as it is viewed as a form of castration as well as alters the body without need and the withdrawal method, because it interrupts a woman's pleasure and prevent a woman from conceiving if that is, what she want. However withdrawal method may be used if the woman agrees to it.

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[58] Tageldin Medam Abdal Rahman, "Right to Abortion: A Comprehensive Perspective", XII, Aligarh Law Journal,1997 p.155.

[59] Birth Control and Religion: Family Planning According to Islam at http://www.epigee.org/guide/islamic.html.

[60] Supra note 58, p.155.

[61] Maulvi Ahmed C.N., "Religion of Islam; A Comprehensive Study," (1976) p.5.

Birth control use may be allowed for various women. Instances when Islam permits the use of contraception include:

- Allowing a woman to rest between pregnancies.
- Preventing the transmission of infectious disease such as STD
- A woman's health requires the birth control
- A husband can not financially support more children.[62]

Islam attaches great sanctity in protecting the life of a child either born or unborn. It is not permissible to abort a pregnancy at any stage unless there is a legitimate reason and within very precise limits. After the four month of pregnancy, induced abortion was forbidden unless a group of trust worthy medical specialists decide that keeping of fetus in mother's womb will cause her death, and that should only be done after all means of keeping the fetus alive have been exhausted. A concession is made allowing abortion in this case as to ward off the greater of two evils and to serve the greater of two interests.[63] Abortion is against Islam, especially if it's for a random reason like pregnancy before marriage or of rape of adultery. It's not the baby's fault. It's considered murder.[64]

The religion of Islam is often considered to be pro-natal in character and some adherents maintain that children are among the richest blessing that Allah bestows.[65] Therefore many reasons why Muslims should campaign against attacks on the sanctity of life including abortion, destructive embryo experimentation, euthemasia and assisted suicide. Some of the most Islamic/religious arguments are given below:

- God is only owner of life. Life is sacred in Islam and no one should steps intentionally to end an innocent human life.

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[62] Supra note 59.

[63] http://islamqa.com/indexphp?ref=42321&In=eng&+x+=abortion p.5.

[64] www.readingislam.com/servlet/satellite?c=Article_c&cid=1154235122976 & pagename=zone-English-Discover_islam%

[65] Dr. Reddy Krishna M.M; "Fertility and Family Planning Behavior in Indian Society",Kanishka Publishing House,Delhi,1996, p.68.

- It is prohibited in the Holy book Al-Qur'an and in the saying of the final prophet Mohammad (PBUH) intentionally to end the life of any unborn child (abortion) or to kill oneself or assist some one to end their life.
- There is not one single statement in the Islamic Holy scriptures which allows abortion, euthanasia, suicide at any time or in any circumstances.
- There are clearly prescribed rights of unborn child in Islam, for example the right to life.
- The right to life is similarly granted to a baby or adult who is disabled.
- To kill an innocent human life is like killing the whole mankind and to save a human life is like the saving of all mankind (according to *the Qur'an*) and is highly rewarded by the God.
- Any child is great gift from the creator.[66]

Islam also provides for the health of the unbom child, family and generation. Islam places responsibility of sucking and bringing up the children upon the parents. Following verses of the *Qura'n* may be cited in this respect.

"*Mother shall suckle their children for two whole years (that is) for those who wish to complete the suckling. The duty of feeding and clothing nursing mothers in seemly manner is upon the father of the child".*[67]

"*And we have commended unto man kindness toward parents. His mother breath him with reluctance and brigneth him forth with reluctance and the bearing of him and the weaning of him is thirty months till when he attaineth full strength.*"[68]

So according to these verses of *Qur'an* mother is directed to suckle her children for two years to attain full strength. In this connection it may be said

[66] Society for the protection of unborn children at http://www.spuc.org.uk/about/muslim-division/why
[67] Al-Qur'an, 2:223.
[68] Al-Qur'an, XLVI:15.

that there should not be another conception till the weaning of the first child. Because another conception during the period of suckling will hamper the right to full development of the fetus. Prophet Mohammad in Al-Hadith asked his companions not to indulge in sexual intercourse during the time the mother is nursing the child which is two years according to *Qur'an* for fear of weakening the child.[69]

Thus, in fact Islam prohibits abortion and it enjoins upon its followers to "multiply and prosper". The right to life is fundamental and compelling interest under Islamic law. Abortion in the sense of destroying a fetus after the creation of soul, that is, when the fetus has acquired life is forbidden and is considered as sin.

The Muslim scholars views differ as to when life begins but after interpreting various injunctions of the *Holy Qura'n* and the traditions of the prophet Mohammad, almost all Islamic scholars are unanimous that insolent occurs at 120 days or after fourth lunar months.

Islamic law follows a moderate course and a reasonable approach towards abortion. There is one exception where abortion is permitted, as to save the life of the mother otherwise not on any other random reasons.

Thus, abortion is against the tenets of Islam but if it becomes certain that termination of pregnancy is necessary and proven by the trustworthy medical specialists to save the life of the mother, then it is permissible. Islam attaches great sanctity in protecting the life of unborn child except where the life of the mother is in danger.

The most important right of the unborn child is to born, in other words not to be aborted. Islam in general condemns the feticide as a mode of fertility control. Termination of pregnancy in the sense of destroying a baby after the creation of soul that is when the fetus has acquired life is forbidden and is

[69] Khan Sheeraz Latif A "Rights of Unborn Child" vol. 21 & 22,1999-2000 and 2001, Law Review, pp. 124-125

considered as haram. *Quran* in Sura Anam and Bani Israel enjoins upon Muslims a duty not to kill children.

C. Christian Views

In Christianity, starting from the Early Christian Tradition, we find that Judeo-Christian tradition going back thousands of years has always valued human life, including unborn human life. The Protestants among Christians do not approve of abortion either but it is generally condoned under certain medical conditions endangering the life and health of the mother. It is also a fact that it is easier to have abortion operation performed in Protestant controlled hospitals than in Catholic institutions.[70]

The primary point of conflict in the entire abortion debate is the question of when life begins. If indeed life begins in the womb, then no one could disagree that the fetus (later for 'little one') is a human being, and is subject to the rights (God's laws concerning humanity) which befit a human being. There are many verses in *the Bible* that speak to the issue of abortion either directly or indirectly. First, the Bible establishes that God recognizes a person even before him or she is born, "*Before I was born the Lord called me"* (Isaiah 49:1).[71] *Chapter 21 Verses 22-23 of Old Testament, Book Exodus* describes a situation in which a man hits a pregnant woman and causes her to give birth prematurely. If there is "no serious injury", the man is required to pay a fine, but if there is "serious injury," either to the mother or the child, then the man is guilty of murder and subject to the penalty of death.[72] Old Testament, Book Exodus reads as follows:

"If man strive and hurt a woman with child so that her fruit depart from her, and yet no mischief follow, he shall be surely punished, according as the

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[70] Mankekar Kamla, "Abortion:A Social Dilemma",pub.By Vikas Publishing House Pvt. Ltd.Delhi,Bombay,Banglore,Kanpur,London, 1973, p.26.

[71] Bibilic perspectives on unborn child "at http://www.epm-org/articles/plbible.html

[72] http://www.reformed.org/social/index.html?mainframe=htte://www.reformed.org/social/abortion.html. of

woman's husband will lay upon him; and he shall pay as the judges determine. And if any mischief follows, than thou shall give life for life".[73]

This command, in itself, legitimizes the humanity of the unborn child, and places the child on a level equal that of the adult male who caused the miscarriage. Scriptural support abounds for the humanity of the unborn child. "For you created my inmost being; you knit me together in my mother's womb. I praise you because I am fearfully and wonderfully made your eyes my unformed body. All the days ordained for me were written in your book before one of than came to be"[74]

The Bible consistently uses the same word for a "born" or "unborn" baby. This is because the divine author of the Bible did not recognize a material difference between the two. In scripture, there is not some special event when a "human being" becomes a "person". Rather he or she is a person from the beginning who goes through growth and development both inside and outside of the womb.[75]

In addition to the Old Testament and Proverbs, the New Testament offers great insight on how to approach the issue of the unborn. In the New Testament the Greek word '*brephos*' is used to describe the unborn, newborn and youth. In Luke 1:44, the word is used to mean unborn baby: "For behold, when the sound of your greeting reached my ears, the baby leaped in my womb for joy". Then in Luke 2:12, it means a newborn: "so they came in a hurry and found their way to marry and Joseph, and the baby as He lay in the manger". And in Luke 18:15, "*brephos*" refers to a young child: "And they were bringing even their babies to Him so that He would touch them, but when the

[73] Promodam MC "The unborn and legal protection." Cochin University of Law Review", 1994, p.255.
[74] A Beblical perspective on abortion at

http://www.reformal.org/social/meloc.html?mainframe=http://www.reformed.org/social/abortion.html. of
[75] The Christian view of Abortion at http://www.abortionfacts.com/literature/diterature -9410CV.asp

disciples saw it, they began rebuking them".[76] Thus God makes no distinction between an unborn baby and one already born.

Perhaps the most Stark Biblical revelation of the humanity of the unborn comes in Jeremiah 20, during Jeremiah's cry of woe in which he laments that he wishes he had never been born, "cursed be the man who brought my father the news, who made him very glad, saying '*A child is born to you- a son"... For he did not kill me in the womb with my mother as my grave"* (Jeremiah 20:15-11).

In the aforementioned Verses, and in countless other verses, the Bible does indeed establish that an unborn child is just as much a human in God's eyes as we ourselves are. This indicates that the command "*Thou shall not murder*" (Exodus 20:13) certainly applies to the unborn as well as the already born. Thus when we read Genesis 9:6 the full realization of what it means to murder comes in to focus," whoever shed the blood of man by man shall his blood be shed; for in the image of God has God made man".[77]

Historical and denominational views differ on the stage at which an unborn child is considered to be human, at which point it is considered on equivalent to murder to terminate its life.

Does the unborn child have rights that ought to be protected, as much as those of humans already born? Views also differ on the merits of certain exceptions where abortion is biblically filling (e.g. on the grounds of a mothers health).

In the 1st century A.D; Greeks influenced Christian ideas about abortion. For the Greeks, ensoulment occurred 40 days after conception for male fetuses and 90 days after conception for female fetuses. Consequently, abortion was not condemned if performed early.

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[76] Ibid.

[77] http://www.reformed.org/social/index.html?mainframe=http://www.reformed.org/social/abortion.html. of

Between the 2nd century A.D. the 4th century C.E., several Christian philosophers condemned women who had an abortion. From the 5th to 16th century A.D., Christian philosopher had varying stances on abortion. St. Augustine wrote that an early abortion is not murder because the soul of a fetus at an early stage is not present. St. Thomas Aquinas, Pope Innocent III, and Pope Gregory XIV believed that a fetus does not have a soul until "quickening", or when a woman begins to feel her fetus kick and move. Abortion before quickening was, therefore, acceptable. Pope Stephen V and Pope Sixtus V opposed abortion at any stage of pregnancy.[78]

The churches and denominations have different views on the practice of abortion. Some denominations take a very conservative stance. These groups maintain that to abort an unborn child is tantamount to murder. Other, more liberal denominations claim that woman have right to terminate a pregnancy if so choose.[79]

1. Eastern Orthodox views on Abortion

The Eastern Orthodox Church believes that life begins at conception, and that abortion (including the use of abortifacient drugs) is the taking of human life. However, it is acceptable in a few circumstances. The basis of the social concept of the Russian Orthodox Church states that while abortion can never be seen as morally neutral; in some cases economy can be used. In case of a direct threat to the life of a mother if her pregnancy continues, especially if she has other children, it is recommended to be lenient in the pastoral practice.

2. Protestant views

The protestant denomination is also against abortion. Christian fundamentalist movements unanimously condemn abortion, while mainstream protestant traditions take more nuanced positions but are generally pro-choice with some exceptions. Several main stream protestant traditions belong to the

[78] http://www.womensrights world.com/Christianity/html/Christian_views-on-abortion.html
[79] http://www.christianet.com/abortionfeuts/christianviewson.abortion.html

religious coalition for reproductive choice. The Church of England states that the unborn child is alive and created by God. However, the Church of England also believes that abortion is sometimes morally acceptable such as when a baby is suffering from serious disability.

3. Fundamentalist (Evangelical) Movements: Fundamentalist Evangelical views

Fundamentalist churches that include the Evangelical, non-denominational, Southern Baptist and Pentecostal movements, do not have a single definition or doctrine on abortion. While these movements hold in common that abortion (when there is no threat to the life of the mother) is a form of infanticide, there is no consensus within these camps as to whether exceptions should be allowed when the woman's life is in mortal danger, or when the pregnancy resulted from rape or incest. Some argue that lives of both woman and child should be given equal consideration, in effect condemning all abortion including those performed to save the life of the woman. Others argue for exceptions which favor the life of the woman, perhaps including pregnancies resulting from cases of rape or incest.

Before 1980, the Southern Baptist Convention advocated for abortion rights. During the 1971 and 1974 southern Baptist conventions, southern Baptists were called upon to work for legislation that will allow the possibility of abortion under such conditions as rape, incest, clear evidence of severe fetal deformity and carefully ascertained evidence of the likelihood of damage to the emotional, mental, and physical health of the mother

4. Mainline Protestant Churches views

The Roman Catholic Church says that deliberately causing an abortion is a grave moral wrong. It bases this doctrine on natural law and on the written word of God. The church says that human life begins at fertilization. Each new

life that begins at this paint is not a potential human being but a human being with potesstial.[80]

The Catholic Church in 1588, under Pope Sixtus V, issued strict sanctions against the practice of abortion among the Catholics. It wiped out all concessions 40 days to 80 days of conceptions, the period till "quickening" and so on- and simply termed abortion at any stage as nothing short of murder.[81] Since the sixteenth century, causing or having an abortion led to automatic excommunication... The Church condemned abortion as early as the 2nd century CE: a document called the Didache, written in the 2nd century (some time after 100 CE) states: *You shall not kill the embryo by abortion and shall not cause the newborn to perish".*

The strong stance taken by the Roman Catholic Church has underpinned many of the pro-life groups which have been formed the challenge to the legalizations of abortion. Recently Pope John Paul II (2002) looks a very strong line on abortion, describing it as murder.

In 1995, Pope John Paul II wrote an encyclical (a teaching letter to the whole Catholic Church) called 'Evangelism vitat' (The Gospel of Life) on abortion specifically the Pope wrote:

> *I declare that direct abortion, that is, abortion willed as an end or as a means, always constitutes a grave moral disorder, since it is the deliberate killing of an innocent human being.*

This emphasized that the Church's opposition to abortion stemmed from recognition of the basic rights of all individuals, including the unborn.[82] The position taken by Anglicans across the world are divergent although most would refrain from simplifying the debate into "*pro choice*" or "*pro life*" camps. The Anglican church of Australia does not take a position on abortion.

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[80] http://www.bbc.co.uk/religion/religions/christianity/christianethics/abortion_2.html
[81] Supra Note 74, p.8.
[82] Religion and Ethics-Christian view of abortion: Roman Catholic http://www.bbc.co.uk/religious/christianity.christianethics/abortion_html

However in December, 2007, an all woman committee representing the Melbourne diocese recommended that abortion is "decriminalized" on the basis of ethical view that the moral significance of the embryo increases with the age and development of the fetus. This is seen to be the first official approval of abortion by Australian.

The united Methodist church up holds the idea that church doctrine should not interfere with secular abortion laws. In light of grave or socio-economic circumstances, the Methodist church believes in the right of the mother to choose whether to have an abortion, and is thus often regarded as pro-choice.[83]

The Church of England shared the Roman Catholic view that abortion is '*gravely contrary to the moral law'*. As the 1980 statement of the Board of social Responsibility put it:

On the light of our conviction that the fetus has the right to live and develop as a member of the human family, abortion, the termination of that life by the act of man, as a great moral evil. We do not believe that the right to life, as a right pertaining to persons, admits of no exceptions whatever; but the right of the innocent to life admits surely of few exceptions indeed.[84] Life belongs to the Lord and individuals, therefore, can not dispose of it at their own whim. It perceives abortion as a breach of the God's commandment, *thou shall not kill*, a commandment which is at the heart of the Ten Commandments. Recently, Pope John Poul II in his latest encyclical on the Gospel of life which has been labeled as Manga Carta of the present century proclaiming and defending human life, reiterate faith of the Christianity in the sanctity of human life and strongly condemned the rising 'culture of death' through abortion. His Holiness, referring to the inalienable right to life and man-made law, opined that the '*right to life'* cannot be abrogated by the will of the majority in modern

[83] Women Rights world: Christianity and abortion. The various Christian views on abortion: historical & current at http://www.womensrights.world.com/christianity/html/christian_views-on-abortion.html

[84] Religion & Ethics-Christian view of abortion: church of England at http://www.bbc.co.uk/religious/christianity.christianethics/abortion_html

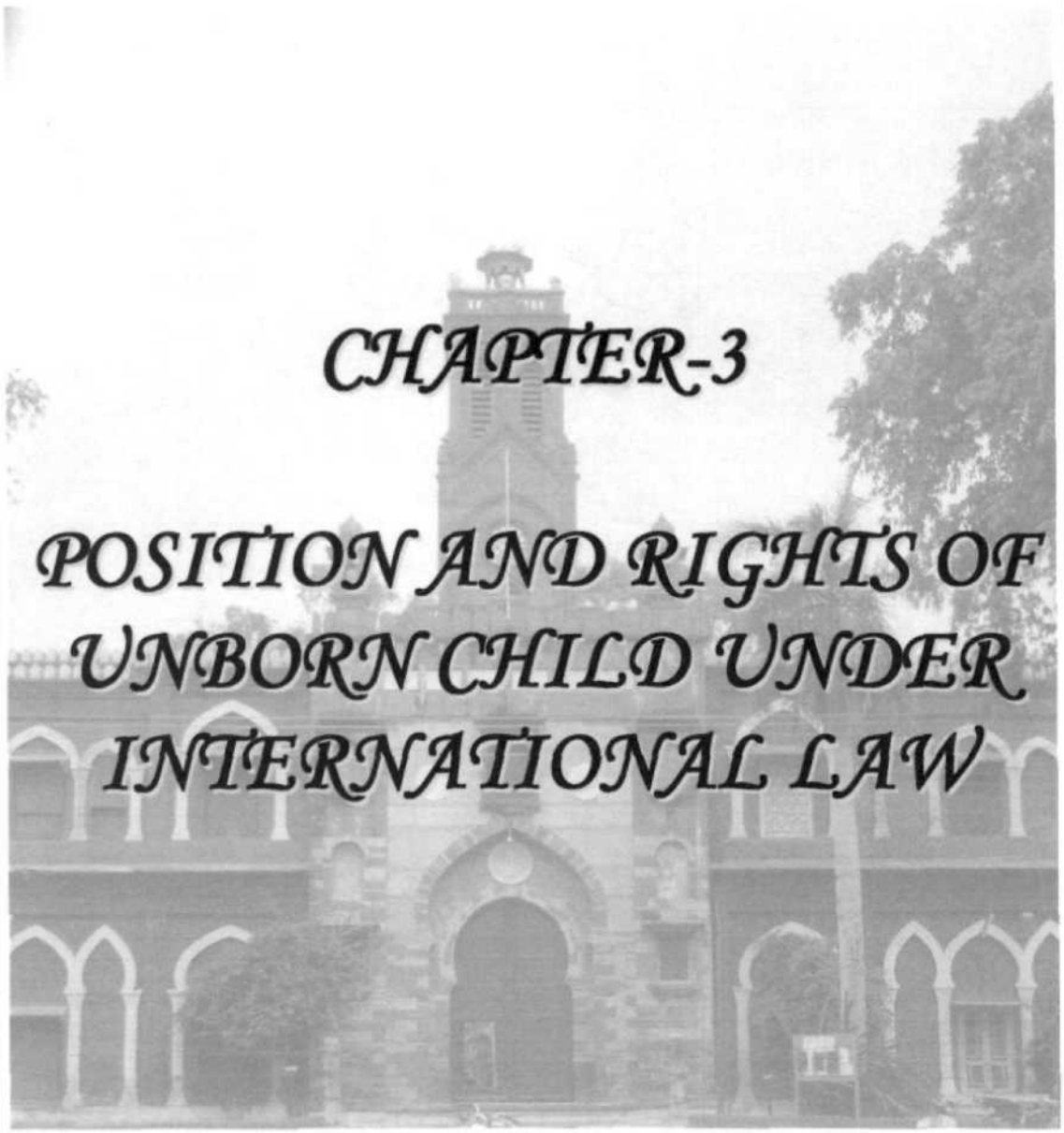
democracy. His Holiness also asserts that 'no law whatsoever can ever make licit an act which is intrinsically illicit, since it is contrary to the law of God, which is written in every human heart. The Holy Pope strongly feels that law must safeguard the moral foundation of respect for inviolable and inalienable rights of individuals. The Holy Father also appeals Christians to exercise their 'clear and grave obligation to resist laws contrary to the law of God'.[85]

From the above discussion it may be submitted that the unborn was treated as equal to human being at least for the purpose of its protection. Anglo-Saxon England gives the unborn children only a partial status. The Church of England is keen to ensure that as many abortions as possible are carried out as early as possible. However, in the rare exceptions, a pregnancy can be terminated beyond 24 weeks, it should only take place where there is a serious fetal disability and survival will be for very short period of time. The Roman Catholic Church has for a long time stated that a fetus becomes a person after fertilization, distinguished theologians such as Augustine and Thomas Aquinas said this did not happen until between 40 and 80 days after conception. The Catholic Church urges absolute protection for the unborn children. It bases this doctrine on natural law and on the written world of God. The Catholic remains practically same even today.

Thus almost all churches and denominations do not regard abortion as morally good, but argue there can be situation in which it may be the least bad moral choice available.

Mother Teresa, perhaps one of the world most renown champions of the under privileged said, *"If we accept that a mother kill her own child, how we can tell other people not to kill each other? Any country that accepts abortion is not teaching its people to love, but to use any violence to get what they want"*.

[85] Indian Bar Review, Vol. 24 (3 & 4) 1997, pp. 78-80.



CHAPTER-3

POSITION AND RIGHTS OF UNBORN CHILD UNDER INTERNATIONAL LAW

CHAPTER-3

CONCEPT, POSITION AND RIGHTS OF UNBORN CHILD UNDER INTERNATIONAL LAW

The basic concept of International law is not new in Indian perspective. Centuries ago even in Ramayana and Mahabharata period there were laws relating to treatment of diplomatic agents and general rules regarding wars. These rules and regulations were based on the consideration of humanity, chivalry and other moral values of Indians. The principle of "*Vasudhev Kutambkum*" where we find mutual contmitment for the well being of "*Manav Matra*" (Human being simplicite) is nothing but an effort to lay down foundation of internationally acclaimed rule conduct. The view of Oppenheim and many other western jurists that the international law is essentially a product of Christian civilization had began gradually from the second half of middle ages seems incorrect. Even ancient Greece, Rome were possessing strong base in this regard.[1]

However, in the aftermonth of the Second World War, the United Nations was formed on the basis of a charter which committed the member of the U.N. to "take joint and separate action in cooperation with the organization" to achieve "the purpose set forth in Article 55 of the charter. Article 55 committed the U.N. to promote *"universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".*[2]

A further important consequence of developments in international law has been the increasing number of Declarations and Conventions which can potentially affect our municipal laws. Major international law and treaties deal with several rights to protect women and children.

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[1] Agarwal H.O.,"International Law and Human Rights", Central Law Pub. Sixth ed. 2000, pp.2-3.
[2] Ibid.

Implicitly all conventions recognize the rights of unborn child.[3] Article of the UN 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.[4]

In 1974, the Australian constitutional 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 that everyone's right to life shall be protected by law, is applicable to unborn life. The court refused to include unborn life in the definition of the term everyone as pleaded by the Australian government because some member States did not recognize a right to life for beings yet unborn, and held that the term everyone' is limited to born human beings.[5]

Though the term 'everyone' does not include unborn but the right to life is "the Supreme right" and "basic to all human rights." Article 3 of Universal declaration of Human Rights stated that "everyone has the right to life liberty and security of the person."

Universal Declaration on Human Rights, 1948 recognized that the child "by reason of his physical and mental immaturity" is entitled to "special

[3] Universal Declaration of Human Rights, 1948, the Convention on the Elimination of All Forms of Discrimination Against Women, 1979, Convention on the Rights of the Child, 1989, International Covenant on Civil and Political Rights, 1966 and International Covenant on Economic, Social and Cultural Rights, 1966.

[4] A Bajpai, "Child Rights in India – Law, Policy and Practive," 2003, New Delhi, p.19.

[5] Bonda, "The Impact of Constitutional Law on the Protection of Unborn Human Life: Some Comparative Remarks" cited in K.D. Gaur, "The Indian Penal Code", Universal Law Publishing Co. Delhi, Ed. 2004, p.502.

safeguards and care including appropriate legal protection before as well as after birth." Thus it means that the right to life, as protected by Article 3 of the UDHR is recognized as early valid for the child before birth as for the child after birth.

Some of the major International Conventions that provide for the protection of the rights of unborn child whether directly or through implication are:

a) Universal Declaration of Human Rights 1948

b) International Covenant on civil & Political Rights 1966

c) Convention on the Rights of Child 1986

d) Convention on the Elimination of All Forms of Discrimination Against Women

A. Universal Declaration of Human Rights 1948

10th December 1948 is a landmark in the scenario of human rights, as on that day the General Assembly of United Nations adapted the Universal Declaration of Human Rights. The preamble of the Declaration proclaims the Universal Declaration of Human Rights as a Common Standard of achievement for all peoples and for all nations, to the end that every individual and every organ of society, keeping this Declaration Constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of members states themselves and among the peoples of territories and their jurisdiction.[6]

The universal Declaration of Human Rights 1948 is founded upon the nation that there are human values and these values are inherent in the human

[6] Preamble, Para 1, Universal Declaration of Human Rights, 1948-whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

individual. As far as the Declaration is concerned there are human values inherent in all members of the human family because of their "inherent dignity". Since "dignity" is about true worth or excellence and, in the context, human worth, then the claim for the inherent dignity of human beings is a claim for basic human values. Further, the preamble links human dignity, human values with human rights that it describes as "*inalienable rights*", rights of which we may not be deprived and cannot deprive us.

These human rights which reflect human values must, says the preamble, "be protected by the rule of law" otherwise humankind may be driven, "as a last resort, to rebellion against tyranny and oppression". This protection of the rule of law is necessary not only for human beings to live together peaceably within the state, but also that nations may live together in peace.[7]

Mary Rabinson, United Nations High Commissioner for Human Rights, addressing the plenary session of the Earth Summit in Johannesburg, 29August, 2002, declared that in every country the emphasis must be on "building democratic institutions, the rule of law and effective legal system that function to protect the human rights of all without discrimination."[8]

The Universal Declaration of Human Rights 1948 presents itself to the world as "a common standard of achievement for all peoples and all nations" and as a guide for every structure in society and for every individual in order that the rights identified in the Declaration may have "their universal and effective recognition and observance secured".[9]

Article 3 of the Declaration begins the articulation of the human values to be defended in terms of human rights. This Article stated that "Everyone has

[7] www.priestforlife.org/articles/flaming_p2.htm
[8] http://www.arctrtkla.org.au/submission/bill of rights.htm
[9] Preamble Universal Declaration of Human Rights, 1948- whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

the right to life, liberty and the security of person."[10] The right to life is "the supreme right" and "basic to all human rights."[11] Thus, human life is held to be both inviolable and inalienable. The Declaration does not begin with hard cases or exceptions but with the general proposition which concerns the value of human life. Noting the order of the rights articulated is also interesting-life first, than freedom, and then security of person. Unless the state can guarantee the right to life then there are no meaningful rights to freedom or to security of person. The right to life is logically prior to considerations of the quality of the individual's life.

Now the question arises that does this right to life extend to the unborn child? In 1959, the U.N. General Assembly formally declared: that the Universal Declaration of Human Rights "recognized" that the child "by reason of his physical and mental immaturity" is entitled to "special safeguards and care including appropriate legal protection before as well as after birth". This means that the right to life, as protected under Article 3 of the Universal Declaration, is recognized as equally valid for the child before birth as for the child after birth.

The right to legal protection "*before as well as after birth"* is one of the equal and inalienable rights of all members of the human family proclaimed at the start as the foundation of justice in the world. No one may destroy that right, nor deprive any human being of that right, nor transfer that right, nor renounce it that what inalienable means. And when the preamble goes on to say: It is essential that human rights should be protected by the rule of law. Thus it is clear that no one may remove the human rights of the unborn child from the protection provided by the rule of law. The term "no one" means no treaty monitoring committee, no commission, no legislature, no judiciary-none of these has the authority to de-recognize the human rights of any individual

[10] Article 3, Universal Declaration of Human Rights, 1948- Everyone has the right to life, liberty and security of Person.

[11] http://www.humanrightsconsultation.gov.au.Rita Joseph

human being or any selected group of human beings. If it is permissible to withdraw legal protection for the human rights of any one group (such as children before birth), then it may be permissible some time in the future to withdraw legal protection for any other group.[12]

Human rights documents specifically condemn "choices" that entail lethal damage to the child's health and development. Abortion "choices" as human rights violations by adults in positions of power over children in positions of dependency are logically incompatible with protection of the child before birth.[13]

The concept of person is one of the most difficult concepts to define-even though it is always burdened with hopes and rededications. It is neither a simple fact, nor evident throughout history. Concepts of personhood based upon science and philosophy abound. For some, personhood beings at syngamy. For others it is at fourteen days after fertilization, twelve weeks, twenty-eight weeks, birth, three months after birth and so on. There is no agreement in science or philosophy about when personhood begins or when it ends or how it should be defined. The only agreement one finds is in the embryological text books, that human life begins at fertilization. It is a fertilization of a human egg by a human sperm that produces a member of the human species, the human family. The main result of fertilization is:

(a) Restoration of the diploid number of chromosomes, half from the father and half from the mother. Hence, the zygote contains a new combination of chromosomes, different from both parents;

(b) Determination of the sex of the new individual. An x-carrying sperm will produce a female (XX) embryo, and a y-carrying sperm a male (XY)

[12] Rita Joseph "Right to life is the most important of all" at http://jmm.aua.net.au/articles/19921.htm.
[13] Ibid.

embryo. Hence, the chromosomal sex of the embryo is determined at fertilization;

(c) Initiation of cleavage without fertilization the oocyte usually degenerates 24 hours after ovulation.[14]

On the basis of the standard text book definition of fertilization it may reasonably be concluded that the embryo is a "new individual", genetically different from his or her parents and containing all the necessary genetic information for further development. This embryological understanding of the beginning of human life has been expressed in various formulations. The Senate Select Committee on The Human Embryo Experimentation Bill 1985 [Australia] defined the human embryo. The Committee in adapting the usage 'embryo' to describe the fertilized ovum and succeeding stages up to the observation of human form, means to speak of genetically new human life organized as a distinct entity oriented towards further development.

It may be pointed out that there is no agreed basis for dividing up the human family into persons and non persons, but there is an agreement from science that from fertilization we all share a common humanity, that we are all members of the "human family", to use the words of the Universal Declaration of Human Rights, 1948.[15]

Four key principles were validated-inclusion, inherency, equality, and indivisibility. Inclusion-meaning that these rights applied to absolutely everyone, including the child before birth. Inherency-meaning that these rights were seen as inherent in each human being, not granted by external government. The child's rights pre-exist birth- they "inhere" in the child's humanity. Equality-in modern human rights law, there can be no concept of some human beings being "more equal" than others- thus the child at risk of

[14] Sadler, T.W, Langman's Medical Embryology, 6th Ed. 1990. Baltimore: Williams & Wikins, p.30/www.priestfor life.org/articles/flaming p2.html

[15] Right of unborn under International www.priestsforlife.org/articles/flaming p2.html

abortion has the same right to life as every other member of the human family. Indivisibility- means that the rights of one set of human beings cannot be scarified for the rights of another group of human beings.[16] If the killing of a child after birth is considered to be in violation of our human rights obligations, then the killing of the child before birth must also be considered violation of that child's right to life.

The eugenic impulse to kill fetuses and other members of the human family who have disabilities is still in evidence in the late twentieth century and is used together with a utilitarian moral philosophy to deny personhood, and therefore moral consideration, to these classes of human beings who constitute a burden to the community, a burden which it is often unwilling to accept. Abortion can then be advanced to parents who may feel unable to cope with that burden alone and without the support of the wider community.

The Universal Declaration of Human Rights 1948, following the United Nations Charter, rejects discrimination against any member of the "human family" and requires the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family". As for as human personhood is concerned the Universal Declaration of Human Rights, 1948 does not allow discrimination on the basis of human personhood.[17] In the preamble the Declaration proclaimed the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.[18] Everyone is entitled to the rights declared without any discrimination. Everyone is entitled to all the rights and freedom set forth in the Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion,

[16] http://www.humanrightsconsultation.gov.au.
[17] Right of unborn under International Law at www.priestsforlife.org/articles/flaming.p2.html
[18] Preamble Universal Declaration of Human Rights, 1948- whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

national or social origin, property, birth or other status.[19] The Declaration 1948 promotes and universalizes recognition of the inherent dignity and of the equal and inalienable rights of all member of human family. It rejects discrimination among human beings. In the matter of the division of human beings into persons and non-persons. Article 6 asserts that "Everyone has the right to recognition everywhere as a person before the law.[20]

It is true that the practice of abortion is widespread and, in many countries, legal at least in some circumstances. There is, however, a mismatch between the human rights requirements of international law and the practice of individuals and nation states in the same way that there is a mismatch between the rights of women and practice of individuals and nations states.

If the human rights of the unborn child are to be uphold in law there will need to be with it an acceptance of the obligation to provide the social, economic, and moral support that women need when faced with an unwanted pregnancy.[21] The hard cases need to be seen as hard cases against the background of the inalienable right of the fetus to life (a right that the fetus shares with his/her fellow human beings) and the rights of everyone (especially women has the right to a standard of living adequate for the health and well being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.[22] Further, it says motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.[23]

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[19] Article 2, Universal Declaration of Human Rights 1948-Everyone is entitled to all the rights freedom set forth in this Declaration, without distinction of any kind, such as Race, colour, Sex, Language, religion, political or other opinion National or Social origin, property, birth or other status.

[20] Article 6, Universal Declaration of Human Rights, 1948-Everyone has the right to recognition everywhere as a person before the law.

[21] www.priestforlife.org/articles/flaming p2.html

[22] Article 25, 1, 1948, Universal Declaration of Human Rights, 1948.

[23] Article 25-2, 1948, Universal Declaration of Human Rights, 1948.

When the indivisibility principle is applied, the individual state's misperceived duty to provide expectant mothers with abortion "services" cannot be performed at the neglect of the more fundamental duty to uphold the rights of their children to *"special safeguards and care including appropriate legal protection before as well as after birth."*[24] The right to life is "the supreme right" and "basic to all human rights."

Mary Robinson, United Nations High Commissioner for Human Rights, addressing the plenary session of the Earth Summit in Johannesburg, 29 August 2002, declared that in every country the emphasis must be on "building democratic institutions, the rule of law effective legal systems that function to protect the human rights of all without discrimination".

B. International Covenants on Human Rights

The Universal Declaration of Human Rights stated the common standard of achievement for the enjoyment and protection of human rights.[25] Mrs. Eleanor Rosevelt rightly called it the "*Magna Carta*" of all mankind, as it constitutes a landmark in the history of human rights.

It should, however, be noted that the UNDHR was devoid of legal sanction to compel states to meet the obligation of ensuring observance and implementation of human rights enshrined in it. So to transform the "principles" into provisions casting binding legal obligation on the part of ratifying states; International Covenants comprising three instruments; (i) International Covenants on Economic, Social and Cultural Rights; (ii) International Covenants on Civil and Political Rights; and (iii) optional protocol to the Covenants on Civil and Political Rights. All these embody political commitments by signatory states and also provide for the conduct of

[24] Preamble, Convention on the Rights of the Child, 1986-Bearing in mind that as indicated in the Declaration of the Rights of the Child, The child by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection before as well as after birth.
[25] Dr. Agarwal, H.O., "International Law and Human Rights", Sixth ed 2000, p. 665.

international relations in the field of human rights and bring the domestic policies in line with international code of ethics. International covenants and instruments are beacon lights showing the path of justice and humanity to the nations. Progressive steps forwarded on this journey call for ceaseless struggle by people in different parts of the world, to ensure that human rights are respected and uphold universally.[26] The second optional protocol came into force on July 11, 1991 with the adoption of the two covenants and two optional protocols, the United Nations completed the task of formulating the international standard of human rights of the individuals.[27]

a. International Covenant on Civil and Political Rights 1966

The human right to life is a fundamental human right, the basis for the exercise of the other human rights. If it is not respected, all rights lack meaning.

International Covenant on Civil and Political Rights 1966 guarantees that "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.[28] The right to life is the only right in the covenant that is expressly stated to be "*inherent*" to everyone.

It is absolutely vital that the "*inherent dignity*" and the "*equal and inalienable rights*" of "*all members of the human family*" including the most vulnerable pregnant women and their unborn children, people with disabilities and the "unwanted" be recognized and protected.

The Human Rights Committee has described "*the right to life*" as "the supreme right". The Human Right Committee is established under the

[26] Alam Aftab, "Human Rights in India: Issues and Challenges"1st ed, 2000, Raj Pub, Delhi, p.20.
[27] Dr. Agarwal, H.O. "International Law and Human Rights", Sixth ed. 2000, p. 666.
[28] Article 6(1) International Covenant on Civil and Political Rights, 1966-Every human beings has the inherent right to life. This right shall be protected by law: No one shall be arbitrarily deprived of his life.

International Covenant on Civil and Political Rights 1966 to implement the Covenant. Mr. Ganji, a former Human Rights Committee member, has provided useful insight to the committee's approach concerning Article 6. He has observed:

> In order to exercise any rights with which the Committee was concerned an individual had to exist, and in order to exist, he must die neither before nor after birth and he must receive a minimum of food, education, health care, housing and clothing. There was undoubtedly and interconnection between the rights to life, the requirements of which were material and the right to exercise all other freedoms.[29]

In every premeditated abortion, deprivation of life is the intended outcome for the child. Despite the current ideologically driven campaign to decriminalize abortion, arbitrary deprivation of life, under modern international human rights law, is still strictly prohibited. No one may be deprived of their life arbitrarily.[30] Right to life is also one of the rights which cannot be derogated from,[31] even in tune public emergency which threatens the life of the nation.[32] The Human Right Committee, in its General Comment on Article 6, has observed:

> "Noted that quite often the information given concerning Article 6 has been limited to only one or other aspect of this right. It is a right which should not be interpreted narrowly." And the "expression inherent right to life, cannot properly be understood in restrictive manner, and the protection of this right requires that states adapt-positive measures".

That international law does envisage human rights protection for the unborn can be seen in the provision dealing with capital punishment in

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[29] www.priestforlife.org/articles/fleming p2.html
[30] Article 6(1) International Covenant on Civil and Political Rights, 1966.
[31] Article 4(2) International Covenant on Civil and Political Rights, 1966.
[32] Article 4(1) International Covenant on Civil and Political Rights, 1966.

International Covenant on civil and Political Rights 1966.[33] The innocent life of unborn child is protected as sentence of death shall not be imposed for crimes committed by persons below 18 years of age and shall not be carried out on pregnant women.[34]

The unborn child's right to life is especially protected under Article 95) of the International Covenant on civil and Political Rights 1966. The explanatory notes written at the time the covenant was negotiated state this explicitly: "The principal reason for providing in paragraph 4, now Article 6(5), of the original text that the death sentence should not be carried out on pregnant women was to save the life of an innocent unborn child."

Marc J. Bossuyt in the Guide to the "*Travawe preparatories*" of the International covenant on civil and political rights observes:

Commission on Human Rights, 5th Session (1949), 6th session (1950), 8th session (1952) A/2929, Chapter VI, 10: "It would seen that the intention of paragraph 4(5) which was inspired by humanitarian consideration and by consideration for the interests of the unborn child, was that the death sentence, if it concerned a pregnant woman should not be carried out at all. It was pointed out, however, that the provision, in its present formulation, might be interpreted as applying solely to the period preceding childbirth". Third Committee, 12th session (1957) A/3764, 118: "There was some discussion regarding the meaning of paragraph 4(5) of the draft of the commission on Human Rights, which provided that the sentence of death should not be carried out on a pregnant woman. A number of representatives were of the opinion that the clause sought to prevent the carrying out of the sentence of death before the child was born. However, other thought that the death sentence a pregnant woman. The normal development of the unborn child might be affected if the

[33] www.priestforlife.org/articles/fleming

[34] Article 6(5), International Covenant on Civil and Political Rights, 1966 -Sentence of death shall not be imposed for crimes committed by persons below eighteen fears of age and shall not be carried out on pregnant women.

mother were to live in constant fear that after the birth of her child, the death sentence would be carried out."[35]

Thus the state, to protect the child's inherent right to life, must prohibit and prevent the death penalty for the unborn child's mother. Just so, the logical imperative of the corollary of this directive requires that the state, also to save the life of an unborn child, must prohibit and prevent use of abortion or use of any other form of death penalty imposed on an unborn child.

Right from the first negations on the Universal Declaration, Australia understood and accepted the obligation to conform, domestic law to international human rights law. Original cablegrams, sent in May and December 1948 from New York and London to the Australian government, made it clear that we would be required to change domestic laws to conform to the universal human right obligations.[36] Here is an explicit recognition in international law that human rights enjoyed by every member of the human family include the unborn child. This fundamentality humane principle was reflected in the common law in England and Australia when each country had the death penalty.[37]

In *R Vs Wycherley*[38] the accused woman head been found guilty of murder and was sentenced to death when aspect whether she had anything to stay the execution she replied: "I am with child now." A jury was empanelled and found that the woman was not pregnant. Nevertheless, the case highlights that the death penalty was stayed pending the resolution of the issue and logically would have been stayed until at least the birth had she been found to be pregnant.

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[35] www.priestforlife.org/articles/fleming
[36] http://www.humanrights consultation.gove.au.
[37] www.priestforlife.org/articles/fleming
[38] 173 ER 486.

Pregnancy is an extraordinary and beautiful relation-ship involving two bodies, two lives can not be easily suppressed. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock shall enjoy the same social protection.[39]

b. International Covenant on Economic, Social and Cultural Rights 1966

The importance of the covenant lies in the fact that they recognized the inherent dignity and of the equal and inalienable rights of all members of the human family which is the foundation of freedom, justice and peace in the world. It is an obligation of the states to provide these rights to the individuals as they derive from the inherent dignity of the human person; and also because they are essential for the development of one's personality.[40]

The states parties to the present covenant recognize that the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it, is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses[41] and special protection should be accorded to mothers during a reasonable period before and after child birth. During such period, working mothers should be accorded paid leave or leave with adequate social security benefits.[42] It also said that special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation.[43] It further says that the states parties to the present covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and

[39] Article 25(2) of International Covenant on Civil and Political Rights, 1966.
[40] Dr. Agarwal, H.O., International Law and Human Rights, Sixth Ed. 2000, p. 666.
[41] Article 10(1) International Covenant on Economic, Social and Cultural Rights, 1966.
[42] Article 10(2) International Covenant on Economic, Social and Cultural Rights, 1966.
[43] Article 10(3) International Covenant on Economic, Social and Cultural Rights, 1966.

mental health[44] and the steps to be taken by the states parties to the present covenant to achieve the full realization of this right shall include the provision for the reduction of the still birth rate and of infant mortality and for the healthy development of the child.[45]

C. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979

The Convention on the Elimination of All Forms of Discrimination against Women was adopted by the General Assembly in 1979. The Convention seeks to address pervasive social, cultural and economic discrimination against women, declaring that states should endeavor to modify social and cultural patterns of conduct that stereotype either sex or put women in an inferior position and to end discrimination against women in all matters relating to marriage and family relations.[46] The Committee on the Elimination of Discrimination Against Women (CEDAW) committee, established in 1982, monitors compliance with: the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). CEDAW the strongest international legal support for women's reproductive rights by explicitly outlining the right to health and family planning. The committee has also requested states parties to review restrictive abortion laws-which are linked to high maternal mortality rates- and to ensure that abortion is safe and accessible where it is legal. Article 11(2) of CEDAW requires states parties to undertake appropriate measures to prohibit dismissal of women workers on the grounds of pregnancy to introduce maternity leave, to promote the development of a network of child care and to

[44] Article 12(1) International Covenant on Economic, Social and Cultural Rights, 1966-The state parties to the present covenant recognized the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

[45] Article 10(2) International Covenant on Economic, Social and Cultural Rights, 1966.-The steps to be taken by the states parties to the present covenant to achieve the full realization of this right shall include those necessary for (a) the provision for the reduction of the still birth rate and infant mortality and for the healthy development of the child.

[46] Sen Indrani "Human Rights of Minority and women's (Reinventing Women's Right) Vol. 1, pub. By Isha Books, 2005, p.3.

provide pregnant women with special protection from work that may be harmful. Article 12 of CEDAW requires states parties to provide women with appropriate services, where necessary during the acute and post-natal stages of pregnancy.[47] Article 24 obligates states "*to ensure appropriate prenatal and postnatal health care for mothers*".[48] Thus CEDAW protects the rights of unborn child as well as pregnancy.

The right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant.[49]

D. The Convention on the Prevention and Punishment of Crime of Genocide 1948

The killing of a group of human beings is a crime under International Law.[50] The General Assembly on December 9, 1948, adapted the Convention on the Prevention and Punishment of Genocide which came into force on January 12, 1951. The main purpose of the Convention was to prevent and punish the genocide.[51]

The use of abortion as a means of genocide is raised in the Convention on the prevention and punishment of the crime of Genocide 1948. Article II enumerated specific acts which may be referred to genocidal. Accordingly, genocide is the commitment of certain acts with intended to destroy in whole or in part a national, ethic, racial or religious group as such. Acts constituting genocide are killing, causing serious or badly or mental harm deliberately inflicting conditions of life, calculated to bring about physical destruction in

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[47] Sen Indrani "Human Rights of minority and women's (Human Rights and sexual minorities) Vol. 4, Pub. By Esha Books, 2005, pp. 209-10.
[48] Dr. Agarwal, H.O."International Law and Human Rights, Sixth ed. 2000, p.4.
[49] Fourth World Conference on Women, held in 1995 (4-15 September 1995) in Beijing, Commonly called Beijing Conference, para 94, p. 690.
[50] Preamble, the Convention on the Preventions Punishment of Crime of Genocide, 1948.
[51] Dr. Agarwal, H.O, "International Law and Human Rights", Sixth ed. 2000, p.690.

whole or in part imposing measures intended to prevent birth and forcible transfer of children. It is the duty of states to prevent and punish the acts of genocide.[52] The Convention defines the "*odious scourge*" of genocide to include "*killing member of the group*" and "*imposing measures intended to prevent births within the group*".[53]

The latter inclusion explicitly recognizes the right to life of the unborn. In the same Article (II) genocide is conceived in terms of an intention "to destroy, in whole or in part, a national, ethical, racial or religious group". The question is, to what extent, if at all, does this apply to the practice of abortion in contemporary society? Much depends on what should be understood by the term "in whole or in part of a national group". The moral justification most frequently advanced for abortion is that, as a group or category of human beings, the unborn are not persons and accordingly have no right to life to protect. The unborn are part of the human family and the human family is itself broken down into nation states or groups. The unborn are, then, a sub-group of a national group. If the unborn, contrary to Article 6[54] of the Universal

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[52] Dr. Agarwal, H.O, "International Law and Human Rights"6th ed. 2000, p.622.

[53] Article 11, Convention on the prevention and punishments of the Crime of genocide, 1948- It states that in the present convention, genocide means any of the following acts committed with intent to destroy in whole or in part, a national, ethnical racial or religious group, as such.

(a) Killing members of the group

(b) Causing serious bodily or mental harm to members of the group.

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

(d) Imposing measures intended to prevent births within the group.

(e) Forcibly transferring children of the group to another group.

[54] Everyone has the right to recognition everywhere as a person before the law.

i. 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.

ii. Those countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes and not contrary to the provisions of the present covenant to the convention on the prevention and punishment of crime of Genocide.

iii. Where the deprivation of life constitutes the crime of Genocide, it is understood that nothing in this Article, shall authorize any state party to the present covenant to derogation in any way from any obligation assumed under the provisions of the convention on the prevention and punishment of crime of Genocide

iv. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of sentence of death may be granted in all cases.

Declaration of Human Rights, 1948 and Articles 6[55] and 16[56] of the International Covenant on Civil and Political Rights 1966, are defined, as a group, as non-persons and therefore beyond moral, legal protection, does the crime of genocide apply to those countries that fail to give protection to that part of the national group?[57] It is a question of fact which is to be answered by the International Communities in detail.

Unborn children, women who are pregnant, people who are elderly, people with disabilities, those people who have mental or physical illness, are truly part of the human family and entitled by their inherent humanity to all human rights. The right to medically assisted suicide would impact upon everyone's right to be cared for and to receive proper palliative care free of implicit or explicit pressure to accept a lethal injection. The right to abort an unborn child with a disability would impact upon every child's right to life, irrespective of disability as well as affect how existing children with disabilities are valued in our society. These spurious "rights" would also impact upon a doctor's basic right of conscience to refuse to carry out procedures that destroy life, rather than heal and protect it. Any medical practices which involve the abuse of a human being, including practices that use human embryos as a means to an end, are not consistent with authentic human rights, which uphold the dignity of every human being: "Recognizing and affirming that all human rights derive from the dignity and worth inherent in the human person."[58]

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v. Sentence of death shall not be imposed for crimes committed by persons below 18 years of age and shall not be carried out on pregnant women.

vi. Nothing in this Article, shall be invoked to delay or to prevent the abolition of capital punishment by any state party to the present covenant (Article 6, International Covenant on Civil and Political Right, 1966.

[55] Article 6 UDHR 1948.

[56] Article 16, International Covenant on Civil and Political Rights, 1966-Everyone shall have the right to recognition everywhere person before the law.

[57] Right of unborn under International Law www.priestforlife.org/Articles/fleming.p.2.html

[58] Preamble, Vienna Declaration & programme of Action, from the World Conference on Human Rights, Vienna, 1993, at http://www.arcrtla.org.au/submission/bill of rights.html

Disabled persons are recognized in international law as a group which forms part of nation. A Declaration on the Rights of Disabled persons was adopted by the General Assembly on December 9, 1975. The declaration asserted that disabled persons shall have the same fundamental rights as their fellow citizens and have the inherent right to respect for their human dignity.[59] These disabled persons "have the same civil and political rights as other human beings."[60] The declaration provides that these persons shall be protected against all exploitation, all regulations and all treatment of a discriminatory abusive or degrading nature.[61] If it is legally permissible to end the life of unborn human beings with disabilities, and medical tests are routinely applied to pregnant women to discover any fetal abnormality, would this not amount to the crimes of genocide against the disabled unborn? The Genocide convention speaks of "imposing measures intended to prevent births within the group". Does this mean that the genocide convention is limited only to cases where abortion is imposed on women? The answer to this question is no. Since the genocide convention defines genocide in terms of "*killing members of the group*," since "*measures intended to prevent births*" clearly includes induced abortion, and since abortion involves the intentional killing of the unborn, then the convention's reference to "imposing measures" cannot be interpreted in a way that would limit its application to women who are forcibly aborted. And in any case, the Convention's definition of genocide includes "killing member of the group". This is sufficient by itself to raise serious question as to whether the practice of abortion is genocide. How is it not genocide to legally prescribe and actively promote the induced abortion of human beings on the grounds of their actual or perceived disability?[62] The human rights of unborn child are also protected either directly or indirectly by some other Conventions.[63]

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[59] Declaration on the Rights of Disabled persons, 1975.
[60] Article 4, Declaration on the Rights of Disabled person 1975.
[61] Article 10, Declaration on the Rights of Disabled person 1975.
[62] Right of unborn under International Law www.priestforlife.org/Articles/fleming.p.2.html
[63] The Convention on the Prevention and Punishment of the Crime of Genocide, 1948 and by the Declaration on the Rights of Disabled Persons, 1975.

E. The Convention on the Rights of the Child, 1989

The Universal Declaration of Human Rights had stipulated under Para 2 of Article 25[64] that childhood is entitled to special care and assistance. The above principle along with other principles of universal Declaration concerning the child was incorporated in the Declaration of the Rights of the child adopted by the General Assembly on November 20, 1959. The International Covenant on civil and political Rights under Article 6(5)[65] 23[66] and 24[67] and the International covenant on economic, social and cultural Rights under Article 10[68] made provisions for the care of the child. The convention on the rights of the child addresses the human rights of all persons below age of 18 years. This

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[64] Article 25 (2) of the Universal Declaration on Human Rights, 1948-Motherhood and childhood are entitled to special care and assistance. All children, whether born in out of wedlock, shall enjoy the same social protection .

[65] Sentence of death shall not be imposed for crimes committed by persons below 18 years of age and shall not be carried out on pregnant women (Article 6(5) of the International covenant on civil and political rights, 1966.

[66] i. The family is the natural and fundamental group unites a society and is entitled to protection by society and the state.
ii. The right of men and women of marriageable age too many and to found a family shall be recognized.
iii. No marriage shall be entered into without the free and full consent to the intending spouses.
iv. State parties to the present covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage its dissolution. In the case of dissolutions provisions shall be made for the necessary protection of any children, (Article 23, International covenant on civil and political rights, 1966).

67 i. Every child shall have without any discrimination to race, cooler, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor on the part of his family, society and the state.
ii. Every child shall be registered immediately after birth and shall have a name
iii. Every child has the right to acquire a nationality (Article 24 of International covenant on civil and political Rights, 1966.

68 Article 10 of International covenant on Economic, social and cultural Rights 1966.
i. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it responsible for the care and education of dependent children. Marriage must be entered .... With the free consult of the intending spouses.
ii. Special protection should be accorded to mothers during a reasonable period and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.
iii. Special measures of protection and assistance should be on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social. Their employment in work harmful to their moral or health or dangerous to life or liberty to hamper their normal development should be punishable by raw. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

declaration stated that "*mankind owes to the child the best that it has to give*". The Declaration on the Rights of child proclaimed to the end that he may have a happy childhood and enjoy for his own good and for the good of the society the rights and freedoms herein set forth."[69] The convention on the Rights of the child was adopted by the General Assembly on November 20, 1989[70] with the following purposes:

> "*Bearing in mind that, as indicated in the Declaration of the Rights of the child adopted by the General Assembly", the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.*"[71]

The importance of affirming the child's right to life was underscored in the discussions of the working group on drafting the convention of the Rights of the child in 1988, in which the right to life was described as *"an intransgressible norm"*. The right to life and the right to protection from cruel and in human treatment are recognized as fundamental civil and political rights, under Article 6, 7, 8 of the International Covenant on Civil and Political Rights, 1966.[72] The United Nations Convention on the Rights of the child defines a child to mean "*every human being below the age of eighteen years unless under the law applicable to the child majority is attained earlier.*"[73] There is no definition as to what is a human being. Although the preamble of the convention refers to safeguarding the "care of the child" before as well as after birth the meaning of whether a child can constitute an unborn child was left open to individual state parties for fear of the impossibility of consensus, in

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[69] Miss Vishnopriya Y "International concern for the protection of the Rights of the child", Supreme Court Journal, 1992, Vol.2, p.17.

[70] Dr. Agarwal, "International Law and Human Rights", 6th Ed. 2000, p.707.

[71] Preamble Convention on the Rights of the Child, 1989-Bearing in mind that as indicated in the Declaration of the Rights of the Child, "The child by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection before as well as after birth.

[72] http://www.arctrtla.org.au/submission/bill of rights htm p3

[73] Article 1, International Convention on the Rights of the Child, 1989.

particular on the issue of abortion[74] under the convention on the Rights of the child, governments must protect children from physical violence and "cruel and inhuman treatment."[75] Abortions conducted at a stage when the unborn child can feel pain clearly contravene these protections.[76] The Fourth World Conference on Women, Beijing, 1995 declared that government must take action on the convention on the rights of the child to: "ensure its full implementation through the adaption of all necessary legislative, administrative and other measures and by fostering an enabling environment that encourages full respect for the rights of children".[77]

Human Rights and the Unborn Child, Convention on the Rights of the Child (CRC) and Abortion

On 20th Novemher, 1989, the United Nations General Assembly unanimously adopted, the Convention on the Rights of the Child. The Convention of 1989 not only protects the child's civil and political rights but also extends protection to the child's economic, social and cultural and humanitarian rights. The Convention has become part of internatinnal law with its ratification by over 30 countries.[78] The Universal Declaration of Human Rights had stipulated that childhood is entitled to special care and assistance.[79]

In particular the Convention on the Right of the child asserts: "States parties recognize that every child has the inherent right to life"[80] and the states

[74] International Conference on Child labour and Child Exploitation Trafficking in Unborn Child on http://www.fmc.gov.au/pubs/docs/trafficking 2008.pdf p.7.
[75] See Article 19 &37 of Convention on the Rights of Child, 1989.
[76] Supra note 72.
[77] The Fourth World Conference on Women Beijing 1995 Para 274.
[78] Miss Vishnupriya Y, " International concern for the protection of the Rights of the child", Supreme Court Journal, 1992, Vol. 2, p.16
[79] Article 25(2) of Universal Declaration of Human Rights, 1948. Article 6(1) of the International convention on the Rights of the child, 1989.
[80] Article 6(1), Convention on the Rights of Child, 1989-States parties recognize that every child has the inherent right to life.

parties shall ensure to the maximum extent possible the survival and development of the child."[81]

Regarding abortion, the Convention on the Rights of the Child bears in mind that, "as indicated in the Declaration of the Rights of the child, the child, by reason of his physical and mental immaturity, needs special safeguard and care, including appropriate legal protection, before as well as after birth."[82]

Does it necessarily follow from this that the right to life of the pre-born child is protected? Senator Gareth Evans, then Minister for Foreign Affairs and Trade, told the Australian Government understands the reference to the rights of the child "*before as well as after birth*" in a way that does not preclude abortion. However, Australia made no such reservation or inter-protection at the time of ratification. Acknowledging that the preference to the rights of the child "before as well as after birth does appear in the preamble in then draft convention, at the same time a statement in the travawe preparatoires- the preparatory materials- makes it clear that the contentious issue of the child's right before birth is a question to be determined by individual states parties."

As a consequence of the debate the working group amended the preamble such that the text would no longer say "Recognizing that " Bearing in mind that...", as indicated in the Declaration of the Rights of the child 1959, "the child by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.[83] In adopting this Preambular paragraph, the working group does not intend to prejudice the interpretation of article 1[84]or any other provision of the convention by states parties."

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[81] Article 6(2), Convention on the Rights of Child, 1989- States parties recognize that every child has the inherent right to life.

[82] Article 6(2), Convention on the Rights of Child, 1989.

[83] Preamble, Convention on the Rights of the Child, 1989.

[84] Article 1, CRC 1989- A Child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Philip Alston[85] claims in his account of the abortion debate, in the context of the Convention on the Rights of the Child that the acceptance of a Preambular paragraph recognizing that "the child by reason of his physical and mental immaturity, needs special safeguards and care including appropriate legal protection, before as well after birth" cannot be interpreted as an indirect reversal of that explicit rejection of proposals to recognize the right to life of the unborn. To do so would be to attribute to the preamble an importance considerably in excess of that which may reasonably be accorded to such policy pronouncements.

Philip Alston believe that the CRC leaves the matter of abortion as an open question such that those states that wish to prohibit abortion and those that wish to approve it are on an equal footing. He believes that existing international human rights law does not provide for the status of the unborn child, and that the CRC is in conformity with that position. But Philip Alston overlooks the fact that a reference in the preamble of the convention on the Rights of the child 1989, is part of the treaty itself[86] whereas the travaux preparatory is a supplementary means of interpretation to be used in limited circumstances.[87] Some delegations favored the inclusion of the words "the child needs special safeguards and care, including appropriate legal protection, before as well as after birth"[88] precisely because they believed that it offered protection to the unborn child while others opposed it because they saw it "re-opening the debate on this controversial matter, i.e. abortion".[89]

The fact is that with a minor change in words "Recognizing that" was changed to "Bearing in mind that", these contentious words were included in

[85] Philip Alston, "The unborn child and Abortion under the Draft convention on the Rights of the child", Human Rights Quarterly 12 (1990) 156, 177 on www.pukline.org/das/0896/061563.html

[86] Article 2(1) of Vienna Convention on the Law of Treaties, 1969.-Treaty is an international agreement concluded between states in written form and governed by International law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

[87] Article 32, Vienna convention on the Law of Treaties 1969.

[88] Preamble, International Convention the Rights of the Child, 1989.

[89] Sharon Detrick, "The United Nations Convention on the Rights of the child, A Guide to the "Travaue preparatories" Dordrechti, Martinus Nishoff Publishers, 1992, p.109.

the preamble of the convention on the Rights of the child 1989. It clearly means the abortion issue was left on the table as both those who opposed its inclusion and those who favored its inclusion have testified. The Convention on the Rights of the child has to be interpreted in the light of and consistently with the Universal Declaration of Human Rights 1948, and the International Covenant on Civil and Political rights 1966. There was no mention of abortion in connection with privacy during the discussions on the International Covenant on Civil and Political Rights, 1966.[90]

During the Drafting of the International Covenant on civil and political Rights 1966, an amendment, to Article 6,[91] submitted by Belgium, Brazil, Elsalvador, Mexico and Morocco led a discussion as to whether the right to life should be protected by law "*from the moment of conception*". Those supporting the amendment maintained that it was only logical to guarantee the right to life from moment life began. The amendment was rejected. It was pointed out that the legislation of many countries accorded protection to the unborn child. On the other hand, the amendment was opposed on the grounds that it was impossible for the state to determine the moment of conception and hence, to undertake to protect life from the moment. Moreover, the proposed clause would involve the question of the rights and duties of the medical profession. Legislation on the subject was based on different principles in different countries and it was, therefore, inappropriate to include such a provision in an international instrument. The toleration of abortion played no part in the rejection of the amendment. In the context of convention on the rights of the child, Malta and Senegal proposed an amendment to draft Article 1 to explicitly protect the rights of the unborn child from conception.[92] These proposals were not rejected by the member states but were withdrawn by Malta and Senegal

[90] Article 17(1) of the International covenant on civil and political Rights, 1966- No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.

[91] Article 6(1) of convention on the civil and political Rights, 1966- Every human being has the inherent right to life. This right shall be protected by law. Alone shall be arbitrarily deprived of his life.

[92] Supra Note 84. Article 1, Convention on the Rights of Child, 1989.

"in the light of the text of preambular paragraph 6 as adapted" which referred to the right of the child" before as well as after birth.[93] The representative of Italy observed that no state was manifestly opposed to the principles contained in the Declaration of the Rights of the child and therefore according to the Vienna Convention on the Law of Treaties, 1969, the rule regarding the protection of life before birth could be considered as "jus cogens" since it formed part of the common conscience of member of the international community.[94] *Jus Cogens* (orius Congens) is a preemptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[95]

The right to life of all human beings has the nature of an intransgressible norm already contained in the Universal Declaration of Human Rights 1948,[96] the International covenant on civil and political rights, 1966[97] and the Declaration of the Rights of the child 1959.[98] In other words, under International law the unborn child is protected and it was not permissible at this late stage to attempt to allow a liberal abortion agenda under the Convention on the Rights of the Child, 1989.

F. Protection of Unborn Child under Regional Conventions on Human Rights

In International Law the term region may mean an area embracing the territories of a group of states. The idea of regional arrangements for the promotion and protection of human rights has been gaining recognition since

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[93] Supra Note 88. Article 1, Convention on the Rights of Child, 1989.
[94] Supra Note 89, pp.109 and 118.
[95] Article 53, The Vienna Convention on the Law of Treaties that a treaty will be void of at the time of its conclusion, it conflicts with a peremptory norm of general international law.
[96] Article 3, Universal Declaration of Human Rights, 1948-Everyone has the right of life, liberty and security of person.
[97] Article 6, Covenant on Civil and Political Rights, 1966.
[98] United Nation Declaration on the Rights of the Child, 1959.

the adoption of the Universal Declaration of Human Rights 1948. The Vienna Conference on Human Rights in 1993 stated in the Declaration that "Regional arrangements play a fundamental role in promoting and protecting human rights. They should reinforce universal human rights standard, as contained in international human rights instruments and their protection".

Until now, only three regional such agencies could be established for the promotion and protection of human Rights. They are:

(i) European Convention on Human Rights,

(ii) The American Convention on Human Rights

(iii) The African Charter on Human Rights and People's Right.[99]

a. The American Convention on Human Rights

The 1969 American Convention on Human Rights respects the right to life "from the moment of conception."[100] Further the American convention declared that capital punishment shall not be applied to pregnant women.[101]

The Inter-American Commission on Human Rights ("IACHR") became an organ of the organization of American States ("OAS') by 1970 revisions to the OAS charter. The IACHR's main function is "to promote the observance and protection of human rights and to serve as a consultative organ of the organization in these matters. Article 33 of the American convention on Human Rights ("ACHR") gives competence "with respect to matters relating to the fulfillment of the commitments made by the states parties to the Convention" to

[99] Dr. Agarwal H.O. "International Law and Human Rights", Central Law Publications Sixth ed. 2000, pp. 727-28.

[100] Article 4(1) of American convention on Human Rights, 1969- Every person has the right to have his life respected. This right shall by law, and, in general, from the moment of conception No one shall be arbitrarily deprived of his life.

[101] Article 4(5) of American convention on Human Rights, 1969- Capital punishment shall not be imposed upon person, who at the time of crime was committed, were under 18 years of age or over 70 years of age; not shall be applied to pregnant women".

both the IACHR and the Inter-American Court of human rights, established by Chapter VIII of the American Convention of Human Rights 1978.[102]

The main functions of the Inter-American Commission on Human Rights are to promote respect for and defense of human rights. The commission is authorized to receive petitions for the violations of the convention by a state party from any person.[103] The IACHR has heard petitions and decided cases based in part on the rights enumerated in the convention on the Rights of the child. In spite of its recourse to the convention, the IACHR has not rendered a decision directly revealing its understanding of the rights of the unborn under the convention; no such claim has been brought under the convention. Reluctance to assert fetal rights claims before the IACHR could be due to its 1981 opinion in a case against the United States and the Common Wealth of Massachusetts protesting the reversal of conviction of a doctor who performed an abortion ("*Baby Boy*"). The Baby Boy opinion suggests that the IACHR would interpret the rights of the unborn under the Convention consist with the emerging international norm preferring the rights of a pregnant child or unborn child.[104]

In the *Baby Boy case*, the IACHR offered its interpretation of Article 4 of the American Convention on Human Rights, which provides: "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.[105] Though this article seems to guarantee the right to life of a fetus, the IACHR eschewed a finding that "the American convention had established the absolute concept of the right to life from the moment of conception. The

[102] Article 33 from American Convention on Human Rights, 1969.
[103] Supra Note 94, p. 739.
[104] http://www.cidh.org/annualrep/80.81eng/OSA2141.html
[105] Article4, The American Convention on Human Rights 1969-

1. Every person has the right to have his life respected. This right shall be protected by law and in general from the moment of conception. No one shall be arbitrarily deprived of his life.
2. Capital Punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age nor shall it be applied to pregnant women.

court based this conclusion in part on the drafting history of the American convention, during which the words "in general" were added to the article, based on the legislation of American states that permitted abortion, interalia, to save mother's life and in case of rape.[106] The IACHR interpreted the words "in general" as providing an exception to the explicitly granted right to life from the moment of conception. Given this interpretation of the American Convention, which seems to explicitly provide rights to the unborn the IACHR would likely interpret the convention on the rights of the child as providing only very limited protection for the unborn. The IACHR, would almost certainly reject a claim against the legality of abortion in an Organization of American States (OAS) member state based in part on the convention.

b. The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950

The Statute of the Council of Europe led to the adoption of the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR) on November 4, 1950. It came into force on September 3, 1953.[107] The European Convention for the protection of Human Rights and Fundamental Freedoms ("European Convention") established the European Court of Human Rights ("ECHR") in 1959. Until 1989, complaints to the ECHR "were first the subject of a preliminary examination by European Commission on Human Right, which determined their admissibility. In 1998, with the entry into force of protocal11 to the European Convention, the European Commission on Human Rights was eliminated, leaving determination of admissibility to the ECHR. The jurisdiction of European court of Human Rights extended to all cases concerning the interpretation and application of the present convention.[108]

[106] http://www.cidh.org/annualrep/80.81eng/OSA2141.html
[107] Dr. Agarwal, H.O. "International Law and Human Rights", Central Law Publications Sixth ed. 2000, p. 728.
[108] Ibid. p.733.

The European Convention for the Protection of Human Rights under Article 2 para 1, sentence states: "*Everyone's right to life shall be protected by law.*"[109]

The ECHR has two cases, *Open Door* and *Duplin well women Vs Ireland ("Open Door")*[110] and *odievre Vs France ("Odievre")*[111], in which it considered the right to life of a fetus under domestic law and under the European convention. In both cases, the ECHR explicitly refused to decide whether the right to life guaranteed by the European convention article 2 extends to the unborn. Yet, in both cases, the ECHR found domestic goal of protecting a fetus's life to be "legitimate aim." Importantly, in both cases the ECHR positions the protection of a fetus as a governmental aim rather than as right held by the unborn child. In a conflict between an aim and an explicitly granted convention right, the right will trump the aim.

The European Court of justice has not addressed the right to life of the unborn under the convention on the Rights of the child, but has delivered a preliminary ruling regarding whether abortion is a service within the meaning of Treaty of Rome. *In society for the protection of unborn children Vs Grogen*[112] the ECJ addressed the same conflict as in *Open Door*, and held "that medical termination of pregnancy. Performed in accordance with the law of the state in which it carried out. constitutes a service within the meaning of Article 60 of the Treaty.

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[109] Article 2, European Convention on Human Rights and Fundamental Freedom 1950-

1. Everyone's right to life shall be protected by Law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary.

[110] APP. No. 14234/88(1992) at http://hudoc.echr.coe.int/hudoc

[111] APP. No. 42326/98(2003) (unpublished), at http://hudoc.echr.coe.int/hudoc

[112] Case 159/90, society for the protection of unborn children Vs Grogem, 1991, E.C.R. 14685.

Does the Unborn child have a Right to life? The Insufficient Answer of the European Court of Human Rights in the Judgment *VO Vs France*.[113]

In the July 8, 2004 case of VO *Vs* France[114], the European Court of Human Rights ("ECHR") dealt with the question of whether the embryo/fetus enjoys the protection of the right to life provided by Article 2 of the European Convention on Human Rights.[115] In this case a pregnant woman lost her fetus due to an error made by attending doctor and the cour de cassation, the French court of last instance acquitted the doctor of involuntary homicide on the grounds that a fetus is not a person within the meaning of the French criminal code. Claiming a violating of her child's right to life within the meaning of the convention, the woman appealed to the ECHR. The ECHR left open the question whether or not a fetus falls within the scope of Article 2; declaring that, even assuming Article 2 was applicable to a fetus, there had been no failure by France to comply with its obligations under Article 2, because the ECHR deemed the institution of criminal proceedings unnecessary. Rather, it considered the possibility for the applicant to bring an action for damages as sufficient and therefore found that there had been no violation of the fetus's right to life.[116]

The case raises many issues regarding the protection afforded by Article 2 of the convention to unborn life. By way of comment, two questions are addressed here, namely: whether the fetus is covered by "everyone" within the meaning of Article 2 of the European convention on Human Rights; and what effect the application of Article 2 to the fetus will have on European laws on abortion.[117]

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[113] Pichon Jakob, "Does the unborn child Have a Right to life? The insufficient Answer of the European Court of Human Rights in the judgment Vs France, www.germanlawjournal.com/article.phd?id=22.
[114] Eur. Court. H.R. No. 53924/00.
[115] Article 2, European Convention on Human Rights and Personal Freedom, 1950.
[116] Supra Note 113.
[117] Ibid.

(i) Is the Fetus covered by the Term "Everyone" within the Meaning of Article 2 of the convention?

Since the European Convention, unlike the American convention on Human Rights[118] does not expand explicitly on the scope of Article 2 as applied to unborn children, this question is certainly one of the most disputed among the 46 contracting states. The ECHR did not answer the question in the abstract. Assuming that Article 2 was applicable, it declared that there had been no violation of the right to life. Today no danger threatens both human life itself and legal concept of its protection. So it is not possible to ignore the major debate that has taken place on the national and international level in recent years on the subject of bioethics and desirability of introducing or reforming legislation on medically assisted procreation and prenatal diagnosis, in order to prohibit techniques such as the reproductive cloning of human beings and provides a strict framework for techniques with a proven medical interest. Consequently the interpretation of Article 2 must evolve these new developments, requiring the inclusion of the right to life of the fetus.[119]

(ii) Would the Application of Article 2 to the Fetus call into question All European Laws on Abortion?

Almost all contracting states already had legislation permitting abortion before ratifying the convention, and did not make any reservation under Article 64 of the convention with respect to Article 2. In *H Vs Norway*[120] the European Commission on Human Rights while explicitly not excluding the possibility that a fetus within the scope of Article 2, declared that an abortion made in 14th week of pregnancy did not violate the convention. Both the national courts and the commission specifically referred to the serious conflict between the

[118] Article 4, The American Convention on Human Rights, 1969.-Every person has the right to have his life respected. This right shall be protected by law and in general, from the moment of conception. No one shall be arbitrarily deprived of his life".

[119] www.germanlawjournal.com/article.phd?id=72

[120] Eur.comm. R., H Vs Norway, Decision of 19 May 1992, Decision and Reports Vol. 73, 155, 167, para 1.

mother's right and those of the unborn child, which led to the duty to balance the interests of mother and fetus. According to the courts and the commission, in this delicate area the contracting state legislature must have some discretion that, in the cases in question, had not been exceeded. Like all international Conventions, the Convention has to be interpreted in accordance with the Vienna convention on the law of Treaties,[121] especially Article 31, which requires treaties to be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. In this respect it should be noted that a number of recent conventions and the prohibition on the reproductive cloning of "human beings" under the charter of Fundamental Rights of European Union show that protection of life extends to the initial phase of human life. Consequently, the ECHR must take such a development into account in order to define the ordinary meaning of the right to life. Thus, even less serious infringements of Article 2 may require criminal law sanctions. Furthermore, if the involuntary homicide of a child already born is punished by the means of criminal law, the same must go for the unborn child. The European Court on Human Rights expressed explicitly their opinions on the applicability of Article 2 on a fetus but does not correspond to the principle of interpreting the convention as a living instrument. This status quo however leaves the contracting states in the dark about the dealing with fetuses.[122]

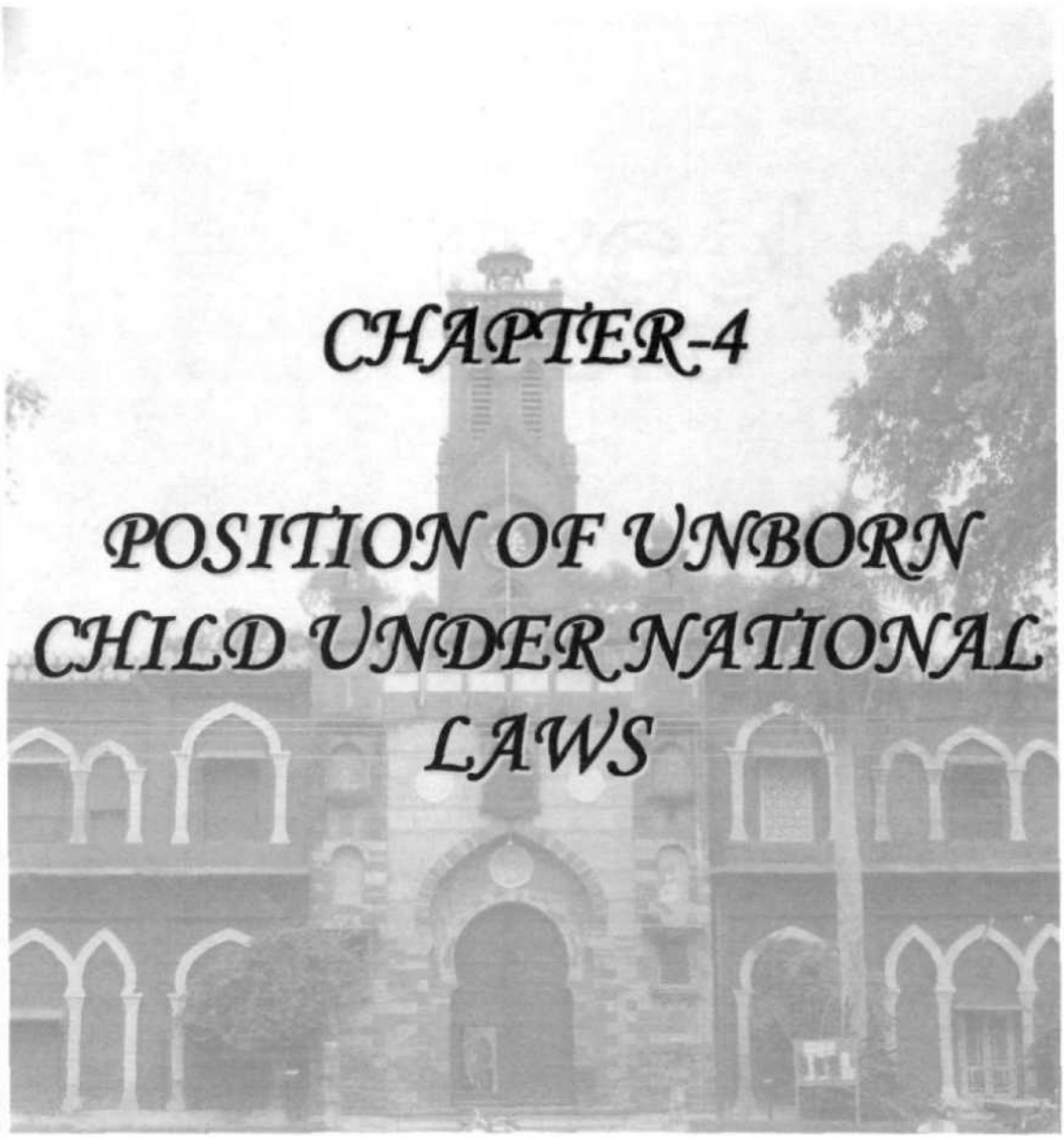
Right of unborn child is also protected by some of the other regional conventions. The Convention of Human Right and Fundamental Freedom of the Commonwealth of Independent States provide that "everyone's right to life shall be protected. No one shall be deprived of his life intentionally. Until abolished, the death penalty may be applied only in the presence of a judicial sentence for a particularly grave offence". Further the Cairo Declaration of Human Right in Islam provides that "Life is a God given gift and the right to

[121] Article 31, Vienna Convention on Law of Trade 1969.
[122] www.germanlawjournal.com/article.phd?id=72/

life is guaranteed to every human being. It is the duty of individuals, societies, and states to protect this right from any violation, and it is prohibited to take away life except for a Shariah prescribed reason."[123]

Although various international Conventions expressly protect the life of fetus but the problem of enforcement of these Conventions has hampered the answering of this issue. [124]

[123] Article 2(a), Cairo Declaration of Human Rights in Islam; www.umn.edu/../cairodeclaration.html.
[124] Right to life Foetus A myth or Reality, LAWZ, June 2004, p.28.



CHAPTER-4

POSITION OF UNBORN CHILD UNDER NATIONAL LAWS

CHAPTER-4

POSITION OF UNBORN CHILD UNDER NATIONAL LAW

A. Criminal Law

a. Indian Penal Code Provisions

It is not the function of the law to intervene in the private lives of citizens or to seek to enforce any particular pattern of behavior than is necessary to carry out the purpose. Thus what a man does in private is not the law's concern unless it can be shown to be so contrary to the public good that the law ought to intervene in its function as the guardian of that public good.[1]

Abortion is the dread secret of our society. Abortion came under the purview of Indian Penal Code framed in 1860 in accordance with 19th century British Law.[2] Indian law of abortion is modeled on English Law of abortion contained in sections 58 and 59 of the Offences Against the Person Act, 1861. The Indian Penal Code does not use the word abortion instead, the term 'miscarriage' has been used and causing it was made an offence there under.

The term 'abortion' or "miscarriage' has not been given any statutory definition. However, miscarriage, in its popular sense, is synonymous with abortion, and means expulsion of the immature fetus at any time before it reaches full growth.[3] However, in some legal dictionaries it has been defined as "a miscarriage, or the premature expulsion of the contents of the womb before the term of gestations is completed. In law, this means the confinement of a pregnant woman at anything short of full term, that is to say, her miscarriage"... or as "a felony if a woman is with child and any person (including the woman herself) unlawfully administers to her any noxious drug

[1] Mishra, S.N. "The Indian Penal Code", Ed. Eight 1998, Central Law Publication, Allahabad, pp.6-7.
[2] Act XL Vol. 1860.
[3] Gaur, K.D., "Abortion and The Law in India", 28 JILI, 1986, p.348.

or unlawfully uses any instruments, etc with intent to procure her miscarriage.[4] In the same dictionary "Child destruction" has been explained as "the felony committed by any person who with intent to destroy the life of a child capable of being born alive, by any willful act causes a child to die before it has an existence independent of its mother."[5] The expulsion of the human fetus prematurely, particularly at any time before it is viable; miscarriage. The knowing destruction of the life of an unborn child or the expulsion or removal of an unborn child from womb other than for the principal purpose of producing a live birth or removing a dead fetus.[6] The Encyclopedia Britannica has defined abortion, "as the termination of pregnancy before independent viability of the fetus has attained miscarriage is a folk term for spontaneous abortion.[7] In the United Kingdom spontaneous abortion is defined as the expulsion of a fetus without signs of viability before 28 weeks of pregnancy. The World Health Organization (WHO) definition also includes a weight criterion (less or equal to 500g) and a gestational age cut-off limit of less than 22 weeks.[8] Halsbury's Laws of England, it defined abortion as "a felony by Statute (1) for any woman with child unlawfully to administer to herself any poison or other noxious thing or to use any instrument or other means whatsoever with intent to procure her own miscarriage; or (2) for any person unlawfully to administer to or cause to be taken by any woman, whether she is with child or not, any poison or noxious thing with intent to procure her miscarriage, or to use any instrument or other means with that intent.[9] The definition in Corpus Jusis Secundum reads, "Abortion is usually synonymous with miscarriage and means the premature delivery or expulsion of a human fetus before it is capable of sustaining life. The Glossary of Family planning

[4] Oborn P.G. "A concise Law Dictionary" 1964 ed., 3, p.69.
[5] Ibid., 69.
[6] Black Law Dictionary, IVth Ed. 1951, St. Paul, Minn; West, p.7.
[7] Encyclopaedia Britannica ed. 1972 p. 42.
[8] Isabel Stabile, J.G. Grudzinsks and T Chard, "Spontaneous Abortion, Diagnosis and Treatment", Pub. By Springer-Verlog London Berlin Heidelbery, Nw York, 1992, p.1.
[9] 10 Halsbury's Laws of England, 1955 ed., 730, as quoted by Singh S.K. and Razada R.K. "Abortion Law in India: Past and Present," Pub. By Family Planning Association of India, Haryana Branch, Bal Vikas Bhawan, India, 1976, p. 17-18.

Terminology as approved by the United States of National Family Planning Forum's Expulsion or extraction of all (complete) or any part (incomplete) of the placenta or membranes, without an identifiable fetus or with live born infant or a stillborn infant weighing less than 500 gm. In the absence of known weight, an estimated length of gestation of less than 20 completed weeks (130 days or less), calculated from the first day of the last normal menstrual period, may be used. Abortion is a term referring to the birth process before the twentieth completed week of gestation. These terms are sometimes used to signify expulsion of the embryo or fetus during the first, second and third trimesters of pregnancy respectively.[10]

The common features of all medical and legal definitions of abortion are:

1. The woman must be pregnant at the time of abortion;
2. An abortion brings to and end the aborted pregnancy;
3. An abortion may be brought about by medicine, instrument or in some other manner;
4. The induced abortion is a deliberate act of the woman or of some other person or of both;
5. The terms abortion or miscarriage are used synonymously; and
6. No delivery can follow from the aborted pregnancy.[11]

Thus abortion, in all cases, is the destruction of fetus or embryo and causing miscarriage of unborn child is an offence except for the purpose of saving the life of the mother. The definition of what constitutes the crimes of abortion has changed frequently and dramatically between the common law era

[10] Dr. Parikh C.K. "Abortion" Section V 6th Ed. 2000, CBS publishers and Distributors, New Delhi, p. 5.56.

[11] Singh S.K and Raizada R.K., "Abortion Law in India: Past and Present", pub by Family Planning Association of India, Haryana Branch, Bal Vikas Bhawan, India, 1976, pp.19-20.

and the present day. Religion and shifting modes have of course contributed to these alternatives in the law.[12]

In India, criminal abortion is restored to mostly by widows who are prevented from re-marriage by social customs, by unmarried girls who have become pregnant from illicit intercourse or when family honor is at stake. Criminal abortion appears to be practiced even in the married in all classes of society to avoid additions to their families. Nearly all criminal abortions take place at about the second or third month.[13] The criminal abortion or attempted criminal abortion is a serious antisocial act, and are offence dealt with under sections 312-316 of Indian Penal Code.

Abortion in all circumstances is condemned and it is anti-social act which is forbidden by law except in the cases where the life of the mother is in danger. The protection of the human rights of an unborn child is vital not for his or her own sake but reducing tension in the society and ensuring peace and development in the country.[14] The Penal Code Protect the interests of an unborn to a hunted extent. The purpose of making abortion an offence under IPC which was framed one and a half century ago is described as:

> "*miscarriage is punished in law, both because it involves the performance of an operation dangerous to life of the mother and because it arrests the growth of the population which is necessary for the existence and welfare of the society.*"[15]

That is to say, the unborn child must not be destroyed except for the purpose of preserving the yet more precious life of the mother.[16] In fact, some provisions of penal code, however, recognize the fetus right to life.

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[12] Encyclopedia of Crime and Justice, Sanford H. Kadish, Vol.1, ed. 1983, p.1.
[13] Dr. Parikh C.K., "Abortion" Section 6th Ed. 2000, CBS Publishers and Distributors, New Delhi, p.5.59.
[14] Dr. Lathwal, P.S. "Human Rights of unborn child" MDU Law Journal, Vol. 5, 1999-2000, M D University, Rohtak.p.110
[15] Gour, Hari Singh, "The Penal Law of India", 1972, p.2569.
[16] Gour, K.D. "A Text Book of Indian Penal Code, 3rd ed. 2000, Universal Law Publishing Co, p.502.

In India, the Penal Code protects the interests of an unborn to a limited extent. Causing miscarriage is an offence. The code also provides for causing death by act-done with intent to cause miscarriage as an offence. Any act done with intent to prevent the child from being born alive or to cause it to die after birth is also an offence unless such an act is done in good faith for the purpose of saving the life of the mother. Abortion of a child is an offence under Penal Laws. The penal provisions were stringent in regard to abortion done with melafide intention. But for the purpose of saving the life of the mother, done in good faith, then it is permissible. Causing death of a quick unborn child would amount to culpable homicide. All the penal provisions relating to miscarriages are however subject to the provisions laid down in the statues enacted in 1971, Medical Termination of Pregnancy Act. The termination of pregnancy in accordance with the provisions of this Act does not become an offence. Sections 312 to 316 of the penal code deals with the penal abortion, ultimately protects the life of unborn child. These sections have been placed under the chapter of offences affecting human body.

a. Causing Miscarriage (Sections 312-314)

Section 312 of Indian Penal code provides that whoever, voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.[17] The explanation further that a woman who causes herself to miscarry, is within the meaning of this section.

Sections 312 to 316 of the Indian Penal Code have made induced abortion punishable. Section 312 makes the causing of miscarriage with the

[17] Section 312 Indian Penal Code, 1860.

consent of the woman and section 313 causing miscarriage without the woman's consent, punishable. Section 312 of the Indian Penal Code requires the following essentials-

(i) voluntarily causing a woman with child to miscarry (abort), and

(ii) such miscarriage (abortion) should not have been caused in good faith for the purpose of saving the life of the woman.

The section speaks of miscarriage only, which has no where defined in the Indian Penal Code. However, miscarriage, in its popular sense is synonymous with abortion and means expulsion of the immature fetus at anytime before it reaches full growth.[18] In Modi's Medical Jurisprudence it is stated: "Legally, miscarriage means the premature expulsion of the product of the conception, an ovum or a fetus from the uterus, at any period before the full term is reached. Medically, three distinct terms, viz.; abortion, miscarriage and premature labor, are used to donate the expulsion of a fetus at different stages of gestation. Thus the term 'abortion' is used only when on ovum is expelled within the first three months of pregnancy, before the placenta is formed. 'Miscarriage' is used when a fetus is expelled from the fourth month to the seven month of gestation, before it is viable, while 'premature labor' is the delivery of available child, possibly capable of being reared, before it has become fully mature."[19] Children born at or after 210 days or 7 calendar months of uterine life are viable, i.e. are born alive and are capable of being reared.

In *Re Malayara Sethu*, it was observed:

> "The child in this case was born alive and the pregnancy was beyond seven months, so that medically this is a case of premature labor and not miscarriage. Acts of doctors and nurses which facilitate or accelerate

[18] Gour, K.D. "A Text Book of the Indian Penal Code", 3rd ed.2004, p. 501.
[19] Modi on Medical Jurisprudence and Toxicology 62, 23rd ed. 2006, p.1012.

> delivery can not be treated as offence under the section only because the delivery otherwise would have been delayed and particularly when the child is born alive and no injury is caused to the mother or the child as in this case."[20]

Feticide or causing miscarriage consists of causing the expulsion of the contents of the uterus after conception and before the term of gestation is completed. "Causing miscarriage" is a popular expression for this operation. Now the miscarriage may be natural or violent. Neither section 312, nor section 313 deals with natural abortion. It only penalizes violent or forced abortion. The question whether a miscarriage caused is natural or violent depends upon the evidence of abortive used or given. Abortion may be induced as much by the administration of irritant medicines as the use of mechanical means. A pregnant woman who threw herself into a well because she could not endure the travails of labour could not be convinced of this offence, because what she did was intended to put on end to her own life and not to cause the miscarriage, which resulted from her act voluntarily within the meaning of the section.[21]

Section 312 of Indian Penal Code, divides the crime in two grounds:

(i) When a woman is with child, and

(ii) When she is quick with child

As per judicial interpretation, a woman is considered to be with child as soon as gestation begins, i.e. as soon as "she is pregnant"[22] and she is said to be "quick with child" when the motion is felt by the mother. In other words, quickening is perception by the mother that movement of the fetus has started or the embryo has a fetal form.[23] It is a more advanced stage of pregnancy.[24]

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[20] AIR, 1955, Mgs 27 at p.29.
[21] Mukia Vs Emperor, 17 A.L.J. 478:50 I.C. 1003 (2).
[22] Queen-Empress Vs Ademma, III, I.D. Madras (N.S.) 653, 1886, I.L.R.9, p.369.
[23] Ibid.
[24] In re Malayara seethe, AIR, 1955, Mys 27.

'Quickening' is the name applied to peculiar sensations experienced by a woman in the fourth and fifth month of pregnancy. The symptoms are popularly described to the first perception of the movements of the fetus.[25]

Where the abortion is caused in good faith to save the life of the pregnant woman it is a complete defense against criminal charge under section 312 of Indian Penal Code. The necessity to save the life of the mother does not require that miscarriage be done only by a registered medical practitioner. Nothing is said to be done or believed in "good faith" which is done or believed without due care and attention.[26] The definition of good faith in this section is a negative one "It says that an act is said to be done in good faith if it is done with due care and attention.[27] It has been held in *Bux Soo Meah Chowdhy Vs the kin*g[28] that absence of good faith means simply carelessness or negligence. The Supreme Court in *H. Singh Vs state*[29] held that the element of honesty in the definition of good faith is not essential.

Section 312 of I.P.C. permits abortion only on therapeutic (medical) grounds in order to protect the life of the mother. The provision by implication recognizes the fetus, right to life. The threat of life, however, need not be imminent or certain. If the act is done in good faith, the person is entitled to the protection of law. But good faith is deceptive and ambiguous enough to protect most therapeutic abortions so long as they are conducted ostensibly to preserve the mother's life. In fact, what constitutes good faith is not a question of law, but of fact, to be decided in each and every case according to the facts and circumstances.

In *Rex Vs Bourne* (an English case) a girl under fifteen, who was criminally assaulted in the most revolting circumstances, become pregnant. An

[25] Ratan Lal and Dhiraj Lal, "The Law of Crimes" 1971, p.836.
[26] Section 52, Indian Penal Code, 1860.
[27] Mishra S.N. "Indian Penal Code" Eighth ed. 1998, p.114.
[28] AIR. 1938 Rang. 350.
[29] AIR, 1966, SC 97.

eminent obstetrics of surgeon and gynecologist, who terminated the pregnancy, was charged under Section 58[30] of the Offences Against the Person Act, 1861, for causing abortion against the law. The court directed the jury that if the crown had satisfied than beyond reasonable doubt that the defendant did not do the act in good faith for the purpose of preserving the life of the girl, he was guilty, but that if the prosecution since the crown failed to comply with the obligation of proving that the operation was not procured for the purpose of preserving the life of the woman.[31]

The Orissa High Court held that where termination of pregnancy of a minor girl was performed to save the life of the mother section 312, of I.P.C. is not attracted. In this case the accused accompanied the girl with her, consent to the nursing home, who wanted termination of pregnancy to avoid social stigma. The accused did not instruct her to go for termination. The accused was not held liable for causing the girl to miscarry.[32]

The Explanation clause appended to section 312 of I.P.C. makes it clear that the offender could be a woman herself or any person. As early as 1886 a woman was charged for causing herself to miscarry though she had been pregnant for only one month; and there was nothing which could be called a fetus or 'child'. The lower court acquitted the woman taking lenient view of the mother. But the High Court held that the acquittal bad in law emphasizing that is was the absolute duty of a prospective mother to protect her infant from the very moment of conception.[33]

A person who aids and facilitates a miscarriage is liable for the abetment of the offence of miscarriage under section 312, read with section 109 of the penal code, even though the abortion did not take place. A person is also liable

[30] Section 58 read, "whoever, with intent to procure the miscarriage of any woman, whether she be or be not with child... shall unlawfully use any instrument or other means whatsoever with like intent, shall be guilty of an offence."
[31] Gaur, K.D "A Text Book of the Indian Penal Code" 3rd ed., 2004, pp.502-03.
[32] Sharif Vs State of Orissa, 1996, Cr LJ 2826 Ori.
[33] Queen Empress Vs Ademma 1886, ILR 9. Mad 369.

for attempt to commit a criminal abortion under section 312 read with section 511, IPC, even if he fails in his endeavor. In *Queen Empress Vs Aruna Bewa*,[34] where the term of pregnancy was almost complete and an attempted abortion resulted in the birth of the child, a conviction under section 312 was set aside and one under section 511, read with section 312 IPC, for attempt to bring about miscarriage was maintained.

In *Emperor Vs Marian Sidi*[35] where the accused merely pledged ornaments to raise money with the intention to aid and facilitate the abortion of a pregnant woman he was held not liable for the offence of miscarriage but could be properly charged with the abetment of the offence.

In *Asgarali Vs Emperor*[36] the administering of harmless substance was held not to be an act towards the commission of an offence under section 312 of the Indian Penal Code.

Sections 313 to 316 of the penal code provides for enhanced punishment in cases of aggravating mother of the offence of miscarriage.[37] Section 313 of IPC makes it punishable to cause miscarriage without the consent of the woman. The gravity of the offence is enhanced. To understand the importance of section 313 of IPC it is necessary to know what constitute "consent"? Section 90 the Penal Code specifically provides that of the IPC states what cannot be deemed to be consent. No consent can be given under fear of injury or misconception of fact, or under unsoundness of mind or in intoxicated state or by a child below twelve years of age unless the circumstances are otherwise.[38]

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[34] 1873, 19 WR (Cr) 230.
[35] (1909) 10 Cr. L.S. 19, 19 K.L.R. 40.
[36] AIR 1933, Cal, 893 (D.B.) 35 Cri L.J. 97.
[37] Gour, K.D. "Text Book on Indian Penal Code, Fourth Ed. 2004, Universal Law Publishing Co., p. 568.
[38] Section 90 Indian Penal Code 1860.

Consent is an act of reason, accompanied with due deliberation, the mind weighing, as in a balance, the good and evil on each side. It means an active will in the mind of a person to permit the doing of the act complained of, and privilege of what is to be done or of the nature of the act that is being done, is essential to consent to the act.[39] Consent may be express or implied. It may not be necessary that it should be expressly warded with accuracy of the woman knowingly takes an abortificient, she impliedly consents for abortion.[40]

Under section 313 of IPC, only the person procuring the abortion is liable to punishment whereas under section 312, IPC the woman is also liable to punished.[41] In *Maideenkuitty Haji Vs Kunhikaya*,[42] the Kerala High Court held that an offence under Section 313, IPC could not be made out, where the only allegation in the complaint was that on hearing that the woman was pregnant, the accused took her to a doctor, who terminated her pregnancy and there was no case that it was without her consent.

Unlike Section 312, Section 313 draws no distinction between "woman with child" and "woman quick with child", and punishes only the person who causes miscarriage, obviously because woman is not a consenting party. The prosecution has to prove all the ingredients of the offence under Section 312 and also the absence of the woman's consent. This section, like the last, is cognizable, warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable and is exclusively traible by the Court of Session.

Section 314 further provides whoever with intent to cause the miscarriage of a woman with child, does any act which causes the death of

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[39] Singh S.K and Raizada R.K "Abortion Law in India: Past and Present" published by family planning association of India, Haryana Branch, Bal Vikas Bhawan, India, 1976, pp.24-25.
[40] Queen Vs Kala Chand Gope (1868) 10 South W.R. 59.
[41] Queen Express Vs Aruna Bewa (1873) 19 WR (Cr.) 230.
[42] AIR 1987 Ker 184 (FB).

such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also liable to fine.[43]

The explanation attached to section 314 provides that it is not essential to this offence that the offender should know that the act is likely to cause death.

This section punishes for causing the death of a woman by doing an illegal act, which is known to be dangerous to the life of the woman. In order to render the accused liable, all that is necessary is that the act should be done with intent to cause her miscarriage. It is immaterial whether the act done was or was not intended or knows to cause her death. The law here holds the accused responsible for the natural consequence of his illegal act. It is immaterial that he had taken due care and that the result was wholly unexpected and due to causes which no human sagacity could foresee. He knew that he was performing an act flagrantly illegal and he must abide by the consequences.[44]

In *Surendra Chauhan Vs State of Madhya Pradesh*,[45] the deceased, an unmarried girl of 24 years age, told her mother that she along with the appellant was going to the clinic of a doctor 'S'. Later in the same day both the appellant and 'S' came to the deceased's mother and told her that deceased was in a serious condition. When the deceased's mother reached the clinic of 'S' she found her daughter lying dead on the table inside the clinic. When asked what was the reason of the treatment and death of her daughter, the appellant told her that she was having illicit relation with the deceased as a result of which she was carrying pregnancy of two or three months. He also told her that he got the deceased admitted in the hospital of "S' for abortion and during the treatment the deceased's condition became serious causing her

[43] Section 314, Indian Penal Code, 1860.
[44] Sri Gaur, H. Singh "The Penal Law of India", Vol. III, 10th ed. 1984, pp.2814-15.
[45] AIR 2000 SC 1436.

death. The appellant and 'S' were tried together, while 'S' was convicted under section 314 of Indian Penal Code and appellant was convicted under SS 314, 34 of Indian Penal Code. Both were sentenced to seven years rigorous imprisonment, and a fine of Rs. 10,000 and in default of payment of fine further two years rigorous imprisonment. Both filed appeal in the High Court of M.P. Their conviction and sentence were upheld and their appeal dismissed. Both sought leave to appeal to the Supreme Court under Article 136 of the constitution of India against the judgment of the High Court. Upholding the conviction of the appellant but reducing the sentence, it was held that there is a concurrent finding that 'S' with the intent to cause the miscarriage of the deceased with child by his act, caused her death and the act was done in furtherance of the common intention of the appellant. He has thus, been rightly convicted under the Indian Penal Code 1860 Ss 314 read with 34.

An accused administered a poisonous drug to a woman to procure miscarriage which resulted in her death. But it was not proved that he know that the drug was likely to cause death. The accused was, therefore, not convicted for murder but under section 314 of the Penal Code.[46] In another case, it remained uncertain whether the deceased was murdered or had died from to effect of an attempt to cause the miscarriage against her will it was held that the accused could be convicted either under section 302 for the offence of murder or under section 314.[47] This section has of course no application to an act of miscarriage done under the exceptional circumstances elsewhere provided.[48] This offence is cognizable and warrant should ordinarily issue in the first instance. It is non-bailable and non-compoundable and is exclusively triable by the Court of Session. The points requiring proof are:

(1) That the woman with child

[46] Queen Vs Kala Chand Gope (1868) 10 South WR, 59.
[47] Queen Empress Vs Musemant Bitana, Oudh, Sc 157.
[48] Queen Vs Kala Chand Gope (1868) 10 South, WR, 59.

(2) That the accused did an act to her

(3) That he did so with intent to cause her miscarriage

(4) That the act caused her death. To which may be added the following aggravating circumstance:

(5) That the act was done without the woman's consent.

b. Injuries to Unborn Children (Section 315-316, Sec. 299 IPC)

Sections 315 & 316 IPC covers the cases of feticide or infanticide.[49]

The offence which this section punishes is the injury to child's life. Section 315 of IPC makes any act done with intent to prevent a child from being born alive or to cause it to die after birth punishable with imprisonment which may extend to ten years of either description i.e., simple or grievous, or with fine, or with both, unless the act is done in good faith for the purpose of saving the life of the mother.[50] The section is aimed at feticide while in the womb, after the fetus develops sufficiently to assume the human form, which it does in normal cases in the sixth month. When it attains that degree of development the act which, would if done earlier, be abortion, cease to be so, as the delivery of an underdeveloped child would be premature labor, for which the accused is held mere responsible owning to the more advanced stage of fetal life.[51]

In some situations it may be only a technical offence, in other cases it may be a case of deliberate infanticide to prevent an inheritance, or other civil rights occurring to the born child. The difference between infanticide and such

[49] Section 315 of the Indian Penal Code - that whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years or with fine, or with both.
[50] Queen Vs Kala Chand Gope (1868) 10 South. WR, 59.
[51] Sri Gour, Hari Singh "The Penal Law of India" Vol. III, 10th ed. 1984, p.2817.

feticide is only of sequence although considerable in consequences. The former is committed after delivery and may amount to murder and the latter before delivery which the child is still in the womb. Unfortunately, the new technology is being used to perpetuate gender basis. For example, in recent past pre-natal diagnostic centers have mushroomed throughout the country which help in determining sex of fetus that enable people choose to abort female fetus.

Section 316 of Indian Penal Code further provides that whoever does any act under such circumstances that if her act thereby caused death he would be guilty of culpable homicide and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Illustration appended to this section reads:

> A knowing that he is likely to cause the death of a pregnant woman does an act which, if it caused the death of the woman, would amount to culpable homicide. The woman is injured, but does not die, but the death of an unborn quick child with which she is pregnant is thereby cause. A is guilty of the offence defined in this section.

Explanation 3 to section 299 (culpable homicide), IPC, may also be noted here, According to it:

> The causing of the death of child in the mother's womb is not homicide, but it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or completely born.

This section deals with the offence of casing death of unborn children when they are in the advanced stage of pregnancy beyond the stage of quickening i.e., when death is caused after the quickening but before the birth

of the child. The principle laid down in section 301[52] is applied here. The offence of culpable homicide applicable to a living person (victim) would be applied in this case where the sufferer is a quick unborn child whose death is caused by any act or omission of nature which would have caused the death a living person.[53]

As per this explanation, the life of child, while it remains within the womb, is a part of the mother's life and not a separate and distinct existence. But as soon as any part of the child has been brought forth from the womb, the child is regenerated as a living human being, to cause whose death may be culpable homicide.[54]

Section 316, designates the act which results in causing death to the quick unborn child, as culpable homicide, if it would have caused death of the person (mother) against whom it was directed. The accused under this section need not necessarily cause miscarriage or intend to kill the child in womb. However, if the accused does an act likely to cause its death, though neither intended nor desired, he would be guilty under this section. The offence under this section can only be committed after the woman become 'quick" with child, and before its birth. During the period any act or omission of such a nature and done under such circumstances as would amount to the offence of culpable homicide if the sufferer were living person, a quick unborn child thereby causing its death; amount to the offence

Even if the child is unborn and within the womb of the mother, it is capable of being spoken of as a "person" if its body is developed sufficiently to

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[52] Section 301, Indian Penal Code – If a person by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing death of any person whose death be neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person, whose death he intended or knew himself to be likely to cause.

[53] Mishra, S.N. "The Indian Penal Code" Eight ed. 1998, Central Law Publicatin, p.410.

[54] The English law in this point is different under the English Law; the child should have completely emerged whereas under sec. 299, it is sufficient if any part (say, even a finger) of the Child has come out of its mother's womb.

make it possible to call it a "child".[55] Where the post-mortem report shows that the child had developed sufficiently to have an identity of its own as child, it would be enough to satisfy the definition of the term "person" as used in section 304 A of IPC.[56]

This offence is in reality a modified form of homicide as applied to an unborn child. All it says is that an act which would be culpable homicide of a person born would be an offence have described if the person thereby killed was still unborn. In other respects the act must possess all the elements necessary to constitute culpable homicide.

c. IPC Provision: A Critique:

The provisions under the Code (Sections 312-316) are formulated in gender – neutral terms and deal with the men and women in the same manner. In fact they seem to be protective of women as they laid down a greater punishment if the offence is committed without the women's consent.[57] The gender neutral items of the IPC provision, however, making women equally liable for abortion or injury to fetus and infants ignore that women in India are socialized in the religious and cultural environment of 'son preference.' The law further ignores women's experiences by keeping certain other aspects of child bearing outside its ambit. For example, impregnating a woman regardless of her wishes or against the advice of a doctor. It is also not an offence to abandon a pregnant women or deny her recovered medical care and attention during pregnancy or at childbirth or soon thereafter.[58]

The IPC provisions are equally applicable whether the fetus or child victim in question is male or female. Male feticide and infanticide however are rather uncommon in India. The problem is of female feticide and infanticide.

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[55] Sri Gour, Hari Singh "The Penal Law of India" Vol. III, 10th ed. 1984, p.2818.
[56] Jabbar Vs State AIR 1966, All.590.
[57] V. Kumari, "Gender Analysis of the Indian Penal Code", Engendering Law" (1999) EBC, Lucknow, pp.147-148.
[58] Ibid.

The provisions have a limitation in this are i.e. sex selective abortions. Further, it is doubtful whether these provisions could take care of the recent reproductive technologies, under which the soc-selective abortion can be done "outside a women's body" under controlled laboratory conditions.

The IPC provisions (Sections 312-316) have now become subject to the provision contained in the Medial Termination of Pregnancy Act (MTPA) 1971. Even after the commandment of the said Act, the IPC Provisions relating to miscarriage have not been amended, redrafted or repealed (wherever necessary) to take into account the fact that abortions are now permissible under the MTPA under certain circumstances.

A careful perusal of the legal provisions would reveal that the law of abortion in India until the passing of the Medical Termination of pregnancy Act. 1971, was very strict. The penal provisions provides abortion only on medical grounds in order to save the life of the mother and on any other grounds abortion is considered illegal and it is punishable. The penal provisions were honored more in breach then in observance. It was estimated that before the enactment of the M.T.P. Act 1971 as many as five million induced abortions were carried out in India every year, of which more than million were illegal, but perhaps not even one percent prosecution and successful convictions taken first instance.

The provisions of the Indian Penal Code, 1860, which criminalize abortion, are curbed by the Medical Termination of Pregnancy Act 1971 (MTPA), which set forth the grounds for obtaining a legal abortion and the rules regarding where abortion may take place and who may perform them. The MTPA softened the rigors of the law of abortion contained in the code. The objects and the circumstances under which the termination of pregnancy is permitted have been discussed in detailed by the researcher in the chapter based on MTP Act 1971.

b. Postponement of Capital Sentence on Pregnant Women (Section 416) the Code of Criminal Procedure 1973

Section 416 of the Code of Criminal Procedure, 1973 provides that if woman sentenced to death is found to be pregnant, the High Court shall[59] commute the sentence to imprisonment of for life.

The recognition of the legal personality of child in the womb of the mother is illustrated in the rule of procedure, which lays down that a pregnant woman condemned to death can not be executed until she has delivered her child.[60] Realizing the legal personality of an unborn, an amendment has been made in the Code of Criminal Procedure in 2008 which provides that where a pregnant woman is sentenced to death, the High Court shall commute the sentence to imprisonment for life. Thus that will enable woman to go safely through pregnancy and childbirth and provide with the best chance of having a healthy infant.

In *Rajiv Gandhi assination Case*, where accused Murgan, Santhan and parvarivalam were sentenced to death in 1999, along with Nalini who is married to Murgan. After Nalini gave birth to baby girl in Jail, her death sentence was commuted to life at the request of Mr. Gandhi's wife Sonia Gandhi.[61]

B. Transfer of Property Act–1872

The unborn is placed in a better position under the law of property. For the purpose of deciding claim in wills, and of interstate property, one question before the common law courts was whether a 'child' included a child in womb.

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[59] The words "order the execution of sentence to be postponed, and may, if it thinks fit', Omitted by Code of Criminal Procedure (Amendment) Act 2008, Sec.30.

[60] Under English Law, such expectant mothers were sentenced to life imprisonment instead of death under the sentence of death (Expectant Mothers) Act, 1931.

[61] www.nettv.com/article/india/rajiv-gandi-assossivation-madras-hight-court-stays-convicts-execution-for-eight-weeks-130050.

The House of Lords finally settled the issue in *Elliot Vs Joicey*.[62] According to them in the ordinary meaning, child "born" before, or "living" at or "surviving", a particular point of time or event during pregnancy, would not include a child in the womb. However, they wanted to depart from such an ordinary meaning which applied a fictional construction that a child included a child in the womb at the relevant date and subsequently born alive, only the child would to have a benefit to which it would have been entitled if it had actually been born on the relevant date. The only justification for applying such a fictional construction is that where a person makes a gift to a class of children or issue described as "born" before or "living" at or "surviving" a particular point of time or event, a child in the womb was necessarily be within the reason and motive of the gift. Thus the benefit is available only where the child is born alive.

In India, the Transfer of Property Act talks about transfer for benefit of unborn person. Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect unless it extends to the whole of the remaining interest of the transferor in the property.[63] Further it deals with the rule against perpetuity. This rule says that no transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer, and minority of some person who shall be in existence, at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.[64]

There cannot be any direct transfer to an unborn person. An unborn person means a person who is not in existence even in mother's womb. A child in mother's womb or, a child *enventra sa mere* is a competent transferee.

[62] 1935 Ac, 209.
[63] Section 13, Transfer of property Act. 1872.
[64] Section 14, Transfer of property Act. 1872.

Property can be transferred to a child in mother's womb. But, property can not be transferred to any person who is not even in the mother's womb because such person is an unborn person. Transfer of property provides that transfer of property[65] takes place only between two living persons. This means that transferee must also be in existence at the date of the transfer. The property can not be transferred directly to an unborn person but property can be transferred for the benefit of an unborn person. Section 13 provides that property can be transferred for the benefit of an unborn person subject to following conditions:

(i) Transfer for the unborn must be preceded by a life interest in favor of a person in existence at the date of the transfer, and

(ii) Only absolute interest may be transferred in favor of the unborn.

Section 73 enacts that interest given to the unborn person must be the whole of the remaining interest of the transferor in the property. It may be noted that where a property is property is transferred in favor of an unborn, the transferor first gives a "life interest to an existing person. After transferring this, he retains with him the "remaining interest" of the property. This 'remaining interest' with the transferor, must be given to the unborn so that after the termination of prior life interest, the unborn gets the whole i.e. absolute interest in the property.

Where the ultimate beneficiary is in the mother's womb i.e. it is a child *enventre sa mere,* the latest period up to which vesting may be postponed (after the preceding interest) is the minority plus the period during which the child remains in mother's womb. It may be noted that minority is counted from the date of worldly birth where as for purposes of being a transferee, a child in mother's womb is a competent person. Where the ultimate beneficiary is in mother's womb when the last dies the property vests immediately in him while

[65] Section 5, Transfer of property Act, 1882 – Transfer of property means an act by which a living person conveys property in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons, and "to transfer of property" is to perform such Act.

he still in mother's womb. Therefore, the exact period from which the minority begins to run is the date when ultimate beneficiary is conceived. Accordingly, the minority up to which the vesting is permitted to be postponed under this section would include the period during which the ultimate beneficiary remains in womb before he is born alive. The period during which a child remains in womb after being conceived is called gestation. In India, the maximum possible remoteness of vesting would, therefore, be maximum permissible remoteness of vesting = life of the proceeding interest + period of gestation of ultimate beneficiary + minority of the ultimate beneficiary.[66] The right conferred on unborn children is, however, contingent depending upon his taking birth alive, when they are transformed into vested rights.

Further, a child in womb may be beneficiary of a trust. Section 9 of the Indian Trust Act, 1882, says,"*Every person capable of holding property may be a beneficiary.*" If some of the beneficiaries of a trust are unborn persons, the trust can not be varied without obtaining Court's consent on their behalf.

Thus the property law protects the interest of unborn child from the mother's womb. Though the property law does not provide personality to the unborn person. The only advantage an unborn receives from the statute is that it would be beneficiary. The provisions in fact show the powers of individuals over their property and certain state-imposed restrictions. Its object is to protect the property for too long a period from the possibility of alienation by their concerns being unborn persons.

C. The Law of Tort

In the absence of any Indian law on tort, the Indian courts can take guidance from the English cases in deciding suits by minor children relating to congenital disabilities. Following the decisions of English court, the rights of

[66] Prof. Sinha R.K. "The Transfer of property Act", 4th ed. Pub. By Central Law Agency, 1999, pp. 84-91.

unborn child is recognized and protected under the law of Torts in India. Nervous shock a branch of law of tort is comparatively of recent origin. It provides relief when a person may get physical injury not by an impact e.g. by stick, bullet or sword but merely by nervous shock through what he has seen or heard.[67] In *Dulieu Vs white and sons*,[68] an action for nervous shock resulting in physical injuries was recognized. There the defendant's servant negligently drove a horse van into a public house and the plaintiff, a pregnant woman, who was standing there behind the bar, although not physically injured, suffered nervous shock, as a result of which she got seriously ill and gave premature birth to still born child. The defendants were held liable.

During recent years, the rights of unborn child have come to be litigated before the courts, more than once. Where an unborn child is involved in an accident, there might be three main situations which are required to be discussed here. In the first situation, (i) the unborn child and the pregnant mother might both survive, but the child might be born with some disability. (ii) The second situation arises where the mother survives, but the child dies, in the womb as a result of the accident. (iii) The third situation occurs where both of them die, because the mother is involved in an accident or is otherwise the victim of an illegal act. Let's discuss all these situations in detail.

a. Child Born with Disability

In the first situation, the question that mainly a raises is this, where a person is born with some injury and disability through damage done to the foetus during the course of pregnancy. Now the next question arises, can he file a suit against the person who caused the damage? Thus the question indirectly appears to raise a question of legal capacity, does an unborn person possesses legal personality, sufficient to enable the unborn to see in relation to injury sustained while in womb?

[67] Dr. Bangia R.K. "The Law of Torts" Twentieth ed. 2007, Allahabad Law Agency, p.296.
[68] (1901) 2 K.B. 669.

In *Walker Vs G. N. Rly Co of Ireland*[69] In this case, the plaintiff a child, sued the railway company for damages on the ground that he had been born crippled and deformed because the injury was caused to it before birth by an accident due to railway's negligence when the plaintiff's pregnant mother traveled on the defendant's railway. The court did not favor the child's claim for damages from the railway company, it is quite common that passengers in trains include pregnant ladies also and a forseability of accident cannot be fully ruled out.

In *Watt Vs Rama*[70] it is a case decided by the Supreme Court of Victoria (Australia). In this case, a person was born with brain damage, because of the injury suffered by his mother during pregnancy. The injury was the result of an actionable accident, for which the Defendant was responsible. The defendant was held to be liable in damages. In this case the court made a distinction between a wrong and its consequences. The court held that the plaintiff could sue for negligence in respect of brain damage, because, though the conduct constituting the breach took place before the birth, the breach itself did not take effect until the child was born, at which time the damage occurred and at that time, the child was a legal person.

b. Death of Child in Womb

The second situation arises where the unborn child dies in mother's womb due to the injury sustained by mother in an accident. In *Mohanti Das Vs Lakshmi Lal Mohanti.*[71] In this case the appellant, a woman, had claimed compensation on account of injury sustained by her in a motor accident, which had caused on abortion after seven days of the accident. The compensation was not allowed by the tribunal, but was, on appeal, allowed by the Orissa High Court.

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[69] 1972, V. 16 Supreme Court of Victoria.
[70] (1891) L.R. IR 69.
[71] 1976 Accident Law Journal 512. Orissa.

In a recent decision it has been ruled by the court that unborn child is a living person if it has been so sufficiently developed within the womb that it could be born and lived. In the instant case the fetus was 22 weeks old and the same was caused to be aborted as a result of injuries sustained in an accident by the mother. The mother claimed compensation for the injuries sustained by her and the death of the unborn. Justice B. L. Garg allowing the claim, directed the respondent to pay Rs.15, 000 as compensation to the mother for the dead child and Rs.50,000 for the injuries sustained with costs and 12 percent interest from the date of filing of the petition till its realization.[72]

This raises an important question. Is the unborn child a 'person'? An *Allahabad case*[73] was one of criminal prosecution under section 304A of the Indian Penal Code, which creates the offence of causing death by a rash or negligent act. The question was whether causing the death of a child in the womb fell within the section. In this case the High Court held that an unborn child, in the advanced stage of its mother's pregnancy, has a being or life of its own, and that it has a body. It may be, that its life and body are not independent of the mother's existence, so that the unborn child can not be said to have a separate existence. "Even if the child is unborn and within the womb of the mother, it is capable of being spoken of as "a person", if its body is developed sufficiently to make it possible to call it a 'child'. The postmortem report shows that the child had developed sufficiently to have an identity of its own as a child. The unborn was regarded as a living entity with a life of its own and a person within section 304-A, IPC.

Recently an Indian State Consumer Court has delivered an unprecedented ruling in favor of a woman seeking an insurance claim on the death of an unborn child- the court determined that the-unborn baby was a

[72] The Hindustan Times, September 10, 1988, p.1.
[73] Jabbar Vs the State, AIR 1966 All 590.

living human being entitled to personhood and required the insurance company to pay the claim.

Marking a reversal in trend from *Roe Vs Wade* (1973), separate personality was argued in favor of a 'fetus' in *Kanter Mohanlal Katecha Vs Branch Manager, United India Insurance Co. Ltd*, a case decided by the Maharashtra, State Consumer Dispute Redressal Commission in 2006. Though India is far from Statutorily legalizing any such development presently, future possibilities cannot be eliminated altogether especially in the wake of recent attempts by legislatures of the western world and the judiciary in India to elevate the status of the fetus.

Kanta Kotecha filed the claim on the deaths of her husband, her son and daughter-in-law, and her unborn grand child of seven months gestation, which were all killed in a tragic automobile accident. The United India Insurance Company rejected her claim for her son Atul, saying he was not covered since he was not a paid driver, and also rejected the claim for the unborn child. The insurance firm said the child could not be considered a passenger in the vehicle since it was not yet born. Kotecha complained before the Yavatmal District Forum, which said that the insurance company must pay the claim for Atul, but not the unborn child. Kotecha then appealed to Maharashtra State Commission. The commission drew on United States law under the unborn victims of violence Act from 2004, which made it a crime to injure or cause the death of an unborn child against the will of the mother. Justice B. B.Vagyani issued a ruling for the three-judge penal in November 2006, stating that the term "human fetus" implies a living, growing organism. Since the unborn baby is living, the commission reasoned, it is entitled to personhood. The Courts decision went a step further than the U.S. law which makes it a separate criminal offence to injure or kill an unborn child while carrying out a federal offence (excluding abortion or any action taken by the mother against the child in the womb). In permitting a separate insurance claim for the unborn child, the

India court ruling gave the unborn child right commensurate with personhood, as a separate identity from the mother under law.[74]

c. Mother and Child Not Surviving

The third situation arises when both the mother and the unhorn child die as a result of an accident. The question now, arises, whether any relative can claim compensation for the death of the child. This question arose before the Rajasthan High Court. In *United India Insurance Corporation Ltd. Vs Sampat Singh*[75] the High Court held that an unborn child cannot be considered as a separate person. Further, unless, the child is born, no question of dependency, mental agony etc can arise and therefore no claim in tort can arise in favor of the surviving relative of the child who makes a claim.

Accepting the appeal of the insurer against the award of compensation, the Rajasthan High Court made the following observations:-"The claim for compensation involving the death of or bodily injury to person arising out of the use of motor vehicle or damage to any property of a third party so arising, or both, are filed under section 110-A of the Act (Motor vehicles Act, 1939). Thus there should be the death of a person in order to claim compensation under the above provision of the Act. Apart from the death of a person, the claim for compensation is determined for the benefits which the claimant would have received from the person who died in the accident. The compensation is also determined for the loss of love and affection, loss of consortium mental agony, pain etc in a given set of circumstances. In the present case, there is no dispute with regard to the interim compensation awarded under section 92-A of the Act for the death of Smt. Premvati (mother). It is also not argued by the learned counsel for the appellant as to what compensation would ultimately determined at the time of final award on account of the death of Smt. Padmavati, carrying a pregnancy of 7 months of

[74] http://www.lifesitenews.com/idn/2007/mav/070307020htm.
[75] 1988 (27) Reports (Rajasthan) 247.

child. The only controversy to be determined at this stage is, as to whether an unborn child of seven months can be considered 'as a separate person' for awarding interim compensation of Rs 15000/- under section 92-A of the Act. The court is of the view that unless a child is born alive, it can not be considered a separate person for the purpose of awarding interim compensation under Section 92-A of the Act. If the contention, of learned counsel for the respondents is to be correct and taken to its logical conclusion a pregnant woman having two or four foetus and having died in an accident, would result into the death of two or four persons as unborn children. This can neither be the intention of the legislature, nor appeals to commence. The word 'person' has not been defined in the Act. Unless a child is born, no question of any dependence or benefit or mental agony to the claimant can arise from such person."

In an another case where On January 28, 1992 the 28-weeks pregnant wife of the petitioner, Margappa Shethappa Vodar, was knocked down and killed by a car owned by Procter and Gamble Ltd.[76] The Bombay High Court ruled in a recent case that if a woman loses her unborn child in a road accident, the parents of the dead foetus cannot claim compensation for it from the accused. Hearing an appeal filed by a Dharavi resident, Justice Abhay Oka observed that the father of an unborn child that died along with the pregnant mother in a road accident is not liable to claim compensation separately for the child from the Motor Accidental Claim Tribunal (MACT).

"An unborn child in the womb will not be included in the definition of the word 'person' as the particular word is defined in the Fatal Accidents Act, 1855. Observed Justice Oka, while dismissing an appeal moved by Margappa Shethappa Vadar. The Court also relied on a judgement by the Himanchal Pradesh High Court which earlier ruled that, "a fetus is a part of the body of the

[76] Lifesitenews.com/idn/2001/mav/070307020.htm.

deceased and no separate compensation is admissible on the ground of loss of fetus".

"The fetus, which was 28 weeks old in the womb, was also a living being. But for the accident the wife of the appellant would have given birth to a child", argued G. S. Hegde, advocate for Vodar. He further submitted that under the provisions of the Indian Penal Code, a person can be penalized for causing death of a fetus, as it is no different from human life and due to the accident; the life of an unborn had come to an end. He said a fetus in the womb also has a life. "A fetus has a heart. A fetus can move its limb and it is said that a fetus can react to the surroundings" argued the petitioners.

The court on its part observed that a fetus or a child in the womb becomes a "human being" or a "person" only after he or she is born. "Under the Hindu Law, in certain contingencies, there can be a right vested in an unborn person in the womb. But the right becomes valid only after the person is born and comes into existence in the world", observed the court "Before a human being can be termed as a person, he has to be born. In the present case, we are not dealing with a human being who is born into this world. Therefore, the 'death' of a fetus in the womb can not be termed as a death of a person within the meaning of Section 165 (1) of the Motor Accident Act, the court ruled.

The court also observed that under Section 166 of the Act, in case of death due to an accident arising out of use of motor vehicle compensation claim can be made only by legal representatives of the deceased. "There is no concept such as "legal representatives of a deceased person. A person never born," the court observed.

Duty of Care and Liability Of pregnant woman for Negligence

Where a woman driving a motor vehicle, when she knows or ought to know herself to be pregnant is under a duty of care towards her unborn child. She is liable if the unborn child sustains any injury and is born alive with some defect. She is not liable in any other situation. Even father can be sued if he causes any injury to unborn child. If a disease is transmitted by father to mother (whole proceeding conception) and than to child the father of the child will be held liable.[77]

Lord Atkin's famous lost for determining negligence based on foreseeability appears best suited to determine liability in negligence of the modern pregnant woman Lord Atkin held:

"you (my dear pregnant lady) must take reasonable care to avoid acts or omissions which you can reasonably forsee would be likely to injure persons (as close as in your own womb) who are so closely and directly affected by (your) act that (you) ought reasonably to have than in contemplation as being so affected when (you are) directing (your) mind to the acts or omissions which are called in question."[78]

Thus it is the duty of the pregnant lady to take care of her unborn child from any injury because the defective or deformed child is a burden to the parents as well as the community.

Adverse effects of environmental pollution (like lead, mercury, uranium etc.) on an unborn child have been well recorded. These include spontaneous abortion, still birth and convulsions, to name just a few.[79] In the absence of any Indian Act, the Indian courts can take guidance from the English Act in

[77] Donogue Vs Stevenson (1932) AC 562.
[78] International Conference on Global Health Law. Orgd. By I.L.I. and W.HO. Dec. 5-7th 1997 (Souvnir IV) p.16, New Delhi.
[79] State of Environment-1990: Children & Environment (New York) 1990, p.18.

deciding suits by minors relating to congenital disabilities. The Supreme Court in *Union Carbide Corporation Vs Union of India*[80] referred to the English Act and held that those who were yet unborn at the time of the Bhopal gas leak disaster and who are able to show that their congenital defects are traceable to the toxicity from the gas leak inherited or derived congenitally will be entitled to be compensated. In *S. Saiduddin Vs Court af Welfare Commissioner*,[81] a girl child conceived and born after the disaster who died after four months showing symptoms of gas effect because the mother had inhaled the gas was allowed compensation of Rs. 1.5 lakh hy the Supreme Court.

Though the medical knowledge has made considerable advances in establishing the cause of injuries sustained by an unborn, problems in law remain unsolved. Problems arise in proving the cause of action. Is there a duty of care towards the unborn under law? No law has so far made on unborn a legal person and the question as to the care towards whom still remains. Public interest has to be evolved in this aspect in order to found a duty of care in the mother. Even where a duty af care is established, it is difficult to derive a casual link between the alleged tortuous act and the injury. In certain cases, the injury may be due to an act done well before consumption.

In general it would be better to have wide insurance schemes to cover claims based on lack of prenatal care, wrongful life and wrongful death. This will take away the inconveniences in making the parents liable. Insurance schemes will also prevent the parents from making of destroying the fetus itself instead of incurring a likely liability. Insurance coverage would also help the children where there is no reasonable forseeability a result out wrongful life. Once the court is convinced that there was no forseeability it may not award damages, or even if awarded it may not match the need of the child. On the other hand, the state has also got a duty to consider favorably the flight of the

[80] AIR 1992 SC 248, P.311: (1991) 4 SCC 584.
[81] 1996 (3) Scale (SP) 28: (1997) 12 SCC 460.

defective children. Social security legislation in this line is a required step. However, the insurance scheme or the welfare benefit measures will not be allowed to become safety valves to negligence. Provisions are definitely desirable to find payable liable guilty or criminally, as the case may be, in cases of gross negligence.[82]

D. Personal Law

a. Hindu Law

There is nothing in law to prevent a man from owning property before he is born. His ownership is necessarily contingent, indeed, for he may never be born at all; but it is none the less a real and present ownership. A man may settle property upon his wife and the children to be born of her, or he may die intestate, and his unborn child will inherit his estate. Yet the law is careful lost property should be too long withdrawn in this way from the uses of living man in favour of generations yet to come; and various restrictive rules have been established to this end. No testator could now direct his fortune to be accumulated for a hundred years and then distributed among his descendants.[83]

Under pure Hindu law, a gift could not be made in favor of a person who is not in existence on the date of the gift. A Hindu may give or bequest his property to any one he likes. He may not only direct who shall take the estate, but may also direct what qualities of estate must be in existence at the date when the gift of bequest is to take effect and the estate given to such person must be an estate recognized by Hindu law.[84]The principles laid down in It was held by the privy Council in *Tagore Vs Tagore*[85] in 1872, that a Hindu cannot dispose of his property by gift in favor of a person who was not in existence at

[82] Pramodan M.C, "the Unborn and Legal Protection'' Cochin University Law Review (1994) pp.272-73.
[83] Salmond on Jurisprudence, 1966, p. 303.
[84] Mulla, "Principle of Hindu Law'', 1980, p. 663.
[85] (1872) 9 Bangal LR 377.

the date of the gift, nor could he dispose of his property by will in favor of a person who was not in existence at the date of the death of the testator.

Tagore's Case still holds good in places where these aforesaid Acts do not apply. Bequest can be made to unborn person. A person capable of taking under the will must, either in fact or in contemplation of law, be in existence at the death of the testator.[86] In laying down the above rule in the case of *Tagore Vs Tagore*[87] the judicial committee desired, "not to express any opinion as to certain exceptional cases of provisions by means of contract or of conditional gift on mortgage or other family provisions usage." But this rule has been relaxed by the Hindu Transfer and the Bequests Act, 1914, the Hindu Disposition of Property Act 1916, and the Hindu Transfer and Bequests (city of Madras) Act 1921.

Although there is no authority in Hindu law to justify the doctrine that a Hindu cannot make a gift or bequest for the benefit of an unborn person, yet that doctrine has been engrafted on Hindu Law by the decision of the judicial committee in *Tagore Vs Tagore*. The decision in Tagore's case was based on wrong reading of the relevant text in Dayabhaga which means, "Since in a gift the donee's ownership in the thing given arises from the very fact of the donor, consisting of the relinquishment of his ownership with the intentions of passing the sin to a sentient being". But since that decision had stood a great length of time and on the basis of that decision rights have been regulated, arrangements as to property have been made and titles to property have passed, it is a fit case in which the maxim communis error facit jus, may be applied.[88]

Under Hindu succession Act 1956, which provides that, "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

[86] Bodi Vs Vankataswami, ILR 38 Mad 369.
[87] (1872) 9 Bengal L.R. 377.
[88] Agarwal, R.K., "Hindu Law" ed 22nd Reprint 2008, p.411-12.

her 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 dale of the death of the intense."[89] This section recognizes posthumous child as an heir. This is nothing but the codification of old Hindu law most systems of law confer such rights on a posthumous child. Under the section, two conditions must be satisfied: (1) the child must be in the womb at the time of the death of intestate, and (2) the child must be born alive.[90]

A child in mother's womb is presumed to born before the death of the intestate, although subsequently born. According to Mulla, 'it is by fiction or indulgence of the law that the rights of a child born in just to matrimony are regarded by reference to the moment of conception and not of birth and the unborn child in the womb, if born alive is treated as actually born for the purpose of conferring on him benefits of inheritance. The child in embryo is treated as person for various purposes when it is for his benefit to be so treated. The view is not peculiar to the ancient Hindu law but one which as adapted by all mature systems of jurisprudence. This section recognizes that rule of beneficent indulgence and the child in utera although subsequently born is to be deemed to he born before the death of the intestate and inheritance is to be deemed to vest in the child with effect from the date of the death of the intestate.[91] For the application of section 20 of the Hindu succession Act, 1956, it is essential that child must be in womb at the time of the death of the porosities and the child must he born alive.

The right of inheritance under the Hindu Law was a right which vested immediately on the death of the owner of the property in the person who was the nearest heir at that time. It could not in any circumstance remain in abeyance in expectation of the birth of a preferable heir, not conceived at the

[89] Section 20, Hindu Succession Act 1956.
[90] Diwan Paras "Modern Hindu Law" Nineteenth Ed. 2008 p.432.
[91] Agarwal, R.K., "Hindu Law" ed 22nd Reprint 2008, p.301-302.

time of the owner's death. Where the estate of a Hindu had vested in a person who was nearest heir at the time of his death, it could not be divested.

To this rule there were two exceptions:-

(1) A son or daughter in the mother's womb at the time of owner's death;

(2) A son validly adapted to the deceased owner by his widow.[92]

In *Gada Dhar Malik Vs Official Trastee of Bengal*[93] the judicial committee observed: "The rule is that the right of succession vests immediately on the death of owner. Apart from the case of a child en ventre sa mere or of an adapted child, the estate once vested in an heir will not be diverted hy the subsequent birth of a person who would have been a preferable heir and he been alive at the time of the death of last owner."

The general rule regarding partition under the Hindu Law is that partition once made can not be re-opened. But there are, however, certain exceptions to the general rule where partition may be re-opened. Some of the exceptions related to the unborn child are given below:

(i) a son conceived at the time of partition, though not born before partition, can re-open it if a share has been reserved for him;

(ii) a son begotten as well as born after partition can demand a re-opening of partition, if his father though entitled to a share, has not reserved a share for himself.[94]

[92] Supra Note 97, pp. 205-6.
[93] (1940) 67 IA 129.
[94] Agarwal, R.K., "Hindu Law" ed 22nd Reprint 2008, p.386.

These are the circumstances under which an unborn child asked for re-opening of partition. A son, who was in his mother's womb at the time of partition, is entitled to a share, though after partition, as if he was in existence at the time of partition. If no, share is reserved for him at the time of partition he is entitled to have the partition reopened and share allotted to him.[95]

Limitations subject to which a Gift or Bequest can be made to an Unborn Person

A Hindu may, under the Hindu Transfers and Bequests Act 1914, Hindu Disposition of property Act1916, and the Hindu Transfers and Bequests (City of Madras) Act 1921, dispose of his property by transfer inter-vivos or by will in favor of an unborn person. This, however, can only be done subject to certain limitations and provisions. These limitations and provisions contained in Chapter-II of the Transfer of Property Act 1882[96] under the provisions of Chapter-II, Transfer of Property Act, 1882, the following conditions must be satisfied, and otherwise the gifts will not be valid:

(i) If a gift to an unborn child is preceded by a prior disposition, the gift must be of the whole of the remaining interest of the transferor in the property.[97]

(ii) the gift shall not offend the rule against perpetuities;[98]

(iii) if the gift is made to a class of persons with regard to some of them, it is void as offending (i) or (ii) the gift fails in regard to those persons only and not regard to the whole class,[99] and

[95] Yekeyamian Vs Agniswarjan (1870) U Mad HC 307, Hurmment Vs Bhimacharya (1888) 12 Bon 105.
[96] Mulla "Principles of Hindu Law", 21st ed. 2010, Reprint, 2011, pp. 552-553.
[97] Section 13, Transfer of Property Act.1882
[98] Section 14, Transfer of Property Act, 1882

[99] Section 15, Transfer of Property Act, 1882

(iv) if a gift to unborn person is void under (i) or (ii) any gift-intended to take effect after such gift is also void.[100]

b. Muslim Law

Under Muslim law a bequest to a person not yet in existence at the testator's death is void; but a bequest may be made to a child in the womb provided that it is born within six months of the date of making the will and hence competent to take the bequest. But in Shia law, a bequest to a child in the womb is valid, if it is born in the longest period of gestation i.e. ten lunar months.[101]

A gift to a person not yet in existence is void.[102] Formerly it was said that a gift of future usufruct to unborn person shall not be valid. Later on, this opinion was not adapted. In *Gulam Husein Vs Fakir Mahammad*[103] it was held that a gift of future usufruct to unborn person is valid provided that the donee is in being at the time when interest opens out for heirs. In this connection, the provisions of the Transfer of property Act may be noted:

(i) if the gift to an unborn person is proceeded by a proper disposition, the gift shall be of the whole residue;

(ii) the gift will not offend the rule against perpetuities;

(iii) the gift is made to a class of persons with regard to some of whom it is void under (i) or (ii), the gift fails in regard to those persons only and not in regard to the whole class;

[100] Diwan Paras "Modern Hindu Law" Nineteenth Ed. 2008, p.504.
[101] Ahmad Aqil, "Mohammadan Law" ed. 19th 1990, Reprint 2000, Central Law Agency, Allahabad, p. 251.
[102] Mulla "Principles of Mohammadan Law' ed. 19th 1990 reprint 2003, p.112.
[103] AIR 1997 Bom 185.

(iv) if a gift to an unborn person is void under (i) or (ii) any gift intended to take effect after such gift is also void.[104]

E. Constitution

Unborn Child and Right to life under Article 21

Each person has the right to "life, liberty and security". These rights are inalienable and are expressed in many national constitutions and international charter. The right to life of all people is undisputed and indisputable. It is a 'care' right without which all other rights are meaningless.

If the society accepts that unborn Childs are human beings then it follows that they are entitled to the protection afforded by this right. The fact that human fetus is weak, vulnerable and inconspicuous, is no reason to ignore or override his or her right to life. A failure to try to protect a person in these circumstances would demonstrate that right for individuals are only acknowledged for those who exercise power or who are visible. The right to life is for all not just for those who have some knowledge tangible utility to society. Each of us may find ourselves excluded from the protection afforded by the right to life at some time if this right is regarded as optional or relative to the circumstances as they change from time to time.

In India the right to life is guaranteed to every persons under the constitution of India. This protection of life flows from Article 21 of the Constitution of India where it is clearly stated "*No person shall be deprived of his life and personal liberty except in accordance with procedure established by law.*"[105]

A very complex problem arise when the pro abortion persons argue that they, under the constitution have a right to personal liberty which includes the

[104] Ahmad Aqil "Mohammadan Law" ed. 19th 1990 Reprint 2000, Central Law Agency, Allahabad, pp. 252-53.
[105] Pandey, J.N ,"The Constitutional Law of India", Central Law Agency, 47th ed. 2010, p.238.

right to or not to bear or beget a child, the right to bear not to be a parent, the right to or not to use contraceptive the right to or not to sterilized our-self, the right to have sex without the nuisance of sex, by artificial insemination. The right may accordingly be held to include the right to stoppage of parenthood in transit, that is, the right to terminate pregnancy premanturely.[106]

If the right to terminate pregnancy is thus comprised in and follows from the right to personal liberty guaranteed as a fundamental right by and under article 21 of the constitution, then under the mandate of that Article, as amplified by the Supreme Court *in Meneka Ghandi*[107] and later case,[108] no person can be deprived of such personal liberty except according to procedure established by law which must be 'sonable, right, just and fair." They relevant provisions[109] of the Indian Penal Code however prescribed very severe punishments for termination of pregnancy in all cases except when caused in good faith for the purpose of saving the life of the woman concerned. These provisions, drawn up more than a century ago in keeping with the then English Law on the point and the concept of social morality then prevailing have accordingly rendered themselves liable to be questioned as volatile of fundamental rights to personal liberty. But, the Medical Termination of Pregnancy Act, 1971, has abated the rigor of these provisions to a considerable extent. Having provided for termination of pregnancy in cases of unwanted motherhood would appear to be more filling with the wide triumphal arch being currently constructed for the 'Right to personal liberty.'

But granting that the right to personal liberty of a woman includes her right to personal liberty of a woman includes her right to terminate pregnancy the question that has been raised is whether or not the exercise of such right would affect the right to life of the unborn child. You may have the right or

[106] Justice A.M. Bhattacharjee, Liberty V Life Rights of the Child, NLSIU, p.59.
[107] Meneka Gandhi Vs Union of India (1978), ISCC 248.
[108] Francis Coralie Mullin Vs Administrator Union Territory (1981), ISCC 608.
[109] Sections 312-316 Indian Penal Code, 1860.

liberty to saving your arm, but not to give a blow to another's nose thereby. The answer to this question would depend on the answers to the questions, namely, whether or not an unborn child is a person within the meaning of the life and liberty clause of the constitution and, whether or not it has life.[110]

A fetus or a child in the mother's womb is not a natural person within the meaning of IPC. In all jurisprudential jurisdictions, however, a child *enventure sa mere* is recognized as a legal persons, capable of inheriting or otherwise acquiring and holding property and also other rights. Medical jurisprudence also treats it as a living being as proved by Dr. Mathenson. Thus granting that a child in the womb is not a natural but only a legal person not entitled to the protection of life, liberty and property clauses look absurd. Even if, for the sake of argument we agree to this absurd proposition, analogical reasoning is in favor of the unborn person's right to life. We know that a non-natural but legal person, like a statutory corporation or a company, has all along been treated as a person within the meaning and protection of the equality clause of the constitution guaranteeing to every persons equality before the law and equal protection of laws.[111] The life, liberty clause of the constitution guaranteeing right to life and liberty to every person, would obviously apply, as it does, to all natural but legal persons also capable in a law of acquiring property, like statutory corporation and incorporated companies and no such persons, even though non-natural, can be denied the protection. A non-natural but legal person, being thus undoubtedly a person within the meaning and protection of the life, liberty and the quality clauses of the constitution, cannot be deprived of life without due process. It can accordingly be argued that since a fetus of child in the mother's womb, even though a non-natural persons, would nevertheless be person within the meaning of Article 21

[110] Supra Note 106, p.60.

[111] Article 14 of the Indian Constitution, 1950-The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

of the constitution, it cannot be deprived of its life, without reasonable, right, just and fair process.

Right to life does not mean mere animal existence. It is life with human dignity. This internationally accepted principle. The term 'life' in Article 21 of the constitution has been interpreted to mean life with human dignity.[112]

The word 'person' is not clearly defined under Article 21 of the Indian constitution. Its simply says that "No person shall be deprived of his life". Now the question arises that whether an unborn child can be a person or not? The Apex court of the country has on the various occasions interpreted Article 21 of the constitution but it has not interpreted Article 21 in such a way as to include "unborn" child as a person'. The word 'person' is derived from the Latin word persona which meant a mask worn by actors playing different roles in a drama. Many writers have restricted the use of the term 'personality' to human beings alone because it is only they who can be subject matter of rights and duties and, therefore, of juristic personality. But the term has for wider connotatinn in law and includes gods, angels, idols, corporations etc, though they are not human beings.

The concept 'person' focuses large numbers of jural relations but it allocates than differently in different cases. The general usage the term 'person' is used to denote "a human being (i.e. natural person) though by statute term may include a firm, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

The word 'person' is also defined under Indian Penal Code which includes any company, or association or body of person whether incorporated or not.[113]

[112] Maneka Gandhi Vs Union of India, AIR, 1978 SC, 597.
[113] Section 11 Indian Penal Code, 1860.

Children are the greatest gift to humanity. They are the potential human resources for the progress of any society. In order to enable them to develop as responsible and productive members of tomorrow's society. Conducive environment has to be created for their all round development. Every nation links its future with the status of the child and neglecting children would result in a loss to the society as a whole.

To ensure that opportunities are provided for all the children to develop physically, mentally, sexually, spiritually and morally, they have been bestowed with certain basic rights in the international and national laws. The child needs special safeguards and care including its appropriate legal protection before as well as after birth.

In modern times, India's greatest apostle of nonviolence, Mohandas Gandhi, has written: "It seems to me clear as day light that abortion would be a crime". Right to life and personal liberty is the most precious sacrosanct, inalienable and fundamental of all the fundamental rights of citizens. Guarantee of Life and personal liberty is not only a restraint on the Government but also a part of cultural and social consciousness of the community. It determines to a great extent the quality of life in the context of individual state relationship. Our constitution framers were conscious that people must be protected against misuse of power by the Government. They, therefore, provided for the Fundamental Rights in Part III of the Constitution where under the guarantee of life and personal liberty, one of the most precious right, is enshrined in Article 21 of the constitution.[114] The fundamental right in part III are enforceable in courts. Thus if these rights are violated, a writ petition can be filed in the Supreme Court or the High Court.[115]

The Indian Government does not seen fully committed to the reproductive rights approach. In other words, it has not explicitly created a

[114] www.legalserviceinindia.com/article/1384-Legalize-Abortion-in-India.
[115] Arts. 32 and 226 the Constitution of India, 1950.

legally enforceable reproductive rights regime through either legislative or judicial acts.[116]

The ICPD programme of Action, one of the principal reproductive rights instruments, defines 'reproductive rights as including the:

> "... right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have information and means to do, so, and the right to attain the highest standard of sexual and reproductive health."[117]

It uses the internationally recognized definition of reproductive health as:

> "... a state of complete physical, mental and social well being and not merely the absence of disease or infirmity ....."

When it comes to reproductive and sexual health care, the ICPD programme of Action has identified a number of areal where these rights are translated into information, education, services and counseling in issues such as family planning, pre-natal care, safe delivery and post natal care, infertility, abortion etc.[118]

The Indian Government does not seem fully committed to the reproductive rights approach. In other words, it has not explicitly created a legally enforceable reproductive rights regime through either legislative or judicial acts.[119] There are, however, a number of legislations relating to children and women in India. There has been a anticulaticen for the general right to health and specific aspects of reproductive health within constitutional law.[120]

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[116] Barot, 'Assessing Reproductive rights: Concern Areas and the way "Forward", the Lawyers Collective, New Delhi, October 2004, p.4.
[117] Programme of Action of the International Conference on Population and Development, Cairo, Egypt, Para 73, September 5-13, 1994.
[118] Ibid, Para 7.2.
[119] Supra note 117.
[120] Few legislations that deal with reproductive rights/health are child marriage restraint Act, 1929, Hindu Marriage Act, 1955 (see option of puberty, the wife's special ground of divorce); Maternity

Recently in *Suchita Srivastava and Anothers Vs Chandigarh Administration*[121] In this case the Supreme Court held that the woman's right to make reproductive choice is also a dimension of 'personal liberty' as understood under Article 21 of the constitution of India. It is important to recognize that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth control methods such as undergoing sterilization procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a "compelling state interest" in protecting the life of the prospective child. Therefore, the termination of pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise the reproductive choices.[122]

In essence India has yet to adopt a reproductive rights approach to issues of reproductive health, population and development. There are very few explicit reproductive rights articulated under Indian law, while the ICPD has been useful in the drafting of policies. In our country (viz. the target free approach of the 200 national population policies), we need to move to the next step and implement laws with accountability mechanisms and enforceable

Benefit Act, 1961; Medical Termination of Pregnancy Act 1971; Pre-natal Diagnostic Techniques Act, 1994. Infant Milk Substitutes Feeding Bottles and Infant Foods (regulation of production supply and distribution) Act, 1992.

[121] AIR 2010 SC 235.

[122] AIR 2010 SC 235.

remedies. A comprehensive law on reproductive rights our grounded in a theory of right to gender equality would be positive step in such a direction.[123]

Thus the termination of pregnancy is not permitted unless the conditions specified in MTP Act 1971 are fulfilled. However, in the case of pregnant woman, the state also has interest in protecting the life of the prospective child.

In fact neither Article 21 nor any other law confers right to life. Article 21, as its marginal note clearly indicates, gives protection against the deprivation of life. The marginal note mentions: "Protection of life and personal liberty". The right, to life is a basic human right, the absence of which renders all the other rights meaningless useless and worthless. In today's scenario, this right has received a global recognition and it has been incorporated in almost all the Human Rights legislations all over the world. Of late, the horizon of the right of life has been widened by judicial interpretation and today it encompasses all the elements which one can think of as an aspect for leading a complete, clean, healthy and dignified life.

Once it is established that human life begins at or near conception and fetus is a person during almost the entire first trimester of pregnancy, Article 21 of our constitution may be interpreted, that, with respect to life, the word 'person' applies to all human beings. If life exists from the moment of conception, then the right to life must commence from that stage only and thus it becomes the obligation of the state to protect it. The state cannot discriminate against person who is fetus by offering than less or no protection, than other persons. In doing so, Article 14 is also violated.[124]

Even the unborn children have the right to life and we should ensure that their rights are well protected, rightly averted the secretary of the Asia

[123] Barot, "Assessing Reproductive Rights Concern Areas and the way "Forward", the Lawyers Collective, New Delhi, October, 2004, p.4.
[124] Ramaiah G.V. ,"Right to conceive Vis-à-vis Right to Birth" AIR 1996, Journal Section, p.140.

Pasific Regional Conference on "Education for human Right" Organised by NHRC in Delhi.[125]

Not only this under Article 72 of the Indian constitution president has been conferred power to grant pardon, experiences respite etc; Reprieve means temporary suspension of death sentence which can be granted where it is found that the convict is a pregnant lady. So in order to protect the life of unborn, the punishment is suspended.[126]

Though the constitution recognizes the sanctity of life, yet have failed to adequately protect the life of fetus.

Regrettably, the in coherence in the law will be exacerbated by the legislative changes recommended by the Warnock Committee[127] in relation to experimentation on the human embryo[128] implemented, the law might in vitro, through controls on experimentation and restriction on the period permissible for keeping the embryo alive, than the abortion law contains for the more developed fetus.[129] It is submitted that there should be far more clarity of thought on the issues involved before sporadic legislation increasingly clouds the picture. It is sometimes argued that public option is so divided on the ethical issues relating to the unborn child that it is impossible for legislation to present a moral stance that will be delectable to all. Such reasoning is a recipe for legislative chaos; although it is indeed difficult to reconcile views on seek matters as abortion and experimentation on human embryos, the law need not be unity and incoherent. The nettle must be grasped and in particular, an answer must be given to the key questions – at what point in time does human

[125] Times of India, New Delhi 30-1-99, p.4.
[126] Article 72 (1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence.
[127] The Committee of Inquiry into Human Fertilization and Embryology, chairman: Dane Mary Warnock DBE, 1984, cmnd. 9314.
[128] Embryo "refers to the unborn young from conception until approximately the end of the second month of gestation.
[129] "Fetus" refers to the unborn young from the end of the second month of gestation to the moment of birth.

life come into consistence and at what point does society deem such life to require legal protection?

When Does Life Begin?

Willful interruption with pregnancy means a lot many denials and deprivations of the rights of unborn child vis-à-vis woman's liberty and morality. The question is often asked "when does human life begin? One of the issues that bear very prominently in the domain of law of abortion restrictive or liberal is when does life begin?

For restrictive law, it is a self evident rule that the law presumes that life begins since conception but the same may not quell the questioner's impressments that it is very difficult to agree to this legal fundamental. So far as liberal law is concerned while deciding the question when does life begin, came forward in order to prove itself as not against humanity or sanctity of unborn life.[130]

Generally, there may be various views to look at the issue e.g. common sense or belief views, medical views, philosophical views, utilitarian views.[131] An attempt has been made to deal with these views, in brief as follows:

a. Common-sense or belief view

A common-sense method is based on experience of mankind. The pregnant woman feels that something is growing inside her when it is so that she is pregnant. Neither she nor the world beyond her not the physiological system within her can repudiate this growth. Therefore, it can be taken without error for a belief that life has begun since conception, for after that life has begun since conception, for after all, the concept us is not a dead cell or non-living tissue but an ever growing and ever living thing, until and unless it is

[130] SC, Journal, 1992, Vol. 2. ,p.87.
[131] Ibid.

dead cell or non-living tissue but an ever growing and ever living thing, until and unless it is dead after spontaneously expelled or deliberately brought outside.

One could guess that there are things man knows without attempt to know, and life begins since conception is one of them. To dispel the same or bring it into impurity man has to acquire knowledge of ethics, morality, sociology, philosophy, religion, medicine, to name a few. Complexities of life in modern time will perhaps force him to undertake this exercise of learning; but, again it can be safely stated that impact of the discipline and knowledge stored therein through academic toil of centuries and of innumerable researchers, will not be able to provide him any coruscating beam of clarity to reject his natural belief that life begins with conception.

b. Medical view

Taking the method of medical judgment into consideration doubts and disbeliefs are probable to the dictum that life begins since conception. As Dr. George W. Corner, the distinguished American embryologist, points out, "Is the unfertilized egg a living thing? It can not reproduce itself unaided, nor even maintain itself more than a day or two. In another sense, yes, for its biochemical make-up contains substances necessary for life and produce only by living organisms- in this case by the mother when it is formed in the ovary. But its store of such substances must be augmented by the sperm cell if it is to survive and develop. It is an much alive as a now unfertilized hen's egg, or as the ovule in the female flower of an oak tree, and no more If indeed we may properly use the word "life" for which there is no satisfactory definition, we might say that the human egg cell briefly possesses half a life."

The above is not an abnegation of the presence of life in the human egg cell and therefore it is equally possible to argue that life begins with conception, when human egg cell has fertilized with its counterparts for a

result. Yet a medical observation about the embryo deserves attention as Professor Garrett Hardin prefers to say:

"When does a human life begin? Molecular biology has given us new insights into the nature of life, individuality, and reproduction insights that have important implications for the ethical problem of the value of life. In biology, the meaning of the word 'life' has been successively redefined. Life as ethereal substances passed on from parent to offspring (or from divinity to new human being). The concept of 'soul' seems to be a substantial one (at least it was initially). Later, as it became clear that the death of an organism resulted in no substantial loss, recourse was had to new ideas related to energy. What distinguishes a living from a non-living thing is not peculiar substance or new forms of energy, but unique organization is essential to life. The act of reproduction is basically in which the information specifying the organization is replicated and the products separated into different packages, which we call 'individuals' (individual cells or individual organisms). By for the greater part of the information is contained in the nucleus of the cell, specifically in the chromosomes, and even more specifically, in the deoxyribonucleic acid (DNA) of the chromosomes"[132]

A wholesome concept of when does life begin- may be admirably posted stating that life does not begin or emerge at a fixed point rather it is a continuous and dynamic process. While a cycle has no beginning and paradoxical as it may seem the cycle of life may be taken to begin with the creation of sperm and ova, which join to make a new being, who in turn may reach puberty and create sperms or ova, and the cycle goes on endlessly. Summing up this position Dr. Malcolin has a belief:

"There is no single event making the beginning of life, there is no Rubicon to be crossed during embryological development, upon which we can

[132] Chandra Sekhar S.,"Abortion in a Crowded World",1974,p.29.

concentrate and say. Before this moment we have an object as trivial as a nail pairing; after this time we have an individual human being to which we must reserve the full sanctity of human life. An ethical system founded on biology must begin by recognizing that reproduction is a continuum which can be traced back to the time when the primeordial germ cells are first recognizable in the yold sac endonom (at about the twentieth day after fertilization in man) and it is still incomplete when a grandmother baby-cists for her daughters children. During this long process fertilization is an incident which is biologically important but so remote from the interests of society that the woman in whose body it occurs has no way of knowing what has happened."[133]

On the basis of the above speculations, it is doubtful if there is any biological opinion supporting any one theory to the exclusion of others with regard to when life begins.

c. Philosophical views

The Hindu philosophers had divergence of opinion regarding when life begins. Some hold the view that life began with conception, some that it began with the first movement of the fetus and some that it began with the first breath of the infant after delivery, just as it ended with the last breath.[134] In Christian philosophy hold the scriptures in high esteem believe that life begins at conception.[135] Islamic philosophy likewise cannot be regarded as having rejected the premise that life begins at conception, however the use of contraceptives to avoid unwanted pregnancies found place in religions injunctions. The adoption of practice of 931 (coitus interrupts) is traceable to the prophet's time.[136]

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[133] Chandra Sekhar. S, "Abortion in a Crowded World" 1974, p.31.
[134] Supreme Court Journal, 1992, Vol.2, p.89.
[135] http://www.christianet.com/abortionfacts/christianviewonabortion.html
[136] Singh .S.K and Raizada R.K. ''Abortion Law in India; Past and Present'',Published by Family Planning Assosiation of India,Haryana Branch,Bal Vikas Bhavan, India p.15.

Perhaps most widely known to the general public is the traditional Roman Catholic approach to these strictest forms maintains that a human person comes into existence at the moment of the ovum being fertilized. At this moment of "emolument" the fertilized ovum becomes unused with a rational soul of its own and this theory of immediate animation is widely believed to embody the official leading of the Roman Catholic Church.

> "The moral consequence of this is obviously that any destructive of the fertilized ovum is the destruction of a human embodied soul, or the putting of a human person, be it by the discarding of ova fertilized in vitro or experimentation upon them, or by the section of intra uterine devices or other contraceptives which prevent the fertilized ovum from implanting in the living of the womb (if that is how they achieve their effect), or by abortion at any later stage of pregnancy."[137]

Some Roman Catholic philosophers adopt the less extreme Aristotelian theory of "delayed animation." This was developed by the theologian, Thomas Aquinas, who maintained that there were a number of stages in human generation and that emolument did not occur until a later stage, serve time after conception.

In the sphere of law the issues as when life begins has been attempted to be solved with reference to the statue of the unborn. Law ever cherishes to evolve a framework that is more adjectivated and objectivated than subjectivated, lest it could become an abstract philosophy difficult to perceive, practice and preach. Few instances of the treatment of the unborn child in law may be considered.

The Roman law drawing a distinction between feticide and infanticide regarded the unborn child merely as spes animentis and not as an infans, a part of the mother," as the fruit is a part of the tree till it becomes ripe and falls

[137] J. Mahoney, S.J., "Bioethics & Belief", 1984, pp.67-69.

down". It was pointed out by Garrand that abortion was regarded rather as an offence against the parents than against the unborn life and that it was no offence if done with their consent.[138]

In 193-211 AD Septimius Severus, looking at the "*Dwindling families and undisciplined women*" of the empire, decided to adopt drastic steps to curb fetus killing. He threatened to exile wives who willfully attempted to abort abortions. But the practice of abortion had been so deeply entrenched in Roman society that even these treats and severe measures failed to have the desired effects.[139] The early and medieval Christian church however strongly dissented from this view of Roman law and strongly influenced the continental and English criminal law right down to the 19th Century. Christians believed in the sanctity of human life from its very beginning. To them prevention of birth was as bad as murder and it was no consequence whether a life was taken away when forming or when already formed. They believed that the unborn child was also a man as it was about to man and every fruit existed in its seed. St. Augustine made a distinction between an embryo already formed and an embryo as yet unformed.

d. Utilitarian views

In Chinese medical thought, it is believed that the fetus is formed by the harmony of the Yin and Yang elements of the parents and sustained by different circuits (of "acupuncture points" during each lunar month of its development. Each of these circuits belongs to a different evaluative phase and supplies the fetus with a different need or a different component of the body. Thus its blood is supplied in the fourth month by the evaluative phase of water through the mother's minor yang upper limb circuit, its energies by the evaluative phase of fire through the mother's lower limb major vin circuit in

[138] Supreme Court Journal, 1992, Vol.2, p.90.
[139] Mankekar Kamla, "Abortion: A Social Dilemma", 1973, p.6.

the fifth month, its muscles and skin in the eighth month by the evaluative phase of earth etc.

The western developmental thought regarding development of the fetus in a step by step progress until it reaches a stage of animation with human scold and deserves to be considered as fully human, the Chinese conception is more horizontal and multicasul. The Chinese conception undeniably believes that human fetus, of course, is always a human being. The fetus is not regarded as a part of the mother's body; rather it is integrated with the mother's body. It is however surprising to see that the unborn was considered as valuable as the host's life and protected in Chinese society, whereas parents were given circumstantial power over the lives of adult offspring and infanticide was tolerated by the society.

The question as to when does life begin is answered differently by antiabortionists and proabortionist.[140] Thus antiabortionists say that life begins Christopher-Hitches, his apposition to abortion has been knows for years. His essay implies that a life-form becomes human after conception because- presumably- that is when the brain and uniquely human attributes begin to develop.[141] A soul, it was an embryo informatics and its artificial abortion was to be punished with a fine only but the embryo formats was regarded as our animate being, and to destroy it was nothing less than murder, a crime punishable with death. Similar were the prescriptions of Cannon and Justinian law which makes distinction between animate and inanimate fetus with the fertilized egg. On the other hand, pro-abortionists distinguish between different stages in the development of pre-natal human life, such as zygote (a fertilized ovum); an embryo (up to the last part of third month of pregnancy); and a fetus (during the remainder of pregnancy). Thus there are persons who do not see any illegality in the induced abortion of an embryo but they do not favor

[140] S.C. Journal, 1992, vol.2, pp.90-91.
[141] Mishra S.N., "Abortion Laws in Todays World" Cyber Tech Publication, New Delhi, 1st ed. 2007, p.25.

abortion of fetus. Needless to say, these are value judgments whose rightness or wrongness will always remain questionable.[142]

e. Judicial view

It is not difficult for a common man or any one specializing in any discipline of human knowledge to believe that life begins with fertilization of an ovum.[143] The abortion dilemma is caused by the fact that 266 days following a conception in one body, another body will emerge. One's own body no longer exists as a single unit but is endangering another organism's life. This dynamic passage from conception to birth is genetically ordered and universally found in the human species. Pregnancy is not like the growth of cancer or infestation by a biological parasite; it is the way every human being outers the world pregnancy is a continuous growth process it is ward to defend logically any demarcation point after conception as the point at which an immature form of human life is different from the day before or the day after, that it can be morally or legally discounted as a non person. Even the moment of birth can hardly differentiate a nine month fetus from a new born. It is not surprising that those who countenance late abortion are logically led to endorse selective infanticide.

The legal tradition which in our society guarantees the right to control one's own body firmly recognizes the wrongfulness of harming other bodies. The handicapped the mentally retarded, and newborns are legally protected from deliberate harm. Prolife feminists reject the suppositious that would accept the unborn from this protection. Justice demands that the powerless ad depended be protected against the uses of power wielded unilaterally. No human can be 'treated as a means to an end without consent. The fetus is an

[142] SC. Journal 1992, pp. 90-91.
[143] Ibid.

immature, dependant form of human life which only needs time and protection to develop.[144]

Most of the biological scientists would agree that an embryo does not represent a real human being. At the most it is a living organism at the stage of animatisms, or rather a lower animal which in the early stages of its development would take an embryologist to recognize its identity.

The legislature, faced with non-availability of any decisive rule on the point of the beginning of life, may decide a point when the fetus can be regarded as to be able to be born alive and supported outside the womb of the mother with artificial support of medical care. Such legislative scheme is a shift from the philosophical exercise of deciding the point of the on set of life to a pragmatic enterprise of personhood of the unborn. This solves the debate on the beginning of life, though indirectly, to some extent.[145]

The court of Appeal in *C. Vs S and another*[146] interpreting "*a child capable of being born alive*" meant a child capable of breathing and capacity to breathe is necessary but not a sufficient condition of viability. The effect of the ruling would appear to he that all abortions from 24th week (when an unborn develops the capacity to breathe) are criminal under the Infant Life (preservation Act unless effected for the purpose only of preserving the life of the mother. The judgment in *Berkshire Case*[147] clearly adhered to the proposition that a child development is a continuing process which commences at conception and not from birth. The House of Lords admitting the long established principle that at the common law, the unborn child has no legal status and, therefore, not an independent legal personality necessary to serve as a basis for criminal liability, however proposed to state that a child's development is a continuing process that commences at conception, not at

[144] Mishra S.N., "Abortion laws in Todays world" 1st ed. 2007, pp. 38-40.
[145] Ibid.
[146] (1987) 2 WLR 1108 (CA).
[147] (1987) 1All ER 20.

birth, which is suggestive of the hope that unborn child should have a feel legal status which legal rights similar to those enjoyed by the newly born in civil law.[148]

In India, the interest of unborn child is protected under Criminal law, Property law, Law of Torts and Constitutional Law in the case of *Jabbar*.[149]

An Indian State Consumer Court has delivered an unprecedented ruling in favor of a woman seeking an insurance claim on the death of an unborn child. The court determined that the unborn baby was a living human being entitled to personhood and required the insurance company to pay the claim.

The court's decision went a step further than the U.S. Law which makes it a separate criminal offence to injure or kill an unborn child carrying out a federal offence (excluding abortion or any action taken by the mother against the child in the womb). In permitting a separate insurance claim for the unborn child, the Indian court ruling gave the unborn child rights commensurate with personhood, as a separate identity from the mother under law.[150]

After analyzing various views it can be said that there are different views as to when life begins. The right to conception, the right to abortion and right to birth are very much conflicting rights and become controversial subject matter in law and procedure of the time. There involved many questions of value, moral, ethical, sociological and legal grounds. Any rigid statute to regulate these rights wills pase critical problems and challenges both to the well being of a woman and unborn child. An ideal situation however may crop up when there is a conflict between the pregnant women's right to termination of pregnancy and the right of the unborn to life, if there is to be any such right in law. Alone but the carrying mother or the state is expected to be the guardian of

[148] Jane E.S Fortin; "Legal Protection for the Unborn Child'', 51 Mod. L. Review (1988) p.54.
[149] AIR 1966 All 590.
[150] Top India State Court Rules unborn child is "Living Person" http://www.lifesitenews/idn/2007/mav/070307020.htm

the unborn. If the former is so freedom drunk that her freedom takes away the interest of the unborn, there is a justified state concern to regular or restricts the freedom of woman to terminate pregnancy by the use of legislation. Guaranteed again it is that none else but the supporting mother is the best guardian of the unborn unless she is not without ordinary human sense and prudence. A child in its mother's womb is for many purposes regarded by a legal fiction as already born, in accordance with the maxim, Nasciturus projam nato habetur. In the words of Coke: "the law in many cases hath consideration of him in respect of the apparent expectation of his birth."[151]

A person is often defined as being the subject or bearer of a right. Right not only reside in, but also are available against person. A natural person must combine the following characteristics.

(1) He must be a living human being i.e. he must be no monster. He must be born alive (vivus) though not necessary capable of continued existence (vitalis) but for certain purposes existence begins before birth 'Qui in utero est perinde ac si in rebus humanism asset custoditur, quatients de commodes ipsius parties quaeritur', says Paulus: So Blackslone: "an infant en ventre sa mere is supposed to be born for many purposes. It is capable of having legacy, or surrender of a copy hold estate made to it. It may have an estate assigned to it; and it is enabled to have an estate, limited to its use, and to take afterwards by such limitations as if it were then actually born. On the other hand he must not have ceased to live".[152]

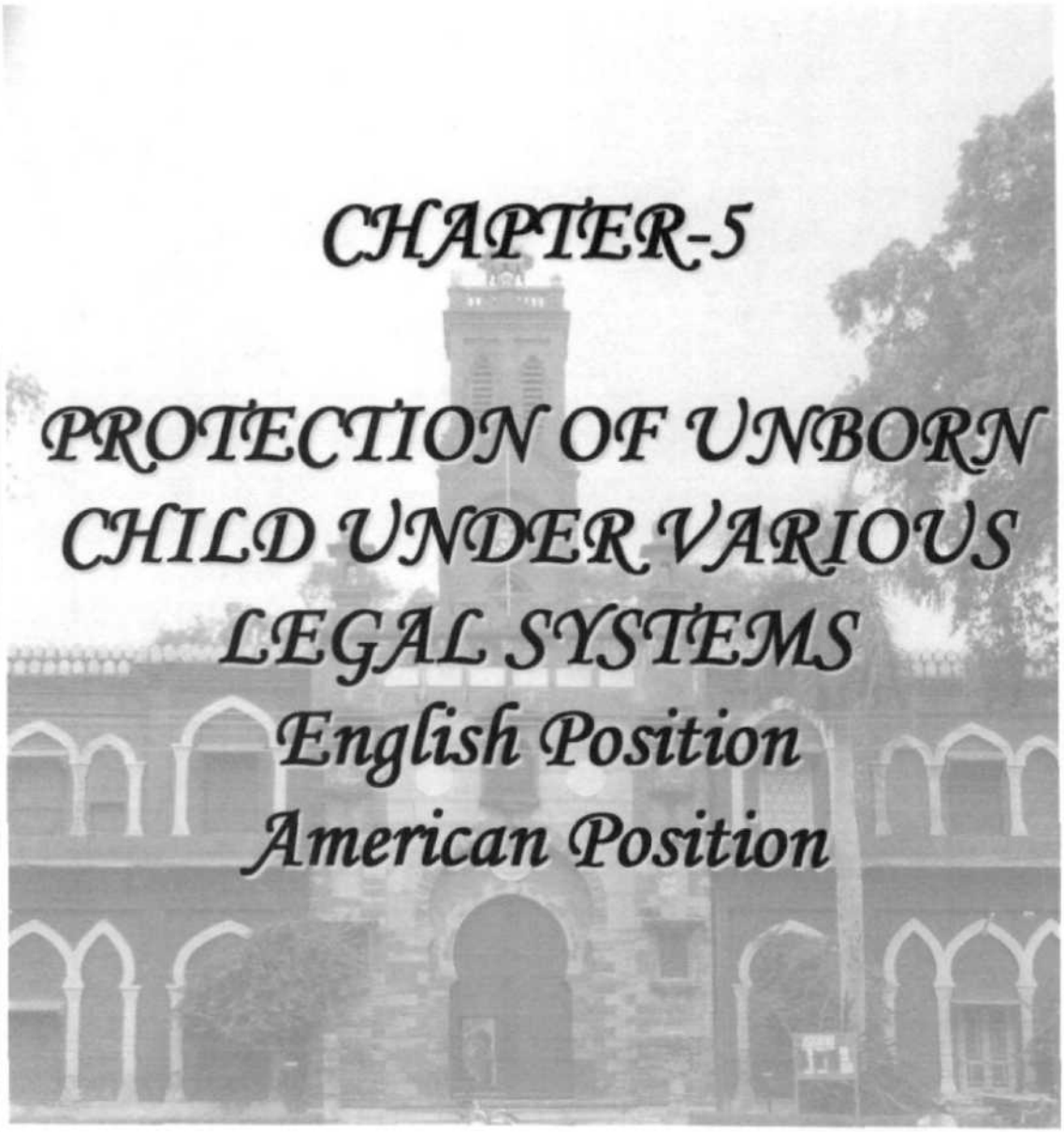
The rights of an unborn person, whether proprietary or personal all are contingent on his birth as a living human being. There is nothing in law to prevent a man from owning property before he is born. His ownership is necessarily contingent, indeed, for he may never be born at all; but it is none the less a real and present ownership. A man may settle property upon his wife

[151] Ibid.
[152] Holland, "Elements of Jurisprudence", pp.89-90.

and the children to be born of her or he may die intestate, and his unborn child will inherit his estate. Yet the law is careful lost property should be to long withdrawn in this way from the uses of living men in favor of generations yet to come; and various restrictive rules have been established to this end. No testator could now direct his fortune to be accumulated for hundred years and then distributed among his descendents.

To what extent an unborn person can possess personal as well as proprietary rights is a somewhat unsettled question. It has been hold that a posthumous child is entitled to compensation under Lord Campbell's Act for the death of his father. Willful or negligent injury inflicted, on a child in the womb, by reason of which it dies after having been born alive, amounts to murder or manslaughter. A pregnant woman condemned to death is respite as of right until she has been delivered of her child. The rights of an unborn person, whether proprietary or personal one all contingent on his birth as a living human being. The legal personality attributed to him by way of anticipation falls away abinilic, if he never takes his place among the living. Abortion and child destruction is crimes, but such Acts do not amount to murder or manslaughter unless the child is born alive before he dies. A posthumous child may inherit, but if he dies in the womb, or is stillborn, his inheritance fails to take effect, and no one can claim through him, though it would be otherwise if he lived for an hour after his birth.

Finally, though the law imputes no rights to persons not yet even conceived, it may protect their interests. Not a single law which directly deals with the rights of unborn child. However, all laws protect their rights and interests.



CHAPTER-5

PROTECTION OF UNBORN CHILD UNDER VARIOUS LEGAL SYSTEMS

English Position

American Position

CHAPTER-5

PROTECTION OF UNBORN CHILD UNDER DIFFERENT LEGAL SYSTEMS

A. English position

a. Protection to unborn child before passing of Abortion Act

Protection of the unborn created a lot of confusion in the common law courts. The questions were more than one who is an unborn? When does the protection begin and what is the degree of protection? Should this degree of protection vary with problems in different areas of law such as torts, property and crime? The degree of protection is an aspect which requires an elaborate scrutiny.

In early English law, abortion came to be regarded as a misdemeanor only and not a criminal offence punishable under the law "unless it was performed after the quickening" and "quickening" meant when the mother felt the movements of the growing fetus in her womb. This, too, was a loose definition and could hardly be effectively put to practice as only the woman-or her husband-could testify to the "quickening."[1]

Although the common law afforded protection to an unborn child, the degree of protection varied from period to period.[2] English Common Law, which also formed the basis of American law in the early years of American settlements, later get entangled with the ethical and moral codes as prescribed by the church. As the law got codified, abortion was included among the punishable offences. In the mid-thirteen Century (1228 AD to be precise), Henry de Bracton published '*The Laws and Customs of England*', he placed the abortion under legal offences punishable under the civil law provided the fetus

[1] Mankekar Kamla "Abortion A Social Dilemma", 1977, p.7.
[2] Bernard M. Dickens. "Abortion and the Law (1966) P.I I, as quoted in promodan M. C. "The unborn and legal protection" Cochin University Law Review, 1994, p.257.

had already been animated. So, the loophole in the law remained and the abortion seekers did not find it difficult to escape punishment even when they were caught in the act, and were brought before justice only when the woman or her husband could testify to the duration of the pregnancy or to the beginning of movement of the fetus in the womb.[3]

However, later on justice Coke was of the view that abortion of a woman "*quick with child*" was great misprision and no murder. Justice Coke observed:

> "*If a woman be quick with child and by potion or otherwise killeth it in her womb, or if a man beat her whereby the child death in her body and she is delivered of a dead child, this is a great misprision and no murder, but if the child be born alive and death of the portion, battery or other cause, this is murder, for in law it is accounted a reasonable creature, in return natural when it is born alive.*"[4]

Blackstone followed the view and opined that after 'quickening' abortion was man-slaughter though not murder.[5] Blackstone observed:

"*Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child and by a potion or otherwise, killeth it in her womb; or if anyone beat her, whereby the child death in her body and she is delivered of a dead child; this though not murder, was by the ancient law homicide or manslaughter.*"[6]

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[3] Supranote 1 p.7-8.

[4] III E. Coke, III Institute 50 (1648) as quoted in David A Gordon, The unborn Plaintiff", 63 Modern L. Rev (1965) 579 at 581.

[5] Singh S.K. and Raizada, "Abortion Law In India: past & present, 1976. Family Planning Association of India, Haryana Branch, Bal Vikas Bhawan, India. p.75.

[6] Black Stone, "Commentaries on the Laws of the England, Vol.1, 4th ed. 1771, Para's 129-130.

Blackstone was not happy with justice Coke, who treated it as a mere misprision or misdemeanor, a lighter crime. Recently it has been argued that abortion even after quickening was not established as a common law crime. Abortion was made statutory crime in England in 1803.[7] The statute made abortion of woman quick with child a capital crime but provided lesser punishment for the felony of abortion before quickening. This law maintained the 'quickening' distinction. This distinction continued until 1828, and was finally given up with the abortion of death penalty for this crime in 1837. It did not reappear in the Offences Against the Person Act 1861, which was a basic anti-abortion law till abortion was liberalized in 1967[8]. *In* 1861 the Offences Against the Person Act, 1861 in sections 58 and 59 made procuring or attempting to procure abortion a felony (offence) repealing the Act of 1803. Section 58 of the Act 1861, prohibits attempt to procure miscarriage from anytime after the conception of the child until its birth. Further section 59 punishes supply or procuring of noxious drugs or instruments knowing it to unlawfully use for causing abortion with imprisonment which may extend upto five years. The offence against person Act 1861, which removed any distinction as to the foetal age. This was followed in 1929 by Infant Life (preservation) Act. The Act 1929 puts emphasis on the protection of "the life capable of being born alive". It made a willful and intentional act of causing death of a 'child to be born' a felony. The infant life preservation Act of 1929 was passed to protect the interest of the foetus and which created the offence of child destruction. Abortion to save the life of the mother in good faith was a valid defence.[9]

British medical men had often felt frustrated over their inability to help pregnant women to get an abortion even in cases where they were convinced that abortion was the only way to save a woman from mental and physical

[7] Lord Ellenborough's Act, 43 (1803) quoted in Glanville Williams Textbook of Criminal Law,1970,p.250.
[8]Glanville Williams, "Textbook of Criminal Law", 1970, p.250 quoted in Gaur, K.D, "Textbook on the Indian Penal Code", 4th Ed. 2009. p.566.
[9] Supranote 5, p.75.

damage. The old law was stringent and the medical profession, as also public opinion, felt the need for change.

In the course of time it was realized that the strict provision of the law of abortion contained in sections 58 and 59 of the Offences Against the person Act, 1861 was doing more harm than good. The attitude of medical profession was hostile and tragic cases continue to occur women who had been raped, deserted by their husbands, and over burdened mother living in poverty with large families failed to get a medical abortion of course, the abortions could be bought but with a heavy price. As a result, most of the women would go to 'back street abortionists' wielding a knitting needle, syringe or stick leading to a great risk to their life. At times unwilling mothers used dangerous methods on themselves or committed suicide. It was also noticed that although illegal abortions were taking place in thousands, yet convictions were negligible. The police would not look upon abortion as a real crime for which they will initiate prosecution.

One particular instance which brought public opinion in open support of abortion law reforms is known as the *Bourne Case*.[10] It occurred in 1938, Dr. Aleck Bourne was a Fellow of the Royal College of Surgeons and had often been disturbed by the restrictions imposed by law on the medical profession in deciding when an abortion was required and should be performed in any particular case. In fact, early in his own medical career he had performed an abortion which he considered was essential for the mental and physical well being of the mother, but he had often been criticized by his colleagues for doing something which contravened the law of the land. Dr. Bourne wanted a clear verdict from the courts as to the obligations and rights of a physician to act for the well-being of his patient in a manner he considered best.

[10] (1939), I K B 687

The Bourne case arose from the rape of 14 year old girl in London. She had been watching the Guards outside the palace among with some friends and was later lured into the stables by some soldiers on duty. There she was held and raped by these men. Later tests confirmed her pregnancy and her parents sought help from the local and school authorities to get her an abortion. The case was ultimately referred to the Abortion Law Reform Committee which in turn approached Dr. Bourne. He agreed to take up the case. He admitted the girl into the hospital and kept her under observation for a few days to make sure of the mental and physical implications which would endanger her health. Then he informed the police that he proposed to induce abortion of the conception and performed the operation. When the police arrived in the evening the operation had already been carried out. The doctor was subsequently put on trial before a Criminal Court in London.

Though there had been a strong feeling both in social reform and legal reform circles that abortion law should be amended, there had practically no open contraventions to challenge the existing law. One of the notable incidents earlier had been the case of a woman who had performed an operation on a mother of three children. The court had acquitted her and in its remarks had referred to the inadequacy of abortion law which it had felt was outdated. Dr. Bourne too received the same sympathy from the trial judge as well as support from the medical men who testified in court that they too agreed with Dr. Bourne that the pregnancy, if allowed to continue, would have seriously affected the physical and mental health of the raped girl. The verdict ultimately was "no guilty".

However, the Bourne Case only broadened the interpretation of the prevailing law and did not result in its change. Psychiatric ground for abortion and the plea that the physician had performed the operation in "good faith"

were later accepted as permissible and acceptable reasons for performing abortions.[11]

To quote the ruling in question, "if the doctor is of the opinion that the probable consequence of continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that doctor is operating for the purpose of preserving the life of the woman.[12] This ruling constituted a fundamental judicial precedent. After the decision in the Bourne Case it was possible to say with certainty to some extent that a clear threat to the health of the mother was a justifiable ground for induced abortion. Though it was still uncertain as to how far and what ways this exception could be interpreted.[13] The Bourne decision did not cover the cases where there was likelihood of deformity in the children to be born.

In spite of the restrictions on abortions in England it was estimated that 10,000 to 25,000 illegal operations were performed in a year. The Abortion Law Reform Association claimed this figure to be 100,000 per year and used to cite it in favor of the reform move.[14] As these evils were beginning to be realized a strong opinion grew that a woman has a right to control her own fertility and that the abortion should be legalized. At the same time powerful religious lobby basing itself upon their "sanctity of life" was apposed to any move for change in law. As a compromise measure the Abortion Act, 1967 was passed which substantially liberalized the law of abortion though it did not concede all the demands of the pro-abortionists.

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[11] Supranote 1 p.11-12.
[12] Lederman, J.J. (1662) Canad. Med. Ass J. 87, 216.
[13] Daniel Callahan: Abortion, Law Choice and Morality, 1972, London,p.143 as quoted in Singh SK and Raizada"Abortion Law in India: Past and Present", 1976 ,Family Planning Association of India Haryana Branch, Bal Vikas Bhawan, India, p.76.
[14] Ibid.

b. Abortion Act, 1967

The Abortion Act of 1967 applies to England, Wales and Scotland, but not to Northern Ireland. This Act has aroused numerous commentaries in the British and foreign medical press and is certainly likely to influence the legislation of many countries. There are, in fact, unmistakable signs of such influence in the new Acts passed in Singapore and South Australia and in the Medical Termination of Pregnancy Bill, 1970 now before the Indian Parliament. The Abortion Act 1967, contains innovatory elements notably in the provisions of section 1 specifying that the medical practitioner must, where there are medical indications not involving a danger to life, weigh the relative risks of continuance of the pregnancy and its termination. Section 1 of the Act provides a person shall not be guilty of an offence under the law relating to abortion[15] when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith-

(a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated; or

(b) That there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Thus a pregnancy may lawfully be terminated on health and eugenic grounds. Health ground includes the health of the woman and the children. According to the World Health Organization health broadly, include, "the state of complete mental, physical or social well being, and not merely absence of

[15] "The Law relating to abortion" is defined elsewhere in the Act as "Secs. 58 and 59 of the offences Against the Person Act, 1861, and any rule of law relating to the procurement of abortion."

disease or infirmity."[16] In a booklet containing advice on the application of the Act, published by the Abortion Law Reform Association,[17] where it is pointed out that there are undoubtedly very few medical conditions which constitute absolute indications for terminating a pregnancy on the basis of "risk to the life of the pregnant woman".

As regards "injury to the physical or mental health of the pregnant woman" the committee has pointed out that the continuation of pregnancy may have adverse effect on the long-term prognosis of a number of conditions. Paragraph (b) of sub-section 1 of sec.1 deals with cases where there is a risk that the child might be affected by such physical or mental abnormalities as to be seriously handicapped. The British Medical Association Committee on Therapeutic Abortion has noted that certain conditions or agents may produce a substantial risk of physical or mental defect. The actual or reasonable foreseeable environment of the pregnant woman may be taken into account in determining whether the pregnancy should be terminated.[18] This sub-section is of considerable significance since, although not providing for social indications as such, it does over medico social indications in the sense that account may be taken of environmental factors liable to affect physical or mental health.

i. Procedural Safeguards for Termination of Pregnancy

To safeguard the interest of the pregnant woman, Section I of the Act has provided three procedural safeguards. Contravention of the provisions would make termination of pregnancy illegal and contrary to law.[19] These safeguards are:

(i) The pregnancy must be terminated by a registered medical practioner;

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[16] Glanville Williams Textbook on Criminal Law, 1970p.250 as quoted in Gaur, K.D, and "Textbook on the Indian Penal Code" 4th Ed. 2009. p.566

[17] Abortion Law Reform Association (1968), A Guide to the Abortion Act, 1967, London, Abortion Law Reform Association.

[18] Sub section 2 of Sec. 1, Abortion Act, 1967.

[19] Sub section 1 of sec.1, Abortion Act, 1967.

(ii) Two registered medical practioners must have formed opinion in good faith that the abortion is necessary,[20] and

(iii) The treatment for the termination of pregnancy must be carried out in a National Health Service Hospital or in a nursing home, by the secretary of the state.[21]

The abortions are preferred before the foetus becomes viable because after twenty eight weeks the Infant Life (Preservation) Act, 1929 protects the child. Beyond this period abortion is permissible only to save the life of the mother. All abortions, except the emergency cases, should be done at a National Health Scheme Hospital. But on this ground a doctor is not allowed to excuse himself in case of emergency as to save life or to prevent grave injury to the physical or mental health, of the pregnant woman. The concurring opinions of two registered medical practioners is waived for the termination of pregnancy if a doctor forms an opinion in good faith that the abortion is immediately necessary to save the life of the mother or to prevent grave permanent injury to her physical or mental health. The Act provides no person will be under any contractual or statutory obligation for any treatment authorized by the Act to which he has conscience objection.

The Act does not impose any residential requirement. Therefore, the foreign women visiting England to obtain abortion is large and several scandals have been reported. The critics of the Act have described London as the abortion capital of the world.[22] A committee headed by the Britain's first woman High Court Judge, Mrs. Justice Lane was appointed to review the working of the British Abortion Act, 1967. The purpose of the inquiry was to access the application of the law rather than to debate its underlying principles. In its report the committee came to the unanimous conclusion that the "gains

[20] Sub section 3 of Sec. 1, Abortion Act, 1967.
[21] Sub section 4 of sec. 1, Abortion Act, 1967.
[22] "Abortion Act under Fire", Times 18 June, 1969 London as quoted by Singh S.K. and Raizada R.K. "Abortion Law in India: Past and Present", 1976, p.78.

facilitated by the Act have much outweighed any disadvantages" and the abortions done under the Act have reduced fast the individual sufferings.

The committee found that waiting list of gynaecalogical patients have actually decreased since the Act was passed. The committee has also made few other observations, including:

First, Abortion should be performed as early as possible. After twenty four weeks of gestation the abortion should be for induction of birth because modern prematurity treatment might preserve the life of the foetus.

Secondly, "Outpatient abortions should be performed only in those hospitals where full back-up facilities were available to deal with complications.

Thirdly, sterilization should not be a condition precedent for abortion, because the committee took serious note of the cases where even unmarried women were subjected to such condition.

Fourthly, there should be careful assessment before the abortion operation is performed. When an abortion is performed, there should be counseling before and after the abortion.

Fifthly, almost one third of the total abortions performed under the Act were on foreign women. It would be legally difficult and perhaps wrong to discriminate against the foreign women.

Sixthly, abuses which do exist would be alleviated by tighter licensing control and the licensing of abortion related agencies.[23]

ii. Termination of Pregnancy by Medical Practioners vis-a-vis Nurses

The Abortion Act, 1967 provides that a licensed physician may terminate a pregnancy of a woman on the basis of the opinion formed in good

[23] Supranote 5, pp.78-79.

faith by two other licensed physician where the continuance of pregnancy would involve risk to life of the pregnant woman or any existing children of her family greater than if the pregnancy were terminated and also where there is substantial risk to the child if born, it would suffer from such physical or mental abnormalities which would seriously handicap it.

In *Royal College of Nursing of the United Kingdom Vs Department of Health and Social Security*[24] an important question as to the legality of the rate of nurses in termination of pregnancy by medical induction was debated before the House of Lords. There are two stages in medical induction, viz.;

First being the insertion of clatter by means of a pump or drip apparatus; and Second, the administration of fluid.

The first stage was carried out by doctors and the second by nurses under the doctor's instructions but in his absence, although he would be on call. The factor in inducing labor and thus in terminating the pregnancy was the administration of fluid which was done by the nurse and not the doctor. The Department of Health and Social Security issued a circular to the nursing profession stating that no offence was committed within section 1 (i) of the Abortion Act, 1967 by nurses who terminate the pregnancy by medical indication. If a doctor on the termination, initiated it and remained responsible throughout for its overall conduct and control. The Royal College of Nursing disputed the connection and brought a declaration against the Department of Health and Social Security in the Court that the advice was wrong and that the act carried out by the nurses in terminating a pregnancy by the induction method contravened the provisions of Section 1(i) of the Abortion Act of 1967.

The lower Court upheld the Department's contention. The College appealed to the court of Appeal which reversed the decision of the lower court holding that the whole process of medical induction had to be carried by a

[24] (1981) 1 All ER 545.

doctor and not merely under a doctor's instructions if it was to come under section 1(i) of the Act of 1967. The Department Appealed to the House of Lords against the decision.

The House of Lords by a majority of three to two set aside the unanimous verdict of the Appeal and restored the verdict of the lower court of Appeal. The court held that if a doctor prescribed the treatment for the termination of a pregnancy, remained in charge and accepted responsibility throughout, and the treatment was carried out in accordance with his directions, the pregnancy was terminated by a registered medical practioner for the purpose of Section 1(i) of the Act of 1967 and any person taking part in the termination was entitled to the protection afforded under the Act. But if the doctor were to direct the whole procedure by correspondence or over telephone, the operation would presumably be unlawful.[25]

The Act of 1967 further says that no person is required to participate in any treatment authorized by the Act to which he has conscientious objection.[26] This provision is however without prejudice to the duty to participate in medical treatment which is essential to save the life of pregnant woman or to prevent grave permanent injury to the physical or mental health of a pregnant woman.

iii. Termination of Pregnancy and the Consent of Father/husband

The pregnant woman is given the right to choose whether or not to proceed with the abortion provided she satisfies the medical requirements and obtained the appropriate certificates. In England, there was a move before Abortion Act, 1967 to the effect that the spousal consent was required, where the husband was the father of the child except in cases of emergency. This

[25] Gaur K.D. "Textbook on the Indian Penal Code", Fourth Ed. 2009, pp.567-568.
[26] Section 4, the Abortion Act, 1967.

move was however, defeated as the new Abortion Law gives him no such right.[27]

In English Law, a father has not right to be consulted in the abortion decision. The approach of the judiciary is in favor of providing necessary freedom to the woman regarding termination of pregnancy. In *Paton Vs Trustees of the British Pregnancy Advisor Services*,[28] a father failed to obtain an injunction to prevent his wife and the defendants carrying out an abortion of his unborn child without his consent. Sir George Baker put the position of the court as follow:

The husband... has legal right enforceable at law or in equity to stop wife having this abortion or to stop doctors from carrying out this abortion...the only way in which he can put the case is that the husband has the right to have a say in the destiny of the child he conceived. The law of England gives him no such right.[29] The unsuccessful plaintiff approached the European Commission on Human Rights. The commission found that the right to life provided under Article 2 of the European Convention on Human Rights and Fundamental Freedom would be applicable only to persons already born and could not be applied to a foetus.[30]

As regards the requirement of spousal consent, D. C. Jauasuriya, a Sri Lankan writer and Attorney-at-law States that the spousal consent could in certain circumstances serve a very useful purpose. In context of Paton's case he said; "A wife to whom the pregnancy has become a traumatic experience might not be in healthy state of mind or in the best of her sense, to use colloquial expressions, to make a rational decision as to whether the pregnancy be terminated or not. The intervention of the spouse, who after all in most cases is

[27] See C.M. Lyon and G.J. Benett, "Abortion- The Female, the Foetus and the Father", 32 C.L.P. (1979).
[28] (1979) 2 QB278.
[29] Ibid.
[30] Paton Vs United Kingdom, 3 E.H.R.R. (1980).

the person who is best familiar with the wife's condition, problems and aspirations could be a very useful input in the decision-making process as regards her own decision as well as that of the two doctors who have to give the green light for the termination to be proceeded with. The presence of the husband could add a significant dimension to the issues which have to be taken cognizance of in arriving at a final decision. Though from a moral perspective there is much to be said for ascertain the husband's views a procedure which makes it compulsory for his consent to be obtained is not without operational difficulties"[31]

The same author further adds that: "A too rigid a requirement of spousal consent could entail additional administrative responsibilities, sometimes of a serious magnitude for the doctor. If penal sanction is to be attached to a doctor who fails to obtain spousal consent or who negligently obtains the consent of someone who is not in fact the legal spouse, the law must provide for the mechanics of identifying a spouse and for regarding his consent with adequate guidelines as to what ought to be done in the event, the doctor has any doubt about the identity of the spouse. The exercise of his discretion to dispense with spousal consent in the event of an "emergency" is upon to challenge by a husband on the ground that there was in fact no such emergency which warranted his consent being dispensed with".[32]

In *C Vs S* and another[33], the putative father of a foetus of an age of 18 weeks applied on his behalf, and on behalf of the foetus, for injunction to restrain the mother and the concerned health authority from performing abortion. The plaintiff was the father of the unborn and not the husband of the woman. The ground was that the foetus was a child capable of being born alive

[31] D.C. Jayasuriya, "Current Medico- Legal Problems", 1984,Sterling Publishers Pvt. Ltd, New Delhi, p.112.
[32] Ibid p.112.
[33] (1988) 1 Q.B. 135.

within the meaning of the Infant Life Act, 1929.[34] However, the medical expert evidence revealed that the child was not capable of being born alive. The court dismissed the application moved by the father for himself as well as on behalf of the foetus. He court also followed the decision of Paton case that a father had no such right to intervene in abortion decisions.

One of the possible implications of the abortion conflict upon family life is that if the woman decided to terminate her pregnancy against her husband's desire, such a conflict might lead to divorce action as a remedy for the injury of the husband's procreation interest. Indeed, any undue increase in the grounds for divorce will endanger the family stability. That the divorce remedy would not adequately protect the husband's interest in the unborn child itself. A divorce merely serves to release the husband from an unsatisfactory marital relationship, it does not provide compensation for the loss of an expected child.[35] However, a father's consent in the abortion decision should not be required at the expense of a woman's life or health. In such exigency a woman's physician must procure the abortion without seeking the father's consent. On the other hand, if according to a physician's judgment, a woman's life or health would not be threatened by seeking a father's consent before procuring an abortion, then in such non-exigent circumstances it is necessary to allow the father to participate in the abortion decision in order to preserve harmony and stability in family life.[36]

Daniel Callahan, an author of the well known book "*Abortion: Law Choice and Morality*" in which he contended that What if a husband demanded that his wife should have an abortion in terms of the "woman's right" argument, which would leave the decision solely up to her, he would not have

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[34] Section 1 of the Infant Life (Preservation) Act, 1929 which provides that the offence of child destruction occurs where any person who, with intent to destroy the life of a child capable of being born alive by any willful act causes a child die before it has an existence independent of its mother.

[35] Stepheng Anderson, Abortion & Husband's consent, B.J. Family L,1973-74,p .311

[36] Tageldin Rahman Medani Adel, "Right to privacy and Abortion: A Comparative Study of Islamic & Western Jurisprudence", Aligarh Law Journal, 1997, p.146.

the right to make such a demand. But there are many family situations in which it would be the husband he would have to bear the economic support of the child to which she gives birth. In addition, he might well perceive that, if his wife had another child, that child could place a heavy, perhaps dangerous burden on her physical and psychological resources, and on the other children and on him as the one responsible to support the entire family. Since his responsibilities would be heavy in the face of an additional child, could he not in justice claim a say in the matter. This is not wholly a speculative question happen that husbands want their wives to have abortions, that the wives themselves do not want to have a child. 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?[37]

The Warnock committee was established in July 1982 with the following terms of reference:

(i) To consider recent and potential developments in medicine and science related to human fertilization and embryology;

(ii) To consider what policies and safeguards should be applied, including consideration of the social, ethical, and legal implications of these developments; and to make recommendation." The committee submitted is report on the July 18th 1984. Its chairman was Dame Mary Warnock on whose name the committee known as the Warnock Committee.[38]

[37] Daniel Callahan, "Abortion: Law, choice and Morality" as quoted in "Right to Abortion: A New Agenda", AIR. 1997 Journal Section p.130.

[38] The Committee of Inquiry into Human Fertilisation and Embryology Chairman: Dame Mary Warnock, DBE, 1984. Comnd. 9314.

The key questions of Warnock committee report are: at what point in time does human life come into existence and what point does society seem such life to require legal protection? These questions indicate the wealth of philosophical debate, generated by the question "*when does human life begin*?" and the inter related ones." What constitutes human being and what a person?" Our might assume that finding answers to these questions would be particularly vital when it came to considering the appropriate ways of regulating experiment on human embryos. Nevertheless, surprisingly the Warnock Committee deliberately refrained from attempting to do so:

> "Although the Questions of when life or personhood begins appear to be questions of fact susceptible of straight forward answers, we hold that the answers to such questions in fact are complex analysis of factual and moral judgments. Instead of trying to answer these questions directly we have therefore gone strength to the question of have it is right to treat the human embryo. We have considered what status ought to be accorded to the human embryo, and the answer we give must necessarily be in terms of ethical or moral principles.[39]

Many critics have doubted the wisdom of Warnock's approach on this. How could the appropriate treatment of the human embryo be determined if the committee were unclear as to its moral status? In particular it is difficult to understand exactly why the majority of the committee was of the view that the human embryo was "entitled to some added measure of respect beyond that accorded to other animal subjects[40]and that it should receive some legal protection, despite their refusal to categories it as a human being or person and despite their also having rejected "*the potentiality argument*" favored by the majority.

The so called "*potentiality argument*" has a great popular appeal, as evidenced by the support given to *Enoch Powell's* unborn children (protection)

[39] Warnock Report, Ibid. 11.9.
[40] Warnock Report, pp.11-15.

Bill which appeared to be based upon it.[41] The argument does not attempt to suggest that an embryo or indeed an unborn child is a person but claims instead that its potentiality for becoming one requires special recognition and protection. Only the minority of the Warnock Committee accepted the potentiality argument, and accordingly opposed the use of human embryos for research purposes, since this would obviously deprive them of their potential for life. The rest of the committee rejected the argument and favored research on the utilitarian grounds that the respect to be accorded the human embryo had to be weighed against the benefits arising from research, which could in some situations only be carried out on human rather then animal embryos. Nevertheless, they agreed without explanation that the human embryo was entitled to be respect than other animals and concluded in relation to the legal position that:

> "The status of the embryo is a matter of fundamental principle which should be enshrined in legislation we recommend that the embryo of the human species should be afforded some protection in law."[42]

Further confusion was caused by Warnock's later assertion that research on human embryos be allowed to continue but subject to certain restrictions; these being that research must only be carried out under licence and not beyond 14 days of embryonic development after which the embryos should be destroyed. In the committee's view, there was no particular stage in the embryonic developmental process that it is more important them another and there was therefore no biological justification for selecting a single development stage beyond which the in vitro embryo should not be kept alive. Nevertheless, they thought that the selection of such a limit was justified by the need to allay public anxiety on this issue. The report failed to explain the reasoning behind such an assumption, although, prior to recommending the 14

[41] Legal Protection for the unborn child, Modern Law Review, Jan 1988, p.59.
[42] Warnock Report, pp.11-17.

days limit. the committee referred without comment to the potentiality argument, perhaps indicating a brief flirtation with thus theory at this later stage of their report. But as critics have pointed out, utilization of that argument renders the degree of the embryo's development irrelevant, since it could be argued that a human embryo fertilized in vitro has even more potential for life at day one then it has at day 14, and research at any stage of development would normally terminate the embryo's potential for life.

Warnock's recommendations relating to the legal status of the early human embryo create further difficulties in relation to the embryo in vitro that reaches the 14 days barrier. The report implied that since it had a greater potential, it had a greater right to protection envisaged is the embryo's destruction. There was also the oblique reference in a footnote to the report to protection for later embryos in vitro. It, Warnock Commented on the illogicality of introducing stringent legislative controls on the research use of the very early embryo whilst maintaining a system of less formal controls on the research use of whole live embryos and more developed fetuses obtained through abortions and miscarriage. In the committee's view, urgent consideration should be given to bringing such research within a similar legislative framework to that proposal for the early embryo.[43]Again, such a comment is quite in consisted with any acceptance of the potentiality theory, since it is clear that embryos and fetuses obtained in the course of an abortion or miscarriage have no viability[44] and therefore, unlike the early embryos in vitro, have no similar potentiality to be protected.

It was suggested that it is morally justifiable to distinguish between the early embryo and the more developed foetus of 10 week's gestational development. Whilst the embryo is merely a human organism, the measure of brain development sustained by foetus of at least 10 week's gestation justifies it

[43] Warnock Report, p.64, n.1.
[44] Research on a viable foetus would be prohibited by the Infant Life (Preservation) Act 1929 unless such research was consistent with preserving the life of the foetus, which seems unlikely.

being accorded the special status of "*human being.*" Although such a status has less moral significance then that enjoyed by a human person nevertheless it requires independent recognition. It may be noted that in recent years, advances in the technology of medical ultrasound have made available from early in the pregnancy very degrees of accuracy in "dating" the foetus. It is proposed to ascertain whether this distinction can be used to frame appropriate legal principles with a sound ethical.

The committee of enquiry into Human Fertilisation and Embryology (the Warnock Committee) received representations from the public, deliberated the issues and reported in 1984.[45] Yet this was felt to be insufficient consultation and a second document to elicit comment was published in 1986.[46] Only after this second consultation did the Government feels able to publish its own proposal in a white paper.[47] Finally, the Human Fertilisation and Embryology has been enacted in the year 1990, which represents milestone in biomedical regulation.[48]

c. Human Fertilization and Embryology Act 1990

The 1990 Human Fertilisation and Embryology Act is an Act of the parliament of the United Kingdom. It covers several areas:

1. The licensing of human fertility treatment involving the parliament of the material (eggs, sperm or embryos)
2. The storage of human embryos
3. Research on human embryos

[45] Cmnd .9314 (1984).
[46] Legislation on Human Infertility Services and Embryo Research cm 46 (1986).
[47] Human Fertilisation and Embryology: A Framework for Legislation, cm 259 (1987).
[48] Montgomery Jonathan "Rights Restraints and Progmatism: The Human Fertlisation and Embryology Act 1990" The Modern Law Review, 54:4 July 1991, p.524.

It contains provisions for the setting up of the Human Fertilization and Embryology Authority, which regulates assisted reproduction in the UK. Amongst other provisions, in section 37 it amends the Abortion Act 1967, which specifies the conditions where abortion is legal. Women who consider abortion are referred to two doctors who then advise her whether abortion is suitable based on the decision of which of four conditions, apply, only when the doctors reach a unanimous decision is the woman allowed to terminate pregnancy.

Pregnancy can be terminated under one of the following circumstances, if the pregnancy:

1. puts the life of the mother at risk;
2. poses a risk to the mental and physical health of the

   Pregnant woman;
3. poses a risk of mental and physical health of the existing children;
4. shows there is evidence of extreme fetal abnormality i.e. the child would be seriously physically or mentally handicapped after birth and during life.

The Act also lowered the abortion limit from 28 weeks to 24 weeks.[49]

e. Statutory Protections to Unborn

The child in the womb was given legal protection under the common law. But it does not mean that the child was treated as a legal person. The protection to unborn child was again restricted in the sense that this protection is available only when the mother was quick with the child. The questions were asked more than once. When does a life come into being? Does the abortion of a foetus amount to taking the life of human being? When the protection does begin and what is the degree of protection? Protection of the unborn child

[49] http:\\en.wikipedia.org/wiki/human-fertilisation-and-embryology-act-1990.

created a lot of confusion in the common law courts. Common law had occasion to address the law's approach to unborn human life, and to resolve how they should treat claims or threats made to pre-embryos to embryonic and fetal life.

Although the unborn child is not a legal person[50] and has very limited protection, though they are capable of holding contingent rights realizable upon their birth in particular under equity and succession.[51] However there are a number of English statutes that create a number of criminal offences in order to protect the rights of unborn.

i. The Offences Against the Person Act 1861

Until the promulgation of the Abortion Act, 1967, the principal statute governing abortion in the United Kingdom was the Offences Against the Person Act of 1861 which prescribed that "unlawfully" induced abortion was a felony perishable by life imprisonment. The Act of 1861 removed any distinction as to the fetal age. The important provisions of the Offences Against the Person Act 1861, which protect the unborn child from any destruction are:

Section 58 which provides that every woman being with child who with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing or unlawfully use any instrument or other means and whosoever, with intent to procure the miscarriage of any woman whether she be or not be with child shall unlawfully administer to her any poison or other noxious thing or unlawfully use any instrument or other means shall be guilty of a felony and also another section 59 provides that whosoever shall unlawfully supply or procure any poison or other noxious thing or any instrument or thing whatsoever knowing that the same is induced to be unlawfully used or employed with intent to procure the miscarriage of any

[50] Paton Vs B PAST (1979) QB 276.
[51] http://www.fmc.gov.au/pub/docs/trafficking2008.pdf

woman whether she be or be not with child shall be guilty of a misdemeanor. The offences Against the Person Act, 1861 under section 58 and 59 made procuring or attempting to procure abortion a felony (offence) repeating the Act of 1803. Section 58 prohibits any attempt to procure miscarriage from any time after the conception of the child until its birth. It says further that Section 59 punishes supply or procuring of noxious drugs or instruments knowing it unlawfully used for causing abortion with imprisonment which may extend upto five years.

The Offences Against the Person Act 1861, which makes the Commission of the crime of abortion a serious criminal offence. The unborn child is only safe if the law criminalizing abortion is safe. Vogue "right to life" clauses are meaningless without this. The combined section 58 and 59 of the act 1861 which is the real and substantial protection given to the unborn child in Ireland.[52]

A woman can be convicted for a conspiracy to procure her own miscarriage or aiding and abetting the commission of the offence by another. In law and legal language, miscarriage, abortion and premature labor are now accepted as synonymous terms indicating any termination of pregnancy at any stage before confinement. For legal purposes, in the words of Williams "Abortion" means foeticide, the intentional destruction of the foetus in the womb, or any untimely delivery brought about with the intent to cause the death of the foetus.[53]

Will a threat against the baby in the womb be an offence? In an English criminal case of *R Vs Tait*[54] the circumstances of the case were so unusual that it is easy to sympathize with the incentive of the trail jury to convict the

[52] Lisban treaty Supranationalizes, the Criminal Law www.http://catholiclawyerblog.wordpress.com/200d/10/01/lisban-treaty-supernationalizes-criminallaw

[53] Dr. Awasthi "Law Relating to Protection of Human Rights" Vol. II, Millennium ed.2000,Vol. II, Orient pub.Comp.New Delhi and Allahabad P. 1068-69.

[54] (1989)3 W.L.R. 891.

Defendant, after the judge rules as a matter of law, that the relevant charge in the indictment disclosed a convictable offence on the facts of the case. The facts were that the Defendant with others broke into a house, intending to frighten the owner. He was not there, but his daughter was. The defendant committed burglary and before the intruders left they warned the daughter, who was five months pregnant that if she told the police, the intruder would come back for her and kill her baby. The defendant was charged, inter alia, with committing an offence against section 16 of the Offences Against the Person Act, 1861, as amended which provides that, "A person who makes to another a threat to kill that other or a third person shall be guilty of an offence"

The trail judge rejected a preliminary defence submission that the court be quashed on the ground that, since any threat to kill a "person". There was discussion at trail about whether the threat might have been to return four or so months later after the foetus had been born, but the judge directed the jury that:

"Parliament, in its wisdom, has not put any restriction on the defunction of a third person. It has left it to the good sense of juries to divide. Was there a threat to kill? Would you call the baby a third person, notwithstanding that it had not been born?"

The court of appeal quashed the consequent conviction on grounds of the trail judge having materially misdirected the jury, since under the 1861 Act, "the fetus in utero was not in the ordinary sense, 'another person', distinct from its mother."[55]

In another case *R Vs Stillivan*[56] 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 trail court was set aside by British Columbia Court of Appeal on the ground

[55] Ibid at 899.
[56] (1988) 43 CCC 3rd 65.

that a foetus that was not living on complete removal from its mother's bndy was not a 'person' but the court substituted a verdict of guilty of criminal negligence causing bodily harm to another person namely the pregnant women. The foetus in birth canal was fond to be part of the mother, so that injury to the foetus constitutes injury to her.[57] This view was rejected in later case, in *Bonbrest Vs Kotz*[58] and the unborn child was recognized as a human being. The unborn child need not reach the stage of viability to maintain an action for recovery of damages under the Law of Torts.[59] Thus the unborn child to whom live birth never comes is held to be a person who can be subject of an action for damages for his death.[60]

ii. The Infant Life (Preservation) Act 1929

The legislature faced with non-availability of any decisive rule on the point nf the beginning of life, may decide a point when the foetus can be regarded as to be able to be born alive and supported outside the womb of the mother with artificial support of medical care. Such a legislative scheme is a shift from the philosophical exercise of deciding the point of the onset of life to a pragmatic enterprise of personhood of the unborn. Thus in U.K. The Infant Life (Preservation) Act 1929 was passed to protect the interest of the foetus and which created the offence of child destruction.

Infant Life (preservation) Act 1929 is an Act to amend the law with regard to the destruction of children at or before birth Section 1 of the Act of 1929 state that:

(1) Any person who, with intent to destroy the life of a child capable of being born alive, by any willful act causes a child to die before it has an existence independent of its mother, shall be guilty of felony, to wit of

[57] Dietrich Vs Northamption, 138 Mass 14, (1884).
[58] F. Supp. 138 D.D.C. 1946.
[59] Williams Vs Marison Rapid Transit Inc. 152 Ohio 114, 87 N.E. 2nd 334 (1947 Sylvia VS Gobeille, 220 A 2nd 222 (R.I.1960).
[60] AIR 1996 Journal Section 136 at p. 140.

child destructing and shall be liable on conviction thereof on indictment to penal servitude for life. Provided that no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother.

(2) For the purpose of this Act, evidence that a woman had at any material time been pregnant for a period of twenty-eight weeks or more shall be prima facie proof that she was at that time pregnant of a child capable of being born alive.

Further Section 2 of the said Act provides prosecution of offences as it stated that:

(1) Where upon the trail of any person for the murder or manslaughter of any child or for infanticide, or for an offence under section fifty-eight of the Offences Against the Person Act, 1861 (which related to administered drugs or using instruments to procure abortion) the jury are of opinion that the person charged is not guilty of murder, manslaughter or infanticide, or of an offence under the said section fifty-eight as the case may be but that he is shown by the evidence to be guilty of the felony of child destruction, the jury may find him guilty of that felony, and there under the person convicted shall be liable to be punished as if he had been convicted upon an indictment for child destruction.

(2) Where upon the trail of any person for the felony of child destruction the jury are of opinion that the person charged is not guilty of that felony, but that he is shown by the evidence to be guilty of an offence under the said section fifty eight of the Offences Against the Person Act, 1861, the jury may find him guilty of that offence, and there from the person convicted shall be liable to be punished as if he had been convicted upon an indictment under that section.[61]

[61] Infant Life (Preservation) Act 1929.

Prosecutions under the 1929 Act have been extremely case, indeed there have only been four since 1957. This may be due in part, to the doubtful meaning of the undefined phrase "capable of being born olive". It had been argued that the requirement is satisfied if the child is capable of being born with a beating heart, even though, it will die after minute.[62]

In the Infant life (preservation) Act, 1929, there is a legal presumption that on 28th week of the pregnancy when the unborn child is likely to be born alive, any attempt to interfere with pregnancy on or after the said period will be towards committing the offence of child destruction. The 28th week criterian of the law impliedly attributes personhood to the unborn and the law aims at protecting the unborn child. However, there is a view that 28th week is too much to have as medically it is acknowledgeable that a foetus is able to sustain a separate independent existence after 24 weeks of gestation. In *C Vs S and Another*[63] the Court of Appeal interpreting "a child capable of being born alive" meant a child capable of breathing and the capacity to breath is a necessary but not sufficient condition of viability. The effect of the ruling would appear to be that all abortions from the 24weeks (when an unborn develops the capacity to breath) are criminal under the Infant Life (Preservation) Act unless effected for the purpose only of preserving the life of the mother. The background of the case was that the father claimed that the foetus not 18 weeks (as stated by the mother) but 21 weeks. The Infant (Preservation) Act 1929 defined the child destruction as the killing of the womb of a foetus "capable of being born". He argued that the termination of the pregnancy at the stage sought to done would involve the commission of a criminal offence under section 1 of that Act, the provisions of which were expressly preserved by section 5 of the Abortion Act, 1967.

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[62] Fortin Jane E.S., "Legal Protection for the Unborn Child" the Modern Law Review, Vol.51, Jan.198, p.64.

[63] (1987) 2 WLR 1108 (CA)

The court had affidavit evidence from three doctors (none of whom had examined the mother) that after 18 weeks the cardiac muscle of the foetus would be contracting and that there would be contracting and that there would be signs of primitive movement. It was argued that these were real and discernible signs of life. But the fetus would not, and would never be capable of breathing either naturally or with the aid of a ventilator. The doctors disagreed whether it was, therefore, "capable of being born alive" within the meaning of the section 1 of the 1929 Act.

In the application for an injunction to the High Court, Mrs. Justice Heilbron rules that a fetus in English law could not have a right of its own, at least until born and having a separate existence from the mother. She held that the Abortion Act 1967 had not given the father the right to be consulted in respect of a termination of pregnancy. Though the applicant had not argued to the contrary, he submitted that this case was distinguishable as he relied upon the affidavit of an eminent obstericition, Mr. Norris, who stated that "an unborn child of 18 weeks gestation, were it to be delivered by hysterectomy, would be born alive". The case thus involved the interpretation of the phrase "capable of being born alive" in the 1929 Act.

The phrase was ambiguous as shown by deferring points of view disclosed in the affidavits. In *R Vs Handley*[64] Mr. Justice Brett had directed the jury that a child was considered to have been "born alive" when it existed as a live child, that is breathing and living by reason of its breathing through its own lungs alone without deriving any of its living or power of living by or through any connection with its mother. The direction was similar to the definition given by professor Newton who, in an affidavit for the mother, stated that a foetus of 18 weeks was unable t breathe and could not be placed an a ventilator.

[64] (1874) Cr. Law Cases 79.

Mrs. Justice Heilbron found the statement of Mr. Norris that an 18 weeks old foetus was inevitably capable of being born alive, unrealistic and unacceptable. Turning to the alleged criminality of the alleged offence which was a penal one and attracted a penalty of life sentence, she was satisfied that an potential crime had not been proved. The application was, therefore, dismissed.

The father immediately moved the court of Appeal, which also agreed with the decision of the High Court. The House of Lords also refused to grant leave to appeal. The mother was, therefore, free to have her abortion. The court also followed the law of Paton[65] that a father had no standing to intervene in abortion decisions.

In *D.Vs Brkshire Country Council*[66] shows the right of a wrongful child and the need to control pregnant woman. In this case, the mother has been taking narcotic drugs during the period of pregnancy as well as after the birth of the child. The child was seriously affected by consumption of drugs by mother and started to show drug withdrawal symptoms. The mother was aware that her drug tasking pregnancy could lead to harm to the child. The local authority successfully approached the juvenile court for a care order committing the child to the care and control of the local authority under an Act.[67] The issue before the court was whether a juvenile court could take into account of the conduct of the mother before the child. The House of Lords considering the gravity of the problem held that it would be possible. The decision suggest indirectly that a child's existence does not commence on birth and also that the ante-natal development may not be ignored.

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[65] Paton Vs British Pregnancy Advisory Services Trustees (1979) B.276.
[66] (1987) 1 All ER 20.
[67] Sec. 1 (2) of the Children and Young persons Act 1969 authorize the making of a care order in respect of a child or young person, if the court "is of the opinion that any one of the following conditions is satisfied with respect to him, that is to say: his proper development is being avoidably prevented or neglected or his health being avoidably impaired or neglected or he is being ill treated.

The House of Lords of England admitting the long established principle that at the common law, the unborn child has no legal status and, therefore, not an independent legal personality necessary to serve as a basis for criminal liability. However proposed to state that a child's development is a continuing process that commences at conception, not at birth, which is suggestive of the hope that unborn child should have a full legal status with legal rights similar to those enjoyed by the newly born in civil law.[68]

Children who are capable of a live birth are protected under the Infant life (preservation) Act 1929 which makes it a serious criminal offence to kill an unborn child who is capable of being born alive. The practice is often either ignored or overlooked but this vitally important Statute should not be forgotten. The offence referred to must be distinguished from the offense of abortion. There are circumstances in which abortion is permitted by law but this is not the same as saying that abortion is lawful. It is necessary to return to 1st principles relating to the law's protection of human life and its provision for the criminal punishment of those who offended against those principles. Subject to certain exceptions, it is murder by deliberate act to cause or accelerate the death of a person who is "in being". From a legal perspective, this is distinguished as the deliberate ending of the life of someone before their birth. That is not murder is not because of the fact that the unborn are not "human". Rather it is because they are not yet "in being". In the words of the Infant Life (Preservation) Act "no person shall be found guilty of an offence under this section unless it is proved that the act which caused the child was not done in good faith for the purpose only of preserving the life of the mother". At times it is incorrectly bandied about the child must be at least 28 weeks old before he/she is to be regarded as capable of being born alive. This misconception starts from a misreading of section 1, paragraph 2, of the 1929 Act.[69]

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[68] See Jane E.S. Fortin, "Legal Protection for the unborn Child", Modern Law Review, 1988,p.54.
[69] Finch J. "Law: Protection of the Unborn Child" @ http://www.ncbi-nlm-nih.gov/dubmed/6557914.

In *Rance Vs Downs HA,*[70] the issue was whether the child was a child 'capable of being born alive' in terms of Section 1 of the 1929 Act had the abortion taken place between the 27th and 28th week of his mothers pregnancy. In this case R, the parents of a child born with spinal bifida, claimed damages for negligence in the carrying out a scan. This scan was carried out when the mother was twenty five and a half weeks pregnant but she was not notified of the suspicion of spina bifida indicated. She claimed she would have asked for the pregnancy to be terminated if she had known. MDHA claimed there was no negligence and in any event an abortion would have been illegal. It was held that the phrase in Section 1 of the Infant life (preservation) Act, 1929, denoted that the child was capable of existing as a live child after birth with no connection to his mother. On the evidence it was stated that the child would have been able to breathe unaided for two or three hours after birth. Thus, the child was capable of being born alive and the abortion, had it taken place would not have been unlawful in terms of the 1967 Act.

In a recent case in *R Vs MC Donald*[71] man received 22 years imprisonment for attempted murder rape and child destruction after stabbing his ex partner with the intention of killing her and her unborn baby.

Reform of Infant Life (Preservation) Act 1929

The greatly improved chances of survival of young fetuses led the Bishop of Birmingham, the Right Revered Hugh Mentefiore, to make an attempt to reduce the 28th week's presumption of viability contained in section 1(2) of the 1929 Act, to 24 weeks presumption. In early 1987, he introduced into the House of Lords, a private member's Bill, entitled the Infant Life (Preservation) Bill, which amended the 1929, Act quite simply, by substituting 24 weeks for 28 weeks in section 1(2) of the 1929 Act.[72] The Bill received 9

[70] 1998 1 All E.R. 801.
[71] (2002) N 54.
[72] Consequently, proof that the pregnancy had lasted for at least 24 weeks would constitute primafacie proof that the foetus was capable of being born alive.

second reading in February 1987 and was considered at length by a Select Committee of the House of Lords. Although that committee was unable to conclude its deliberations, it compiled an extensive special report containing much written and oral evidence on the subject matter of the Bill for use in any future consideration of reform.

According to Select Committee's Report that grave moral problems are caused by the legal significance attached to the "*viability foetor*" by the 1929 Act, particularly in the context of the increasingly accurate detection of severe handicaps in fetuses whilst still in utero. Obviously it was not the original intention of the 1929 Act either to impose a time limit on abortions, or to establish any moral principle relating to the sanctity of life, but merely to prevent a viable foetus being destroyed whilst in the process of being born. Nevertheless, the uneasy relationship between 1929 Act and the 1967 Act results in the earlier Act appearing to have this effect. Thus the 1929 Act appears to embody the view taken by many, including the Bishop of Birmingham, that viability has a moral significance of its own and that if a foetus has developed to such a degree that it is capable of being born alive, then despite any deformities it may have, it automatically deserves greater legal protection them the less developed foetus which can be aborted. This approach allows no compromise with the allegedly "more humanitarian view" that the mother should not be forced to give birth to a malformed foetus whatever its stage of development.

Planning, a great deal of confusion could be awarded either by the complete abolition of the 1929 Act or by a drastic reduction of its scope, so that it deals, only with the lactuna it was originally designed to meet that is the destruction of a child in the process of being born. Unresolved issues, such as whether there is a need for an upper limit on abortion, or far a restructured lest for dealing with severely disabled fetuses, should be reviewed as part of a more comprehensive review of the abortion Act itself.

A duty of care is probably owned to unborn child under common law, that is independent of any statute. But there some statutes which one especially enacted to protect the rights/interest of the unborn child. These statutes protech unborn child from any willful destruction. But these statutes are not so stringent to overweight in the interest of mothers. That's why some defences are available to the women to terminate their pregnancy subject to the provisions of law relating to abortion.

In *R Vs Bourne,*[73]Mr. Bourne was an eminent obstetric surgeon. He performed an abortion on a fourteen years old girl who had been made pregnant as the result of a violent rape. He was charged under the Offences Against the Person Act, 1861, for unlawfully procuring the abortion. Mr. Bourne argued in his defence that he had performed the operation because of the serious risk to the health of the mother if the pregnancy were to continue. In this instructions to the jury the learned judge concluded that the word "unlawful" used in the Act imported the same meaning expressed by the provision of the Act of 1929 (The Infant life (Preservation) Act 1929) though there was no mention of preserving the life of the mother in the Act 1861. He interpreted the phrase "preserving the life of mother" broadly, that is "in a reasonable sense" to include a serious and permanent threat to the health of the mother. The mischief of the word was to highlight that there were lawful reasons for procuring a miscarriage which instructed the jury to acquit Dr. Bourne.

After the decision in the Bourne case it was possible to say with certainly to some extent that a clear threat to the health of the mother was justiable ground for induced abortion. Though it was still uncertain as to how for and in what ways this exception could be interpreted.[74]

The decision of Bourn case led to the liberalization of Abortion Law in *U.K. The Abortion Act*, 1967 was passed which substantially liberalized the law

[73] (1939) KB 687.
[74] Daniel Callahan, "Abortion, Law Choice and Morality", 1972, London, p.143.

of abortion. The Act of 1967 (as amended by Sec. 37 Human Fertilisation and Embryology Act, 1990) has legalized the termination of pregnancy by a registered medical practitioner under section 1 which states: that a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion formed in good faith.

- That the pregnancy has not exceeded its twenty fourth weeks[75] and that the continuance of the pregnancy would involve risk greater that if the pregnancy were terminated injury to the physical or mental health of the pregnant woman of any existing children of her family or
- That the termination of the pregnancy is necessary to prevent grave permanent injury to the physical or mental health of the pregnant women.[76]
- That the continuance of the pregnancy would involve risk to the life of the pregnant woman greater than if the pregnancy were terminated.
- That there is substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

The actual or reasonable foreseeable environment of the pregnant woman may be taken into account in determining whether the pregnancy should be terminated.

Section 5(i) of the Abortion Act 1967 *states that* "no offence under the Infant Life (Preservation) Act, 1929 shall be committed by a registered medical practitioner who terminates a pregnancy in accordance with the provisions of this Act. Whereas Section 4 of the Abortion Act, 1967 allows a contentions objection to participating in such treatment other than to save the life of the mother. Where the abortion is for sex selection and such a selective selection

[75] Section 1(2) Infant Life (Preservation) Act 1929.
[76] Codification of Bourne decision.

need to satisfy section 1 of the Abortion Act, 1967. Thus termination of pregnancy of a woman is not permitted/ allows unless there is substantial risk to the life of the pregnant woman.

Miscellaneous Criminal Protection:

None of the legislation changes the fundamental principle of both criminal and civil law, that the unborn child has no legal personality whatsoever. Consequently if a man treated a pregnant women so violently that her unborn child was killed whilst still in utero, this would not constitute homicide, nor indeed any offence at all in relation to the foetus, unless the foetus was deemed to be viable at the time of the assault and an intent to destroy the foetus could be proved, in which case his action would amount to an offence under the 1929 Act. In any event, the perpetrator of violence towards a pregnant mother will not escape all punishment, since his behavior towards her would be a severe offence, irrespective of the legality or otherwise of his conduct towards the unborn child.

In most circumstances the unborn child is much more likely to be harmed, not by a third party but by his own mother. The expansion of biological and medical knowledge about the needs of the unborn child show that is at its most vulnerable at the earliest stages of its gestational development and that fetal abuse or neglect at thins time, may do serious and permanent structural damage. It is now well known for example that the excessive consumption of drugs or alcohol and the excessive smoking o cigarettes by the pregnant mother is hazardous to be health of her unborn child. There is much other potential harm. Safeguards are now commonly taken against unsuitable or inadequate maternal diet and work place hazards such as exposure to radiation or harmful chemicals of various kinds. If a pregnant mother deliberately exposes herself to the effects of any of these sources of danger, the criminal law in its present form can no more punish her for the damage done to the child them it could punish the violent third party mentioned above.

An unborn child has no legal personality and can not for its own protection is regarded as a different person from its mother.[77] A foetus has no recognizable right at law unless it is born alive. An unborn child has no legal personality, once born alive it can apply retrospective rights for criminal or civil wrong.

The recent decision of the House of Lords in *D. Vs Berkshire C.C.*[78] could have for reaching effects in particular, might enable the institution of criminal proceedings against a mother who acted in such a way. Since it was clear that the child birth with withdrawal symptoms from drugs was a direct result of her drug addicted mother's persistent and excessive use of drugs throughout her pregnancy, the house of Lords rules that a care order made soon after the child birth, committing her into the care of the local authority under section 1(2) (a) of the Children and Young Persons Act, 1969,[79] was justified on the ground that her proper development was being avoidably prevented or her health was avoidably impaired.[80] Although the decision has wide implications, it cannot be claimed that it has affected in any way the general principle of common law, that the unborn child has no legal status. Thus, whilst the Berkshire decision established that a child's ante-natal treatment and development is relevant for the purposes of determining the existence of a containing course of events, it has not invested the unborn child with the independent legal personality necessary to serve as a basis for criminal liability.

The Statutory creation of a maternal offence such as "behaving with reckless disregard for the unborn child's development" would be extremely problematic. It is in the earliest stages of pregnancy that fetal abuse and neglect

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[77] Whitfield Adrian, "Common Law Duties To unborn Children" Medical Law Review 1, January, 1993, pp. 28-52@http://www.medlaw.oxfordjournals.org.cgi/pdf

[78] (1987) 1 All E.R. 20.

[79] Sec. 1(2) of the children and young persons Act, 1969, authorizes the making of a care order in respect of a child or young person if the Court is of the opinion that any of the following conditions is satisfied with respect to him, that is say: (a) his proper development is being avoidably prevented or neglected or health is being avoidably impaired or neglected or he is being ill treated.

[80] (1987) 1 All E.R.20.

are likely to cause the most serious damage. Next only would it be difficult to prove the mother's intention to harm the foetus at such stage of her pregnancy, but is submitted that the enforcement of the law, for instance by the imposition of a supervision order on the mother, would involve a gross invasion of her privacy. Moreover, it would be difficult to provide workable sanctions for its breath.

In an old English case *R Vs Knight*[81], it was held that if a person causes prenatal injury which results into premature birth, rendering the child's survival difficult and it actually dies soon after birth the person is guilty of murder or manslaughter. The English Court in *Re Attorney Generals*[82] ruled that some one who deliberately stabs a pregnant woman in the stomach, causing premature birth of a baby girl, who dies 120 days after birth, could be tried for murder. However, on further reference to the House of Lords, the verdict was modified from murder to manslaughter as mensrea for murder was not there. The requisite intent to be proved in the case of murder is an intention to kill or cause rally serious bodily injury to the mother, the foetus before birth being viewed as an integral part of the mother. In *R Vs Enoch*[83], the court recognized that the unborn child has a separate personality if the child has a separate circulation of blood. However, there are contrary decisions to the point that foetus is not person.

It is submitted that statutory coercion in the form of criminal sanctions is an unsuitable way to persuade pregnant women to adopt their life style to promote the development of their unborn children. Some kind of cash benefit payable on successful completion of a scheme of ante-natal care stands a greater chance of success.

[81] (1860) 2 F F 46.
[82] Re (No.3 of 1994) and (1996) 2 All E.R. 10at 22.
[83] (1988) 2 All E.R.193.

However, regarding protection of the unborn, serious question arise where the pregnant woman does not take enough care and seek necessary medical attention for the well being of the unborn. Where a child is born defective, physically or mentally, it is a serious burden on the society. The community's interest is thus evident which requires an intervention by the state. In *Re F (In Utero) (Wardship)*,[84] the mother's ante-natal behavior in this case involved less obvious danger to the foetus than. In the *Berkshire case* nevertheless the local authority were clearly determined to do all but they could to protect it.[85] In this case a pregnant woman who was mentally ill led a nomadic life without caring for her potential child. In order to protect the unborn, the local authority also applied for leave to issue a summons making the foetus a ward of the court. It was felt that this would allow the mother to be located and 'ensure her residence in a suitable place and to exercise care and control when the baby was born'. This was judged to be impossible by the Family Division because the rights of the mother could not be infringed for the benefit of an unborn child who has no right to action in English Civil Law. As soon as a child is born. it is entitled to protection under the Children Act, 1989.[86] In an another case one mother refused a casarean section for preeclampsia against medical advice. She was detained under Section 2 of the *Mental Health Act,* 1983 and the caesarean section was performed, but a later judicial review found her detention to have been unlawful. It was deemed that the mental Health Act could not be used to detain the patient merely because her thinking process is unusual.[87]

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[84] St. Georges Health Care NHS Trust Vs S; R VS Collins & Others ex partes (1998) FLR 728@http://jrsm.rsmjournals.com/cgi/reprint/96/2/92.pdf

[85] Fortin, Jane E.S. "Can you ward A fetus?", the Modern Law Review, Vol.51, Nov.1988, p.768.

[86] (1988) FLR 307.

[87] EAJ Beveridge, H Ananth & H.J. Scrulock "What protection for the unborn child of a psychologically vulnerable adult?", Journal of the Royal Society of Medicine, Vol.96, Feb. 2003 & Also @ http://jrsm.journals.com/cgi/reprint/96/2/92.pdf

The Civil Status of the Unborn Child and the Actionability of Death or Disabilities

The well established rule of civil law of England is that an unborn child shall be deemed to be born whenever its interests require it. The unborn is places in a better position under the law of property. For the purposes of adjudicating claim in wills, and intestate property, one question before the common law courts was whether a 'child' included a child in the womb. In *Elliot Vs Jaicey*[88] the House of Lords finally settled the issue. According to them, in the ordinary meaning, child "born" before, or "living" at or "surviving" a particular point of time or even during pregnancy, would not include a child in the womb. However, the House of Lords wanted to depart from such an ordinary meaning which applied a fictional construction that a child included a child in the womb at the relevant date and subsequently born alive, only the child would have a benefit to which it would have been entitled if it had actually been born on the relevant date. The only justification for applying such a functional construction is that where a person makes a gift to a class of children or issue described as "born before or "living" at or "surviving" a particular point of time or event, a child in the womb must necessarily be within the reason and motive of the gift. The benefit to unborn child is available only where the child is born alive.

Thus a gift to a class of children living on a particular date is held to benefit a child in the womb (*en Ventre sa mere*) at that date but later born alive within that class. In *Yunghanns Vs Candoora No.19 Pty* Ltd (No.1).[89] In this case the primary beneficiaries of a trust were Y's children that were either alive at the date. In August 1974 the Law Commission Report on Injuries to unborn children was presented to pertinent. While expressing the view that it is highly probable that the common law would in appropriate circumstances, provided remedy for a plaintiff suffering from a pre-natal injury caused by another's

[88] (1935) AC 209.
[89] (1999-2000) 2 IT E.L.R. 589.

fault. It recommended that the question should be controlled by legislation. So came about the *Congenital Disabilities (civil liability) Act* 1976. However, following the recommendations of the Law Commission the Act by section 4(5) provides that the Act applies in respect of births after (hut not before) its passing and in the respect of any such birth it replaces any law in force before its passing whereby a person could be liable to a child in respect of disabilities with which it might be born.

But the "law in force before its passing" was the common law, and recently in the cases of *Burton Vs Islmgton H.A and De Martell Vs Merton and Sutton H.A.* the Court of Appeal Confirmed that it did indeed provide remedy envisaged by the law commission This conclusion is not without practical significance because there exists a number of potential plaintiffs, born before the Act came into force, who allege that they suffered injury sustained prenatally as a result of another's negligence against whom the limitation period may not have run. Indeed, it never does so. This is because, under the Limitation Act, 1980 time does not run against a person "under a disability."[90]

In England there are so many cases where the rights of an unborn person had been discussed and later on the same follows. In the *Davies Vs British Picture Corporation Ltd*[91] the defendant's negligence had caused a ladder to fall on Mrs. Davies who was then pregnant. This apparently resulted in the birth of a child the next day and its death a day later. The mother sued as administered of the child but the defendant settled the action by paying 100 ponds in the court. With obvious relief the judge said that he did not share Counsel's regret that the settlement obviated the need to decide the point of law which might otherwise have arisen. In all the nervous shock and illness caused without physical impact was originally disallowed but the case which so held[92]

[90] Adrium Whitfield "Common Law Duties to unborn children" Medical Law Journal Review, January 1993, p.28-52 or at http://www.med.law.oxfordjournals.org/cgi/pdf/octract/1/1/28.
[91] (1939) SJ 185.
[92] Victoria Rly Commissioners Vs Coultas (1888)13 AC.322, S Vs Distillers Co. (Biochemicals) Ltd (1969)3 All E.R. 1412.

is no longer a law clarified in *Thalidomide* Case[93] where the children having been injured in the womb by the drug thalidomide used by the mother and children were born deformed.

In *Watt Vs Rama*[94] the full Bench of the Supreme Court of Victoria had to decide certain preliminary points of law which arose out of a car crash in which a pregnant lady driver had been injured by the faulty driving of the defendant. The lady driver had subsequently given birth to the plaintiff who suffered brain damage, epilepsy and paralysis. The questions which fell to be determined were whether (i) the defendant owed a duty of care not to cause injury to the unborn plaintiff (2) he owed a duty of care to the infant plaintiff not to injure her mother and (3) whether the damage complained of was in law to remote. For the purpose of the determination of those questions it was assumed in the plaintiff's favor that the injuries sustained by her were caused by the defendant's faulty driving. All three judges emphasized that there was nothing unusual in there being a time lag between the defendants careless driving and the consequential damage suffered by the plaintiff of the trust's creation or born in the future. It was held that unborn child was a person for the purpose of proceedings where a right-that was for its benefit was in issue and in circumstances where it could institute proceedings regarding that right if it survived birth. The law of succession also for many purposes treated a child in the womb equal to a person in existence.

iii. Congenital Disability (Civil Liability) Act 1976

Regarding the unborn child's rights in the realm of torts, 'The Congenital Disability (Civil Liability) Act, 1976' passed by British parliament which provides that an action may lie against a person or authority whose breach of duty to a parent results in a child being born disabled, abnormal, deformed and unhealthy.

[93] Santher Vs Distillers Co. (Biochemicals) Ltd (1970) 1 W L R 114 (1969) 3 All. E.R. 1412.
[94] (1972) Victorian Reports, 353.

The opening words of the Act 1976 is "An Act to make provision as to civil liability in the case of children born disabled in consequence of some person's fault; and to extend the Nuclear Installations Act 1965, so that children so born in consequence of a breach of duty under that Act may claim compensation.

Section 1 of the Civil Disability (Civil Liability) Act 1976 provide: (1) If a child is born disabled as the result of such an occurrence before its birth as is mentioned in subsection (2) below, and a person (other than the child's own mother) is under this section answerable to the child in respect of the occurrence, the child's disabilities are to be regarded as damage resulting from the wrongful act of that person and actionable accordingly at the suit of the child.

(2) An occurrence to which this section applied is one which-

(a) affected either parent of the child in his or her ability to have a normal, healthy child; or

(b) affected the mother during her pregnancy, or affected her or the child in the course of its birth, so that the child is born with disabilities which would not otherwise have been present.

(3) Subject to the following subsections, a person (here referred to as "the defendant") is answerable to the child if he was liable in tort to the parent or would, if sued in due time, have been so; and it is no answer that there could not have been such liability because the parent suffered no actionable injury, if there was a breach of legal duty which, accompanied by injury, would have given rise to the liability.

(4) In the case of an occurrence preceding the time of conception, the defendant is not answerable to the child if at that time either or both of the parents knew the risk of their child being born disabled (that is to say, the

particular risk created by the occurrence); but should it be the child's father who is the defendant, this subsection does not apply if he knew of the risk and the mother did not.

(5) The defendant is not answerable to the child, for anything he did or omitted to do when responsible in a professional capacity for treating or advising the parent, if he took reasonable care having due regard to then received professional opinion applicable to the particular class of case; but this does not mean that he is answerable only because he departed from received opinion.

(6) Liability to the child under this section may be treated as having been excluded or limited by contract made with the parent affected, to the same extent and subject to the same restrictions as liability in the parent's own case; and a contract term which could have been set up by the defendant in an action by the parent, so as to exclude or limit his liability to him or her, operates in the defendant's favor to the same, but no greater, extent in an action under this section by the child.

(7) If in the child's action under this section it is shown that the parent affected shared the responsibility for the child being born disabled, the damages are to be reduced to such extent as the court thinks just and equitable having regard to the extent of the parent's responsibility.

Further Section 1 of 1976, Act has been extended to cover infertility treatments which result into disability of unborn child. Thus, it provides that:

(1) In any case where-

(b) A child carried by a woman as the result of the placing in her of an embryo or of sperm and eggs or her artificial insemination is born disabled,

(c) The disability results from an act or omission in the course of the selection, or the keeping or use outside the body of the

embryo carried by her or of the gametes used to bring about the creation of the embryo, and

(d) A person is under this section answerable to the child in respect of the act or omission; the child's disabilities are to be regarded as damage resulting from the wrongful act of that person and actionable accordingly at the suit of the child.

(2) Subject to subsection (3)below and the applied provisions of section 1 of this Act, a person (here referred to as "the defendant") is answerable to the child if he was liable in tort to one or both of the parents (here referred to as "the parent or parents concerned") or would, if sued in due time, have been so; and it is no answer that there could not have been such liability because the parent or parents concerned suffered no actionable injury, if there was a breach of legal duty which, accompanied by injury, would have given rise to the liability.

(3) The defendant is not under this section answerable to the child if at the time the embryo, or the sperm and eggs, are placed in the woman or the time of her insemination (as the case may be) either or both of the parents knew the risk of their child being born disabled (that is to say, the particular risk created by the act or omission).

(4) Subsections (5) to (7) of section 1 of the Act apply for the purpose of this section as they apply for the purposes of that but as if references to the parent or the parent affected were references to the parent or parents concerned.

Liability of woman driving when pregnant (Section 2)

A woman driving a motor vehicle when she knows (or ought reasonably to know) herself to be pregnant is to be regarded as being under the same duty

to take care for the safety of her unborn child as the law imposes on her with respect to the safety of other people; and if in consequence of her breach of that duty her child is born with disabilities which would not otherwise have been present; those disabilities are to be regarded as damage resulting from her wrongful act and actionable accordingly at the suit of the child.

Disabled birth due to radiation (Section 3)

(2) Section 1 of this Act does not affect the operation of the M1Nuclear Installations Act 1965 as to liability for, and compensation in respect of, injury or damage caused by occurrences involving nuclear matter or the emission of ionizing radiations.

(3) For the avoidance of doubt anything which-

(a) Affects a man in his ability to have a normal, healthy child; or

(b) Affects a woman in that ability, or so affects her when she is pregnant that her child is born with disabilities which would not otherwise have been present, is an injury for the purposes of that Act.

(4) If a child is born disabled as the result of an injury to either of its parents caused in breach of a duty imposed by any of sections 7 to 11 of that Act (nuclear site licensees and others to secure that nuclear incidents do not cause injury to persons, etc.), the child's disabilities are to be regarded under the subsequent provisions of that Act (compensation and other matters) as injuries caused on the same occasion, and by the same breach of duty as was the injury to the parent.

(5) As respects compensation to the child, section 13(6) of that Act(contributory fault of person injured by radiation) is to be applied as if the reference there to fault were to the fault of the parent.

(6) Compensation is not payable in the child's case if the injury to the parent preceded the time of the child's conception and at that time either or both of the parents knew the risk of their child being born disabled (that is to say, the particular risk created by the injury).

Under the provisions of the UK's Congenital Disabilities (Civil Liability) Act 1976 a duty of care is owed to an unborn child via his/her mother, and although not conclusively settled, a duty of care is probably owed to an unborn child in common law, that is independent of the statute. Thus, it is clear that the law protects the child before birth in the form of an action for damages brought on his/her behalf in respect of disabilities caused during the mother's pregnancy by some one's negligence. In certain cases the law also allows the lives of unborn children to be terminated at some time before birth, or, more precisely, until such time as, the unborn child is capable of being born alive. The age at which a child can be born alive is a question of fact and "bonafide" medical evidence in each case.[95]

The policy behind the Act is that a child should have a right of action for prenatally inflicted injuries sustained by him/her as a result of such occurrence it was born disabled. The Act requires that the child should born alive disabled or with deformities. As the Act says the child must born with any deformity, disease or abnormality, including predisposition (whether or not-susceptible of immediate prognosis) to physical or mental defect in the future.[96] A wrongful life claim is a cause of action on behalf of such a defective child asserting that he would have been better off had he never been born. Wrongful claims arise on various instances such as:

a. action against parent alleging irresponsible conduct in having intercourse in circumstances where there is danger of transmitting a disease or a genetic deformity to the child;

[95] http://www.ncbi-nlm.nih.gov/pubmed/6557914 Law: Protection of the unborn child by Finch J.
[96] Section 4(1) The Congenital Disabilities (Civil Liability) Act 1976.

b. actions wherein are claimed damages for illegitimate or disadvantaged birth;

c. actions against manufacturers alleging negligence in the production of a contraceptive device;

d. actions against medical authorities and doctors for not advising the parents on the disability of an abortion in circumstances where without a termination of pregnancy a serious risk of deformity will be incurred.

e. actions against public authorities for allowing the parents to have intercourse thereby bringing a disadvantaged child into the world etc.[97]

Generally courts do not accept such an argument because were it not for the act of birth, the child would not have existed. There is no liability for a pre-connectional occurrence if the parents accepted the particular risk. There are also other exceptions and qualification in the Act of 1976. It further says that a deformed child can not claim damages either under the Act or under general law when the deformity resulted because of an infections disease suffered by the mother during pregnancy and the fault of the doctor was in not advising the mother of the desirability of the abortion in those circumstances, it did not follow that the doctor was under legal obligation to the foetus to terminate its life or that a foetus had a legal right to die, such action for 'wrongful life' would be contrary to the public policy as a violation of sanctity of human life.[98]

In *Mackay Vs Essex Area Health Authority*[99] it was conceded that the duty owned to an unborn child was a duty not to injure it. This was a case where the mother early in her pregnancy contracted German Measles. Though her blood samples taken by doctor were tested by the local health authority, the infection was not diagnosed. The child was born severely disabled. In an action for negligence by the mother and child against the doctor and the health

[97] See. P. A Lovell and R.H, Griffith Jones, "The Sins of the Fathers Tort Liability for Prenatal Injuries", 90 L.Q.R., 1974, 531 at 549.
[98] M.C. Kay Vs Essex Area Health Authority (1982) All ER 771 (CA).
[99] (1982) 2 All ER 771 (CA).

authority it was held by the court of Appeal that the child had not been injured by the doctor or the health authority but by the infection contracted by the mother without any fault on their part. The health authorities were not negligent as the disablement could not have been foreseen. Was not the Health Authority in a position to force the mishap? The question was whether the doctor was under legal obligation to the foetus to terminate its life to prevent existence in disabled state? It was held that such a right would be contrary to public policy and that common law did not recognize such a right. It would mean regarding the life of a handicapped child as not only less valuable than the life of a normal child but so much less valuable that it was not worth preserving. These are the consequences of the assumption that a child has the right to be born perfect or not at all.

The courts have faced with a number of claims by parents following unsuccessful sterilization operation and the birth of a child (it is immaterial that the child is normal or abnormal). At first, it was held that for reasons of public policy damages were not recoverable for the cost of the child's upbringing because such a claim would offend the moral ethics of society, which recognizes the preciousness of human life and because the child might suffer psychological damage if he learnt of the suit.[100] The mental and other deformities of the child can also be detected earlier. Once deformities are found, legal system permit the abortion of such foetus. Modern birth technologies have developed to a great extent.[101] In England, some years ago, damages were awarded in favor of a parent; against a doctor when, after an unsuccessful vasectomy on the male parent, the wife conceived and gave birth to a child.[102] But the court of Appeal in *Enech Vs Kingston and Chelsea and Westiminister Area Health Authority*[103] rejected this reasoning and held that

[100] Winfield and Jolweiz, 'Tort', 1998, PP B-831-832, Symons policy Factors in Actions for wrongful Birth (1987) 50 MLR 269

[101] Nair Indu S "Right of the Child: Challenges Before law in the New Era of Technology", Cochin University Law Review, 2003, p. 111

[102] Thaka Vs Macurice (1984).

[103] (1984) 3 All ER 1044 (CA).

mother can claim in full the financial damage sustained by her as a result of the negligent failure to perform the sterilization operation properly and she is entitled to damages for loss of earrings, maintenance of the child, pain and suffering and loss of amenities including extra care, the child would require in case of being born deformed. But the deformed child in these circumstances would not be entitled to sue for damages as it could not be said that there was any injury caused to the fetus or to the parents by the negligence of the doctor which caused the deformity.[104]

Nevertheless, to presents, it must see anomalous that so far as the low is concerned, the dead foetus never existed and that therefore, it is cheaper to kill rather than merely to injure the unborn child. It is submitted that in the case of the foetus which survives beyond 10 weeks, the law might offer serve form of acknowledgement that before its death, it had developed beyond a mere cluster of cells to an entity with some measure of brain development. Thus, it might be appropriate for the existing parental claim for bereavement to be extended to allow parents to claim relatively normal sum by way of damages, in case where the death of a foetus in utero was caused by a third person's tortuous act. In the recent case of *Bagley Vs North Herts Health Authority*[105], the health authority responsible for the plaintiff's ante-natal care, admitted liability for negligently failing to carry out a blood analysis on the plaintiff during her pregnancy though it was known that she suffered from blood incompatibility, and for failing to ensure an early delivery, with the result that the plaintiff gave birth to a still born child. Simon Brown J on assessing damage noted that a parent's claim for bereavement was not possible here since such a claim could only benefit parents in the case of the tortuous killing of a live child. Because the hospital had caused the child to be born dead, the plaintiff was not entitled to damages for grief, sorrow and loss of society under such a head. Nevertheless, in his view, the plaintiff was plainly entitled under two other recoverable heads

[104] Lal .Ratan & Lal,Dhuraj, "Law of Tort ",1999, p.59.
[105] (1986)136 New L.J. 1014.

of damage to an award which should include not less than the taken sum of $3,500 to which she would have been entitled for bereavement under the Fatal Accidents Act 1976, had her child been born alive and then perhaps immediately been allowed to die.

In Bagley, Simon Brown J made efforts to avoid the difficulties implicit in the civil law's refusal to acknowledge the brief existence of the foetus which died in utero, and for the bereavement suffered by its parents on its premature death. An action for damages brought by the parent and quantifiable on the basis of compensation for the parent for that bereavement would provide an acceptable solution to this type of problem.[106]

The general principle is that criminal offences may be committed only in relation to living person so that it is necessary to establish that, at the time of commission of the actus reus, the child had a separate existence from the mother. There are a few exceptions to this rule. Abortion is a criminal offence except in circumstances provided for in the abortion Act 1967. The Infant Life Preservation Act, 1929 created the offence of child destruction which is committed "by any person who, with intent to destroy the life of a child capable of being born alive, by any willful act causes a child to die before it has an existence independent of its mother. Both of these offences are concerned with the death of an embryo or foetus and do not cover the situation of injuries caused in utero which do not result in death. A limited degree of protection in this respect is however afforded by the Congenital Disabilities (Civil liability) Act 1976 which establishes tortuous claim where the embryo or foetus has been injured in utero by the negligence of third party.[107]

Now in cases of HIV infected mother if a child is born their can a suit for damages is filed against the parents? For such cases Congenital Disabilities

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[106] Fortin, Jone E.S., "Legal Protection for the Unborn Child" Modern Law Review Vol.51, Jan 1988,p.65

[107] Bainham Andrew "Protecting the Unborn- New Rights in Gestation?", The Modern Law Review, Vol.50. May 1987, p.366.

(Civil Liability) Act, 1976 would require suitable amendments. Of course, none of the parents may desire a child born infected with HIV. In case they come to know about the infection prior to the birth of the child may opt for abortion. But it they came to know of the infection after birth then would be suit for damage by the child is the only remedy? Damages may provide for medicines, health care area but what is required is real care.[108] Thus, the policy behind the Act is that a child should have a right of action for prenatal inflicted injuries are as a result it was born disabled. Thus, we find though the fetus is not a legal entity as such, but once the child is born the right to claim damages accrue to the child for the injuries experienced by him in the state of fetus.

B. American position

a. Position of Unborn Child before Roe Case

The right to life is inalienable because it not of human but of divine origin.[109] Because man does not create himself, he cannot deprive himself of the primary goods that are inherent to human existence: Life freedom and happiness. Just as no government can deny its citizens these inalienable rights, neither can a man deprive himself of these rights. The "inalienable" right to life thus precludes abortion as well as suicide.[110]

Amongst the western countries, America presents a heterogeneous picture of the abortion laws and practices. Abortion being not a federal subject under the United States constitution, the states have enacted their own laws until the mid-nineteenth century the law of abortion in most parts of the United States was pre-existing English Common Law.[111]Connecticut, the first state to enact abortion legislation, adapted in 1821 that part of Lord Ellenborough's Act

[108] Sheeraz Latif A Khan "Right of Unborn child" Law Review 1999-2005, 2000-2001, Vol.21 & 22, P. 132-33.
[109] John Dickinson, Founding Father and Author of the Articles of confederation.
[110] English philosopher John Lock, II Treatise, IV.
[111] Roe vs Wade, 41 L.W. 4213, 4221.

that related to a woman "*quick with child.*"[112] The death penalty was not imposed. Abortion before quickening was made a crime and continued to be so up to 1860.[113] The state of New York passed a law[114] in 1828 which served as a model for early antiabortion laws in two respects, first, while barring destruction of an unquickened fetus as well as a quick fetus, it made the former only a misdemeanor, but latter second degree manslaughter. Secondly, it incorporated a concept of therapeutic abortion by providing that an abortion was excused if it "shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose". By 1840, when Texas had received the common law[115]only eight American States had statute dealing with post quickening abortions.[116]The others, to the extent that they purported to cover earlier abortions remained unenforceable, for pregnancy itself could not yet be established conclusively prior to quickening.[117]

After the civil war the states started replacing the common law with legislation in the field of abortion. Most of these initial Statutes dealt severely with abortion after quickening but were lenient with it before quickening. Most of these statutes also made attempt punishable while many statutes included the exception for an abortion thought by one or more doctors to be necessary to save the mother's life. This exception soon disappeared and was replaced by other procedural requirements.

During the middle and later part of nineteenth century the "*quickening*" distinction disappeared from the laws of most of the stages but the degree of the offences and the penalties were increased. By 1950 a large majority of the states banned abortions except when necessary to save the life of the

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[112] Oregon-Ore. Gen. Laws, Crime. Code C.43, 509, p.528 (1845-1864).
[113] Pennsylvania Panel Laws No. 374, 87, 88, 89 (1860).
[114] Texas-Tex. Gen. Stat. Dig., CVII, Arts. 531-536, P24 (Oldham & White 1859).
[115] Vermont Vt. Acts. No. 33, 1 (1846). By 1868 this statute had been amended. Vt Acts No. 57, 1, 3 (1867).
[116] Virginia-Va. Acts. Tit.II, C.3, 9, p.96 (1848).
[117] Kadish Snford, Encyclopedia of Crime and Justice, Vol.1,ed.1983, p.2.

mother.[118]But Alabama and the District of Columbia permitted abortions to preserve health of the pregnant mother.[119] Some other states permitted those abortions which were not "unlawfully" performed or were not "without lawful justification", and left the interpretation of these phrases to the law courts.[120] Neither the statutes nor the case law have provided exact definitions of such expressions as "preserve the life" and "health."

An important role in the reform of the abortion laws was played by the Model Penal Code provisions on abortion, put forward by the American Law Institute in 1959 and later in somewhat modified form in 1962. These provisions would permit abortion to the performed by a physician where:

1. there is a danger to the physical or mental health of the woman;

2. the pregnancy was caused by rape or incest;

3. Where there is a probability that the child to be will be mentally retarded or physically deformed.[121] Many states passed the legislation on the lines proposed by the ALI.[122]

The act of procuring abortion at every period of gestation except for preserving the life of either mother or child was condemned as an offence. In 19th century in United States of America many State Legislation came into force providing for the protection of the foetus from the moment of conception though the entire period gestation.[123]Lucas points out that towards the middle third of the 19th century a change of attitude occurred, apparently occasioned largely by the need to combat the "back-street abortionist" and the dangers of

[118] Washington (Terr./) Wash. (Terr.) State; CII, 37, 38, P.81 (1854).
[119] West Virginia-Sec.va. Acts. Tit. II, C.3, 9. P.96 (1848); W.Va. Const.,. Art. XI Para 8 (1863).
[120] Mass.Gen. Laws Ann. (1970); N.J. Rev. State Ann. (1969) Pa. Stat. Ann. Tit (1963).
[121] Seth D.D., Maitra, S.K.and Sinha ,B.N,"Abortion and Termination of Pregnancy in India", ed.1973,Delhi Law House, Allahabad, p.40.
[122] Supranote 114.
[123] Right to Conceive vis-à-vis Right to Birth, AIR Journal Section, 1996,p 138.

any form of surgery at the time.[124] A gestational time-limit for therapeutic abortion is prescribed in a certain states. In California, for example, an abortion may not be performed after the 20th week of pregnancy. In Colorado, a time-limit (16 weeks) is imposed only where the pregnancy is due to rape or incest. In a number of states, the time-limit does not apply where the mother's life is in danger or where the fetus is dead. Other states impose no statutory gestational time-limit for therapeutic abortions.[125]

b. Human Rights of Unborn vis-a-vis Liberalization of Abortion Laws: Supreme Court Decisions in *Roe* and *Doe Cases*

The validity of abortion laws have been assailed on the ground of constitutionality of 'right to life of unborn vis-à-vis right of the mother to bear or not to bear a child'. The issue of abortion, therefore, has become a subject of public debate and courts intervention in many countries, particularly, in the United States. Some of the cases decided by the United States and Northern Ireland court which have assumed great constitutional importance. The cases are directly related to the human right aspect of the unborn and the right of the state to preserve and protect the life of the unborn.

Two recent United States Supreme Court decisions of *Roe Vs Wade*[126] and *Doe Vs Balton*[127] are significant. These cases settled interalia a few important questions of constitutionality of the abortion laws of the two American States. In the *Roe Case*, Roe was an unwed mother who wanted to get her pregnancy terminated by a competent licenced physician, under safe clinical conditions. This was denied in the state of Texas because medically her life did not appear to be threatened by the continuation of pregnancy. It was the only permissible ground for induced abortion under the state law. She claimed

[124] Means C.C. (1970). In: Hall R.E., ed; Abortion in a Changing World, New York and London, Columbia University Press, Vol. II pp. 137-142.
[125] Supranote 121, p. 41.
[126] L.W., 13, 410 U.S. 113 (1973).
[127] L.W. 233, 410 U.W. 179 (1973).

that she could not afford to travel to another state jurisdiction in order to secure a legal abortion under safe conditions. Jane Roe brought a class action in the Supreme Court of the United States challenging the constitutionality of the Texas Criminal Abortion Law restricting, procuring or attempting to procure abortion on medical advice for the purpose of saving the mother's life. The petitioner pleaded that the state criminal abortion laws were unconstitutionally vogue and that they abridged her rights of personal privacy, protected by the *First, Fourth, Fifth, Ninth* and *Fourteenth* Amendments to the United States constitution.

In the *Doe Case* the appellant was married citizen of the State of Georgia, she sought abortion because she thought herself unable to care for or to support the unborn child. Her poverty and inability to care for the earlier issues had led her to place them in a foster home. However, she was denied abortion because the state of Georgia permitted abortion only to a woman who was citizen of the state and had obtained prior approval of the board of doctors. A therapeutic abortion had to be performed only in an accredited hospital. The petitioner had failed to satisfy these conditions. She challenged these procedural conditions as well as the requirements of challenged these procedural conditions as well as the requirements of residence as being ultra vires of the United States constitution.

The two cases were resisted by the respective defendants on the ground that the unborn child is a person within meaning of the fourteenth amendment of the United States constitution, and therefore, he can not be deprived of his life without due process of law.[128] Secondly, the state has an interest in the health protection and the existence of a "potential of independent human existence" justifying the state abortion laws. It was also contended that the

[128] Fourteenth Amendment of the U.S. Constitution inter alia provides: Nor shall any state deprive any person life, liberty or property, without due process of law.

right to privacy as claimed by the plaintiffs is not an absolute right under the constitution.

The court ruled that states may not categorically proscribed abortions by making their performance a crime, and that states prescribing elaborate procedural guidelines. The constitutional basis for the decisions rested upon the conclusion that the Fourteenth Amendment right of personal privacy embraced a woman's decision whether to carry a pregnancy to term. The court noted that its prior decisions had "found at least the roots of guarantee of personal privacy" in various amendments to the constitution or their penumbral (i.e., projected offshoots) and characterized the right to privacy as grounded in "the fourteenth Amendment's concept of personal liberty and restrictions upon state action."[129] Regarding the scope of that right, the court stated that it included "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty" and "bears some extension to activities related to marriage procreation, contraception, family relationship and child rearing and education."[130]Such a right, the court concluded, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[131]

With respect to protection of the right against state interference, the court held that since the right of personal privacy is a fundamental right, only a *"compelling state interest"* could justify its limitation by a state. Thus while it recognized the legitimacy of the state interest in protecting maternal health and the preservation of the fetus potential life, and the existence of a rational connection between these two interests and the states anti-abortion law, the court held these interests in sufficient to justify an absolute ban on abortions.[132] Instead, the court emphasized the durational nature of pregnancy and held the state's interests to be sufficiently compelling to permit curtailment or

[129] Roe, 410 U.S. 152.
[130] Roe, 410, U.S. 152-3.
[131] Roe, 410 U.S. 153.
[132] Roe, 410 U.S. 148-50.

prohibition of abortion only during specified stages of pregnancy. The High Court concluded that until the end of the first trimester, an abortion is no more dangerous to maternal health than childbirth itself, and found that "with respect to the states important, and legitimate interest in the health of the mother, the 'compelling' point, in light of present medical knowledge, is at approximately the end of the first trimester.'[133]

Compelling Interest

In relation to the right to abortion, the court found that the state has two legitimate and important interests which are separate and distinct. One is to preserve and protect the health of the pregnant woman. The other is to protect the potential human life embodied in the foetus. Despite these interests being "*legitimate and important.*" The state is nevertheless prohibited from regulating the fundamental right to abortion until the time when these interests become "*compelling.*"[134]The Court determined that these interests grow as the pregnancy develops and at different points in time during the terms of the pregnancy, each interest becomes 'compelling.'

The "*compelling*" point with respect to the state's interest in the potential life of the fetus" is at viability- following viability, the states interest permits it to regulate and even prescribe an abortion except when necessary in appropriate medical judgment, for the preservation the life or health of the mother.[135]The court defined viability as the point at which the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid."[136] Its summarized its holding as follows:

[133] Roe, 410 U.S. 163.
[134] Grswold vs Connecticut,381 US 479,485(1965).
[135] Roe, 410 U.S. 163-4.
[136] Roe, 410 U.S. 160.

(a) For the stage prior to approximately the end of the first trimester of pregnancy, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the state subsequent to approximately the end of the first trimester, the state, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the state in promoting its inherent in the potentiality of human life may, if it chooses, regulate, and even prescribe, abortion except where it is necessary, in appropriate medical judgement, for the preservation of the life or health of the mother.[137]

The determination of when each interest become compelling was based upon the medical technology available at the time o the Roe decision. The court divided the term of women's pregnancy into these there segments, now commonly known as the "trimester analysis." During the first trimester, which is the first, twelve weeks following conception, & the state has not compelling interest which would uphold any but the most minor regulations regarding absorption: At this stage, the responsibility for the abortion decision rests with the pregnant women's attending physician. The State's interest in the material health of the pregnant woman becomes compelling at approximately the end of the first trimester. From this point the state may regulate the abortion procedure to the extent that the life and health of the women is normally drawn to that end.

The State's interest in potential life becomes compelling at the point when the foetus reaches viability, approximately at the end of the second capability of surviving outside the women's womb. At such a time the state can

[137] Roe, 410 U.S. 164-5.

even prohibit the abortion except when it is necessary to protect the life or health' of the pregnant women.

c. Criticism of Roe

The *Roe Vs Wade*[138] decision has been controversial since the day it was handed down. Opponents claim that no support for the right to abortion can be found in the constitution. Attacks have been levied against the court for having judicially created abortion legislation, when the abortion issue should have been decided by either the state or the federal congress. Both opponents and supporters of abortion have criticized the trimester analysis set forth in the decision because the delineation of when the state's interest becomes compelling is blood and less certain as medical technology advances. Until Webster, the court itself has seemed uncertain about the course it would significantly weakened the practical effect of Roe, while theoretically reaffirming the constitutional principles which it recognized.

In *Doe*, the court reiterated its holding in Roe that the basic decision of when an abortion is proper rests with the pregnant mother and her physician, but extended Roe by warning that just as states may not prevent abortion by making their performance a crime, states may not make abortions unreasonably difficult to obtained by prescribing elaborate procedural barriers. In *Doe,* the court struck down state requirements that abortions be performed in licensed hospitals; that abortions be approved before hand by a hospital committee; and that two physicians concur in the abortion decision.[139] The court appeared to note, however, that this would not apply to a statute that protected the religious or moral beliefs of denominational hospitals and their employees.[140]

The court in Roe also dealt with the question whether a fetus is a person and thereby protected under the Fourteenth Amendment and other provisions of

[138] (1973) 410 US 113.
[139] Doe, 410 U.S. 196-9.
[140] Doe, 410 U.S. 197-8.

the constitution. The court indicated that the constitution never specifically defined" person" but added that in nearly all the sections where the word person appears, "the use of the word is such that it has application only potentially. None indicated with any assurance, that it has any possible pre-natal application."[141] The court emphasized that, given the fact that in the major part of the 19th century prevailing legal abortion practices were for freer, than today, the court was persuaded "that the word 'person' as used in the Fourteenth Amendment does not include the unborn."[142]

The court did not, however, resolve the question of when life actually begins. While noting the divergence of thinking on this issue, it instead articulated the legal concept of "viability", defined as the point at which the fetus is potentially able to live outside the womb, although the fetus may require artificial aid.[143]

It was also held that the opinions of the court in the Roe and Doe case were to be read together. It was not decided by the court whether father of the unborn child has any say in the abortion matters. However, when the foetus became viable, the state may regulate, even, proscribe abortion in promoting its interests in potentiality of human life.

d. Protection of Unborn Child Subsequent to decisions of Roe and Doe cases: Viability, Fetal Testing, and Disposal of Fetal Remains

The Supreme Court articulation of the concept of viability has required further elaboration, particularly with regard to the critical question of who defines at what point a fetus has reached viability. In *Roe*, the court defined viability as the point at which the foetus is "*potentially able to live outside the mother's womb, albeit with-artificial aid.*"[144] Such potentiality however, must

[141] Roe, 410 U.S. 157.
[142] Roe, 410 U.S. 158.
[143] Roe, 410 U.S. 160.
[144] Roe, 410 U.S. 160.

be for "meaningful life" and this cannot encompass simply momentary survival.[145] The court also noted that while viability is usually placed at about 28 weeks, it can occur earlier and essentially left the point flexible for anticipated advances in medical skill. Finally, Roe stressed the central role of the pregnant woman's doctor emphasizing that "the abortion decision in all its aspects inherently, and primarily, a medical decision".[146]

Similar themes were stressed in *Planned Parenthood Vs Danforth*[147], in which a Missouri law, which defined viability as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life support systems was attacked as an attempt to advance the point of viability to an earlier stage of gestation. The court disagreed, finding the statutory definition consistent with Roe. It reemphasized that viability is "a matter of medical judgment skill and technical ability" and Roe meant to preserve the flexibility of the term.[148] Moreover, the Danfort court held that "it is not the proper function of the legislature or the courts to place viability, which is essentially a medical concept at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is and must be, a matter for the judgment of the attending physician".[149]The physician's central role in determining viability, and the lack of such definitional authority in the legislatures and courts, was reaffirmed by the court in *Colautti Vs Franklin.*[150]

In *Danforth,* the court rules that fetal protection statutes were generally overbroad and unconstitutional if they pertained to pre-viable fetuses. Such Statutes required doctor performing an abortion to use available means and

[145] Roe, 410 U.S. 163.
[146] Roe, 410 U.S. 160.
[147] 428, U.S. (1976).
[148] Danforth, 428 U.S. 64.
[149] Ibid.
[150] 439 S. 379 (1979).

medical skills to save the life of the fetus. In *Colautti,* the Supreme Court held subsequently that such fetal protection statute could only apply to viable fetuses and that the Statute must be precise in setting forth the standard to determining viability. In addition, the court in *Colautti* stressed that in order to meet the constitutional test of sufficient certainty, fetal protection laws had to define whether a doctor's paramount duty was to the patient or whether the physician had to balance the possible danger to the patient against the increased odds of fetal survival.[151] In *Planned Parenthood Association of Kansas City Missouri Inc. Vs Ashoraft,*[152] the court found that the second physician requirement during the third trimester was permissible under the constitution because it "reasonably furthers the state's compelling interest in protecting the lives of viable fetuses.[153] In *City of Akron Vs Akron Center for Reproductive Health, Inc,*[154] the court ruled that the portion of the Akron ordinance requiring that physicians performing abortions see to it that the remains of the unborn child be disposed of "in a humane and sanitary" way was void for vagueness. The level of uncertainty present was the prospect of criminal liability being imposed.[155]

The Supreme Court reaffirmed its decision *in Roe* and its intention to continue to follow the trimester framework balancing a woman's constitutional right to decide whether to terminate a pregnancy with the state's interest in protecting potential life. The deformation of viability is the one used by the court in its Roe decision in 1973. Again in 1986 the court reaffirmed Roe in *Thornburgh Vs American College of Obstetricians and Gynecalogists*[156] in1989, the Supreme Court upheld the constitutionality of the State of Missouri's abortion statute in *Webster Vs Reproductive Health Services,*[157]

[151] Colautti, 439 U.S. 379, 397-401.
[152] 462 S. 476 (1983).
[153] 462 S. 486.
[154] 462 S. 416 (1983)
[155] 462 S. 451
[156] 476 S. 747 (1986).
[157] 492 S. 490 (1989)

which provided that the life of each human being begins at conception and an unborn child has protectable interest in life, health and well being. The statute had put stringent conditions for abortion. The Supreme Court held that it was constitutional for a state declares an interest in human life at all stages of pregnancy. Thus the liberty of woman allowed by Roe is further curtailed by Webster. As per Roe, the state must demonstrate a compelling interest before defining a woman the right to make a decision as to abortion. The time fixed in Roe, court was that of viability at which time the state acquired the power to control. This shifting point of jurisdiction from the woman to state as the foetus develops is blurred by *Webster;* while for *Roe*, it was uncertain as to when life begins, Webster unequivocally found that life begins from conception itself.

The concept of viability has its own importance. At this point, the foetus can be served from the womb by a process which enables it to survive. An abortion decision would confer not only a right to remove an unwanted foetus from ones body but also a separate right to ensure its death. A distinction thus may be made out between termination of pregnancy and destruction of foetus. Abortion thus can be meaningfully prohibited on foetus attaining viability[158] provided necessary medical assistance and state interest in bringing up the fetus is available. Thus viability may also be considered as legal standard. However, much depends on the medical technology. The fetus may be able to survive and at the same time the removal of foetus may not turn out to be dangerous to the mother.

In *Davis Vs Davis*[159] case where a divorced wife and husband disputed on claiming of right on Frozen pre-embryos for implantation to have a child. The trail judge found, however, that Mr. Davis was too late to object to the pre-embryos being used for the creation of children, because Mr. And Mrs. Davis have accomplished their original intent to produce a human being to be known

[158] L. Tribe, "The Supreme Court 1972 Term-Forward: Toward A Model of Roles in the Due process of Life and Law", 87 Harv. Law. Rev (1973) 1 at .28.
[159] (1989) 15 FLR 2097.

as their child. Finding as a matter of law that human life begins at conception, the judge concluded that legal provisions governing "a human being existing as an embryo, invitro" to be those of child custody law, dominated by the obligation to seek, protect and advance the best interests of the child.[160]

Planned parenthood of South Eastern Pennsylvania Vs Casey,[161] is the most recent in the series of United States Supreme Court decisions addressing the constitutionality of state abortion restriction.[162] Although planned parenthood was only decided in mid 1992, it is clearly the product of another era – an era in which a 'litmus test' on abortion *Roe Vs Wade* (the Supreme Court's 1973 decision declaring a women's right to an abortion a 'fundamental constitutional right') appeared to govern the selection of federal judges yet despite the election of president Clinton, planned parenthood is of immediate and continuing relevance not only because it remains the most recent Supreme Court abortion decision but also because of its extended discussion of *stare decises*.[163] In this case the Court reaffirmed the basic constitutional right to abortion while simultaneously allowing some new restrictions. The Court upheld the most aspects of restrictive Pennsylvania provisions of the Pennsylvania Abortion Control Act, 1982 which were added by the 1988 and 1989 amendments to the Act. The said provisions:

(i) require that a woman seeking an abortion must give her informed consent prior to the procedure, and specified that she should be provided with certain information's at least 24 hours before the abortion is performed;[164]

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[160] (1989) 15 FLR 2103.
[161] (1992) 120 L.Ed. 2nd 674.
[162] See Campbell A.I.L. "The Constitution and Abortion" the Modern Law Review; Vol.53:2, March 1990, p.238.
[163] Both President and President Bush were elected on Republic can party platform that Realism a constitutional amendment forbidding abortion and the 'appointment of judges who respect traditional family values and sanctity of innocent human life. Clinton is considering judge stops for opponents of abortion Rights.
[164] Laird Vanessa, "planned parenthood v. Casey: The Role of Stare Decisis" Modern Law Review, Vol.57, May 1994, p.461.

(ii) mandate the informed consent of one parent for a minor (expectant mother) to obtain an abortion, but provides a judicial bypass process;[165]

(iii) command that, unless certain exception apply, a married women seeking an abortion must sign a statement indicating that she has notified her husband;[166]

(iv) defined a 'medical emergency' that will excuse compliance with the foregoing requirements and[167]

(v) impose certain reporting requirements on facilities providing abortion services[168]

The five abortion clinics and a physician representing himself and a class of doctors who provided abortion services, filed a suit seeking a declaratory judgment that each of the provisions, namely, informed consent, parental consent, spousal notice, reporting requirements and public disclosure of clinics were violative of the '*due process clause*' of the Fourteenth Amendment of the United States Constitution.

The plurality opinion indicated that State Laws, which contained on outright born on abortion would be unconstitutional. Nevertheless, the court rejected the trimester framework set forth in Roe and the strict scrutiny standard of judicial review of abortion restriction and held that states have legislate interest in protecting the health of the woman and the life of the unborn child from the outset of the pregnancy. The Court adopted a new analysis, undue burden." The court will now need to ask the questions whether a state abortion restriction has the effect of imposing an "undue burden" on a women's right to obtain an abortion. "*undue burden*" was defined as

[165] Pennsylvania Abortion Control Act, 1982, Sec. 3205.
[166] Id. Sec. 3206.
[167] Id. Sec. 3209.
[168] Id. Sec. 3203.

"*substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.*"

The court applied this new analysis to the Pennsylvania Statute and concluded that four of the provisions did not impose an "undue burden" on the right to abortion, and were constitutional.

The Pennsylvania law requires a 24 hour waiting period, approval for minors by a parent or a judge; doctors' telling woman about fetal development and alternatives, such as, adoption, detailed reports by doctors to the government on each abortion performed, and pre-abortion notification of husband. The court only struck down the husband notification provision as undue burden and approved rest of the provisions. Thus the Supreme Court ruling allows the State to sharply restrict but not outlaw abortions.[169]

The United States Supreme Court, perhaps in one of the most emotional and politically explosive cases in years, by a majority of 5 to 4 affirmed the Court of Appeals' verdict and refused to discard its 19 years land mark decision in *Roe Vs Wade*,[170]that made abortion legal as the law of the land.

While the conservative dominated court controlled by justices chosen by Bush and Regan the former Presidents of the United States, upheld the woman's limited right to abortion recognized by *Roe*, it also sought to accommodate by a Bench of 7to 2 the State's interest in potential life and said restrictions could be allowed as long as they do not place an undue burden on a woman's right. The court accordingly upheld most parts of the controversial Pennsylvania law that make it more difficult for a woman to obtain an abortion.

The court's decision in *Casey* was significant because it appeared that the new standard of review would allow more state restrictions to pass constitutional matter. The decision was also noteworthy because the court

[169] Id. Sec. 3207 (b), 3214(a) and 3214(f).
[170] Gour K.D. "Indian Penal Code" 3rd ed .2004 p.506.

found that the state's interest in protecting the potentiality of human life extended throughout the course of the pregnancy and thus the state could regulate, even to the point of favoring child birth over abortion from the outset. Between 1992 and 1993, the court declined to hear appeals in three abortion cases[171] contrary decisions by the US Court of Appeals regarding the validity of state stature prohibiting "partial-birth" abortions, as well as congressional interest in enacting federal partial-birth legislation may have prompted the court to decide *Stenberg Vs Carhart.*[172] In this case a Nebraska physician who performs abortions at a specialized abortion facility sought a declaration that Nebraska's partial-birth abortion ban statute violates the US constitution. The Nebraska statute provides: No partial birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury including a life-endangering physical condition caused by or arising from the pregnancy itself.[173]

The term "*partial-birth abortion*" is defined by the statute as "an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery."[174] The term partially delivers vaginally a living unborn child before killing the unborn child" is further defined as "deliberately and intentionally delivering into the vagina a living unborn child or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child. Violation of the statute carries a prison term of up to twenty years and a fine of up to $ 25000. In addition, a doctor who violates the stature is subject to the automatic revocation of his license to practice medicine

[171] 410 S. 113 (1973).
[172] Ada Vs Guam, 113 S.C. 633 (1992); Barnes vs Moore, 113 S.C. 656 (1992); Barnes vs Mississippi, 114 S.C. 468 (1993).
[173] 530 S. 914, 120 SC, 2597 (2000).
[174] Neb. Rev. Stat §28-328 (1).

in Nebraska. The court based its decision on two determinations. First, the court concluded that the Nebraska statute lacks any exception for the preservation of the health of the mother. Second, the court found that the statute imposes an undue burden on the right to choose abortion because its language covers more than the D and X procedure. Despite the courts provisions instructions in Roe and Casey, that abortion regulation must include an exception where it is "necessary, in appropriate medical judgment, for preservation of the life or health of the mother", the state argued that Nebraska's partial birth abortion statute does not require a health exception because safe alternatives remains available to women and a ban on partial birth abortions would create no risk to the health of women.[175] Although the court conceded that the actual need for the D and X procedure is uncertain, it recognized that the procedure could be safer in certain circumstances.[176] Thus, the court stated, "a statute that altogether forbids D & X creates a significant health risk... the statute consequently must contain a health exception".[177]

e. Trend of Restriction:

From this brief of some of the major abortion decisions since *Roe v Wade*, it is apparent that the Supreme Court has constricted the availability of abortions, especially to poor women, by allowing the government to withhold public funds for abortions not medically necessary. Nevertheless, until Webster, court had upheld the principle of the trimester analysis outlined in *Roe*, reaffirming a woman's constitutional right to an abortion in the first trimester of pregnancy, a conditional right in the second trimester, restricted only by the state's interest in the maternal health of the pregnant woman, and no clear right in the last trimester because of the state's interest in the potential life of the foetus, Government regulation of abortion was allowed only so far as it was narrowly drawn to effect the state's "compelling interests.

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[175] Neb. Rev. Stat §28-326 (9).
[176] Stenberg 120, S.C. 2610.
[177] Stenberg 120, S.C. 2613.

Delivered on 3 July 1989, the *Webster* decision allows states to impose greater restrictions on the availability of abortion, although the opinion does not say precisely what regulations would be permissible. The decision abandons the trimester analysis, or Roe, referring to it as "unsound in principle and unworkable in practice." The decision also allows state regulation of doctor-patient communication regarding abortion.

What *Webster* Upheld

Specifically, the court in *Webster* upheld a Missouri Statue which:

1. declares that "the life of each human being begin at conception", prosecutable interest in life, health and well-being'.

2. Required a physician to perform "such medical examinations and tests as are necessary to make a finding of the gestational age, weight and lung maturity of the unborn child, in determining viability of the foetus for woman who appear to be twenty weeks pregnant or more; and

3. Prohibits public employees form "encouraging or counseling a woman to have an abortion not necessary to save her life", and also bans the use of public funds and facilities for such "encouraging or counseling",

In upholding the legislative declaration of when life begins, the court has given states the power to enact in law what is essentially a religious belief. There percussions of such legislation certainly affect a woman's right to abortion, but may also affect the law of torts in relation to unborn children. Prior to *Webster*, the foetus had no "protectable interest" until it had reached viability. The future impact of this "preamble" to the Missouri statute is uncertain.

Repression of *Webster*

The medical testing requirement imposed on physicians before performing abortions on woman twenty weeks pregnant, is a significant deviation form the rights of woman during the second trimester is focused on the foetus, not the maternal health of the pregnant woman. This regulation places significant obstacles in the path of a woman desiring an abortion, including increased costs and forcing her to submit to additional medical examination. The regulation also intrudes into the physician-patient relationship by controlling the manner by which the physician may determine viability.

Perhaps what is most astounding about the *Webster* decision is the prohibition on public employees from counseling or encouraging abortions not medically necessary. To not allow physicians to fully inform their patients of all the medical options available to them, not only appears to infringe upon the first Amendment right to free speech, but also compromises the physician's professional obligations to his patients. Furthermore, because of the life-defining preamble to this statue, physicians would also be prohibited from prescribing, counseling or encouraging the use of contraception such as IUDs and certain low dose birth control pills which act as abortifacients. The decision allows states to regulate what physicians and other health care providers, who are public employees, can actually say to their patient, and forces them to withhold complete medical advice.

Having found the Missouri Statute to be constitutionally sound, the court has opened its doors to "many future challenges to a woman's right to abortion". Thirty one states have already declared their intentions to restrict abortions. At least fifteen states are ready to outlaw abortion if the court so allows. At this point in time a woman's right to abortion still exists, although it is obvious that sates will be allowed to significantly restrict that right. How far

state regulations will be allowed to interfere in uncertain, but clarification should be announced shortly, as the Supreme Court has al-ready agreed to hear three more abortion cases this fall.

Ayotte v. Panned Parenthood of Northern New England[178], was a decision by the Supreme Court of the United State involving a facial challenge to New Hampshire's parental notification abortion law. The First Circuit had ruled that the law was unconstitutional and an injunction against its enforcement was proper.

The Supreme Court vacated this judgment and remanded the case, but avoided a substantive ruling on the challenged law or a reconsideration of prior Supreme Court abortion precedent. Instead, the Court only addressed the issue of remedy, holding that invalidating a statue in it's entirely "is not always necessary or justified, for lower courts may be able to render narrower declaratory and injunctive relief."

The opinion was delivered by Justice Sandra Day O'Connor, who had been significantly responsible for developing the Court's recent abortion jurisprudence.[179] This decision was O'Connor's last opinion on the Court before her retirement on January 31, 2006.

In its ruling the Court found that the following three propositions were established:

1. "States have the right to require parental involvement when a minor considers terminating her pregnancy."

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[178] 546 US. 320(2006).

[179] [179] O'Connor was one of the three attributed authors of the plurality opinion in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), that adopted the "undue burden" standard for reviewing whether abortion regulations were too stringent, a standard she herself had previously formulated in her concurring opinion in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

2. "A State may not restrict access to abortions that are 'necessary, in appropriate medical judgment for preservation of the life or health of the mother.' *Planned Parenthood of Southeastern Pa. v. Casey. (plurality opinion).*

3. "New Hampshire has not taken issue with the case's factual basis: In a very small percentage of cases, pregnant minors need immediate abortions to avert serous and often irreversible damage to their health. New Hampshire has conceded that, under this Court's cases, it would be unconstitutional to apply the Act in a manner that subjects minors to significant health risks."

The Court considered under that circumstances federal courts can enjoin enforcement of abortion laws if in some cases such laws would have the effect of regulating abortion more strictly than is consistent with Supreme Court precedent, as the New Hampshire law did in some circumstances.

The Court ruled that in such circumstances facial invalidation of a statue would be inappropriate if the statute could be narrowed sufficiently by judicial interpretation. It raised the question of what the appropriate judicial remedy would be if a statute's enforcement would be unconstitutional in medical emergencies. The court ruled that "invalidating the statute entirely is not always necessary or justified, for lower courts may be able to render narrower declaratory and injunctive relief."

Gonzales v. Carhart,[180] is a United States Supreme Court case which upheld the Partial-Birth Abortion Ban Act of 2003. The case reached the high court after U.S. Attorney General Alberto Gonzales appealed a ruling of the United States Court of Appeals for the Eighth Circuit in favor of LeRoy Carhart that struck down the Partial-Birth Abortion Ban Act. Also before the Supreme Court was the consolidated appeal of *Gonzales v. Planned*

[180] 550 S. 546 (2007).

Parenthood from the United States Court of Appeals for the Ninth Circuit, which had struck down the Partial-Birth Abortion Ban Act.

The Supreme Court's decision, handed down on April 18, 2007, upheld the federal ban and held that it did not impose an undue burden on the due process right of women to obtain an abortion, "under precedents we here assume to be controlling," such as the Court's prior decisions in *Roe v. Wade* and *Planned Parenthood v. Casey*. This case distinguished but did not reverse *Stenberg v. Carhart* (2000), in which the Court dealt with similar issues.

Justice Anthony Kennedy wrote for the Court that the respondents had failed to show that Congress lacked power to ban this abortion procedure. Chief Justice John Roberts along with Justices Samuel Alito, Clarence Thomas, and Antonin Scalia agreed wit the Court's judgment, and they also joined Kennedy's opinion.

The Court left the door open for as-applied challenges citing its recent precedent in *Ayottee v. Planned Parenthood of New England*. According to *Washington Post* reporter Benjamin Wittes, "The Court majority, following the path it sketched out last year in the New Hampshire case, decided to let the law stand as a facial matter and let the parties fight later about what, if any, applications need to be blocked."

The Court decided to "assume for the purposes of this opinion" the principles of *Roe v. Wade* and *Planned Parenthood v. Casey*. The Court then proceeded to apply those "principle accepted as controlling here."

The Court said that the lower courts had repudiated a central premise of *Casey* - that the state has an interest in preserving fetal life – and the Court held that the ban was narrowly tailored to address this interest. Relying deferentially on Congress's findings that this intact dilation and extraction procedure is never needed to protect the health of a pregnant woman. Kennedy

wrote that a health exception was therefore unnecessary. And, where medical testimony disputed Congress's findings, Congress is still entitled to regulate in an area where the medical community has not reached a "consensus."

The majority opinion held that "ethical and moral concerns", including an interest in fetal life, represented "substantial" state interests which (assuming they do not impose an "undue" burden) could be a basis for legislation at all times during pregnancy, not just after viability.

The majority opinion in *Gonzales v. Carhart* did not discuss the constitutional rationale of the Court's prior abortion cases (i.e. "due process"). However, the majority opinion disagreed with the Eighth Circuit that the federal statute conflicted with "the Due Process Clause of the Fifth Amendment [which] is textually identical to the Due Process Clause of the Fourteenth Amendment."

McCorvey v. Hill[181] was a case in which the principal original litigant in *Roe v. Wade*, Norma McCorvey, also known as 'Jane Roe', requested the overturning of Roe. The U.S. Court of Appeals for the Fifth Circuit ruled that McCorvey could not do this; the United States Supreme Court denied certiorari on February 22, 2005, rendering the opinion of the Fifth Circuit final. The opinion for the Fifth Circuit was written by Judge Edith Jones, who also filed a concurrence to her opinion for the court. *McCorvey's* case.

McCorvey– who, since *Roe*, had become pro-life – sought to have *Roe* overturned based on her rights as an original litigant. Federal Rules of Civil Procedure permit a litigant to file for "relief from judgment", under defined circumstances. However, the same rule requires that "[t]he motion shall be made within a reasonable time"; the U.S. District Court for the Northern District of Texas ruled that the time elapsed since *Roe* (in excess of thirty years) was too great for *McCorvey* to now file.

[181] 385F. 3d 846 (the Cir. 2004)[1].

The Court of Appeals for the Fifth Circuit upheld the ruling of the district court. Judge Jones, writing for a three judge panel, noted that of the objections brought by *McCorvey* on appeal, none held up; the district court acted properly.

Judge Jones concluded:

> "The perverse result of the Court's having determined through constitutional adjudication this fundamental social policy, which affects over a million women and unborn babies each year, is that the facts no longer matter... That the Court's constitutional decision making [sic] leaves our nation in a position of willful blindness to evolving knowledge should trouble any dispassionate observer not only about the only about the abortion decision but about a number of other areas in which the court unhesitingly step into the realm of social policy under the guise of constitutional adjudication.[182]

Thus the American Supreme Court recognized the right of a foctus 'to grow and born'. A critical question is "does the abortion of a foetus amounts to taking the life of a human being? There is no satisfactory answer to the question, when does the life comes into being? The recent judgments which deal with legal protection of human life before birth disclosed that abortion of a fetus is illegal and criminal because it amounts to taking of life of an unborn child. Thus, it restrained the right of abortion.

f. From Legal to Moral Justification to Value Fetal Life:

Abortion is serious lethal violation of human rights slaughtering innocent children must never be construed as health care. True health care reform respects, protects and enhances human life. It is violence against children and it exploits and harms women. It is certainly not a health care for the baby who is destroyed, and now we knew that abortion even adversely

[182] Ibid

affects the health of subsequent children born to women who abort.[183] Pro-life feminists grant the good intention of their pro-choice counterparts but protest that the pro-choice position is flawed morally inadequate, and inconsistent with champion a more encompassing moral ideal. They recognize the claims of fetal life and offer a different perspective on what is good for women.[184]

i. From the moral right to control one's own body to a more inclusive ideal of justice.

The moral right to control one's own body does apply to cases of organ transplants, mastectomies, contraception, and sterilization; but it is not a conceptualization adequate for abortion. The abortion dilemma is caused by the fact that 266 days following a conception in one body, another body will emerge. One's own body no longer exists as a single unit but is endangering another organism's life. This dynamic passage from conception to birth is genetically ordered and universally found in the human species. Pregnancy is not like the growth of cancer or infestation by a biological parasite, it is the way every human being enters the world. Strained philosophical analogies fail to apply having a baby is not like rescuing a drawing person, being hooked up to a famous violinist's artificial life-support system, donating organs for transplant or anything it else.

As embryology and fetology advance, it becomes clear that human development is a continuum. Just as astronomers are studying the first three minutes in the genesis of the universe, so the first moments, days, and weeks at the beginning of human life are the subject of increasing scientific attention. While neonatology pushes the definition of viability ever earlier, ultrasound and fetology expand the concept of the patient in utero. Within such a continuous growth process, it is ward to defend logically any which an immature form of human life is so different from the day before or the day

[183] Abortion is a serious Lethal violation of Human Rights http://www.nrlc.org/news/2010/NR201/Humanrights.html. pp.1-2

[184] Misra S.N. "Abortion Law in Todays Worlds", ed.1st 2007,Cyber Tech Publications, pp.38-44.

after, that it can be morally or legally discounted as a non person. Even the moment of birth can hardly differentiate a nine month fetus from a newborn. It is not surprising that those who countenance late, abortions are logically led to endorse selective infanticide. The same legal tradition which in our society guarantees the right to control one's own body firmly recognizes the wrongfulness of harming other bodies, however immature, dependent, different looking or powerless. The handicapped, the retarded and new borns are legally protected from deliberate harm. Fortunately, in the course of civilization there has been a gradual realization that justice demands the powerless and dependent be protected against the use of power wielded unilaterally. No human can be treated as a means to an end without consent. The fetus is an immature, depended form of human life which only needs time and protection to develop. Surely, immaturity and dependence are not crimes.

Would it be just that an embryonic life-in half the cases, of course, a female life-be sacrificed to the right of a woman's control over her own body? A woman may be pregnant without consent, and experience a great many penalties, but a fetus killed without consent pays the ultimate penalty. It does not matter whether the fetus being killed is fully conscious or feels pain. Nobody can sanction killing the innocent if it can be done painlessly or without the victim's awareness.

ii. From the necessity of autonomy and choice in Personal responsibility to an expanded sense of responsibility

Morality has often been viewed to exclusively as a matter of human agency and decisive action. In moral behavior persons must explicitly choose and aggressively exert their wills to intervene in the natural and social environments. The human will dominates the body overcomes the given, breaks out of the material limits of nature. Thus if one does not choose to be pregnant or cannot rear a child, who must be given up for adaption, then better to abort the pregnancy. Willing, planning choosing one's moral commitments

through the contracting of one's individual resources becomes the premier model of moral responsibility. Parent-child relationships are one instance of implicit moral obligations arising by virtue of our being part of the interdependent human community. A woman, involuntarily pregnant, has a moral obligation to the now-existing dependent fetus whether she explicitly consented to its existence not. No pro-life feminist would dispute the forceful observations of pro-choice feminists about the extreme difficulties that bearing an unwanted child in our society can entail.

But the stronger force of the fetal claim presses a woman to accept these burdens; the fetus possesses a woman to accept these burdens; the fetus possess rights arising from its extreme need and the interdependency and unity of humankind. The woman's moral obligation arises both from her status as a human being embedded in the interdependent human community and her unique life giving female reproductive power. To follow the pro-choice feminist ideology of insistent individualistic autonomy and control is to betray a fundamental basis of the moral life.

iii. From the moral claim of the contingent value of fetal life to the moral claim for the intrinsic value of human life

The feminist pro-choice position which claims that the value of the fetus is contingent upon the pregnant woman's bestowal-or willed. Conscious "construction"- of human hood is seriously flawed. The inadequacies of this position flow from the erroneous premises.

1. that human value and rights can be granted by individual will;
2. that the individual woman's consciousness can exist and operate in an a priori isolated fashion, and
3. that "mere' biological, genetic human life has little meaning. Pro-life feminism takes a very different stance to life and nature.

Human life from the beginning to the end of development has intrinsic value, which does not depend on meeting the selective criteria or tests set up by powerful others. A fundamental humanist assumption is at stake here. Either to value embodied human life and humanity as a good thing or take some variant of the nihilist position that assumes human life is just one more random occurrence in the universe such that each instance of human life must explicitly be justified to prove it worthy to continue. When faced with a new life, or an involuntary pregnancy, there is a world of difference in whether one first asks, "why continue?" or "why not?" Where is the burden of proof going to rest? The concept of compulsory pregnancy" is as distorted as labeling life "compulsory aging".

In a sound moral tradition, human rights arise from human needs, and it is the very nature of a right, or valid claim upon another, that it cannot be denied, conditionally delayed or rescind by more powerful others at their behest. It seems fallacious to hold that in the case of the fetus it is the pregnant woman alone who gives or removes it right to life and human status solely through her subjective conscious investment or "humanization". Surely no pregnant woman or any other individual member of the species has created her own human nature by an individually willed act of consciousness, nor for that matter been able to guarantee her own human rights. An individual woman and the unique individual embryonic life within her can only exist because of their participation in the genetic inheritance of the human species as a whole. Biological life should never be discoursed. Membership in the species, or collective human family, is the basis for human 'solidarity, equality, and natural human rights.

iv. The moral right of women to full social equality from a pro-life feminist perspective

Pro-life feminists and pro-choice feminists are totally agreed on the moral right of women to the full social equality so for denied them. Women

will never climb to equality and social empowerment over thousands of dead fetuses, numbering now in the millions. As long as most women choose to bear children, they stand to gain from the same constellation of attitudes and institutions that will also protect the fetus in the woman's womb-and they stand to close from cultural assumptions that support permissive abortion. Despite temporary conflicts of interest, feminine and fetal liberation are ultimately one and the same cause.

Women's rights and liberation are pragmatically linked to fetal rights because to obtain true equality; woman need (i) more social support and changes in the structure of society, and (ii) increased self-confidence, self expectations and self esteem; society in general, and man in particular, have to provide women more support in rearing the next generation, or our devastating feminization of poverty will continue. But if a woman claims the rights to decide by herself whether the fetus becomes a child or not, what does this do to paternal and communal responsibility.[185]

In the wake of judicial rulings that a fetus is not a "person" or human being under criminal homicide statutes. Legislation captures began to pass feticide statutes.

g. Statutory Protection to Unborn

Recently, Statute has been drafted specifically to restrict these later abortions-without providing exceptions to preserve a woman's life or health. Abortion opponents hope to use such laws to force courts to revisit the Supreme Court's long standing precedent that physicians, not legislators, must determine when an abortion is necessary. In 1995 Ohio became the first state to ban what it deemed dilation and extraction (D & X) abortions- a modified version of dilation and evacuation (D & E) procedure- performed primarily after the twentieth week of pregnancy. The Ohio Statute also outlawed post-

[185] Mishra S.N. "Abortion Law in Today's World, Cyber Tech Publications 2007 pp. 38-44.

viability abortions, without making adequate exceptions when the woman's life or health is at stake and placed numerous restrictions on the few procedures that renamed legal.[186] The unborn child is only safe if the, law criminalizing abortion is safe. *Webster V Reproductive Health Services*[187] a case that may indeed limit severely, if not revoked the right to a legal abortion. Webster made it clear that state legislatures have considerable discretion to pass restrictive legislation in the future, with the likelihood that such laws would probably pass constitutional muster. The *Casey*[188] case brings some new restrictions. It adapted a new analysis "undue burden". It was defined as a "substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus". Thus, the recent judgments of the U.S. Supreme Court which deal with legal protection of human life before birth led to the enactment of statutory restriction on the right to abortion. These enacted statutes protect the interest of unborn child.

i. Partial-Birth Abortion Ban Act, 2003

The U.S. Senate passed a bill to ban the practice of partial-birth abortion nationwide. The ban, twice vetoed by President Bill Clinton, is strongly supported by President George W. Bush. President Bush, public, senators and Supreme Court justices say there is no constitutional right to deliver most of a living baby and then puncture her head with a scissors.[189]

The Partial Birth Abortion Ban Act of 2003 has been enacted by the Senate and House of Representatives of the United States of America in Congress assembled to prohibit the procedure commonly known as partial-birth abortion. The Partial Birth-Abortion Ban Act 2003 is small Act, containing only 4 sections.

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[186] Mishra S.N. "Abortion Law in Today's World" Cyber Tech Publications 2007, pp. 108-9.
[187] 492 S. 490 (1989).
[188] 505 U.S. 833 (1992).
[189] U.S. Senate Passes Ban on Partial- Birth abortion (2003) http://www.lawcornell.edu.uscode/search/display.html?terms=protection%20of20urborn%20childsort=uscodehtml/uscode18

Section 1 of the Act talk about the titles that this Act may be cited as the "Partial-Birth Abortion Ban Act of 2003".

Section 2 of the Act talks about the findings which the congress finds and declares in relation to partial-Birth abortion Ban. Some of the findings of the congress are as follows:

(1) A moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion- an abortion in which a physician deliberately and intentionally vaginally delivers a living, unborn child's body until either the entire baby's head is outside the body of the mother, or any part of the baby's trunk past the navel is outside the body of the mother and only the head remains inside the womb, for the purpose of performing an overt act (usually the puncturing of the back of the child's skull and removing the baby's brains) that the person knows will kill the partially delivered infant, performs this act, and then completes delivery of the dead infant- is a gruesome and inhumane procedure that is never medically necessary and should be prohibited.

(2) Rather than being an abortion procedure that is embraced by the medical community, particularly among physicians who routinely perform other abortion procedures, partial-birth abortion remains a disfavored procedure that is not only unnecessary to preserve the health of the mother, but in fact poses serious risks to the long-term health of women and in some circumstances, their lives. As a result, at least 27 States banned the procedure as did the United States Congress which voted to ban the procedure during the 104th, 105th, and 106th Congresses.[190]

[190] U.S. Senate passer Ban on partial-birth Abortion (2003) @http://euthanasia.com/pba2003.html.

(3) In *Stenberg v. Carhart*,[191] the United States Supreme Court opined 'that significant medical authority supports the proposition that in some circumstances, [partial birth abortion] would be the safest procedure' for pregnant women who wish to undergo an abortion. Thus, the Court struck down the State of Nebraska's ban on partial-birth abortion procedures, concluding that it placed an 'undue burden' on women seeking abortions because it failed to include an exception for partial-birth abortions deemed necessary to preserve the 'health' of the mother.

(4) In reaching this conclusion, the Court deferred to the Federal district court's factual findings that the partial-birth abortion procedure was statistically and medically as safe as, and in many circumstances safer than, alternative abortion procedures.

(5) However, substantial evidence presented at the Stenberg trial and overwhelming evidence presented and compiled at extensive congressional hearings, much of which was compiled after the district court hearing in Stenberg, and thus not included in the Stenberg trial record, demonstrates that a partial-birth abortion is never necessary to preserve the health of a woman, poses significant health risk to a woman upon whom the procedure is performed and is outside the standard of medical care.

(6) Despite the dearth of evidence in the Stenberg trial court record supporting the district court's findings, the United States Court of Appeals for the Eighth Circuit and the Supreme Court refused to set aside the district court's factual findings because, under the applicable standard of appellate review, they were not 'clearly erroneous'.

[191] 530 us 914,932(2000).

(7) There exists substantial record evidence upon which Congress has reached its conclusion that a ban on partial-birth abortion is not required to contain a 'health' exception, because the facts indicate that a partial-birth abortion is never necessary to preserve the health of a woman, poses serious risks to a woman's health, and lies outside the standard of medical care. Congress was informed by extensive hearings held during the 104th, 105th, 107th, and 108th Congresses and passed a ban on partial-birth abortion in the 104th, 105th, and 106th Congresses. These findings reflect the very informed judgment of the Congress that a partial-birth abortion is never necessary to preserve the health of a woman, poses serious risks to a woman's health, and lies outside the standard of medical care, and should, therefore, be banned. Pursuant to the testimony received during extensive legislative hearings during the 104th, 105th, 107th, and 108th Congresses, Congress finds and declares that:

(A) Partial-birth abortion poses serious risks to the health of a woman undergoing the procedure. Those risks include, among other things: An increase in a woman's risk of suffering from cervical incompetence, a result of cervical dilation making it difficult or impossible for a woman to successfully carry a subsequent pregnancy to term; an increased risk of uterine rupture, a abruption, amniotic fluid embolus, and trauma to the uterus as a result of converting the child to a footling breech position, a procedure which, according to a leading obstetrics textbook, 'there are very" other than for delivers" few, if any, indications for "of a second twin'; and a risk of lacerations and secondary hemorrhaging due to the doctor blindly forcing a sharp instrument into the base of the unborn child's skull while he or she is lodged in the birth canal, an act which could result in severe bleeding, brings with it the threat of shock, and could ultimately result in maternal death.

(B) There is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures. No controlled studies of partial-birth abortions have been conducted nor have any comparative studies been conducted to demonstrate its safety and efficacy compared to other abortion methods. Furthermore, there have been no articles published in peer-reviewed journals that establish that partial-birth abortions are superior in any way to established abortion procedures. Indeed, unlike other more commonly used abortion procedures there are currently no medical schools that provide instruction on abortions that include the instruction in partial-birth abortions in their curriculum.

(C) A prominent medical association has concluded that partial-birth is 'not an accepted medical practice', that it has 'never been subject to even a minimal amount of the normal medical practice development', that 'the relative advantages and disadvantages of the procedure in specific circumstances remain unknoen, and that 'there is no consensus among obstetricians about its use'. The association has further noted that partial-birth abortion is broadly disfavored by both medical experts and the public, is 'ethically wrong,' and 'is never the only appropriate procedure'.

(D) Neither the plaintiff in Stenberg v. Carhart, nor the experts who testified on his behalf, have identified a single circumstance during which a partial-birth abortion was necessary to preserve the health of a woman.

(E) The physician credited with developing the partial-birth abortion procedure has testified that he has never encountered a situation where a partial-birth abortion was medically necessary to achieve the desired outcome and, thus, is never medically necessary to preserve the health of a woman.

(F) A ban on the partial-birth abortion procedure will therefore advance the health interests of pregnant women seeking to terminate a pregnancy.

(G) In light of this overwhelming evidence, Congress and the States have a compelling interest in prohibiting partial-birth abortions. In addition to promoting maternal health, such a prohibition will draw a bright line that clearly distinguishes abortion and infanticide, that preserves the integrity of the medical profession, and promotes respect for human life.

(H) Based upon *Roe v. Wade*,[192] and *Planned Parenthood v. Cosey*,[193] a governmental interest in protecting the life of a child during the delivery process arises by virtue of the fact that during a partial-birth abortion, labor is induced and the birth process has begun. This distinction was recognized in Roe when the Court noted, without comment that the Texas parturition statute, which prohibited one from killing a child 'in a state of being born and before actual birth,' was not under attack. This interest becomes compelling as the child emerges from the maternal body. A child that is completely born is a full, legal person entitled to constitutional protections afforded a 'person' under the United States Constitution. Partial-birth abortions involve the killing of a child that is in the process, in fact mere inches away from, becoming a 'person'. Thus, the government has a heightened interest in protecting the life of the partially-born child.

(I) This, too, has not gone unnoticed in the medical community, where a prominent medical association has recognized that partial-birth abortion are 'ethically different from other destructive abortion techniques because the fetus, normally twenty weeks or longer in gestation, is killed outside of the womb'. According to this medical

[192] 410 US,113(1973).
[193] 505 US. 833(1992).

association, the "partial birth" gives the fetus an autonomy which separates it from the right of the woman to choose treatments for her own body'.

(J) Partial-birth abortion also confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child, whom he or she had just delivered, all but the head, out of the womb, in order to end that life. Partial-birth abortion thus appropriates the terminology and techniques used by obstetricians in the delivery of living children-obstetricians who preserve and protect the life of the mother and the child- and instead use those techniques to end the life of the partially-born child.

(K) Thus, by aborting a child in the manner that purposefully seeks to kill the child after he or she has begun the process of birth, partial-birth abortion undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world, in order to destroy a partially-born child.

(L) The gruesome and inhumane nature of the partial-birth abortion procedure and its disturbing similarity to the killing of a newborn infant promotes a complete disregard for infant human life that can only be countered by a prohibition of the procedure.

(M) The vast majority of babies killed during partial-birth abortions are alive until the end of the procedure. It is a medical fact, however, that unborn infants at this stage can feel pain when subjected to painful stimuli and that their perception of this pain is even more intense than that of newborn infants and older children when subjected to the same stimuli. Thus, during a partial-birth abortion procedure, the child will

fully experience the pain associated with piercing his or her skull and sucking out his or her brain.

(N) Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life. Thus, Congress has a compelling interest in acting-indeed it must act-to prohibit this inhumane procedure.

(O) For these reasons, Congress finds that partial-birth abortion is never medically indicated to preserve the health of the mother; is in fact unrecognized as a valid abortion procedure by the mainstream medical community; poses additional health risks to the mother; blurs the line between abortion and infanticide in the killing of a partially-born child just inches from birth; and confuses the role of the physician in childbirth and should, therefore, be banned."[194]

As the findings reveal that partial birth abortion is a gruesome and in humane procedure which is never medically necessary to preserve the health of a woman. President Bush called partial-birth abortion an "abhorrent procedure that offends human dignity".

Section 3 talk about prohibition on partial birth abortions which provides that:

(a) Any physician who, in or affecting interstate or foreign commerce, knowingly performs a part abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years both. This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother, whose life is endangered by a physical disorder, physical illness, or physical injury, including a

[194] Section 2, Partial Birth Abortion Ban Act, 2003.

life-end physical condition caused by or arising from the pregnancy itself.

(1) The term 'partial-birth abortion' means an abortion in which--

(A) the person performing the abortion deliberately and intentionally vaginally delivers a fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and

(B) performs the overt act, other than completion of delivery, that kills the partially delivers fetus; and

(2) the term 'physician' means a doctor of medicine or osteopathy legally authorized to practice and surgery by the State in which the doctor performs such activity, or any other individual legally authors the State to performs abortions: Provided, however, That any individual who is not a physician or not doctor legally authorized by the State to perform abortions, but who nevertheless directly performs a partial-birth abortion, shall be subject to the provisions of this section.

(C) (1) The father, if married to the mother at the time she receives a partial-birth abortion procedure the mother has not attained the age of 18 years at the time of the abortion, the maternal grandparents may in a civil action obtain appropriate relief, unless the pregnancy resulted from the plaintiff's criminal or the plantiff consented to the abortion.

(2) Such relief shall include

(a) Money damages for all injuries, psychological and physical, occasioned by the violation section; and

(b) Statutory damages equal to three times the cost of the partial-birth abortion.

(D) (1) a defendant accused of an offense under this section may seek a hearing before the State Medical Board on whether the physician's conduct was necessary to save the life of the mother, whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

(2) The findings on that issue are admissible on that issue at the trial of the defendant. Upon a mother defendant, the court shall delay the beginning of the trial for not more than 30 days to permit such a help to take place

(E) A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section and a conspiracy to violate this section, or for an offense under section 2,3 or 4 of this title based on a violation of this section.[195]

Section 3(b) (1) (A) legally defines a partial-birth abortion as any abortion in which the baby is delivered "past the navel... outside the body of the mother" before being killed. It is well documented that partial-birth abortions are performed by thousands, mostly on healthy babies of healthy mothers in the fifth and sixth months of pregnancy, and sometimes even later. It is an inhumane procedure to kill a partially born child, in fact mere inches away from, becoming a 'person'. Thus the Act punishes those physicians who

[195] Section 2, Partial Birth Abortion Ban Act, 2003.

performs partial abortion and thereby kills a human fetus unless to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life endangering physical condition caused by or arising from pregnancy itself.

Section 4 of the Partial Abortion Ban Act 2003 says that it is the sense of the Senate that:

(1) the decision of the Supreme Court in *Roe v. Wade*[196] was appropriate and an important constitutional right; and

(2) such decision should not be overturned

Thus the Act has been enacted to protect the unborn child from abortion. The partial-abortion ban Act has been enacted to prohibit this inhumane procedure to kill a vulnerable and innocent human life who is just inches from birth. In short, the Act protects the unborn child from destruction.

ii. Unborn Victims of Violence Act 2004

Prior to enactment of the federal law, the "*child in utero*" was, a general role, not recognized as a victim of federal crimes of violence. Thus, in a federal crime that injured a pregnant woman and killed the "*child in utero*" no homicide was recognized, in most cases. One exception was the "born-alive rule", applied in *US Vs Spencer*[197] a case in which the child was born alive and died shortly afterwards; therefore there was no doubt that the decedent was once a living person under the law.

The need for the unborn victims of violence Act is amply illustrated by the facts of a case argued before the court of Appeals for the Armed Forces on May 12, 1999. In *United States Vs Robinson* in 1996, Gregory Robbins, an enlisted man in the Air Force and his wife Kartene (then age 18) resided on

[196] 410 U.S. 113 (1973).
[197] 839 F 2nd 1341 (9th Cir. 1988).

Wright-Patterson Air Force Base in Ohio, a jurisdiction governed by federal military law. Also residing there, in utero, was Jasmine Robbins, an unborn baby girl of 34 weeks of development.

On September 12, 1996, Gregory Robbins wrapped his fist in a T-shirt and badly beat Karlene, repeatedly striking her in the face and abdomen. Karlene's uterus split open, expelling baby Jasmine into her mother's abdominal cavity, where the baby died. Karlene's servived with a broken nose, swollen eye, and ruptured uterus. Gregory Robbins was arrested and charged with several criminal offences for what he had done to his wife. But Air Force prosecutors concluded that they could not charge him with a separate offense for killing Jasmine, because an unborn child is no recognized as a victim under federal law.

That judgment was concurred in by the U.S. Air Force Court of criminal Appeals in a 1998 ruling dealing with the Robbins Case. The court said "Federal homicide statutes reach only the killing of a born human being [congress has not spoken with regard to the protection of an unborn person".[198]

The Unborn Victim of Violence Act was first introduced in Congress in 1999. It passed the House of Representative in 1999 and 2001, but not the Senate. In 2003, the bill was reintroduced in the House. After several amendments were rejected it was passed in the Senate on March 25, 2004. It was signed into law by President Bush on April 1, 2004. At the signing ceremony during his remarks, Bush said, "Any time an expectant mother is a victim of violence, two lives are in the balance each deserving protection, and each deserving justices. If the crime is murder and the unborn child's life ends justices demands a full accounting under the law".

The Unborn Victims of Violence Act of 2004 is a United States law which recognizes a "*child in utero*" as a legal victim, if he or she is injured or

[198] Federal Bill to protect unborn victims of violence @http://www.euthensia.com/vio/.html.

killed during the commission of any of over 60 listed federal crimes of violence. The law defines *"child in utero"* as a member of the species *Homo Sapiens* at any stage of development, who is carried in the womb.

The law applies only to certain offences over which the United States government has jurisdiction including certain crimes committed on Federal properties, against certain Federal official and employees, and by members of the military. Because of principles of federalism embodied in the United States Constitution, Federal Criminal law does not apply to crimes prosecuted by the individual states. However 34, states also recognize the fetus or "unborn child" as a crime victim, at least for purposes of homicide or feticide.[199]

For the first time, the unborn child would be recognized in federal law as the victim of a crime of violence. Under the Unborn Victims of Violence Act, 2004 if a person commits a violent act against a woman that is already a federal crime under existing law, and also injures or kills the unborn child of such a woman, he will be charged with crimes against two victims that the woman and the unborn child. The Act provides that the punishment for injuring or killing an unborn child would be the same as the punishment under existing federal laws if the same conduct had resulted in the same degree of harm to the mother. This would result in federal prison sentences for convicted offenders, ranging from up to three years if an unborn baby suffers a minor injury during a simple assault on federal employer, to life imprisonment for many cases in which the unborn child dies. The Act, does not however, establish any death-penalty offenses.

The Act does not deal with the legality of abortion it does not conflict with US Supreme Court decisions currently in force. Therefore, the bill should be upheld in the courts, if challenged. Thus the protection of dozens of existing federal laws, dealing with crimes such as assault manslaughter, and homicide,

[199] State Homicide Laws That Recognize Unborn victims (Fetal Homicide).

would be extended to unborn children. "The unborn victims of violence Act is definitely a right to life bill, and a very important one that recognizes the humanity of unborn children and protects than against many heinous crimes". The Act of 2004 challenges that ideology by recognizing the unborn child as a human victim, distinct from the mother.

Prior to 1970, the killing of a fetus was not murder. In *Keelar Vs Superior Court*[200] a fetus was deliberately "stomped out of" the mother but this court held a fetus was not a "human being" within the meaning of former Section 187, subdivision (a) following Keelar, the Legislature amended section 187, subdivision (a) to provide that murder was the unlawful killing of either a human being or a fetus.[201] Relying on a law review article interpreting the legislative history of this amendment, defendant contended, "the stated purpose of the bill's author was to make Robert Keller's action susceptible to a charge of murder:

The language of section 187, subsection (a), that "murder is the unlawful killing of a human being, or a fetus, with malice aforethought".

California recognizes two categories of murder victims-human beings and fetuses. It is unclear whether the State Legislature intended to create a single crime of murder applicable to both a human being and a fetus, or whether it intended to create two crimes- murder of a human being and murder of a fetus.[202]

Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.[203] Viability is not an element of fetal homicide under section

[200] (1970) 2 Cal. 3d 619, 623.
[201] Stats. 1970, Ch. 1311, $.1, p.2440.
[202] Recently congress enacted a federal statute creating two separate crimes: one against the mother, the other against "the unborn child". (unborn victims of violence Act of 2004).
[203] People Vs Honsen (1994) 9 Cal. 4th 300, 307 (Hansen); 187, sub.sec (a).

187(9), but the state must demonstrate "that the fetus has progressed beyond the embryonic state of seven to eight weeks".[204]

In the *Propel v Harold Wayne Taylor* the California Supreme Court on April 5, 2004 upholds murder conviction of man who shot a pregnant woman to death; and argued that he unknown she was pregnant. Harold Taylor was convicted of two counts of murder in the 1999 shooting deaths of Fanster and her 11-weeks to 13-weeks old unborn child. A state appeal court reversed the fetal homicide conviction, saying the law did not apply to Taylor because he was not aware of the pregnancy. California Supreme Court reinstated the conviction, ruling that it is not necessary to prove that an attacker knew of the existence of a fetal victim.

Thus ruling makes California law, as under the federal unborn victims of violence Act, 2004, if criminal intention of the victim is proved, a criminal will be held responsible for the harm he does to other victims including unborn children. This legal doctrine will serve to determine attacks, including attacks on women and girls who are not actually pregnant.[205]

iii. Unborn Child Pain Awareness Act 2005

The Unborn Child Pain Awareness Act, 2005, amends the public Health Service Act to require an abortion provider, beginning any abortion of a pain-capable unborn child (defined as an unborn child who has reached a probable stage of development of 20 weeks after fertilization), to (1) make a specified statement to the pregnant woman that there is substantial evidence that the process will cause the Unborn Child Pain, and that the mother has the option of having pain-reducing drugs administered directly to the child; (2) provide to the woman an Unborn Child Pain Awareness Brochure (unless she waives receipt) and an unborn Child Pain Awareness Decision Form; and (3) obtain on

[204] People Vs Davis (1994) 7 Cal. 4th 797, 814-815.
[205] California Supreme Court uphold conviction for murder of human "fetus" even if pregnancy unknown @http://www.nrlc.org/unborn-victims/CAsupremecourtruling040504.html.

the form the woman's signature and her explicit request for or refusal of the administration of drugs to the child. Creates an exception for certified medical emergencies. Establishes for willfully failing to comply with this Act, including civil penalties, medical license suspension, or both Authorizes: (1) specified official to bring suit in federal court; and (2) private rights of action by a parent or guardian of a woman who is an unencipated minor. Requires each state and state medical licensing authority to promulgate procedures for the revocations or suspension of a provider's license upon a court finding that the provider has violated this Act. Subjects a state that fails to implement such procedures to loss of medical funding.[206]

iv. State Homicide Laws That Recognize Unborn Victims (Fetal Homicide)

The laws of the 35 states of United States of America that recognize the unlawful killing of an unborn child as homicide in at least some circumstances. The Federal Unborn Victims of Violence Act, enacted April 1, 2004 covers unborn victims of federal and military crimes. These states with homicide laws recognize unborn children as victims throughout the period of pre-natal development.[207] However there are some other states of United States of America, whose laws are gravely deficient because they do not recognize unborn children as victims during certain period of their pre-natal development. These states are referred to partial-coverage unborn victim's states.[208]

v. Constitutional Challenges to State Unborn Victims (Fetal Homicide) Laws

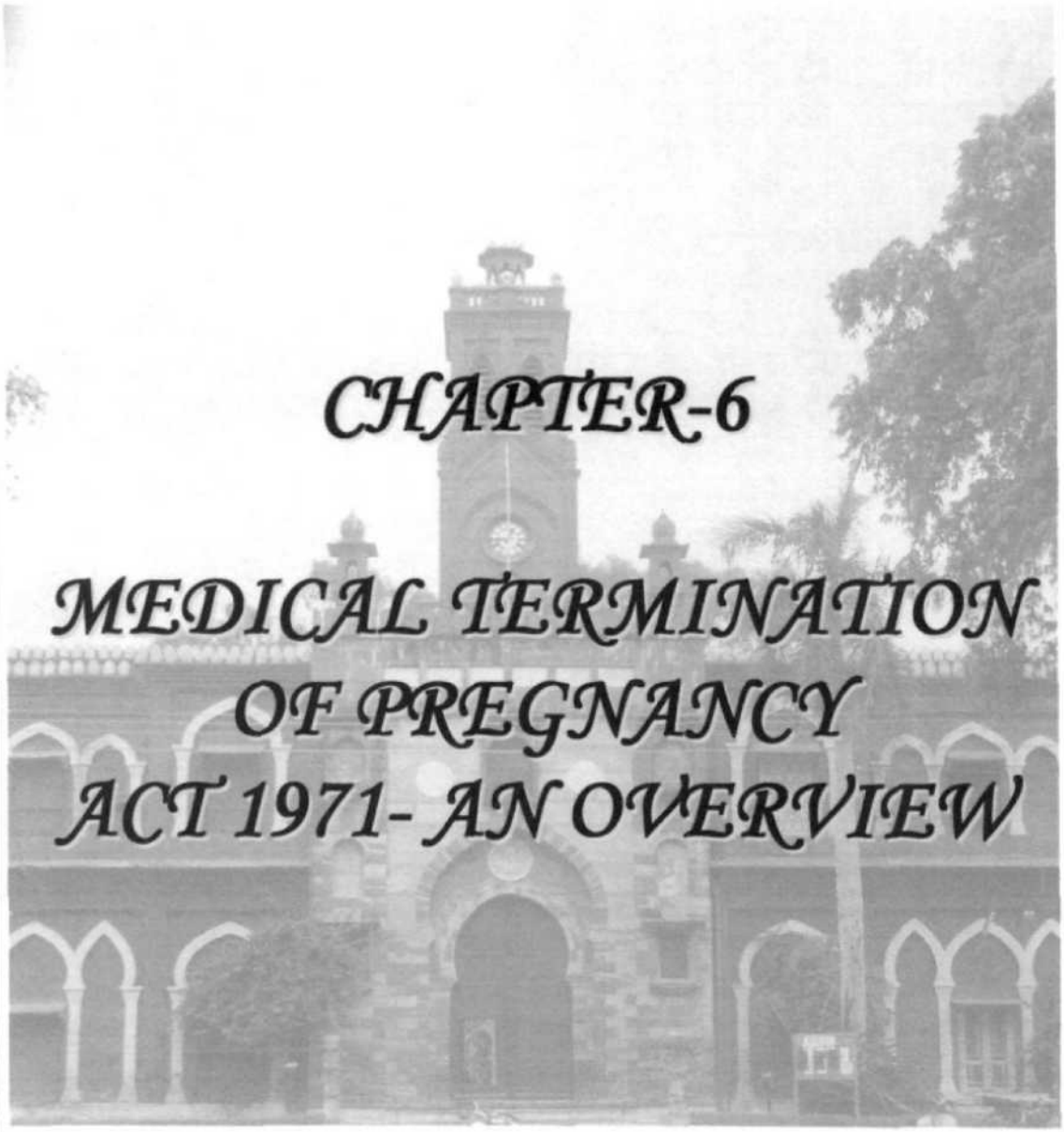
Since 1992, federal and State Courts have repeatedly invalidated statutes and initiatives that sought to criminalize virtually all abortions, and the Supreme Court has refused to review those cases- signal that the *Casey* plurality remains intact. Determined to find a way to strike at the heart of the right to choose, even if they can not overrule *Roe* and out-law abortion, anti-

[206] http//www.congress.gov/cgi-bdquery/z?d/09;SN00051;@@@L&Summ=m&
[207] State Homicide Laws That Recognize Unborn Victims (Fetal Homicide) @ http://www.nrlc.org/unborn-victims/statehomicidelaws092302.html
[208] http://www.nrlc.org/unborn-victims/statehomicides092302.html

choice legislators are now attempting to ban certain methods of second-trimester and past viability abortion attack on these procedures, which represent a tiny fraction of pregnancy terminations, take their greatest toll on women with wanted pregnancies, who discover very late that their fetus is suffering from severe or fetal anomalies or that their own health is threatened.

Various constitutional challenges to State Unborn Victims (Fetal Homicide) Laws were made which based at least in part on *Roe v. Wade* was unsuccessful.[209]

[209] Constitutional Challenges to state unborn victims (Fetal Homicide Laws at http://www.nxlc.org/urborn-victims/statechallenges.html



CHAPTER-6

MEDICAL TERMINATION OF PREGNANCY ACT 1971- AN OVERVIEW

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MEDICAL TERMINATION OF PREGNANCY ACT, 1971- AN OVERVIEW

A. MTP ACT-A Step towards Liberalization of Abortion Law

Abortion was first legalized under the Indian Penal Code which makes the causing of a miscarriage (if not done in good faith to save the life of the woman) an offence punishable with imprisonment up to seven years. In case carried out without the consent of the woman (a woman under a misconception, a woman with an unsound mind or in an intoxicated state and a girl below 12 years of age), the person carrying out such an act is punishable for life. The most important provision in the Indian Penal Code was the prohibition in killing of a fetus after the twentieth week of pregnancy by when the fetus is recognized as having become "quick" for which the offender was liable for imprisonment up to 10 years.[1]

The stringency of the law led to many illegal abortions, which very severely affected the health of the pregnant women and in many cases led to their death. With the stringent law on abortions, the maternal morality, resulting from illegal abortions, has been considerable, as abortions are performed mostly by unqualified people under unhygienic conditions. And it was honored more in breach than in observance. It was estimated that before the enactment of the M.T.P. Act, 1971 as many as five million induced abortions were carried out in India every year, of which more than three million were illegal[2], but perhaps not even one percent prosecutions and successful convictions taken. Knowledgeable people have claimed also that the strict abortion law resulted in a variety of mental problems for women and in an increasing number of suicides. A large number of maternal deaths is also

[1] Sections 312-316 Indian Penal Code 1860.
[2] Madhava Menan, N.R., "Population policy, Law Enforcement on the Liberation of Abortion: A socio-legal Inquiry into the Implementation of the Abortion Law in India", 16 JILI (1974) P. 626 at 632-33.

attributed to illegal abortions. Despite all these social consequences nobody even thought to liberalize the law to combat criminal abortion or restore the so called legitimate right of women to decide when to have a child till exponents of the family welfare programme found in it an effective device for birth control.[3]

The problem of induced abortions is a complex one involving various factors of significance both to the individual and to the society as a whole and has, therefore, assumed global importance in recent years. A demand for the liberalization of the stringent laws on abortion has, therefore, arisen all over the world and most countries have liberalized their laws relating to induced abortions.

Recommendation of the Central Family Planning Board.

The need for liberalizing the law relating to induced abortions has also been felt in India because the number of induced abortions in India has been estimated at 65 lakhs per year. The Central Family Planning Board, at its meeting held on the 25th August, 1964, expressed anxiety on the reported increase in the number of induced abortions under insanitary conditions affecting the health and life of the pregnant woman. The Board considered that the question was complex and recommended that a committee may be formed to examine the question.

Pursuant to the said recommendation of the Central Family Planning Board, the Central government appointed, in 1964, a committee under the Chairmanship of a medical professional Dr. Shantilal Shah, Minister of Law, Health and Judiciary, in the State of Maharashtra.

After considering the evidence tendered before it and after considering the law on the subject in other countries, the *Shanti Lal Shah Committee*

[3] Ibid p.635.

submitted its report on the 31st December, 1966, recommending interalia, the liberalization of the law relating to induced abortions.

In pursuance of the recommendations of *Shantilal Shah Committee*, the minister for Health and Family Planning introduced the Medical Termination of Pregnancy Bill, 1969, in the Rajya Sabha on the 14th November, 1969. The Bill was referred to a joint committee of both Houses of Parliament consisting of 33 members. The joint committee after considering 21 memoranda received by it and the evidence of 26 witnesses examined by it amended the Bill and recommended the consideration of the Bill, as amended by it. The Bill, as reported by the Joint Committee, was further amended during its passage through parliament and the Bill as passed by parliament was accented to by the President on 10th August, 1971.

The new abortion law of India, though somewhat late in coming, is among the most liberal legislations of its kind in the world. The Indian law is perhaps the only legislation where failure of contraceptives has been legally accepted as a valid ground for abortion. The M.T.P. Act 1971 has often the vigor's of the law of abortion contained in the Indian Penal Code.[4]

Purpose of the Act

The purpose of the Act, besides being the elimination of the high incidence of illegal abortion is perhaps to confer on the woman the right to privacy, which includes the right to space and to limit pregnancies (i.e., whether or not to bear children), the right to decide about her own body. Another important feature of the Act is to encourage a reduction in the rate of population growth by permitting termination of an unwanted pregnancy on the ground that a contraceptive device failed.[5] The Act seeks to achieve two

[4] Seth D D and Maitra S K and Sinha B.N, "Abortion and Termination of Pregnancy in India", 1973 ed., Pub.by Delhi Law House,Allahabad.p.95.

[5] Gour K.D. "A Text Book of The Indian Penal Code",3 rd ed.2004,Universal Law Publishing Comp.pvt ltd,Delhi, PP.503-4

purposes. On the one hand, it seeks to liberalize the law relating to termination of pregnancies where such termination is necessary.

(a) as a health measure, where the continuance of the pregnancy would involve a risk

  (i) to the life of the pregnant woman, or

  (ii) of grave injury to her physical or mental health or

(b) on humanitarian grounds, where the pregnancy has been caused by a sex crime, or

(c) on eugenic grounds, where there is a substantial risk that the child, if born, is likely to suffer from such physical or mental abnormalities as to be seriously handicapped

The M.T.P. Act, on the other hand, seeks to make the law relating to termination of pregnancies more strict. The Act though progressive in outlook, is very cautious in its approach to the problem. While the MTP Act seeks to strike at the root of age-old prejudice-social, religious or otherwise-against termination of pregnancies and further seeks to remove a social malady, the existence of which is undeniable, its cautious approach would be evident from its provisions. There are built in, the Act itself, sufficient safeguards to ensure that the provisions to the Act may be resorted to only for safeguarding the health of the pregnant woman and not for the purpose of ushering in a permissive society. The Act seeks to strike a balance between progression and caution. Under the Indian Penal Code a pregnancy may be lawfully terminated only when it is necessary, in good faith, to save the life of the pregnant woman, but under the Medical Termination of Pregnancy Act, *1971,* a pregnancy may be lawfully terminated not only where it is immediately necessary to save the life of the pregnant woman but also where the continuance of the pregnancy would involve one or more of the risks specified in the Act. To this extent, the

law relating to abortion has been liberalized by the Act. But this liberalization has been offset by the other provisions of the Act which have in effect, made the law relating to termination of pregnancies more strict. While under the Indian Penal Code, a pregnancy which was required to be terminated to save the life of the pregnant woman could be terminated by any person, whether qualified or not, under the present law such pregnancy can be terminated only by a registered medical practitioner. The provisions of the Indian Penal Code to the contrary have been expressly modified by the Act. Besides, although the Act permits an ordinary registered medical practitioner to terminate a pregnancy where it is necessary to save the life of the mother pregnancies cannot be terminated on other grounds by an ordinary registered medical practitioner. In order to qualified to terminate pregnancy on one or more of the grounds specified in section 3 of the M.T.P. Act, 1971, the person concerned must not only be a registered medical practitioner but must also possess the prescribed experience or training in gynecology and obstetrics. An ordinary registered medical practitioner, who does not have the prescribed experience nr training in gynecology and Obestrics, will not, therefore, be competent under the Act to terminate a pregnancy on any of the grounds specified in section 3. The Act thus not only totally disentitles unqualified persons from terminating any pregnancy but also disentitles a registered medical practitioner, who does possess the prescribed experience or training in gynecology and obstrics, from terminating any pregnancy except where the termination of the pregnancy is immediately necessary to save the life of the pregnant woman.[6]

B. Constitution and MTP ACT-1971

The concept of equality and equal protection of laws guaranteed by Article14[7] in its proper spectrum encompasses social and economic justice in a political democracy. The principle enshrined in Article14 does not take away

[6] Ibid.

[7] Article 14 The Constitution of India 1950- The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

from the state the power of classifying persons for legitimate purposes. The legislature is competent to exercise its discretion and make classification. Every classification is in some degree likely to produce some inequality. Differential treatment does not per se constitute violation of Article 14.Article 14 prohibits class legislation but not reasonable classification for the purpose of legislation. The classification may be founded on differential basis according to objects sought to be achieved but what is implicit in it is that there ought to be a nexus, i.e, casual connection between the basis of classification and object of the statute under consideration.

In the case of pregnancy the classification is between two genders. The decision making power lies in the woman as she is undergoing the nine month process of pregnancy and it is her body has to bear the burnt of the pregnancy. Therefore, the entire decision making must obviously lie with the mother. The Medical Termination of Pregnancy Act, 1971, has been passed to eliminate high incidence of illegal abortion, which includes the right to space and to limit pregnancies, i.e., whether or not to bear children. But, this MTP Act lays down the grounds for termination of pregnancy by the registered medical practitioner, where it is necessary to save the life or health of the pregnant woman.

In *Vijay Sharma Vs Union of India,*[8] the court held that the Medical Termination of Pregnancy Act, *1971* permits termination of pregnancy of a woman by medical practitioners on ground of mother's health, i.e., when pregnancy arises from a sex crime like rape or intercourse with a mentally ill woman etc. The MTP Act does not deal with sex selection. A prospective mother who does not want to bear a child of a particular sex cannot be equated with a mother who wants to terminate the pregnancy not because of the sex of the child but because of other circumstances laid under the MTP Act, to treat her anguish as injury to mental health is to encourage sex selection which is not permissible.

[8] AIR 2008 Bom.29.

The Indian Constitution guarantees personal liberty as a fundamental right to all the inhabitants of India.[9] Article 21 of the constitution of India enshrines the protection of life and personal liberty. Now before a person is deprived of his life or personal liberty. Now before a person is deprived of his life or personal liberty, the procedure established by law must be strictly followed and must not be departed from the disadvantage of the person affected. Procedure established by law under Article 21 means the procedure prescribed by the state made or enacted law. But this law should not be arbitrary, unfair or unreasonable. It is to be mentioned that the MTP Act, has not been enacted to legalize abortions. Instead, the Act aims at termination of pregnancy in the interest of the woman or to unborn child.[10] It would appear that the dominant object to achieve for which the law has been enacted is to save the life of the pregnant woman or relieve her of any injury towards physical and mental health or prevent the possible deformities in the child to be born.

The right to life which is the most fundamental of all is also the most difficult to define, certainly it cannot be confined to a guarantee against the taking away of life,it must have a wider application. By the term "life" something more is meant than mere animal existence. The inhabitation against its deprivation extends to all those limbs and faculties by which life is enjoyed.[11] In *A.D.M Jabalpur Vs Shivkant Shakla*[12] it was contended by the Attorney General that Article 21 of the constitution of India is the sole repository of the right to life and personal liberty. But this is not true in the sense that even if Article 21 is deleted from the constitution, a person does not automatically lose his right to life or personal liberty. In fact, right to life is a basic human right from which all other rights emanate. Hon'ble Justice Khanna

[9] Article 21, Constitution of India 1950- No person shall be deprived of his life personal liberty except according to procedure established by law.
[10] Nand Kishore Sharma Vs Union of India, AIR,2006 Raj.166.
[11] Munn Vs Illinois (1876) 94 U.S. 113.
[12] AIR 1976 SC 1207.

in his dissenting judgement of the right to life and personal liberty. Even in the absence of Article 21, the state has got no power to deprive a person of his life or personal liberty without the authority of law. This is essential postulate and basic assumption of the Rule of Law in every civilized society.

In *Gopalan Case*[13] justice Mukherjee also said: "The right to the safety of one's life and limbs and to enjoyment of personal liberty, in the sense of freedom from physical restraint and coercion of any sort, are the inherent birth rights of a man..."

The Indian Supreme Court in the recent decision of *S. N. Sarkar Vs State of West Bengal*[14] has added a new dimension to the concept of personal liberty when the court held that the state act which interferes with the life and the liberty of the individual should not be only according to the procedure established by law" but also be reasonable. This has brought the constitutionality test of state action nearer to some extent to the one adapted in the United States. The implicit incorporation of the 'due process' doctrine in the personal liberty clause of the Indian constitution seems to be in the offing. Accordingly, an unreasonable or drastic restriction on the option of an Indian woman seeking abortion may not have constitutional validity as they would fetter the liberty of the woman.

In fact neither Article 21 nor any other law confers right to life. Article 21 as its marginal rate clearly indicates, gives protection against the deprivation of life. The marginal note mentions: "protection of life is a basic human right, the absence of which renders all the other rights meaningless, useless and worthless. In today's scenario, this right has received a global recognition and it has been incorporated in almost all the Human Rights legislations all over the world. Of late, the horizon of the right of life has been widened by judicial

[13] A.K. Gopalan Vs State of Madras, A.I.R. 1950 S.C.
[14] A.I.R. 1973 S.C. 1425; (1973) 1. SC.C.856.

interpretation and today it encompasses all the elements which one can think of as an aspect for leading a complete, clean, healthy and dignified life.

The relevance for the plea of right or 'personal privacy' is presently doubtful in India. This right has not been expressly included in the constitution either of India or of the United States. The Supreme Court of United States has recognized the right of privacy. The Indian Supreme Court has rejected it by its majority decision in *Kharak Singh Vs State of U.P.*[15] However, the minority view that "the right to privacy is an essential ingredient of personal liberty." In *Govind Vs State of M.P.*[16] the Supreme Court said that the right to privacy would necessarily have to go through a process of case by case development. Coupled with the later decisions of the Supreme Court in the S.N. Sarkar and Govind Cases, sounds an optimistic note for future and will be of great significance particularly for the legal problems relating to population control.

Article 21 of the constitution of Indian provides for the right to life and liberty to every person. The privacy rights are accepted under the concept of personal liberty.[17] Thus, Article 21 of the Constiution may confer on a pregnant woman the necessary right to decide for herself questions as to abortion. Such a right could only be restricted by a fair procedure established by a just and reasonable law. Thus the provisions of the M.T.P. Act may meet the test of reasonableness.

The Indian constitution doe not define the word "person". Obviously, for abortion a 'person' cannot include an 'artificial person'. But the question still remains whether ao unborn child will come within the definition of person as used in article 21[18] of the constitution. There is no direct decision of Indian Supreme Court as the definition of 'person' which includes unborn children.

[15] A.I.R. 1963 SC.1295.
[16] A.I.R. 1975 SC 1379.
[17] State of Maharashtra Vs Madhukar Narayan Mardikar, AIR 1991, SC 207.
[18] Article 21, The Constitution of India 1950- No person shall be deprived of life and personal liberty except according to procedure established by law.

The Allahabad High Court has however, held that for the purposes of section 304-A[19] of Indian Penal Code, the word 'person' includes a child born or unborn. An unborn child can be regarded as a living entity with a life of its own.[20]

Since the time immemorial Indian laws too treated the termination of pregnancy as an offence. According to Hinduism abortion or killing of fetus was considered a sin. According to Islam after a fetus was completely formed and given soul, abortion was haram (forbidden).[21]

In Hindu law a child (son) in womb is deemed to be in existence as a person and is entitled to share the joint family property.[22] These may form the basis to challenge the validity of Medical Termination pf Pregnancy A*ct*. It is a redeeming feature that the MTP Act imposes no residential requirement for seeking abortion under the Act. But, unlike the Abortion Act, 1964 of United Kingdom, the M.T.P. Act does not allow any option to a doctor to refuse to perform an abortion operation merely on the ground of his conscience. A medical practitioner may challenge the validity of this statutory obligation as an infringement of the fundamental right to the freedom of conscience guaranteed to him under the Indian constitution.[23]

As a basic rule, abortion is a crime, which takes away the life of the potential human being. The Medical Termination of Pregnancy Act, 1971 provides for circumstances in which a medical practitioner may perform an abortion without incurring criminal liability. A woman's right in this respect is doubtful because her right is dependant on certain condition, proof of risk of her or grave injury to her physical or mental health substantial risk of physical or mental abnormalities to the child if born and a situation where abortion

[19] Section 304-A-Indian Penal Code,1860
[20] Jabbar Vs State A.I.R. 1966 All 590; 1966. Cr. L.J. 1363.
[21] "Right to conceive vis-à-vis Right to Birth" A.I.R. Journal Section, 1996, p. 139.
[22] See Mulla, "Principles of Hindu Law" ed.1966.
[23] Article 25 (1) The Constitution of India 1950- subject to public order, morality and health entitled to freedom of conscience and right to freely to profess, practice and propagate religion.

could only save her life, all to be arrived at by the medical practitioners. Can a woman request a medical practitioner to perform an 'abortion' on the ground that she does not want a child at that time? Where the liberty of the woman is fully dependent on certain other factors, such a request cannot be said to be just and reasonable. The M.T.P. Act also does not classify the pregnancy period so that the woman's interests and the states interests could be given predominance in one's own shares. No doubt, the provisions of the Act are thus voilative of the life and liberty conferred under Article 21 of the constitution.

A decision as to abortion may be entirely left with woman provided she is same and attained majority. Only in case where an abortion may affect her life her freedom may be curtailed. All other restrictions on the right to abortion are unwelcome. In fact, a woman's decisions as to abortion may depend upon her physical and mental health or the potential threat to the health of the child. Apart from these reasons, there are also various important factors. She or her family may not be economically sound to welcome an additional child. Her relationship with the husband may virtually be on the verge of collapse and she may prefer not to have a child from him, for it may possibly affect a future marriage. All these factors are quite relevant and the Indian statute on abortion does not pay any respect to them. The law thus is unreasonable and could be found to be violative of the principles of equality provided under Article 14[24] of the Indian Constitution. It is desirable to pay compensation to woman for all her physical and mental inconveniences and liabilities which arise in these contexts? There seems to be no need for a woman alone to suffer for maintaining the public interest. The society has a duty to share such burdens. It may be noted that the M.T.P. Act 1971 does not protect the unborn child. Any indirect protection it gains under the Act is only a by-product resulting from the protection of the woman. The rights which provided and the restrictions which are imposed under the M.T.P. Act shows that the very purpose of the state is to

[24] Article 14 The Constitution of India, 1950- The state shall not deny to any person equality before law or the equal protection of the laws within the tertiary of India.

protect a living woman from dangers which may arise during an abortion process. It is the protection to the pregnant woman that protects the unborn child.[25]

Since the Act takes away the right of some of the medical practitioners, whether qualified or not, to terminate pregnancies, a question might arise as to whether these provisions of the Act are constitutionally valid because they impugn on the fundamental right conferred by Article 19 of the constitution of India on a person to practice his profession.[26] The fundamental rights conferred by that article are not absolute rights and reasonable restrictions may be imposed on such rights in the interest of the general public. Parliament is competent to specifying any profession or carrying on any occupation, trade or business. The technical or professional qualification specified in the Act having been made in pursuance of the provisions of Article 19(6) of the constitution, these provisions of the Act appears to be constitutionally valid provisions. Dissemination of literature on abortion for information, knowledge or discussion is important for popularizing the induced abortion as a measure of population control or for relieving the human suffering on account of unwanted pregnancies. However, legal and constitutional limitations may arise on this account. In the United States postal authorities are authorized to stop in transit or to refuse to accept the mail which they consider to fall under "non-boilable" category. In *Associated Students Vs Attorney General*[27] the plaintiffs, a student's organization, attempted to mail pamphlets containing birth control and abortion information, was refused by the postal authorities. They considered the material non bailable as it contained information regarding procuring or producing abortion and unsolicited advertisement on prevention of conception. The court, however, upheld the plaintiff's right to distribute the literature on the ground that birth control and abortion are the topics of extreme

[25] Promodan M.C. "The unborn and Legal Protection", Cochin University Law Review (1994) PP. 272-73.
[26] Article 19 (6) the Constitution of India 1950.
[27] 14 Cri. L-R 2251.

importance to the people at large. The discussion and dissemination of ideas should be allowed. In such matters interference can not be justified without a significant governmental interest.

In India, there is no comprehensive law to regulate the advertisement, displays, distribution or mailing of birth control and abortion literature. *In Romesh Thapper Vs State of Madras*[28] the Supreme Court declared that the right to circulate published material is an important aspect of the fundamental right of freedom of speech and expression guaranteed under the Indian constitution. The fundamental principle involved here is the people's right to know.[29] The postal authorities are authorized to prohibit mailing of indecent or absence material.[30] Some provisions of the Indian Penal Code provide instances of restrictions on the freedom of speech and expression in the interest of decency and morality. These sections prohibits the sale or distribution or exhibition of obscene words, etc in public places[31] which has the tendency of matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort is likely to fall. The criminal procedure code further restricts to makes, produces, publishes or keeps for sale, imports, exports, conveys, sells, lets to hire, distributes, publically exhibits or in any other manner puts into circulation any absence matters such as is referred to in section 292 of the Indian Penal Code.[32] Some other specific statutes[33] appear to have some bearing on the publicity of abortion medicines and techniques. The Drug and Magic Remedies (objectionable Advertisement) Act, 1954, prohibits the publication of objectionable and unethical advertisement in order to discourage self medication and self treatment. In *Hamdard Dawakhana Vs Union of India*[34] the

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[28] A.I.R. 1950 S.C. 124.
[29] Dr. Pandey, J.N. "Constitutional Law of India", 34th ed. 1999, p.142.
[30] Section 20 (A) the Indian Post Office Act, 1808.
[31] Section 292 and 293 Indian Penal Code,1860.
[32] Section 108 (i) (ii) The Criminal Procedure Code, 1973.
[33] Dangerous Drugs Act, 1930, Drugs Act 1930 and 1940.
[34] A.I.R. 1960 SC 554.

validity of Drug and Magic Remedies (objectionable Advertisement) Act 1954, which put restrictions on advertisement of drugs in certain cases and prohibited advertisements of drugs having magic qualities for curing diseases which challenged on the ground that the restriction on advertisement abridged the freedom speech. The Supreme Court held that the advertisement is no doubt a form of speech but every advertisement is not a matter dealing with the freedom of speech and expression of ideas. In the present case the advertisement was held to be dealing with commerce or trade and not for propagating ideas. Advertisement of prohibited drugs would thus not fall within the scope of Article 19(1) (9) of the constitution of India.

Yet in view of public and governmental larger interests involved in the abortions, the appropriate literature may be saved from the mischief of these prohibitive provisions and may be allowed to go unhindered in circulation.[35]

The potential ground to challenge the validity of the Act may rest on the distribution of legislative power as schemed under the constitution. As the M.T.P. Act is central enactment which seems to have transgreed[36] the subject matter of the state list[37] where measures of public health find a place for legislative action.

The Medical Termination of Pregnancy Act, 1971 has been alluded to as an instrument of criminal law, dealing with the matter included in the Indian Code which in turn is a subject matter of entry one of the concurrent list in the constitution.[38] The view however, does not appear to be correct. The exclusory portion of the 7th Schedule list-II entry 6 i.e. excluding offence against laws

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[35] Chandra Kant Vs State of Maharashtra, AIR 1970 SC, 1390.

[36] The M.T.P. Act 1971 has been described as health measure, Gazette of India dated Nov. 17, 1969, Pt. II S-2 Ext. 880.

[37] 7th Schedule, List III entry- The Constitution of India 1950-Criminal law, including all matters included in the Indian Penal Code at the commencement of this constitution but excluding offences against laws with respect to any of the matters specified in list I or list II and excluding the use of naval, military or air force or any other armed forces of the Union in aid of the civil power.

[38] 7thSchedule List II entry 6, the constitution of India, 1950 "Public and Sanitation; hospitals and dispensaries.

with respect to any of the matter specified in list I or II and excluding the use of naval, military or air force or any other armed forces of the Union aid of the civil power, makes it doubtful if the union legislature could have rightly claimed competence to enact the Act as a piece of criminal law. The M.T. P. Act significantly does not contain any Vital Penal provision, not even for the violation of its own provisions or that of the rules framed there under by the Union Government. Presumably, such deviation would be punishable under the Indian Penal Code as acts of unlawful abortion.[39]

Modern India, a secular democracy, permits abortion by law, under certain circumstances. No doubt this is a law availed by some. Yet it is true to say that the issues relating to the moral status of the unborn and abortion have neither been aired not even properly identified in general, in Indian minds and it literature. In public, the topic is by and large taboo. Illegal abortionists in the back street or the bush continued play their trade, often with dire consequences for their customers. To check exploitation of one kind or another in this matter, the issue must be thrown open.[40] The Act only widens the scope of induced abortions exempted from criminal liability arising under the Indian Penal Code. The M.T.P. Act provides for the permissible circumstances in which a pregnant woman may be aborted. A registered medical practitioner is absolved from any liability "for any damage caused or likely to be caused by anything which in good faith done or intended to be done by him under the Act".[41] The Act, however makes violations of the regulations framed under it by the states[42] a penal offence and fixes the upper limit of vine to be imposed.[43] The only other instance where the Act expressly makes abortion on offence under the Indian Penal Code is when it is performed "by a person who is not a registered

[39] Section 312-16 Indian Penal Code,1860.
[40] Singh Subash Chandra ,"Right to Abortion: A New Agenda" AIR 1997, S.C. Journal Section, p.134.
[41] Section 8 M.T.P.Act, 1971.
[42] Section 7 M.T.P. Act, 1971.
[43] Section 7(3)M.T.P. Act, 1971.

medical practitioner".[44] In this M.T.P. Act is narrower than, the code[45] and modified the latter "to this extent".[46]

The Medical Termination of Pregnancy ensures that in any circumstance only a duly authorized medical practitioner can terminate the pregnancy. The requirement of registered medical practitioner even in emergency situations only shows the concern of legislature for the health and safety of a woman, to keep the quacks out. As such the Act would fall more under entry 6 of list-II[47] which is exclusively a state subject.

The questions as to when does 'life' begin and what is the nature of obligation of the state to protect potential human life were not discussed or debated at all in the constituent Assembly at the time of making of the constitution nor such questions were considered at the time of enacting medical termination or pregnancy Act 1971. The architects of the MTP Act, 1971, have not taken into consideration the fundamental right, if any, of the fetus to be born. It is submitted that life exists in the fetus while in the womb of the mother and in this context Article 21 of the constitution of India is applicable to unborn person as well. Fetus is a separate and distinct legal entity existing in the womb of the pregnant mother and its destruction without following the provisions of Article 21 under a law like MTP Act 1971 would tend to make such law unconstitutional, invalid, illegal and null and void. The Medical Termination of Pregnancy Act, 1971 provides the substantive aspects for the deprivation of 'life' which exists in fetus, but it fails to provide procedural aspect required under Article 21 for such deprivation of life.[48] Yet, some constitutional justification may be argued in favor of the central legislature for having enacted this M.T.P. Act 1971, if it is considered as a measure of "*Social*

[44] Section 5(2), M.T.P. Act 1971.
[45] Section 312-13, Indian Penal Code,1860.
[46] Section 5(2) The M.T.P. Act 1971.
[47] 7th Schedule, List II entry 6. The constitution of India 1950-public and sanitation; hospitals and dispensaries.
[48] Shrimati Andhare Archana,"How Far is the Medical Termination of Pregnancy Act, 1971 constitutional?", Gujrat Law Herald, Vol. 22, 2002 (2), p.21.

and economic planning".[49] In the view the country wide 'havoc of quacks' abortion practices imperiling lives of thousands of women every year and also with the stimulated expectation that the safe use of medical termination of pregnancy technique may help the population control schemes as well as to save the lives of pregnant women the Act has acquired an importance of national character.[50] The M.T.P. Act, 1971 has liberalized the abortion law to ensure better health and avoidance of any risk to the life of the pregnant woman. The object of the Act being to save the life of the pregnant woman or to relieve her of any injury to her physical and mental health, and no other thing, it would appear the Act is rather in consonance with Article 21 of the constitution of India than in conflict with it. While it may be debatable as to when the fetus comes to life so as to attract Article 21 of the Constitution of India, there cannot be two opinions regarding the fact that where continuance of pregnancy is likely to involve risk to the life of the pregnant woman or cause grave injury to her physical or mental health, it would be her interest to terminate the pregnancy. Furthermore, the termination of pregnancy is not something which is provided for the first time by the Medical Termination of Pregnancy Act. It was provided for by the British in their enactment of the Indian Penal Code 1860.Section 312 of the Indian Penal Code too protects termination of pregnancy described as miscarriage; if it is done ''good faith for the purpose of saving the life of woman". Similarly section 315 of Indian Penal Code protects any act done with intent to prevent child from being born alive or causing it to die after its birth ''if such act has been done in good faith for the purpose of saving life of the mother.

C. Provisions for Termination of Pregnancy

The M.T.P. Act in India is founded on the principles of the British Act passed by its parliament in 1967. As an opening paragraph states, the M.T.P.

[49] 7th Schedule List III Entry 20, the Constitution of Indian, Economic and social planning.
[50] Article 249, the Constitution of India 1950- Power of parliament to legislate with respect to a matter in the state list in national interest.

Act is designed to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto. In essence, it liberalizes and attempts to regularize medical practices and institutions in relation to abortion and consequently, allows medical liberalization to supersede medical criminalization. Clearly, the M.T.P. Act does not encompass a fundamental right to induced abortion but is limited to the liberalization of the conditions under which women may have access to abortion services provided by approved medical practitioners of the liberalized conditions given in the Act. This is done by expanding the earlier medical indication of saving a pregnant woman to include medical and psychological morbidity or the potential of such morbidity if the woman is forced to carry an unwanted pregnancy to full term. Thus from the medical angle, the termination of a pregnancy becomes a "therapeutic" intervention rather than a right. Another important feature of the Act is to encourage a reduction in the rate of population growth by permitting termination of an unwanted pregnancy on the ground that a contraceptive device failed.[51]

The M.T.P. Act carves out exceptions to the provisions contained in the Indian Penal Code that criminalize the performance of an abortion. Thus, only those abortions which fall outside the purview of the M.T.P. Act and of the exception contained within the IPC are regarded as illegal and punishable. The Act only widens the scope of induced abortions exempted from criminal liability arising under the Code. It provides for the permissible circumstances in which a pregnant woman may be aborted.[52]

The Medical Termination of Pregnancy Act 1971 is a mini Act consisting of only 8 sections. The 1971 M.T.P. Act specifically mentions laws regarding:

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[51] See Gazette of India, 17th Nov, 1969 Pt.II, Sec.2, P.880 for statement of objects and reasons of the Medical Termination of Pregnancy Bill 1969.

[52] Singh S.K and Raizada R.K, "Abortion Law in India; Past and Present", ed.1976,Family Planning Association of India,Haryana Branh,Bal Vikas Bhavan,India,p.42

i) when a pregnancy can be terminated

ii) by whom it can be terminated

iii) place where pregnancy can be terminated

iv) The punishment of violation

The Medical Termination of Pregnancy Act 1971 regulates the law relating to abortion in India. The Act is encapsulated in 8 sections, concisely setting forth the law on this subject. While the first two sections set out the scope and clarify certain terms in the Act, the operative section would be third, which lays down the conditions when pregnancy may be terminated by a medical practitioner. Section 4 defines the place where pregnancy may be terminated while the section 5 sets out empower the central government to make rules and regulations respectively while section 8 protects any action taken or any damage caused under this Act by any registered medical practitioner acting in good faith.

After the enactment of the principal Act[53] the latest amendments were done in 2002[54], while rules were framed for the first time in 1972[55], amended in 1975[56], 1977[57] and first time and recently amended in 2003[58]. The latest amendments are based on the recommendations of the expert group committee formed in 1997, and suggestions of the National Women's Rights Commission as a measure to prevent cases of female feticide along with the experience gained in the implementation of the MTP Act 1971. The aim and objectives of Amendment are:

[53] M.T.P. Act 1971.
[54] M.T.P. (Amendment) Act 2002.
[55] M.T.P. (Amendment) Rules, 1995.
[56] M.T.P. (Amendment) Rules 1977.
[57] M.T.P. (Amendment) Regulations 1975.
[58] M. T.P. (Amendment) Rules 2003.

- To make the MTP Act 1971 more relevant to the current scenario of the India
- To remove provisions which were discriminatory to women (practice of Female feticide)
- To provide strict and enhanced punishment for the violation of the provisions of the Act.
- To save the RMP's from the purview of the IPC
- To legalize termination of pregnancy on various socio-medical grounds[59]

The main provisions for the termination of pregnancy are:

a. By whom it can be terminated

M.T.P. Act 1971 is an improvement over section 312 IPC, as it regulated the qualifications of a person who can terminate the pregnancy of a woman. In this act the expression "registered medical practitioner" has two different connotations- one for the purposes of section 3 and the other for the purposes of section 5. For the purposes of section 3, a person will not fall within the ambit of the expression "registered medical practitioner" unless he fulfils the following conditions, namely:

(i) he possess any recognized medical qualification, as defined clause (h) of section 2 of the Indian Medical Council Act, 1956;

(ii) his name has been registered in a state Medical Register; and

(iii) he has the prescribed experience or training in gynecology and obstrics;[60]

[59] Dr. Yadav Mukesh & Dr. Kumar Alok , "Medical Termination of Pregnancy (Amendment) Act 2002; An Answer to mother's Health & Female Felicide" @http://medind.inc.in/jal/105/il/jatt05i/p46.pdf

Where the pregnancy is terminated on one or more of the grounds specified in section 3, all the three conditions specified above should be fulfilled not only by the registered medical practitioner who forms the opinion that the pregnancy would involve one or more of the risks specified in that section but also by the registered medical practitioner who actually terminate the pregnancy. But where the pregnancy is terminated under section 5 on the ground that such termination is immediately necessary to save the life of the pregnant woman, it would be enough if the registered medical practitioner who terminates the pregnancy fulfils the first two conditions specified above, he need not have the prescribed experience or training in gynaecology and obstrics.

In the exercise of the powers conferred by Section 6, of the M.T.P. Act 1971, the Central Government has made the rules. *The Medical Termination of Pregnancy Rules 1972*[61] prescribes the experience or training required for the termination of any pregnancy under MTPA. According to Rule 4, a registered medical practitioner shall have one or more of the following experiences or training in gynaecologic and obsterics, namely:

(i) In the case of a medical practitioner possessing a post graduate degree or diploma in surgery, experience in the practice of gynaecology and obstetrics for a period of not less than six months.

(ii) In, the case of a medical practitioner who was registered in a state medical register immediately before the commencement of the Act, experience in the practice of gynecology and obstetrics for a period not less than five year

[60] Section 2(d) M.T.P. Act, 1971.
[61] The Gazette of India, March 11, 1972, Pt. II, 708.

(iii) In the case of medical practitioner who was registered in 9 State Medical Register on the date of the commencement of the Act or at any time there after;

(a) if he has completed six months of house surgery in gynecology and obstetrics with practical training in termination of pregnancy, and

(b) where he has not done any such house surgery, if he has practical training at any hospital established or maintained by government for a period of not less than three months in the termination of pregnancy.

It further stipulates that in the case of a registered medical practitioner who has a post-graduate degree or diploma in gynecology and obstetrics, it shall be presumed that he has the required experience of training in gynecology and obstetrics.[62] The termination of pregnancy by a person who is not a registered medical practitioner shall be an offence punishable under the penal code and that code shall to this extent stands modified.[63]

A woman causing herself to miscarry is within the criminal prohibitions unless she is herself a registered medical practitioner. The definition of the expression "registered medical practitioner" makes obvious that the practitioner of any system of medicine, other than the modern scientific system of medicine, will not fall within the definition of registered medical practitioner". The practitioner of Ayurvedic, Homoeopathic, Unani or other systems of indigenous medicine will not therefore fall within the scope of the expression "registered medical practitioner" and consequently they would not get any protection under the Act if they terminate any pregnancy, not even where such termination is immediately necessary to save the life of the pregnant woman.

[62] Rule 4(2) M.T.P. Rules, 1972.
[63] Section 5(2), M.T.P. Act 1971.

This exclusion of indigenous systems of medical practitioners results in hardship to the rural people who constitute substantial majority of the Indian people and who are largely served by non-allopathic practitioner.[64]

b. Duration of Pregnancies which are Terminable under the Act

The scope of the Act is very limited. All pregnancies are not terminable under the Act. Where the duration of pregnancy is less than 12 weeks a single doctor can give an opinion and certify as to whether a termination is indicated.[65] Where the length of a pregnancy is more than 12 weeks but less than 20 weeks two registered medical practitioners must agree that there is a case for termination.[66] The number of registered medical practitioners specified in this sub-section being the minimum number which would be required to form the opinion, the formation of the required opinion, in good faith, by a larger number of registered medical practitioners is not prohibited. Under section 5, a pregnancy, irrespective of the length thereof, may be terminated where the termination of such pregnancy is immediately necessary to save the life of the pregnant woman such pregnancy may be terminated by any registered medical practitioner irrespective of whether he possess the prescribed experience or training in gynecology and obstetrics or not. Where, however, the termination of pregnancy is not immediately necessary to save the life of the pregnant woman, such pregnancy may be terminated on the fulfillment of the conditions specified therein provided that the length of the pregnancy does not exceed 20 weeks.[67]

Before any pregnancy is terminated under sub-section an opinion is required to be formed, in good faith, by one or more registered medical practitioners that:

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[64] Menon, N.R.M. "Policy law Enforcement and the Liberalization of Abortion: A socio-legal Inquiry into the Implementation for the Abortion law in India", 16 JILI, 1974, P.633.
[65] Section 3(2) (a) M.T.P. Act 1971.
[66] Section 3 (2) (b) M.T.P. Act 1971.
[67] Section 3(2) (a), M.T.P. Act 1971.

(i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health or

(ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.[68]

c. Circumstances under which Pregnancy may be Terminated

The Medical Termination of Pregnancy Act, 1971 lays down the various grounds for termination of pregnancy by the registered medical practitioner, where it is necessary to save the life or health of the pregnant woman.

a. Risk to the life of Pregnant Woman

Section 312 of the Indian Penal Code allows miscarriage in good faith only to save the life of the pregnant woman. The M.T.P. Act provides among other grounds, for termination of pregnancy where the continuance of pregnancy would involve a risk to the life of the pregnant woman. Where the risk is such that the termination of pregnancy[69] is immediately necessary to save the life of pregnant woman, such termination may be made at any time irrespective of length of the pregnancy. Section 5 is more in the nature of an emergency provision, over riding the conditions setout in its preceding sections by saying that, "The provisions of section 4, and so much of the provisions of sub-section (2) of section 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioner in a case where he is of opinion formed in good faith, that the termination of such pregnancy is immediately necessary to save the pregnant woman.[70] The difference which has been made by the Act between the different grades of risks to the life of the pregnant woman may lead to difficult situation. For example where the continuance of pregnancy would involve a risk to the life of the pregnant woman but the risk is not such as to require an immediate termination of

[68] Section 3(2) b (i) & (ii) M.T.P. Act 1971.
[69] Section 3 (2) (i), M.T.P. Act 1971.
[70] Section 5(1) M.T.P. Act 1971.

pregnancy, such pregnancy cannot be terminated after the length of the pregnancy had exceeded 20 weeks.

In such a case, the pregnant woman will have to bear the risk to her life until the risk becomes as grave as to require an immediate termination of the pregnancy. The continuance in such cases, of the risk to the life of the pregnant woman would thus be undesirable and may itself constitute a danger to her life. This anomaly does not occur in the U.K. Act because it does not put limit on the length of pregnancy, which may be terminated under that Act. The Indian Act, i.e. Medical Termination of Pregnancy Act 1971, has by rigidly specifying the length of the pregnancy which may be terminated under the Act, creates these undesirable anomalies. There are cases where it is reasonably certain that a woman will not be able to deliver the child with which she is pregnant. In such a case, where the doctors expects, basing his opinion upon the experience and knowledge of the profession, that the child can not be delivered without the death of the mother, in those circumstances, operations may be necessary with a view to saving the life of the mother. The doctor can not wait until the unfortunate woman is in peril of immediate death and then at the last moment snatch her from the jaws of death.[71] In this situation, the provisions of section 312 of Indian Penal Code are better which provide the termination of pregnancy at any time for saving the life of the pregnant woman. In such emergency cases no time limit applies. What one can consider here is whether the condition to save the life of the pregnant woman is the only condition that warrants an emergency provision overriding other operative sections of the Act? Is it complete in itself? Should there be a provision for the child's health where there is a provision for the dangers to mother's health? The inclusion of an emergency provision widen the scope of the act, nonetheless, but such provision should be of a nature so as to include within its ambit a wide variety

[71] R. Vs Bourne (1983) 3 All ER 615.

of cases that will promote judicial activism and not limit judges by their conditions.

b. Risk of Grave Injury to the Physical or Mental Health of the Pregnant Woman

Under the MTP Act, a pregnancy could be terminated if the continuance of the pregnancy would involve a grave injury to the physical or mental health of the potential mother.[72] It is further stated in the Act there in determining whether the continuance of a pregnancy would involve grave risk of injury to the health account may be taken of the pregnant woman's actual or reasonably foreseeable environment.[73] Where the continuance of pregnancy does not involve a risk to the life of the pregnant woman but involve a risk to her physical or mental health, such risk is required to be a grave one. Under the U.K. Act such risk is not required to be a grave one. Whether the risk is or is not a grave one would depend on the facts and circumstances of each case. Hence, the registered medical practitioner, who forms the opinion in good faith, is required to take all the facts and circumstances of the case into account.

Recently a unique case that made it to the front pages of the newspaper[74] that has brought the scope of section 5 under the viewer. In *Nikita Mehta case*[75],the Bombay High Court on 4th August 2008 rejected the petition filed by Niketa and her husband Haresh Mehta, along with their doctor Nikhil Dator, seeking permission to terminate her pregnancy now in the 26th week. The foetus was diagnosed with a complete heart blockage when she was in the 24th week of pregnancy. The couple wanted to abort the child for fear it would suffer for life.

A Bench consisting of justices Khandeparker and Ahmad Sayyad said that there was "no categorical opinion" from medical experts that "if the child

[72] 5th August 2008, the Hindu, 7th August 2008. The Times of India, 3rd August 2008, Times of India, 11th Aug, 2008 Times of India, 15th August, The Hindu and all National Newspaper.
[73] Dr. Nikhil D. Datar and Others Vs Union of India and Others, Writ petition (L) No. 1816 of 2008.
[74] Section 3(2) (i) M.T.P. Act 1971.
[75] Section 3(3) M.T.P. Act 1971.

were born...it would be seriously handicapped". Moreover, there was no provision in the Medical Termination of Pregnancy Act, 1971 to end pregnancy after the 20th week. Only in exceptional cases of danger to the health of the pregnant woman could abortion be allowed, said justice Khandeparker. In this case "no exceptional case has been made out". The judge said the issue here, however, was one of future health risks to the unborn child, and not to the mother. A second medical report submitted by a committee of experts, on the court directive, said there were "least chances" of the child being seriously handicapped. In its first report, the committee spoke of "fair chances", an opinion which was equivocal and therefore led to the directive for a second report. The reports submitted by Niketa's doctors mentioned serious health risks. However, they were negative to the possibility of cardiac surgery on the birth of the child and to the question whether a peacemaker could be a one-time solution.

The court resorted to section 3 and 5 of the Act. Section 3 mandates that opinion of registered medical practitioners be taken to determine any "serious handicap" section 5 allows termination of pregnancy after the 20th week only when there is a health risk to the woman. "A more desire to termination a pregnancy will not entitle the woman or doctors to terminate the pfregnancy", said justice Khandeparker. As for the eventually of the childs condition, the court said there was no provision in section 5 to that effect thus leaving a lacuna. Addressing it was the prerogative of the legislature and the court had no power to do that. The courts are not empowered to legislate upon a stature, said justice Khandeparker. Finally the medical reports could not establish that Niketa's case was exceptional. Therefore, the court had to rule against abortion. "Nothing is placed on record that the period (for termination of pregnancy is arbitrarily prescribed", said justice Khandeparker.[76]

[76] Dr. Nikhil D. Datar and Others Vs Union of India and Others, Writ petition (L) No. 1816 of 2008.

If, the registered medical practitioner has formed the opinion in good faith, he would be protected under the law. Where the risk to the physical or mental health of the pregnant woman is a grave one, the pregnancy may be terminated only if the length thereof does not exceed 20 weeks. If the length of the pregnancy has exceeded 20 weeks, the pregnancy cannot be terminated on this ground. In determining whether the risk to the physical or mental health of the pregnant woman is or not a grave one, the registered medical practitioner is empowered to take into account the pregnant woman's actual and reasonably foreseeable environment. The environment, which may be taken into account need not thus be an actual environment but may be a reasonably foreseeable one. For example, where a pregnant woman is suffering from a serious ailment and does not have a domestic or other aid to help her in domestic chores, has already two children to look after and is living in one room apartment, the registered medical practitioner may after taking these facts into account from the opinion in good faith, that the continuance of pregnancy would constitute a grave risk to the physical or mental health of such women.

There does not seem to be the perfect line of distinction between danger to life and danger to health. Of course, there are maladies that are a danger to health without being danger to life. Rheumatism is not danger to life, but a danger to health. Cancer is plainly a danger to life.[77] What is meant by the mental health of the woman is capable of wide interpretation. It may appear to be a question of fact to be determined in each case by the physician according to his medical knowledge. The doctor is supposed to judge a variety of factors-medical, social, moral and economic for which he may not have the necessary expertise.[78] Some intellectuals argue that in other areas of medicine practice such, matters are left to the abortion also. However, abortion is a special case where medical practice requires strict supervision by law. If that is so, one

[77] R Vs Bourne, (1983) 3 AllER 617.

[78] Menon Madhvan N.R., "Policy Law Enforcement and liberalization of Abortion: A socio-Legal Inquiry into the Implementation for the Abortion law in India", 16 JILI,1974, p. 633.

cannot very well have it both ways arguing that there is simultaneously need for a law but no need for strict legal definition within the law.

Narrowly interpreted, it may require the doctor to fear that the patient will suffer from what is commonly called a mental illness. whether a psychosis or severe neurosis. This may include a depressive psychosis or relative depression which is a pathologic state of happiness despair resulting from circumstances. If the question is one of illness, the natural course would be to call in a psychiatrist, a specialist in mental disorder.[79] The definition of health advanced by the World Health Organization is that it is "the state of complete mental physical and social well being and not merely our absence of disease or infirmity". It is difficult to say as to accept this wider view. Since the medical termination of pregnancy Act 1971 has not defined the word health (physical or mental), many controversial situations can arise, for example, if the pregnant woman is in a serious suicide risk which is indicated by the pregnant. Woman's depressive state of mind or if the new addition to the family would lead to poverty with already large number of children in the family to rear, who are badly cared for or if the pregnancy is allowed to go to full term the matters may be worsened for the existing children to the extent that either health as well as the health of the pregnant woman should be affected. Can such factors be taken into account by the registered medical practitioner while taking a decision to terminate the pregnancy on the ground of mental or physical health of the pregnant woman?[80]

In *Suchita Srivastava Vs Chandigarh Administration*[81] the Supreme Court allowed a mentally retarded rape victim to bear her child by refusing medical termination of her 19 week old pregnancy. The girl is staying in a home for the mentally challenged in Chandigarh. The bench stayed an interim order of the Punjab and Haryana High Court directing immediate termination

[79] Williams G. "Text-book of Criminal Law", ed.1983, p.300-301.
[80] Ibid pp. 300-301.
[81] AIR 2010 SC 235.

of the pregnancy on the ground that she had limited mental capacity to bear the child. The bench said "we are sure that somebody will be in position to give protection to the child. Our anxiety is the fetus is already 19 weeks. The second medical opinion says her physical condition is good to bear the child. The child is not suffering from any deformity. Nature will give her biological protection. If somebody is ready to take care of the child, should we even then order medical termination of pregnancy? Nature will take care on its own". The Bench further said; "we know as a natural mother she will not be able to take care of the child. But if somebody is ready to look after the child then there would not be any problem.

c. Termination of Pregnancy on Eugenic Ground

Under the Act, a pregnancy may be terminated where there is substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.[82] Where the pregnancy is sought to be terminated on eugenic grounds, the registered medical practitioner must be satisfied, in good faith, that:

(i) there is a risk that the child, if born, would suffer from such physical or mental abnormalities as to be seriously handicapped, and

(ii) the risk is a substantial one[83]

Advances in knowledge and medical skills make it more and more possible to attach a precise weight to the chance of the fetus being affected by genetic defects. But still the doctor has discretion to decide whether the case is sufficiently grave to justify termination. The abnormality might be either physical or mental but not both. But the abnormality should be such as to create a serious handicap for the child. The handicap may either relate to the capacity

[82] Modi's Medical Jurisprudence and Toxicology, 23rd ed .2006, Pub.by Lexisnexis Butterworths p.1017.
[83] Section 3(2) (b) (ii), M.T.P. Act 1971.

of the child to earn this livelihood or, the limitation on the power of the child to earn his livelihood. The mere fact that the child is unable to grow up and live as any normal or healthy child would not fall within the ambient of this clause.

In an *English case*[84] it was concluded that the duty owned to an unborn child was a duty not to injure it. This was a case where the mother early in her pregnancy contracted German measles. Though her blood samples taken by doctor were tested by the local health authority, the infection was not diagnosed. The child was born severely disabled. In an action for negligence by the mother and child against the doctor and the health authority. It was held that the child had not been injured by the doctor or the health authority but by the infection contracted by the mother, without any fault on their part. The question was whether the doctor was under legal obligation to the fetus to terminate its life to prevent existence in disabled state? It was held that such a right would be contrary to public policy and that common law did not recognize such a right.[85] Deformed, disabled or defective children are burdens not only for their parents but also for the society. Thus it is the duty of the state in mitigating such tragedies by enacting necessary legislation. In India, a registered medical practitioner may be justified in terminating pregnancy of a woman on the ground that she had suffered from German measles either immediately before or during the first three months of her pregnancy. The cases of thalidomide babies would also fall under section 3(2) (b) (ii) of Medical Termination of Pregnancy Act 1971.

A pregnancy may be terminated on eugenic ground only if the length thereof has not exceeded 20 weeks. If the length of pregnancy has exceeded 20 weeks, the pregnancy is not terminable on this ground. The medical practitioner must decide where there is a "substantial" risk that child if born would be "seriously handicapped". However, no definition is given of the term

[84] Mackay Vs Essex Area Health Authority (1982) 2ALL,ER771(CA).
[85] Khan, Sheeraz Latif A, "Rights of unborn child" Law Review (Lucknow), 1999-2000 & 2000-2001, Vol. 21 & 22, p.132.

substantial risk. How would the determination of the substantial risk be made? On determining whether a substantial risk is involved in a particular case, a doctor must make an individual judgment based on his observations of that particular patient. Supposing his judgment, is that her prospects are poor if the pregnancy continues how poor must that be for the risk to be substantial? There is no definite answer to this question. The substantial risk is to be determined on the facts and circumstances of each case by the registered medical practitioner, forming in good faith.

d. Rape

Section 3 of this Act begins with stating that not withstanding anything contained in the Indian Penal Code, a registered medical practitioner shall not be guilty of any offence under that code or any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act. A plain reading of the sections of the Act would make it clear that with the consent of a major woman, the unwanted pregnancy alleged by the pregnant woman to have been caused by rape, can be terminated by a registered medical practitioner. on the basis of the opinion of two registered medical practitioner formed in good faith, where the length of the pregnancy is 12-18 weeks.[86]

With a view to assisting the registered medical practitioner to form the opinion as to whether the continuance of the pregnancy would or would not involve a grave risk to the physical or mental health of the pregnant woman, two explanations have been included in the Act. Under the first explanation, an allegation by the pregnant woman to the effect that the pregnancy was caused by rape will lead to compulsory presumption to the effect that the anguish caused by such pregnancy constitutes a grave injury to the mental health of the pregnant woman. No distinction has been made by this explanation, between married women, an unmarried woman or a widow alleges that the pregnancy

[86] "Abortion Pills for Rape Victims: need for Introduction in India" LAWZ,2007 p. 3907.

was caused by rape; the registered medical practitioner is required by the Act to presume that the anguish caused by such pregnancy constitutes a grave injury to the mental health of the pregnant woman. The expression which has been used in this explanation is "shell presume. The court shall presume a fact it shall regard such fact as proved, unless and until it is disapproved[87], a fact is said to be disapproved when, after considering the matters before it, the court either believed that it does not exist or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case act upon the supposition, that it does not exist". Accordingly, when an allegation is made by the pregnant woman that the pregnancy was caused by rape, the registered medical practitioner will have no option but to draw the presumption specified in the plantation, nor will have any option to call for evidence to support the presumption. The party interested in disproving the allegation is required to disprove the allegation. If such party produces cogent evidence to disprove that the pregnancy was caused by rape or there are patent facts and circumstance appearing before him which would disprove the allegation of rape, the registered medical practitioner may refuse to form the opinion that the continuance of the pregnancy would involve a risk of grave injury to the mental health of the pregnant woman. But where the registered medical practitioner does so, he must act a in good faith.

According to WHO, health is not merely absence of disease but a positive state of overall physical, mental and social well being. Thus, where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy is presumed to constitute grave injury to her mental health.[88]

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[87] Section 4, Indian Evidence Act,1872

[88] Dr. Parikh, C.K., "Abortion" 6th Ed 2000, pub. by C.B.S. Publishers and distributors (New Delhi) Section V, p.557.

Section 375 of the Indian Penal has defined rape and lays down six circumstances under which a man is said to commit 'rape' who has sexual intercourse with a woman. Falling under any of the following descriptions:

(i) Against her will

(ii) without her consent

(iii) with her consent, when her consent has been obtained by putting her in fear of death, or of hurt

(iv) with her consent, when the man knows that he is not her husband that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

(v) With or without her consent, when she is under sixteen years of age.

The plea of rape may be a convenient excuse for abortion as under the MTP Act, the registered medical practitioner had no option but to concede to the requests. Rape is a cognizable offence but no one is under an obligation to report its commission. Thus, if the rape is not reported to the competent authority, it will go unrecorded, and the victim may visit the medical practitioner for termination of pregnancy only of detecting the conception. However the allegation of rape may not be much of embarrassment to a woman in view of the statutory secrecy of the records.[89] Under the Indian Penal Code, marital rape has been made punishable, if a husband performs sexual intercourse on his unwilling wife where she is below fifteen years of age.[90]

A two judge Bench of the Madras High Court, in its land mark judgment held that "a minor girl has right to bear a child". No doubt the court is bound to presume, as the expression used is "shall be presumed". But such presumption can rebutted on the facts. Even if it is presumed that the pregnancy is caused by rape, there is no question of anguish caused by such pregnancy in the pregnant woman particularly when the girl was very keen to continue the

[89] Regulation 6, MTP Act Regulations 1975.
[90] Exception to Section 375 Indian Penal Code.1860.

pregnancy and bearing the child. Hence the continuance of the pregnancy will not cause any injury to her mental health.[91]

In *Suchita Srinivasa Vs Chandigarh Administration*[92] the Supreme Court has allowed a mentally retarded rape victim to bear her child by refusing medical termination of her 19 week old pregnancy. When mentally retarded woman who was victim of rape was orphan and inmate of Government run welfare institution, had refused to give consent, the court cannot permit a dilution of the requirement of consent since the same would amount to an arbitrary and unreasonable restriction on reproductive rights of the victim. In the present case, the victim has expressed her willingness to carry the pregnancy till its full term and bear a child. To terminate the victim's pregnancy was not in pursuance of her "best interest" and performing abortion at such later stage could have endangered the victim's physical health and the same could have also caused further mental anguish to the victim since she had not consented to such a procedure.

e. Failure of Contraceptive Method or Device

MTP Act is one of the few statutes in the world providing "failure of contraceptive" as an additional and specific ground to seek abortion.[93] Second explanation to section 3 of the Act provides the termination where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children. The anguish caused by an unwanted pregnancy, resulting from the failure of any family planning method or device used by the pregnant woman or her husband may be presumed to constitute a grave injury to the mental health of the pregnant woman. While the Act emphasized its importance as a health measure, the permission granted under section 3(2) to permit such

[91] V. Krishnan Vs G. Rajanalia Madipu Rajan (1994) 113 Mad. L.W. 89 (D.B.).
[92] AIR 2010 SC 235.
[93] Singh S.K and Raizada R.K, "Abortion Law in India; Past and Present" ed.1976,Family Planning Association of India,Haryana Branh,Bal Vikas Bhavan,India,p.46

termination for married women in cases of contraceptive failure, has emphasized its importance as an instrument of population control. This has given rise to a strong difference of opinion among medical personal, which are averse to using abortion for such purpose. Many of them insist on tubectomy as a condition for abortion. In their view, based on experience, abortion often lead to frequent pregnancies apart from its health hazards.

No contraceptive is hundred percent effective. Therefore, where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy is presumed to constitute a grave injury to the mental health of the pregnant woman.[94] It has been reported to be most common reasons given for termination of pregnancy. Unlike the first explanation, the expression "shall presume" has not been used in this explanation. Here the expression "may presume" has been used. According to this explanation, the medical practitioner is not bound to act on the allegation of the pregnant woman, and is entitled under the law to call for the evidence to substantiate that the pregnancy was caused by the failure of a contraceptive device or method used either by the pregnant woman or her husband for the purpose of family planning. The MTP Act 1971 was nothing but a licence to abort, being used by them for the purpose of limiting the number of children. Soon abortions become popular in the masses as well as with the Government Departments as a tool to family planning. In the past emergency era, Government agencies, including the Health Department became active to persuade and even pressurize in some cases to pregnant woman to go in for abortion to limit the number of children in order to achieve their Family Planning targets. Targets were fixed for all government departments to bring Family planning cases under the Prime Minister's 20-point programme and abortion was an accepted family planning practice by the

[94] Supra note 88, p.5.58.

government agencies without questioning its legality or otherwise.[95] This explanation specifically assists the married couples who have taken resource to various family planning methods for the purpose of limiting the number of their children. There is no doubt that the MTP Act was passed to emancipate woman by giving them a choice about having a child and was intended to end the illegal and unsafe abortions that were affecting the health and life of a large number of married and unmarried women. At the same time family limitation through abortion is a concept that is neither officially propounded nor accepted under the liberalized abortion law. However, in practice, it has remained more of a family planning measure, than a law merely to safeguard the health of women and children. The MTP Act promotes the policy of Planned Parenthood by making abortions available if contraceptive fails. Therefore, keeping in view explanation II in sub section (2) of section 3, it is a measure for limiting family size. This express requirement excludes, by necessary implication, unmarried women and widows from its scope. A widow who had lost her husband after she had become pregnant would, however, fall within the purview of the explanation, if the other conditions specified therein are fulfilled. A married woman who is living separately from her husband under a decree or order of a court and who has no access to her husband would also outside the scope of the explanation. The Act has not made any distinction between device or method used for the purpose of limiting the number of children. The expression "device" used in the explanation, ordinarily means any contraceptive used either by the pregnant woman or her husband to prevent a pregnancy. The expression "method" has not been defined in the Act. The expression "method" is not capable of being proved objectively and it would be difficult to establish which of the several methods for the prevention of pregnancy was used by the married couple. But in every case, where it is alleged that the pregnancy was caused by the failure of a contraceptive method, the registered medical practitioner would be required, under the law, to form an opinion, in good faith

[95] Singh K.P. & Nagpal Vijaya, "Medical Fermination of Pregnancy in India; A socio-legal Aduit", CBI Bulletin, Jun-2005, Vol. 13, p.42.

that the pregnancy was caused by such failure. The position of the registered medical practitioner in such a case would not be an enviable one. The law in effect, making abortions available on 'demand' but for married woman only.

f. Termination of pregnancy on Environmental grounds

In determining whether continuance of pregnancy would involve such risk of injury to health as mentioned in the Act, account may be taken of the pregnant woman's actual or reasonably foreseeable environment.[96] This is a 'social clause' which relates the mental and physical state of the woman to unfavorable circumstance in her home environment.[97] Thus, a pregnancy can also be terminated on environmental grounds, for example (i) if the woman has some heart disease, has no one to help in her domestic work, and restrain of rearing a child is likely to be too much for her (ii) if the new arrival is likely to create financial difficulties leading the family to poverty line (iii) if the woman has already two children, she is doing all her work by herself, and lives in a single room where she cooks. the family eat, and sleeps or (iv) if there is already a subnormal child who requires considerable attention making it impossible to look after the new arrival.[98]

D. Place where Pregnancy can be terminated

Section 4 provides that No termination of pregnancy shall be made in accordance with this act at any place other than[99]

(a) a hospital established or maintained by government, or

(b) a place for the time being approved for the purpose of this act by government or a District Level Committee Constituted by that Government with the Chief Medical Officer or District Health

[96] Section 3(3) M.T.P. Act 1971.
[97] Modi's Medical Jurisprudence and Toxicology, 23rd ed. 2006, p. 1015.
[98] Dr.,Parikh C.K. "Abortion",ed.6th 2000,pub.by CBS Publishers and distributors(New Delhi),Section V, p.5.58.
[99] Title of Section 4 Substituted by MTP Act (Amendment) Act 2002.

> Officer as the Chairperson of the said committee. Provided that the District Level Committee shall consist of not less than three and not more than five members including the chairperson, as the government may specify from time to time.[100]

The Amended Act of 2003 specifically provides that a pregnancy can be terminated in a hospital established or maintained or for the purpose of this Act, for a time being approved by the Government or a District Level Committee constituted hy that Government. Complicated procedure of approval and bureaucracy was supposed to be one of the important reasons for 'unsafe abortions in 'unhygienic conditions' and 'unapproved places' now simplified. Power of approval is shifted from state level to the District level. Application in "Form-A"[101] addressed to CMO of the District, who may verify/Inspect/Enquire and after satisfying himself, recommended the approval of such place to the "District Committee" having at least three members. District Cummittee after consideration approves such place and issues a certificate of Approval".[102]

Under the old rules boards were constituted by the central government for the units under its direct control and by the states for their respective territories for recommending places to be certified for the termination of pregnancies.[103] The constitution of the board was a cumbersome process and arming it with various powers had needlessly added to red-tapism. The new rules have simplified the process by doing away with the boards instead its functions are to be discharged by Chief Medical Officer, who in their respective districts already function as superior and effective medical authorities. Rule 4 of the M.T.P. Rules 1975 framed by the central government lays down that no place shall be approved by the government until and unless it

[100] Section 4(b) M.T.P. (Amendment)Act 2002.
[101] Rule 5(2) M.T.P. Rules (Amendment) 2003.
[102] Rule 5 (6) M.T.P. Rules (Amendment) 2003.
[103] Rule 6 M.T.P. Rules 1972.

has satisfied itself on the recommendation of the Chief Medical Officer to whom an application is to bed made by the owner of the place and who will verify, enquire or inspect the place, with regard to the information supplied in the application that for the termination of pregnancies the requisite safe and hygienic conditions are provided therein. Every such place will be liable to inspection by the Chief Medical Officer[104] who having reason to believe that the place is wanting in any of the prescribed furnishing or facilities or to have resulted in death or injury to any pregnant woman, is entitled to call for any information or seize any relevant material thereof.[105] The Chief Medical Officer is authorized to inspect any approved place and seize articles from such places in accordance with the procedure laid down under the code of criminal procedure, 1973.[106] Chapter VII of the Code deals with these matters. Section 100 is especially relevant under it when a premise is to be searched by an authorized person, the owner or the occupier of the place is required to provide facilities for the search or inspection to the authorized person affecting the search. If there are pardanashin ladies they are allowed to move aside. Ladies are to be searched by ladies. Two or more respectable persons of the locality are called to witness the search and they are under legal obligation to cooperate. A list is prepared of the seized articles and the places from where they are recovered are indicated therein. The witnesses are required to sign the list. A copy of the list is given to the occupier. The witnesses are not required to attend the court unless specially summoned by it. The occupier of the place searched or some person in his behalf is permitted to attend during the search. The Chief Medical Officer shall then make a report to the government which may cancel or suspend the certificate granted after giving the opportunity of being heard to the owner of the approval place.[107] The certificate once suspended or cancelled can be revived on making necessary addition or

[104] Rules 5(1) M.T.P. Rules 1972.
[105] Rules 5(2) M.T.P. Rules 1972.
[106] Rules 5(3) M.T.P. Rules 1972.
[107] Rules 6(1) M.T.P. Rules 1972.

improvements in the place as were in waiting. The owner of the place has to make a fresh application for this purpose and a certificate is issued again subject to the requirements of rule 4.[108] An order made under rule 6 can be reviewed by the government if an application for it is made within sixty days from the date of such order. And the government may confirm, modify or reverse the order after giving opportunity to be heard to the aggrieved owner. But under the Indian Penal Code if miscarriage is caused to save the life of the pregnant woman, the place where it is done is not material, as it has not been specified in the code.

(E) Other Requirements

a. Good faith

Section 312 of Indian Penal Code allows termination of pregnancy in good faith for saving the life of the pregnant woman. The expression "good faith" though not defined in the Act has been defined in the General clauses Act, 1897 and in the Indian Penal Code. According to the General Clauses Act[109] "a thing shall be deemed to be done in good faith where it is, in fact, done honestly whether it is done or believed in good faith if it is done or believed without dude care and attention". There is thus a difference between the definitions of "good faith" in the General clauses Act it is the absence negligence which is material under the IPC. Since the definition in the General Clauses Act, would apply "unless there is anything repugnant in the subject or context", this definition would stand modified to the extent it is repugnant to the definition of that expression in Indian Penal Code. Since the M.T.P. Act uses the expression "good faith" in the same sense in which it has been used in the Indian Penal Code, "good faith", according to the Act, will mean that if the opinion is formed by the registered medical practitioner with due care and attention to make wrongful again, it will be regarded as having been formed in

[108] Rules 6(2) & (3) M.T.P. Rules 1972.
[109] Section 3 (22), General Clauses Act 1897.

good faith. What is necessary is due care and attention. Both the definitions retain the real essence of 'good faith", i.e. honesty.[110] *In Imperor Vs Marriam Sidi*[111] the accused, a widow, became pregnant 'Desiring to conceal the fact she caused miscarriage with the intention to remarry afterwards. She caused miscarriage to herself with the help of her nephew. The Appellate Court was mainly concerned with the question; did the accused caused miscarriage to her in good faith? The Appellate court unanimously decided that accused is guilty of committing miscarriage to herself not in good faith and sentenced her to simple imprisonment for three months.[112] In *Re Malayard Sethu*[113] where the appellant was charged under section 312 of the penal code for having caused miscarriage to a girl, it has been held that "the acts of doctors and nurses which facilitate or accelerate delivery can not be treated as an offence under section 312 of Indian Penal Code because the delivery otherwise would have been delayed and particularly when the child is born alive and no injury is caused to the mother or the child as in this case".

The quantum of care and caution which a registered medical practitioner must exercise towards the patient had been determined by the Supreme Court in *Dr. Laxman Vs Dr. Trimbak Bapu Godbole*[114], justice Shelat, held "the duties which a doctor owes to his patients are clear. A person who holds himself, acts ready to give medical advice and treatment implicitly undertakes that he is possessed of skill and knowledge for the purposes. Such a person when consulted by a patient owes him certain duties, viz.; a duty of care in deciding what treatment to give or a duty of care in administration of that treatment. A breach of these duties gives a right of action for negligence to the patient. The practitioner must bring to his task a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged

[110] Krishna Vij, "Textbook of Forensic Medicine & Toxicology, Principles & Practice", 2nd Ed. 2002 BI Churchill Living Stone Pvt. Ltd. New Delhi, p. 688.
[111] (1909) Cr. L.J. 2351, Vol. 19.
[112] Ibid. 23
[113] AIR 1955 Mys. 29.
[114] AIR 1969 SC 128.

in the light of the particular circumstances of each case is what the law requires". Similarly in *Philips India Ltd Vs Kunju Punnu*[115] Vaidya, J. held that "the duty of a medical practitioner arises from the fact that he does something to human being which is likely to cause physical damage useless it is done with proper care and skill. The standard of care and skill to satisfy the duty in fact is that of the ordinary competent medical practitioner exercising the ordinary degree of professional skill" In *Murari Mahan Koley Vs The state and Another*[116], a woman would to have abortion on the ground that she has a 6 months old daughter. She approached the petitioner for an abortion. And the petitioner agreed to it for consideration. But some how the condition of the woman worsened in the hospital and she was shifted to another hospital. But it resulted in her death. The abortion was not done. The petitioner who was a registered medical practitioner had to establish that his action was done in good faith (includes omission as well) so that he can get exemption from any criminal liability under section 3 of the M.T.P. Act, 1971. Thus, the term good faith is not a constant term but it varies from case to case.

b. Consent

Section 3(4)(a) of the M.T.P. Act provides that no pregnancy of a woman who has not attained the age of eighteen years, or who having attained the age of eighteen years, is a mentally ill person[117] shall be terminated except with the consent in writing of her guardian. Save as otherwise provided in section 3(4) (a) no pregnancy shall be terminated except with the consent of the pregnant woman. Consent has been defined under section 90 of the Indian Penal Code. Section 90 IPC states, that consent will not be free if given under fear of injury or misconception of fact or under the unsoundness of mind or in intoxicated state, or by child below twelve years of age.[118] Consent is required

[115] AIR 1975 Bom 306.
[116] CR, R Appeal No. of 2003, http://wwwlawyersservicesin/murari-mohan-koley-vs-state 2004.
[117] For the word "Lunatic" the word 'Mentally ill person", shall be substituted by M.T.P. Amendment Act 2002.
[118] Section 90, I.P.C.

to be free and express. A consent obtained by force or fraud is not a valid consent and as such. the termination of a pregnancy on the strength of a consent obtained by force or fraud will not be lawful one. Before terminating a pregnancy, the registered medical practitioner is required to be satisfied in good faith, that the required consent has been given by the pregnant woman, or where she is not competent to give such consent by her guardian, in the appropriate form. Adding to this, with an aim to safeguard the privacy of the women, the government[119] has formulated Regulations under section 7 of the M.T.P. Act, 1971. The consent given by a pregnant woman for the termination of her pregnancy, together with the certified opinion recorded under section 3 or 5, as the case may be and the intimation of termination of pregnancy shall be placed in an envelope which shall be sealed by the R.M.P. or practitioners by whom such termination of pregnancy was performed shall be kept in the safe custody until that envelope is sent to the head of the hospital or owner of the approval place[120] and every such envelope shall be marked "SECRET".[121] Every head of the hospital or owner of the approved place shall maintain a register and keep therein the details of the admission of woman for the termination of pregnancies and keep such register for a period of five years and thereafter destroy it.[122]

The termination of a pregnancy without the consent of the pregnant woman is an offence punishable under section 313 of the Indian Penal Code. By section 3(4) (a) of M.T.P. Act. the provisions of section 313 of IPC has been modified in relation to a minor or a lunatic. Hence, the termination of the pregnancy of a minor or lunatic (including idiot), if made with the consent of the guardian of such minor or lunatic will not be an offence under section 313 of the Indian Penal Code. In case of minor or mentally ill woman, the consent

[119] Section 7 M.T.P. Act 1971- Power to Make Regulations.
[120] Regulation 4(1) M.T.P. Regulations, 2003, Ministry of Health and Family Welfare New Delhi.
[121] Regulation 4(2) M.T.P. Regulations, 2003, Ministry of Health and Family Welfare, New Delhi.
[122] Regulation 5(1) M.T.P. 2003 Ministry of Health and Family Welfare (Department of Family Planning) New Delhi.

of her guardian is required to be obtained by the registered medical practitioner in order to terminate pregnancy. This is so because normally the will being of a minor or lunatic is understood by her guardian. But the termination of pregnancy is not merely a question of physical or socio-economic will being of the expectant mother; it also involves many emotional overtones having for reaching physio-psychological effects. Denial to the girls below 18 years of age to give their consent to suffer abortion is discriminatory insofar as generally children above twelve years are required to consent for a surgical operation to be performed on them. The Termination of pregnancy in such cases under the M.T.P. Act may be misused by some guardians. In this respect, the National Committee on status of women in India was of the view that the consent of a minor girl above twelve years of age should also be obtained in addition to the consent of the guardian, and that the consent of the latter should be dispensed with the case of pregnant girl nearing majority. Consent must be free and without fear. A pregnant woman who puts herself under the treatment of a medical practitioner gives an implied consent to suffer the harm and to take the risk. In *Shri Bhagwan Katariya and others Vs State of M.P.*[123] the woman was married to one Navneet. Applicants are younger brothers of said Navneet while Bhagwan Katariya was the father of said Navneet. After the complainant conceived pregnancy, the husband and other family members took an exception to it, took her for abortion and without her consent got the abortion done. The Court opined that if we refer section 3 of the M.T.P. Act 1971, a doctor is entitled to terminate pregnancy under particular circumstances and if the pregnancy was terminated in accordance with the provisions of law, it must be presumed that without the consent of the woman it could not be done. Present is a case where a permanent scar has been carved on the heart and should of the woman by depriving her of her child. And the doctor will be held liable. The consent of the husband is not necessary and furthermore, abortion cannot be performed on the request of the husband, if the woman herself is a minor

[123] 2001(4) MPHT 20CG,http://www.indiakanoon.org/doc/12330

(below 18 years of age) or a lunatic, then written consent of a guardian is required.

In November 1993, when a 16 year old girl eloped and got married, her father preferred a complaint with the police. The police traced the couple and the boy was let on bail by a judicial Magistrate while the girl was taken to the boy's house. On a habeas corpus petition filed by the father, the Madras High Court directed the girl be sent to a home. After a month the girl was found to be pregnant and the father filed another habeas corpus petition in the Madras High Court seeking a direction for medical termination of his daughter's pregnancy. The Division Bench of Madras High Court after listening to the girl who was firm on continuing with the pregnancy refused to order the termination of the pregnancy.[124]

The Act does not make it obligatory for the doctor to ask for a woman for proof of her age, nor is she required to procedure such proof. The statement of the woman that she is over 18 years of age is accepted to b sufficient for the purposes of the Medical Termination of pregnancy Act 1971.

In Case of *Satya Vs Shri Ram*[125] parties to the marriage lived together for about 2 years. They were temperamentally incompatible. Wife was impregnant twice but the crisis arose because of her conduct in getting herself aborted twice against the wishes of her husband and other members of the family. On the husband's petition for divorce, the decree of divorce was granted by the lower court on the ground that the wife had been cruel to her husband in as much as she refused to bear a child in spite of his persuasions. Appeal to the High Court was dismissed. The court placed reliance on *Forbes Vs Forbes*[126] and emphasizing the use of expression "reasonable apprehension

[124] The Hindu, 24th and 25th November 1991.
[125] AIR 1983 Punjab and Haryana 252.
[126] (1955) 2 ALL ER 311.

in the mind of the petitioner that it will be harmful or injuries to live with the respondent", amended by 1976 Amendment, observed:

> *"If the wife deliberately and consistently refuses to satisfy husband's natural and legitimate craving to have a child, the deprivation reduced him to despair and it naturally affects his mental health. This is more so in the case where the parties to the litigation are Hindus. In this sort of case the court had to attach due weight to the general principle underlying the Hindu law of marriage and sonship and the importance attached by Hindus to the principle of spiritual benefit of having a son who can offer a funeral care and libation of water to the names of his ancestors. It would be no answer to say that, it is now open to the respondent to adopt a son".*

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 *Deepak Kumar Arora Vs Sampuran Arora*[127], a Division Bench of Delhi High Court observed that if a wife underwent abortion with a view to spite the husband it might, in certain circumstances, is contended that the act of getting herself aborted has resulted in a cruelty.

In *Sushil Kumar Verma Vs Usha*[128] the parties married on 23/11/1980. The wife became pregnant very soon. In January 1981, along with her mother without the consent of her husband, she got pregnancy terminated in its very early stage when she missed her period just by four days. Husband's petition for a decree of divorce under section 13(i) (a) Hindu Marriage Act was dismissed by the Additional District Judge, Delhi. On appeal to High Court it was allowed. It observed: "In this country every one wants to have at least one child, if not more and in fact one of the primary ends of the marriage is to have

[127] (1983) IDMC 182.
[128] AIR 1987 Del. 86.

pregnancy. I am of the view that aborting the coitus in the very first pregnancy by a deliberate act, without the consent of the husband, would amount to cruelty".

In *Maideekutty Haji Vs Kunhikaya*[129] the Kerala High Court held that an offence under section 313 IPC could not be made out, where the only allegation in the complaint was that on hearing that the woman was pregnant, the accused took her to a doctor, who terminated her pregnancy and there was no case that it was without her consent. On the contrary, the averment showed that the woman willingly submitted herself to abortion and even thereafter had sexual intercourse with the accused and there was nothing to show that abortion was at the instance of the accused. Further, it was not clear from the allegation whether he was only accompanying the lady at her request and whether he even made a request to the doctor to have the abortion done. Finally, the doctor who conducted the abortion was not made an accused; which showed that she had no complaint against him. The offence is cognizable, non-bailable, non compoundable and may be tried by the court of sessions and is punishable with imprisonment up to ten years of either description or fine.[130]

Recently in *Suchita Srivastava and Anothers Vs Chandigarh Administration*[131] the Supreme Court observed that consent of the pregnant woman is an essential requirement for proceeding with the termination of pregnancy. The exceptions to this rule of consent have been laid down under section 3 (4) (a). Section 3 4(a) lays down that when the pregnant woman below the eighteen years of age or is a 'mentally ill' person, the pregnancy can be terminated if the guardian of the pregnant woman gives consent for the same. The only other exception is in case of medical emergency to save woman's life. Mental retardation is clearly different from the condition of a 'mentally ill person' as contemplated by section 3(4) (a). While a guardian can

[129] AIR 1887 Ker 184 (Feb.).
[130] Gour K.D. "A Text Book of Indian Penal Code",3rd ed.,2004 p.514.
[131] AIR 2010 SC 235.

make decisions on behalf of a 'mentally ill person' as per section 3(4)(a) the same cannot be done on behalf of a person who is in a condition of 'mental retardation'. The only reasonable conclusion that can be arrived at in this regard is that the state must respect the personal autonomy of a mentally retarded woman with regard to decisions about terminating a pregnancy cannot permit a dilution of this requirement of consent since the same would amount to an arbitrary and unreasonable restriction on the reproductive rights of the victim. Any dilution of the requirement of consent contemplated by section 3(4) (a) is liable to be misused in a society where sex selective abortion is a pervasive social evil. When the mentally retarded woman who was victim of rape, was orphan and inmate of government run welfare institution, had refused to give consent the court cannot permit a dilution of the requirement of consent since the same would amount to an arbitrary and unreasonable restriction on the reproductive rights of the victim.

In the present case, the victim has expressed her willingness to carry the pregnancy will its full term and bear a child. To terminate, the victims pregnancy was not in pursuance of her 'best interests' performing an abortion at such later stage could have endangered the victims physical health and the same could have also caused further mental anguish to the victim since she had not consented to such a procedure.

F. Protection to Registered Medical Practitioner acting in Good faith

No Penal Provision has been incorporated in the Act or the rules to punish their violations. Instead, under section 5(2) of the Act, termination of pregnancy by a doctor who is not duly certified under the Act, has been made an offence punishable under the Penal Code only a registered medical practitioner who does not have experience or training in gynecology and obstrics and forms in "good faith" the opinion to terminate the pregnancy and

does so to save the pregnant woman from immediate danger to her life, has been absolved from any liability.[132]

In other case, a registered medical practitioner, as defined under section 2(d) of the Act, is saved from any liability arising from "any damage' caused or likely to be caused by anything which in good faith done or intended to be done under the Act".[133] By sub-section (1) section 3, a registered medical practitioner, who terminates a pregnancy in accordance with the provisions of the Act is protected from any prosecution for the termination of such pregnancy. By this section, he is protected from any civil action for compensation for any damage caused or likely to caused by anything which is in good faith done or intended to be done under the Act. In order to be able to get this protection, the registered medical practitioner must establish that his action was done in good faith. "Act" may also include omissions. Hence any omission to terminate any pregnancy is made in good faith; an action for compensation for damages may not lie for such omission if such omission was done in good faith. But if a registered medical practitioner omits, after forming the opinion that the termination of the pregnancy is necessary on one or more of the grounds specified in the Act, he may not be regarded as having acted in good faith. Consequently, the immunity specified in section 8 will not, it seems extend to him and as such he may be successfully used for damages if any injury to the life or physical or mental health of the pregnant woman is caused by such omission. The question whether the birth of a deformed baby may also give rise to an action for damages is not, however, free from difficulty because the claim for damages by an uniforms on the ground of "wrongful existence" may be allowed because there is no method of computation of compensation for a life with defect as against the utter void of non-existence.

[132] Section 5(1) and Explanation M.T.P. Act 1971.
[133] Section 8 M.T.P. Act 1971.

The Act does not also provide for the disposal of the fetus or the care of children born as a result of the termination of the pregnancies. These matters, would be, it is presumed, dealt with under the existing regulations relating to sanitation and care of children.

G. Overriding Effect and Punishment for the violation of the M.T.P. Act

No Penal provision has been incorporated in the original Act or the rules to punish their violations. Recently an amendment has been made in M.T.P. Act in 2003. The ultimate aims of these amendments (2002) are:

To eliminate the incidence and prevalence of abortions by: untrained persons (quacks); and in unsafe and unhygienic conditions, so that reduction in the 'mental mortality and morbidity' could be achieved and crime of 'female feticide' dealt effectively. Thus the Amendment (2002) has incorporated the provisions for the violation of the Act and lays down punishment for its violation. Section 5 of MTP has been amended to include provisions for its violation: The amended Act 2003 provides that "Not withstanding anything contained in the Indian Penal Code, the termination of pregnancy by a person who is not a 'registered medical practitioner shall be an offence punishable with vigorous imprisonment for a term which shall not be less than two years but which may extend to seven years under that code and that code shall, to this extent, stand modified[134] and also whoever terminates any pregnancy in a place other than that mentioned in section 4, shall be punishable with vigorous imprisonment for a term which shall not be less than two years but which may extend to seven years.[135] It further lays down that any person being owner of a place which is not approved under section 4(b) of the Act shall be punishable with vigorous imprisonment for a term which shall not be less than two years but which may extend to seven years.[136]

[134] Section 5 (2) M.T.P.(Amendment) Act 2002.
[135] Section 5 (3) M.T.P. (Amendment) Act 2002.
[136] Section 5 (4) M.T.P. (Amendment) Act 2002.

Following persons can be punished for violation.

- Termination of pregnancy by a person, who is not a Registered Medical Practitioner.

- The possession by Registered Medical Practitioner of experience or training in Gynecology and Obstetrics to which section 2(d) i.e. Registered Medical Practitioner shall not apply[137] whether terminates pregnancy in a place that is 'unapproved.

- Any person, being 'owner' of a place that is not approved, and doing or allowing the termination of pregnancy at such place.

The expression "owner" means any person who is the administrative head or otherwise responsible for the working or maintenance of a hospital or place, by whatever name (DM, MS, DP etc.) called[138]

The offence under the Act is now a cognizable offence for which a police officer can arrest a doctor for violations without warrant. Where a person willfully contravenes or willfully fails to comply with the requirements of any regulation made punishable to 'one thousand rupees'.[139]

The MTP Act has been given overriding effect by section 5(2).In view of non-obstinate clause in the MTPA, pregnancies that are carried out in accordance with the provisions of the Act will not be subject to any scrutiny under the provision of the Indian Penal Code dealing with miscarriage (sections 312-316).

Under the Penal Code, not only is the person causing the miscarriage guilty of an offence but the woman who procures abortion is also guilty. The only circumstance, under which abortion was allowed, was where the abortion

[137] Explanation 2 Section 5 MTP (Amendment) Act 2002.
[138] Explanation 1 Section 5 MTP (Amendment) Act 2002.
[139] Section 7 (3) MTP Act 1971.

was caused in good faith in order to save the mother's life. The MTP Act was build on the "saving the life of the woman" clause, as it liberalizes the ground of abortion. However, the provisions of the IPC and MTP Act are not in any way in conflicting or contradictory to each other. The present legal position is that, the IPC provisions will only be utilize to prosecute the person who obtains as well as provides the abortion, when the conditions and requirement enumerated in the MTP Act,1971, have not been met or in other words, when the abortion is illegal under the MTP Act,1971.[140]

H. M.T. P. Act 1971: A Critique

The MTP Act does not permit abortion for the purpose of sex selection. The Act aims to give protection to the physical and mental health of a pregnant woman and also to the child in the womb (viz. if there is substantial risk of fetus being deformed\suffering from serious abnormalities, it could be aborted).The problem is more of female feticide and abortion in illegal manner.

The Act sanctions abortion under the prescribed circumstance. A woman could be brought into the acceptable categories defined in section 4 of the Act. On finding of the female fetus, she can easily have her pregnancy terminated. The doctor's opinion, in reality, is difficult to challenge. Though the State regulation provides for certification of such opinion and intimidation of it to the Chief Medical Officer proved for certification of such opinion and intimidation of it to the chief medical officer of the state, the punishment for violation of it is only a fine of Rs.1. 000, further, the Act protects the doctor's action taken in good faith for anything done or intended to be done under the Act.

There is thus, no method to check that the reason specified by the doctors for termination of pregnancy under the Act is true. A register giving reasons for termination of pregnancy and the period thereof has to be

[140] Bonda, "The impact of constitutional law on the protection of unborn human life some comparative remarks" in K.D Gour, "A Text Book of the Indian Penal Code"3rd ed.2004, pp 62-63.

maintained. But is rarely is. The certificate forwarded the government is hardly taken note of the latter. Monetary punishment is provided for the violation. This is so when sex-selective abortion is totally illegal, unconstitutional and criminal act on the part of the doctor. I t may also be noted that under the MTP Act, records maintained under the Act secret and confidential documents not open to public inspection. In practice, in majority of cases, the issue is not of the reproductive right of the woman or her choice but of the sex of the unborn child. Nearly 95% of abortions conducted in the period between 12 to 20 weeks of pregnancy has been found to be sex-selected.

Though the Act has legalized and liberalized the termination of unwanted pregnancy[141] but, the impugned provisions fail to satisfy this very object for which the M.T.P. Act was enacted. Only two in five of the estimated 604 million abortions that take place annually in India are safe.[142] Until now there have hardly been any cases which have brought up the reach of the Medical Termination of Pregnancy Act into question. One major reason for this may be the easier, cheaper, faster, more clandestine way of just running into some clinics and getting over with the process instead of fighting for better legal protection.

Laws that regulate the identification of a fetus and the termination of pregnancy in India are shaped by their social context. The medical termination of pregnancy Act, 1971, discriminates against unmarried women by not recognizing that unwanted pregnancies in unmarried women could result in at least as much anguish and suffering as that experienced by married woman. The initiative to enact the MTP Act came from groups that looked at it as a law for family planning. However, the government and the than ruling congress party consistently defended the law by saying that it was not for family

[141] Indian Bar Review Vol. 25(2) 1998, p. 127.
[142] The Times of India, October 16, 2009.

planning and that it was social legislation aimed at empowering women.[143] The M.T.P. Act 1971 did not provide abortion as a right to women. It expanded the permitted reasons for abortion in India, legalizing abortion subject to the fulfillment of the conditions specified in the Act.[144] Abortion on any grounds other than those specified in the law is an offence punishable under the Indian Penal Code. A lot of progress has been made in theories of law, especially laws that relate to the rights and roles of women. The M.T.P. Act makes abortion due to a failure of contraceptives available only to married women.[145] The Supreme Court has rules that classification of daughters as married and unmarried violates the equality clause enshrined in Article 14 of the constitution of India. It would be ignoring reality if the law ignores the anguish of an unmarried mother in the Indian social context. The MTP Act brings into focus the moral undertones of a law that discriminates against unmarried, pregnant women. Laws related to abortion must also benefit persons whose sexual relationships are beyond the legitimacy conferred by law especially when the court has taken the view that live-in relationships are not illegal.[146] It is unethical for a law to punish such choices by not recognizing the "anguish cased by unwarranted pregnancy" to unmarried women.

In the objects and reasons of the M.T.P. Act, the legislature has recognized eugenic grounds as one of the grounds of termination of pregnancy. The Act allows abortion if the medical practitioner is of the opinion that "there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities to be seriously handicapped.[147] In the absence of any definition of what constitutes such abnormality and what a "substantial

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[143] Government of India. The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002, Gazette of India, January 20, 2003, No. 14 of 2003 @http://mohfw.nic.in

[144] Section 3 and 5, MTP Act 1971.

[145] Explanation II, Section 3, MTP Act 1971- Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a gave injury to the mental health of the pregnant woman.

[146] Savita Samvedi Vs Union of India ,(1996) 25CC 380.

[147] Section (3) (2) (b) (ii) MTP Act 1971.

risk" is this open-ended condition can be applied according to an individual's understanding of ethics. But again, the impugns provisions fail to satisfy the same by restricting the time limit to 20 weeks. Further, the legislature has not prohibited use of diagnostic techniques to discover fetal disabilities. Once the abnormality is confirmed the only option in most cases is to terminate the pregnancy. Any treatment currently available to correct fetal abnormalities before birth is at best experimental. The limit of 20 weeks puts undue pressure on the doctors making a diagnosis and on the couples making difficult choices. The haste may lead to grave mistakes, or even worse couples may choose to abort on a suggestion or a doubt, rather than wait for confirmatory test which may take the pregnancy beyond 20 weeks. The aim of prenatal diagnosis is to prevent the birth of an abnormal child. The whole science of prenatal diagnosis is meaningless if abortion is not allowed even when gross abnormality is confirmed. Unfortunately abortion is still illegal in India under laws enacted in the 19th century. Some abortions are allowed now under the euphemistic *Medical Termination of Pregnancy Act, 1971*. The Act was made to facilitate abortion for birth control considered a national priority than, and not quite the 'enlightened legislation' one hoped for. The limit of 20 weeks was imposed in 1971 as abortion after this was considered a risk to the mother.[148]

Nikita Mehta's Case[149] is among the few ones on the *Medical Termination of Pregnancy Act* that has addressed the Act specifically and attacked its provisions. Niketa and Haresh Mehta, a couple, who dared to question the abortion laws that do not permit medical termination of pregnancy beyond 20 weeks even when the health of the child is at risk. The couple and a Gynaecologist Dr. Nikhil Datar had moved the Bombay High Court with a plea to permit an abortion of the couple's 25 weeks old fetus with a complete congenital heart blockage and malpositioned arteries that could, according to doctors requires a pacemaker implementation soon after birth. However a

[148] Times of India August 7, 2008 p.4.
[149] Writ Petition (L) No. 1816 of 2008.

Division Bench of justice R.M.S. Khandeparker and justice Amjad Syed held that couple and the doctor could not establish ground fit enough for the court to step in and make an exception for than by exercising its extra ordinary jurisdiction and dismissed the petition. The court observed that medical experts did not express any "categorical opinion that if the child is born it will suffer from serious handicaps". Once there is life can you ask for it to be killed now? Is it any different from mercy killing?"[150]

The question to abort fetal abnormalities beyond 20 weeks was not confined to Mr. And Mrs. Mehta and their problems. It is a wide social issue and a decision of this nature could have many, often unforeseen ramifications. Are the Mehta's justified in their claim? They were courageous enough to approach the courts and take the legal route instead of going to the dime-a-dozen 'quick-fix' clinics that are available. Child birth and child rearing is amongst the most meaningful activities in a human being's existence, and they should also have the right to decide whether or not this experience could be handled by than or not taking care of a physically sick child for the rest of his or her life a long job. It requires patience, financial sources, and a lot of sacrifice. Not everyone is blessed with these traits or the ability to accomplish this task. Fetal abnormality was considered a reason to abortion in the 1971 Act but little was available then in terms of prenatal diagnosis. All techniques of prenatal diagnosis including 'triple Test' ultrasounds, chromosomal and DNA analysis and tests for fetal infections came much later. These are complicated and expensive tests and take weeks. In many cases, the pregnancy crosses 20 weeks by the time a diagnosis is confirmed. The limited access to health care further delays diagnosis in India. The law, however, has not been amended to accommodate these late abortions of the abnormal fetus if required. Laws have been amended in most countries to allow late abortions since prenatal diagnostic techniques became available. In the U.K. a grossly abnormal fetus

[150] Abortion or Mercy Killing, Lawyers Update, September 2008, p.20.

can be aborted at any stage of pregnancy. Abortion performed by specialist at any stage has now been shown to be at least as safe as a normal delivery and we need to re-look at this arbitrary limit.

A new and liberal abortion law is urgently required but we need to be careful as it may be abused to perform female feticide. All future laws must be transparent and have built in checks and mechanisms to curb female feticides while accommodating late abortions of gross abnormal fetuses. This can be done by maintaining a nation wide 'abnormality registry'. This could allow late abortions for abnormal fetuses provided all these are followed by autopsies, and any abuse of the law is checked.

Couples who are carrying an abnormal fetus do not have the luxury of the 'best possible choice' as all choices available are terrible. Late abortion is terrible, and so is allowing the birth of a child with a known abnormality.[151]

In the light of the recent Nikita Mehta case it may be suggested that the statutory limit mentioned in section 3 should be increased from 20 to 24 weeks like it stands in some another countries. It could be argued that extending the prescribed limit by another four weeks is not going to make any real difference. They are just ball park figures. However, another way of looking at this would be giving time to the parent's and the doctors to decide about the health of the child growing inside the womb. A child would be better formed at 24 weeks than at 20 weeks and this is a suggestion that could be incorporated by the legislature.

The emphasis that normally only a registered and duly qualified medical practitioner should do induced abortions goes well in theory so far as the dangers involved in quack practice are to be ward off. So also the requirement that abortions under the Act must be done only at the approved places or government hospitals. Clinics openly flouting the provisions laid down by

[151] Change the Law, The Times of India, August 7, 2008.

legislature are not in common. But in face of acute paucity of government hospitals or of the approved places particularly for rural areas and the very poor ration of registered medical practitioners and the people served by them, the twin conditions seems impracticable. Further, restricting practical training in gynecology and obstetrics only at the hospitals "established or maintained by the government" is an impediment in producing sufficient number of registered medical practitioners qualified to become certified practitioner under the Act. The resultant imbalance in demand and supply would give impetus to quacks.

According to Explanation clause (1) to sub-section (2) to section 3 abortion is not permitted if pregnancy is caused by illegal sexual connection other than rape. In such a case section 312 of Indian Penal Code would apply.[152] From 2002-2004, 720 women in India committed suicide because of illegitimate pregnancy, another 1,239 because they were physically abused. The year 2005alone brought 18,359 cases of rape to light for a woman to carry a child in her womb as a result of conception through an act of rape is not extremely traumatic for her but humiliating and psychologically devastating.[153] Further the question of 'rape' has to be established in court. Should termination of pregnancy be postponed till the charge of rape is established in court of law? If rape is not established, whether section 312 I.P.C. would make mother and doctor guilty? However, a doctor can involve defence of act done in good faith recognized by section 8 of the Act.[154]

Again the plea of rape may prove a convenient excuse for abortion as the doctor shall have no option but to concede to the request. It can be taken by a woman of any age, irrespective of her marital status. The doctor is not to satisfy himself with the veracity of the allegations. Under the criminal procedure code rape is a cognizable offence except when committed by a husband on his unwilling minor wife, but no one is under obligation to report

[152] Indian Bar Review Vol. 25(2), 1998 p. 127.
[153] Abortion Pills for Rape Victims: need for Introduction in India, Lawz, December 2007 p.39.
[154] Sections 312, 16 Indian Penal Code 1861.

its commission. Thus, if the act was not reported to a competent authority, it will go unrecorded; and the victim may visit a doctor for abortion only on detecting the conception. The admission of rape may not be of much embarrassment to a woman in view of the statutory secrecy of the records. Further under the penal code, even a husband may be accused of rape on his unwilling wife if she is below fifteen years of age. The offender husband being her guardian may in such case withhold his consent for the abortion on this ground under the M.T.P. Act.

In India owing to social set up many rape cases go unreported to police. Hence it would be practically impossible to take advantage of the act in such rape cases. [155]The use of adjectives like 'grave', 'substantial' or 'seriously' has introduced subjectiveness in doctor's discretion favoring or rejecting a request for abortion. The only exception is a case of pregnancy caused by rape where a doctor by virtue of explanation 1 to section 3 shall be presumed to constitute a grave injury to the mental health of the pregnant woman and became a fit case for causing abortion. But in all other cases including one on the ground of "failure of any device or method used by any unmarried or woman or husband for the purpose of limiting the number of children", which is the easiest plea of seeking abortion, a doctor has a wide discretion. An unscrupulous doctor can make gainful abuse of this discretion to exploit the needy woman. The British Act is free from any such qualifying conditions. The conditions under section 3 of the Act may appear to be inflexible, but each condition can be interpreted according to the ethic of the practitioner. For example "failure of contraception" has been read as "non-use of contraceptives".[156] We are now living a sort of jet-age technologically and economically we have advanced phenomenally in the last 40 years but medically, there are new problems that have come to avail us. Life style disease was a term unheard of in the 1970's,

[155] Supra note.177.

[156] Talha, A Rahman and Ayesha T. Siddiqui, "Discrepancies in the Laws on Identifying Fetal Sex and Terminating a Pregnancy in India", Indian Journal of Medical Ethics, Jul- Sept 4(3) 2007 p.2.

but it is very much a part of our lives now. Contraception methods, various contraceptives and antibiotics that aid contraception have modified the rules of conception.

Admitting the well being of a minor is normally understood by her guardian, but the pregnancy or its termination is not merely a question of physical or socio-economic well being of the expectant mother, it also involves many emotional overtones having for reaching physio-phychological effects. Irrespective of her age an expecting mother must also have her say: In India in spite of the fact that the child marriage restraint Act is in force, marriages of minors are common. The termination of pregnancies in such cases under the MTP Act may be misused by some guardians. Further, under the gradual adoption by the Indian Supreme Court, of the "*due process*" concept in the "*personal liberty*"[157] provisions of the constitution read with the "equality" provisions the consent requirement under the Act may be ultimately struck down as unconstitutional as has been done by some courts in the United States with regard to similar sections of some state statutes in that country. It may be submitted that abortions performed under the Act by qualified doctors do not absolve them of criminal or civil liability if they have damage to the woman's health. In criminal abortions besides the criminal liability for such abortion, civil liability of a doctor may also arise if he by his negligent conduct causes further damage to a woman's health. The general rule of civil liability is that no one is allowed to take advantage by inviting a wrong, so a consenting woman in an illegal abortion may not be allowed to recover damages from the doctor in a civil suit for that act. But in case the physician has been negligent and caused injury besides causing illegal abortion, consent may hardly be a saving ground for the liability of causing that injury or where the consenting party is a minor

[157] See S. N. Sarkar Vs State of W.B. AIR 1973SC 1425, R.C. Cooper Vs U of India AIR 1970 SC 564. Menaka Gandhi 115 U of India, AIR 1978 SC.

female or where the law recognizes father's 'marital interest' in an unborn child and the father brings the action.[158]

Section 2(d) of the Medical Termination of Pregnancy Act, 1971 talk about the "registered Medical Practitioner". Doctors duly qualified under section 2(d) of the Act and rule 3 but unwilling to do abortion cases either due to their conscience constraints or in expectation of some extra allowances for the work, which until the Act came into force, was not part of their normal duties, may avoid abortion cases to the determent and harassment of the needy woman who calls on them.

Regulation 4(1)[159] requiring that the consent given by a pregnant woman for the termination of her pregnancy, together with the certified opinion recorded under section 3 or section 5, as the case may be and the intimation of pregnancy shall be placed in an envelope which shall be sealed by the registered medical practitioner. It indicates that the consent should be given in writing. This requirement appears to be ultra vires the Act as an excessive exercise of the delegated power. Section 3(4) (b) of the MTP Act provides that no pregnancy shall be terminated except with consent of the woman. Thus the consent under the Act can be oral also. On the other hand, section 3(4) (a) of MTP Act 1971 specially provides that the consent given by the guardian of a minor or mentally ill[160] pregnant woman must be in writing.

The absence of any Penal provision to punish violation of the Act or the rules is a serious loophole. However, an amendment has been made in MTP Act 1971 by 2002 to provide strict and enhanced punishment for the violations of the provisions of the Act.[161]

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[158]Singh S.K and Raizada R.K, "Abortion Law in India:Past and Present" ed.1976,Family Planning Association of India,Haryana Branh,Bal Vikas Bhavan,India,p p.55-57.

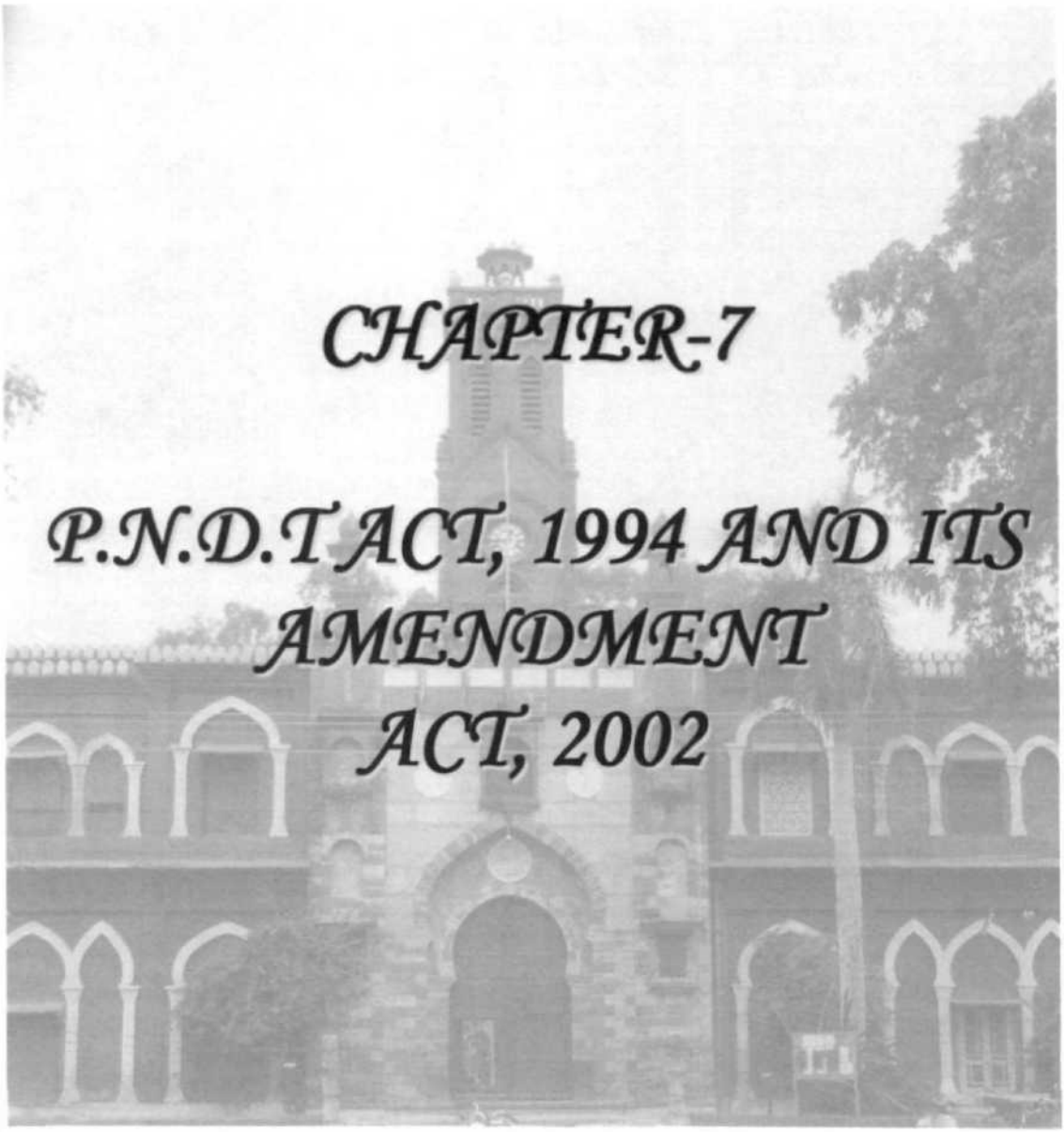
[159] Medical Termination of Pregnancy Regulations, 2003.

[160] Section 13.The Indian Contract Act, 1872, Substitution of term "Lunatic" with "Mentally ill person".

[161] See, Medical Termination of Pregnancy (Amendment) Act 2002

In the absence of any reporting to the contrary it may be assumed that the enforcement of Act which is landmark legislation has been less problematic. Effective implementation of MTP Act both by law enforcing agencies and medical fraternity surprise visits by District Committee members to ensure effective implementation of these laws. Ensuring full confidentiality to patients so that they can come to approved places instead of going to 'quacks' in the 'unsafe' and 'unhygienic' places in the fear of social stigma attached to abortion.

Though the MTP Act 1971 has liberalized the law on abortion but this liberalization has been offset by the provisions of the Act, which have in effect made the law relating to terminate the pregnancy more strict. The Act lays down the grounds on which a pregnancy can be terminated where the continuance of the pregnancy involve a risk to the life of the pregnant woman or grave injury to her physical or mental health or where there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. None other than the grounds mention in the Act, an unborn child can be terminated because abortion practices have always been present. Thus, the Act has curbed the high number of clandestine abortions and reduce the high rate of maternal deaths caused by such abortions and also it ensure women's access to safe abortion services by bringing medical termination of pregnancy into institutional setting where adequate equipment, medical supplies and specially trained personnel are in position. However, strict interpretation of the law may only strengthen the gender bias against the girl child today. There is, however, and urgent need to check the sex-selective abortions. For that particular purpose, the Act needs to be strictly construed.



CHAPTER-7

P.N.D.T ACT, 1994 AND ITS AMENDMENT ACT, 2002

CHAPTER-7

PRE-NATAL DIAGNOSTIC TECHNIQUES (REGULATION AND PREVENTION OF MISSUSE) ACT 1994 AND ITS AMENDMENT ACT, 2002

Right to reproduction is undoubtedly one of the cardinal principles of law, available to all, found on the guiding principles of human dignity, eq1uality and liberty. When it comes to reproductive and sexual health care, the ICPD Programme of Action has identified a number of areas where these rights are translated into information, education, services and counseling in issue such as family planning, pre-natal care, safe delivery and post-natal care, infertility, abortion, etc.[1] Man has become the slave of the technology which he has created to fulfill his various needs. Technology plays an important role in this gruesome act. Education, global exposure and affluence, all of which translates into easier access to expensive technology, have made it easier to select the sex of the child. Prenatal diagnosis does approach children as consumer objects to quality control. In large part support to pre-natal diagnostic techniques is offered on grounds of right to determine the quality of the child. This line of thinking, however, has extremely threatening implications, which must be carefully perceived. For, it this quest for "quality" of the child is considered legitimate and intervention with reproductive processes is permitted on this ground, the day will not be far when the right to have children itself will be subject to the "quality" qualification. Reproduction will not only be reduced to a mechanical process, it will also become a right of the qualified few. And all this is most likely to be done in the name of interests of the child to be born.[2] This will only result in the perception of child as a 'product' of a commercialized reproduction process. And this may further reinforce class

[1] Programme of Action of the International Conference on Population and Development, Cairo, Egypt, September 5-13,1994,Para 7.6.

[2] Arora, Doly, "The Victimising Discourse; Sex Determination Technologies and Policy", Economic and Political Weekly, February 17,1996,p.240

distinctions even in reproduction, if only by nearly closing opportunities of producing a better quality child for many who will not be able to avail such quality control services offered by the market. Choice made available through such technologies will effect be restricted to those who will increase, not reduce, the basis for inequality in society.

The Techniques of Prenatal Diagnosis (PNDT) are meant for the detection of congenital malformations. However, in India, this modern technology is being misused for sex-determination and sex-selective abortions through the mushrooming of diagnostic centers and services at an affordable price. The pre-natal sex determination techniques and assurance of safe abortion in private ultrasound clinics and nursing homes have allured people to abort the unwanted female child.[3] To deprive women arbitrarily of their rights and privileges or to deprive them to even being born or killing them in infancies is both immoral and unjust, a violation of God's law. The sex ratio has altered consistently in favor of boys since the beginning of the 20th century, and the effect has been most pronounced in the states of Punjab, Haryana and Delhi. It was in these states that private fetal sex determination clinics were first established and practice of selective abortion become popular from the late 1990's. Worrying the trend is for stronger in urban rather than rural areas among literate rather than illiterate women.[4]

The deficit of female has been known to exist even in British India from the time the first Census was done in 1881 and has only worsened in every subsequent Census with the exception in 1981 when it rose in favor of females. The figures from 1991 have been included in order to recall why Census 2001 made such headlines a decade ago. This was when the child sex ratio (CSR) first dropped below that of the overall sex ratio: While the child sex ratio fell from 943 in 1991 to 927 in 2001, that of the overall sex ratio rose from 927 to

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[3] Kashyap Amit, "The cursed creature": A focus on female feticide in India", Civil and Military Law Journal, vol. 45, No.3, July-Sep. 2009, p.140.
[4] Ibid.pp. 140-41.

933 in the same period (a clear sign that life expectancy among women was increasing significantly). It was in 2001 that several states in north-west India witnessed plunges in their child sex ratios – with Punjab leading the way by dropping below the 800 mark, while other states such as Himachal Pradesh experienced huge declines for the first time. Secondly, 2001 made history (especially at the district level) because of evidence of child sex ratios falling below the 950 mark (taken as the general norm the world over) in other parts of the country outside the north-west, such as Goa, urban Orissa, and even pockets in the north-east. In the north-west, these patterns were put down to the intensification of practices of sex selection at birth in regions with known prior histories of female infanticide and higher female mortality; elsewhere, a smaller proportion of families was now resorting to similar practices probably for the first time. The 1991 Census is only indicative of this disturbing trend when elsewhere in the world women outnumber men by 3 to 5 percent. There are 95 to 97 male to 100 females in Europe, USA and Japan with the ratio being as low as 88 males to 100 females in Russia primarily due to the casualties suffered in the wars. India and China share this deficit phenomenon indicating 6 to 8 percent more men than females. Both societies have been traditionally matrilineal and men have enjoyed a much higher status then women. According to the UNICEF, 40 to 50 million girls have gone 'missing' in India. Since 1901- missing because they were not allowed to be born, or if born murdered immediately thereafter. Today India tops the list as far as illegal abortions and female infanticide are concerned of the 15 million illegal abortions carried out in world in 1997, India accounted for four million, 90% of which were intended to eliminate the girl child. '*Saheli*' a Delhi based NGO, has reported that between 1978-88 nearly 78,000 female fetuses were aborted after sex-determination tests in the country. Between 1986-87, 30,000 to 50,000 female fetuses have been aborted. Between 1982-92, the number of sex-determination clinics multiplied manifold and nearly 13,000 sex determination test were estimated to have been done in seven Delhi clinics

themselves.[5] Prof. Amartya Kumar Sen, in his world famous article "*missing women*" has statistically proved that during the last century, 100 million women have been missing in south Asia due to "*discrimination experienced by them from womb to tomb*".[6] The recent Census data revealed some contradictory phenomena. For instance in 1991, the overall sex ratio declined and so also the child sex ratio, while in 2001, the overall sex ratio increased but child sex ratio declined. The interpretation of the declining child sex ratio (females per 1,000 males in 0-6 age group) calls for considerable demographic expertise.[7]

A. Declining Sex Ratio in India

Available data on declining child ratio is useful not only to know the extent of the problem. but also to monitor it on a year-to-year basis.[8] There has not been sufficient debate and dialogue on the pros and cons of the declined sex ratio in India. This therefore needs to be monitored and reported in its correct perspective. Serious efforts should be made to analyse the Census data on child sex ratio in all the districts and States of India so that concern make policy interventions on the basis of scientific analysis.

Sex ratio is an important social indictor to measure the extent of equity that prevails between the male and female members of society at a given point of time. India is one of the few countries in the world where men outnumber women. According to the Census 2001, sex ratio in India is lowest amongst the ten most populous countries in the world, viz. China, Bangladesh, Indonesia, Nigeria, Japan, Brazil, USA, Russia and Pakistan.[9]

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[5] Gurung Madhu, 'Female Feticide" 1999.
http://www.hsph.harvard.edu/grhfasia/forums/foeticide/articles/foeticide.html.

[6] Patel Vibhuti, "Sex Eelection and Pre-Birth Elimination of Girl child", The Radical Humanist, Vol. 69, 2005 (June) p.3.

[7] Bose Ashish "Fighting Female Feticide: Growing Greed and Shrinking Child Sex Ratio" Economic & Political weekly, Sept. 8, 2001, p.3427.

[8] See below table 1-5 in the Chapter.

[9] See S. Chandra, "Female Feticide: Causes, Laws and Preventive Strategies", Paper Presented at a Symposium held at New Delhi. July 2005.

Sex ratio in Indian Census usage denotes the number of females per 1000 males, while in western countries it denotes the number of males per 100 females. The definition of child varies but because of the data constraint (so far, the age data in the 2001 Census are available only for the age group 0-6 years), the term 'child sex ratio' will imply the age group below six years. The overall 'sex ratio' refers to the total population n all age groups.[10]

Nature has turned the boy-girl ratio to be more or less equal. At birth, the girls are data slightly greater risk of serious congenital abnormalities and so the normal ratio of girls being born is 95 for every 100 days. This discrepancy at birth is evened out later, on as the girl child has better instincts of survival[11] Studies have shown that where men and women have access to equal care, nutrition, health and medical attention, women, due to their biologically determined stronger constitution, live longer than men, and therefore outnumber them. In the industrialized countries (Europe, USA, Japan), for example there are, on an average 106 women for every 100 men; in Sub-Saharan Africa, there are 102 women for every 100 men and, in South-East Asia 101 women for every 100 men. In India, on the contrary, there are 93 women for every 100 men in the population.[12]

A 1997 UPFA report *"India towards Population and Development Goals"*, estimates that 48 million women are missing from India's population. The report states that, "If the sex ratio of 1036 females per 1000 males observed in the State of Kerala in 1991 had prevailed in the whole country the number of females would 455 million instead of the 407 million (in the 1991 Census). Thus, there is a case of between 32 to 48 million missing females in the Indian society as of 19991 that needs to be explained.[13]

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[10] "Darkness at Noon: Female Feticide in India", Voluntary Health Association of India, available at http://www.indiafemalefoeticide.org.
[11] K. Nambisan, "The Baby Doom", *The Hindu*, New Delhi, July 25, 2004.
[12] P. Misra, "Female Infanticide: A Threat to Posterity", NISD Journal, 2002, pp.24-28.
[13] M. Gurung, "Female Feticide", available at http://www.indiafemalefoeticide.org (August 20, 2008).

A newspaper article reported that in Hathin (Haryana), two decades of female feticide have caught up with the people. Men are resorting to the practice of buying brides from other States like Assam and West Bengal. The price put on such a girl is much less than what people pay for cattle! After marriage, they are condemned to a life of slavery.[14]

Does it imply that child sex ratio is going the way the environment in India is heading towards in recent times? The negative or side effects of development has resulted in the drawing of an analogy between the "Missing woods" and the "Missing women."

The issue of India's 'missing women' has raised concern since the abnormal female-deficit population sex ratio was first noted in the 1871 Census. Since then the ratio has grown almost steadily are masculine, despite small upswings in proportion to female in 1981 and 2001.[15] According to the 1991 Census the overall sex ratio of the country was 927 women per 1000 men. This sex ratio is becoming more skewed day by day. With a population count of 1,027 million, the Census also showed the male population as 531 million and female population as 496 millions.[16]

The scene of sex ratio in India has been worsening in the recent decades. It recorded 972 females to 1000 males in 1901 and declined up to 933 females to 1000 males in 2001. The figures have been fluctuating between 941 to 933 between the decades 1961-2001. Sex ratio in context of males and females neither uniformly low nor consistently declining across region of the nation.

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[14] The Hindustan Times, New Delhi, July 12, 2003.
[15] Sudha & S.I. Rajan, "Persistent Daughter Disadvantage: What Do Estimated Sex Ratios at Birth and Sex Ratios of Child Mortality Risk Reveal?" Economic and Political Weekly p.4361, October 11, 2003 p.4361.
[16] Census,Report of Government of India, 1991.

Table 7.1, showing Sex-Ratio in India according to the data providing Census of India 1901-2011.

Table 7.1

Sex Ratio in India, 1901-2011

Census years	Sex Ratio (Females per 1000 males	Variation From the preceding Census
1901	972	¾
1911	964	-8
1921	955	-11
1931	950	-15
1941	945	-5
1951	946	+1
1961	941	-5
1971	930	-11
1981	934	+4
1991	927	-7
2001	933	+6
2011	940	+7

Source: Census of India (1901-2011)

The table listed above shows that in the beginning of the 20th century, the sex ratio in colonial India was 972 female per 1000 male, it declined by -8, -11, -5, and -5 points in 1911, 1921, 1931, and 1941 respectively. During 1951 Census it improved by +1 point. During 1961, 1971, 1981 and 1991 it declined by -5, -11,-4, -7 points respectively. Even though the overall sex ratio improved by +6 points decline in the juvenile sex ratio (0-6 age group) is of -18 points which is alarmingly high.[17] The 2001 Census has been more gender sensitive

[17] Census of India 1901-2001.

than before, there should have been an improvement in the child sex ratio as well but this has not happened. It seems that a real decline in the child sex ratio must have wiped out the gains of better enumeration of the girl child. There is convincing evidence in the district-wise analysis of 2001. Census data that the decline in the child sex ratio is all pervasive and has occurred throughout India while it is more pronounced in Punjab, Haryana, Himanchal Pradesh and Gujrat apart from cities like Chandigarh, Delhi, Surat, Mumbai, Kolkata, etc. The decline in child sex ratio is assuming an alarming proportion in certain districts of Punjab, Haryana, Himanchal Pradesh and the decline in majority of the districts in other states and Union territories across the country (Uttar Pradesh, Madhya Pradesh, Chhatisgarh, Orissa, Karnataka, Assam, Delhi, etc) is rather intriguing. The social cultural bias against the girl child might have been possibly aggravated by recent medical support in terms of sex determination test.[18] The declining juvenile sex ratio is the most distressing factor reflecting low premium accorded to the girl child in India.[19]

The provisional figures of Census 2011 were released on 31st March 2011 by union 'home secretary Shri G.K. Pillai and RGI Shri C Chandramouli. Census 2011 reaffirms a fact so disturbing that it could cast a shadow on the positive developments. It's thus girls seem to have no place in India's growth story. The data show that the sex ratio for children below 6 years has dropped from 927 to a dismal 914 for every 1,000 males. The gender bias yet again draws attention to a lingering societal flow that economic growth is not being able to correct.

Improved medical technology, education and improvement in quality of life in the last decade has increased gender ratio. Overall sex ratio at the national level has increased by 7 points to reach 940 at Census 2011 as against

[18] Supra note 7.
[19] Patel Vibhuti "The Girl Child: Health Status in the Post Independence Period", the National Medical Journal of India, Volume 16, 2003, pp. 42-45.

933 in Census 2001. This is the highest sex-ratio recorded since 1971 and a shade lower than 1961. All states accept, Bihar, Gujrat, J & K show increase.

However, improvement in technology and spawning of mini vans with sex determination machines chugging risk than ever before, Registrar of General of India C. Chandramouli said, "This is a matter of Grave concern." The gender imbalance continues despite a bona on sex determination tests based on Ultrasound, Scan and sex-selective abortion. The government policies aimed at arresting the declining child sex ratio needed a "complete review" and "whatever measures that have been put in place over the last 40 years have not had any impact on the child so ratio.[20]

The sex ratio of 940 females per 1000 males in 2011 showed an overall improvement of 7 points form the sex ratio of 933 per 1000 males in 2001.[21] But a matter of deep concern is the decline in the sex ratio of population in the 0-6 age group (or the child sex ratio) from 927 in 2001 to 914 in 2011. The child sex ratio has further declined by thirteen points in 2011.[22]

The overall improvement in sex ratio in favor of females may be explained by the fact that female death rates have become lower than the male death rates. But decline in child sex ratio is an area of grave concern. (It was healthy 972 girls per 1000 boys in 1901). And so does the sex ratio at birth (SRB) becoming more favorable to males.

A detailed look at the child sex ratio for the past six decades shows that it has been declining continuously and the decline has been the sharpest from 1981 onwards (Table 7.2).

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[20] Census 2011 Report, the Times of India, April, 2011,www.timesofindia.com/major-highlights-of—the-Census-2011.
[21] Census, Report of Government of India, 2001.
[22] Bajpai, Child Rights in India – Law, Policy and Practice, OUP, New Delhi, 2003, p.386,.

Table7. 2

Child Sex Ratio, 1961-2001

Years	Sex Ratio (0-6)	Variation (point)
1961	976	
1971	964	-12
1981	962	-2
1991	945	-17
2001	927	-18
2011	914	-13

In India, all the State that have shown large declines in child sex ratio between 1991 and 2011 (See Table 7.3) – Punjab, Haryana, Himachal Pradesh, Gujarat, Maharashtra, Chandigarh and Delhi – are economically well developed and have recorded a fairly high literacy rate. Both Uttar Pradesh and Uttaranchal registered in improvement in overall sex ratio between 1991 and 2001, but had the child sex ratio declining.[23] Satish Agnihotri, an expert on India' sex ratio calls the northern States of Haryana, Punjab and Uttar Pradesh the "*Bermuda Triangle*". The force of demographic fundamentalism' (reflected in the son complex) has increased all over India but more so in the northern states.

[23] M.K. Premi, "The Missing Girl Child", Economic and Political Weekly, 26 May, 2001.

The more prosperous States like Haryana, Punjab and Delhi & Gujarat show ratios that have declined to less than 900 girls for 1000 boys. Further, 70 districts in 16 States and Union Territories of the country have recorded a decline of more than 50 points in the sex ratio in the last decade. Since the 2001 Census, the sex ratio has fallen in many north-eastern States also as per a study conducted by the National Sample Survey Organization. In Meghalaya, it has gone down from 975 to 950.

The State Maharashtra recorded a child sex ratio of 946 in 1991 and it stands at 913 in 2001 and today it declined at 883. State of Rajasthan, prominent for sati incidents, also has an adverse child sex ratio. (See Table 7.3)

Table 7.3

State-wise Child Sex Ration (1991-2011)

S.No.	States	1991	2001	2011
1.	Punjab	875	798	893
2.	Haryana	879	819	830
3.	Chandigarh	899	845	867
4.	Himachal Pradesh	951	896	906
5.	Jammu & Kashmir		941	859
6.	Delhi	915	868	866
7.	Rajasthan	916	909	883
8.	U.P.	927	916	899
9.	Bihar	953	942	933
10.	Orissa	967	953	934
11.	Madhya Pradesh	941	932	912

12.	Uttrakhand	948	908	886
13.	Jharkhand	979	965	943
14.	Chhattisgarh	984	975	964
15.	Sikkim	965	963	944
16.	Arunachal Pradesh	982	964	960
17.	Nagaland	993	964	944
18.	Manipur	969	964	934
19.	Mizoram	969	964	971
20.	Tripura	967	973	953
21.	Meghalaya	986	973	970
22.	Assam	975	965	957
23.	West Bengal	967	960	950
24.	Gujarat	928	803	886
25.	Daman & Diu	958	979	909
26.	Dadra & Nagar Haveli	1013	979	924
27.	Maharashtra	946	913	883
28.	Andhra Pradesh	975	961	943
29.	Karnataka	960	946	943
30.	Goa	964	938	920
31.	Lakshdweep	941	959	908
32.	Kerala	958	960	959
33.	Tamil Nadu	948	942	946
34.	Pondicherry	963	967	965
35.	A & N Islands	973	957	966
	All India	945	927	914

Source: Census of India 1991-2001 and Census 2011: Provisional Data

The situation in the capital is also discouraging. Delhi records the most crimes against women in India. Female feticide too appears to be on the rise. The 2001 Census showed that there were only 878 females for every 1,000 men in Delhi. UNFPA studies show the figure at 865. Significantly, the most affluent area in the capital registered the lowest female sex ratio of 845.[24] According to a study conducted by the National Sample Survey Organization, since 2001, the sex ratio in Delhi has gone down to 808.

Figure.1

5 minimum child sex ratio states (Census 2011)

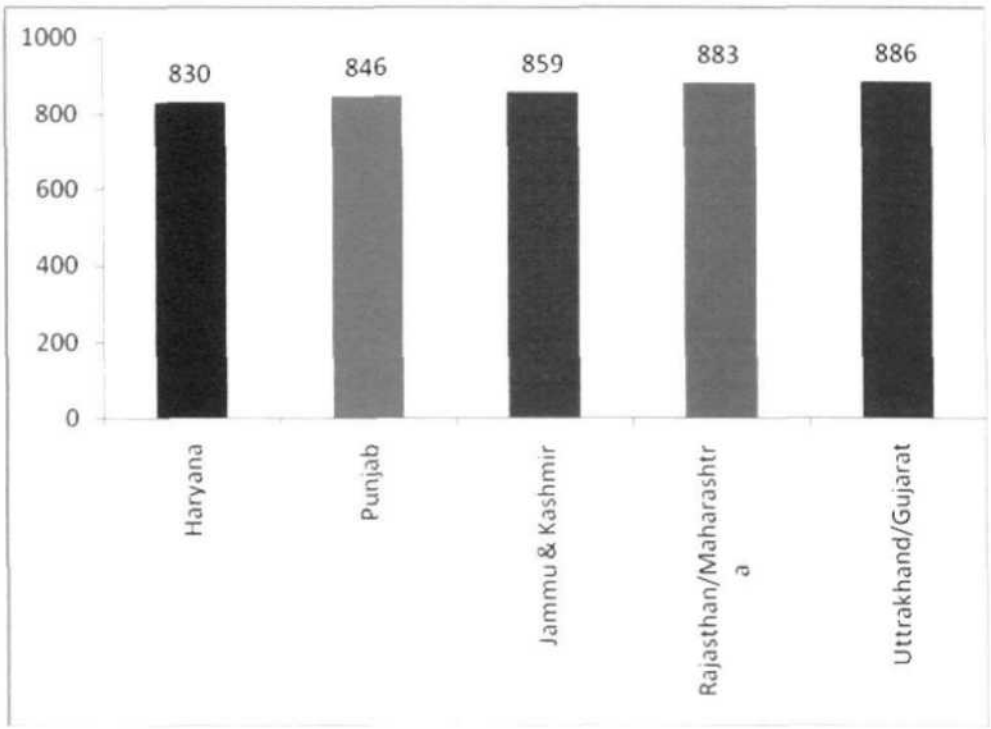

Figure 1 shows five states which have minimum child sex ratio. It shows that all these five states reflect the child sex ratio with less then 900 females for every thousand male is recorded as less then, national averages. However, it is not that every state in the country is showing a declining sex ratio (see Figure.1), which shows sex ratio in descending order and their ranking). The figure gives information that the states where the decline is marginal or where

[24] Anonymous, "The Lady Vanishes", the Times of India, New Delhi, June 15, 2005.

even an increase in the child sex ratio. But the rise in the number of females in the smaller States gets lost in the decline in the number of females in Punjab, Haryana and other States large populations. The national average take into account the over all figures and hence, these figures are low and do not reflect the increase.

The situation in southern states like Tamil Nadu, Karnataka and Adhra Pradesh is also a cause of concern. The district in Tamil Nadu that reflect a huge gap in the child sex ratio – with less than 900 female babies for every thousand male babies – are Salern, theni, Madurai and Namakkal. This according to the State government was mainly owing to the incidence to the incidence of female feticide.[25]

[25] T.K. Rajalakshmi, "Against Gender Bias", Frontline, February 1, 2002.

Table 7.4

Minimum Child Sex Ratio (0-6 age) States and Union Territories in Descending order Census, 2011: Provisional Data

S.No.	States	Child Sex Ratio
1.	Punjab	893
2.	Haryana	830
3.	Chandigarh	867
4.	Himachal Pradesh	906
5.	Jammu & Kashmir	859
6.	Delhi	866
7.	Rajasthan	883
8.	U.P.	899
9.	Bihar	933
10.	Orissa	934
11.	Madhya Pradesh	912
12.	Uttrakhand	886
13.	Jharkhand	943
14.	Chhatisgarh	964
15.	Sikkim	944
16.	Arunachal Pradesh	960
17.	Nagaland	944
18.	Manipur	934
19.	Mizoram	971
20.	Tripura	953
21.	Meghalaya	970
22.	Assam	957
23.	West Bengal	950
24.	Gujarat	886

25.	Daman & Diu	909
26.	Dadra & Nagar Haveli	924
27.	Maharashtra	883
28.	Andhra Pradesh	943
29.	Karnataka	943
30.	Goa	920
31.	Lakshdweep	908
32.	Kerala	959
33.	Tamil Nadu	946
34.	Pondicherry	965
35.	A & N Islands	966
	All India	914

Source: Census of India 1991-2001 and Census 2011: Provisional Data

Several demographers have made technical comments on the declining child sex ratio (0-6 age group) revealed in the 2001 Census. For example, Ashish Bose has coined the term DEMARU to denote 'Daughter Eliminating Male Aspiring Rage for Ultrasound'. Ashish Bose and Mahendra K. Premi have drawn attention to what seems obvious, namely, that since migration is minimal in this age group the adverse female sex ratios point to endemic female feticide and infanticide in these States. The statistics provided by Premi on age-specific death rates in the 0-4 and 5-2 age group by sex for the years 1986 to 1994 for India and the States show that except Himachal Pradesh, the three States mentioned above, namely, Punjab, Haryana, Gujarat and also Uttar Pradesh and Rajasthan, have for the period covered a much higher mortality of female children compared to males.[26]

Mari Bhatt in his paper 'Vanishing women and surplus men: The demography of falling sex ratios' maintained that:

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[26] L.S. Vishwanath, "Female Feticide and Infanticide", Economic and Political Weekly, September 1, 2001, p.110.

(i) Female feticide would lead to greater destruction of the sex ratio in States such as Punjab, Haryana, Rajasthan and Western Uttar Pradesh.

(ii) The rising proportion of male births is one of the reasons for the acceleration in the fall of child female-to-male ratio (FMR) after 981; and

(iii) The pattern of the sex at birth by order of birth implicates the role of female feticide, and there is a stronger basis for assuming that female feticide caused fertility decline in States such as Haryana and Punjab rather than the reason that the fertility decline in these two States is caused by a fall in the desire family size.[27]

In another study, based on the estimated Sex Ratio at Birth (SRB) and Sex Ratios of Child Mortality Risk, the following findings are noted: SRB is a strong indicator of prenatal sex selection or sex-selective abortion. SRB values more masculine than 107 males per 100 females are treated as an indicator of 'weeding out' of girls, either through prenatal sex selection, or under-reporting female births, both mechanisms are varying forms of bias against girls, denying them physical or social existence.[28]

Regions of India where the SRB is greater than the 'normal' range (SRB>=107 M/F) are: Female disadvantage remains strong in the northern belt and also deeply penetrates all four major southern States. More such points also noted in the north-east. By 1991, the same area sin north and northwest India show masculine estimated SRB concurrent with excess female child mortality. That is gender bias in birth and death patterns appear to operate simultaneously in these areas. These foreshadow the findings of the 2001 Census of India

[27] Supra note 10.
[28] Sudha, S and Rajan,S.I, "Persistent Daughter Disadvantage; What Do Estimated Sex Ratios at Birth and Sex Ratios of Child Mortality Risk Reveal?",Economical and Political Weekly,October,11,2003 p.4361

where especially the states of Punjab, Haryana and Delhi have the least proportion of females to males at the age 0-6.[29]

Several studies have been conducted on the sex ratio in the country. They provide useful insight into the linkages between various factors (like regional development, female labor participation, education, birth order, religion, etc.) and the sex ratio. The results of these studies could be utilized to check the menace of female feticide.

Reasons for lower sex ratio in India are:

(a) Child marriage
(b) Female infanticide
(c) Neglect of Health and Education of women
(d) Deaths due to unsafe deliveries and abortions

Reasons for reduction in child sex ratio from 1991 onwards are:

(a) Development of pre-natal diagnostic tests and procedure which resulted in development of pre-natal diagnostic tests and procedures.
(b) These prenatal diagnostic tests and procedures were intended to help the Doctors in diagnosis of congenital diseases and sex linked disorders. Unfortunately in India and some other countries these tests and procedures were used to determine sex of the foetus which led to elimination of female fetuses by Medical Termination of pregnancy.

The history of legal abortion goes back to the year 1971, when the Medical Termination of Pregnancy Act was passed to legalized abortions. The MTP Act permits the termination of pregnancy by a registered medical practitioner, where the length of pregnancy does not exceed twelve weeks, or by two registered medical practitioners forming opinion together where the

[29] Ibid.

length of pregnancy exceeds twelve weeks provided that the medical practitioner/medical practitioners are of the opinion formed in good faith-

1. The continuance of the pregnancy would involve a risk to the life of the pregnant woman or an injury to her physical or mental health.
2. There is a substantial risk of the child were born it would suffer from such physical or mental abnormalities, as to be seriously handicapped. The liberalized abortion, under the grab of Medical Termination of Pregnancy Act, 1971 (MTP) was intended to be used as one of the birth control method to curb the demographic explosion. But in reality abortion is now increasingly resorted to for gender selective feticide.[30] The MTP Act meant for cases where pregnancy carries the risk to the foetus or the mother, in cases where a child may be born with abnormalities. This law which was enacted in 1974 originally to detect fetal abnormalities mainly at the All India Institute of Medical Science (AIIMS), and was in no way meant for sex-selection as a basis for a legal abortion, was being misused for amniocentesis, an invasive procedure done after 14 weeks of pregnancy. Since it was an expensive procedure, the technology was mostly confined to urban areas. But there were public protests and women's organizations including NFIW had taken out a protest deputation to ban amniocentesis. In Delhi, the AIIMS started conducting a survey of amniocentesis in 1974 to find out about fetal genetic condition 11,000 pregnant women get enrolled as volunteers for its research. Once the clinical reports were out, those women who were carrying female fetuses asked for abortion. This experience led to public outrage and government was forced to ban selection determination test for sex selection in all government hospitals in 1978. But private clinics were booming and by the beginning of 80's amniocentesis and sex determination (SD) tests become a means of earning

[30] Ahmad Shakeel, "Legalised Abortion: A Gender Selective Feticide",Military Law Journal,1995, pp.230-231.

a lot of money for medical doctors. During the 80's the situation turned out to be terrible. In 1984-85 hundred percent of 15914 abortions were done after sex determination tests by a well known clinic in Bombay.[31]

The MTP also provides two instances where continued pregnancy is assumed to constitute a grave injury to the mental health to the pregnant woman namely:

(a) Where the pregnancy is the result of a rape, and
(b) Where the pregnancy occurs as a result of failure of any device by a married woman on her husband for the purpose of limiting the number of children.[32]

The provisions provide the doctor with a yard stick for a broad interpretation of the basic concept of the potential injury to the mental health of the pregnant woman. This provision in its implementation means abortion on demand. Section 312 of the Indian Penal Code, 1860 permitted abortions by anyone with the object of saving the life of mother, but under MTP Act only a doctor can terminate pregnancy. MTP Act requires that operation must take place in either hospitals established and maintained by the government or in approved place, except in approved place, except in emergency if it is immediately necessary in order to save the life of the mother.[33]

The following justifications in favor of permissive abortion are found in MTP Act 1971

1. *Therapeutics*: Where continuation of the pregnancy might endanger the mother's life or cause grave injury to her physical or mental health
2. *Eugenic*: The basis of eugenic abortion is that there is a justification for abortion when it is known before birth that the child will be born

[31] The Times of India, 20th June 1986.
[32] Section 3 MTP Act, 1971.
[33] Section 5 MTP Act, 1971.

mentally or physically deformed. The unborn child should be relieved of a life of misery.

3. *Pregnancy Caused by Rape*: The problem of a pregnancy caused by rape may affect the mental health of the mother. It is assumed that the victim mother does not want the child and does not want to bear the continuing results of a crime for which she was not culpable.
4. *Failure of Contraceptive Method or Devices*: The anguish caused by the unwanted pregnancy resulting from a failure of any contraceptive device or methods can be presumed to constitute a grave mental injury to the health of the mother.[34] This condition is a unique feature of the Indian law and virtually allows abortion on request.[35]

Thus MTP Act grants wide discretion to the doctors in implementing its provisions, section 8 of the MTP Act, 1978 protects the doctors by providing that no suits or other legal proceedings shall lie against any doctor for any damage cause or likely to be caused by anything which is done or intended to be done in good faith under MTP. The doctor is required to base his opinion on a variety of complex, medical, humanitarian, socio-economic and moral considerations. With an increase in abortion on demand, the prospect of commercialization of abortion by medical practitioner has increased.[36] It was meant for cases where pregnancy carries the risk to the foetus or the mother in cases where a child may be born with abnormalities. But, soon the problem began with the secret misuse of this law to determine the sex of the unborn child and terminate it if found to be female foetus. The evil of gender discrimination with the accelerated pace of modernization of medical technology, the chances of abuse of liberal abortion rule by members of medical profession are increasing.

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[34] Section 3 MTP Act, 1971.
[35] Shakeel Ahmad "Legalised Abortion: A Gender Selective Feticide", Military Law Journal, 1995 pp. 231-32.
[36] Ibid.

B. Pre-Natal Diagnostic Tests and Procedures

There is an official admission to the fact that "it increasingly becoming a common practice across the country to determine the sex of the unborn child fetus and eliminate it if the foetus is found to be a female. This practice is referred to as pre-birth elimination of females (PBEF). PBEF involves to stages: determination of the sex of the foetus and induced termination if the foetus is not of the desired one. It is believed that one of the significant attributors to the adverse child sex ratio in India is practice of female fetuses".

With the advancement of medical technology sophisticated techniques can now be used or rather misused, to get rid of her before birth. Such advances in medical science have resulted in sex-determination and sex pre-selection techniques such as sonography, fetoscopy, needling chronic villi biopsy (CVB) and the most popular amniocentesis and ultrasound. Indian metropolis are the major centers for sex determination (SD) and sex pre-selection (SP) tests with sophisticated laboratories; the techniques of amniocentesis and ultrasound are used even in the clinics of small town and cities of Gujarat, Maharashtra, Karnataka, Uttar Pradesh, Bihar, Madhya Pradesh, Punjab, West Bengal, Tamil Nadu and Rajasthan.[37] It shows that no state is far from these sex-determination technologies. These tests have had serious implications, which is evident from the provisional results of Census of 2011 that were released.

a. Amniocentesis- In 1975, amniocentesis is a medical technology arrived in India as a method which was developed a few decades ago to detect genetic abnormalities in the foetus. It is a diagnostic procedure performed by inserted a hollow needle through the abdominal wall into the uterus and withdrawing a small amount of fluid found on the sac surrounding the foetus. The test can detect chromosomal disorder-such as structural defects (open spine, where the

[37] Patel Vibhuti "The Radical Humanist" Vol. 69, No. 3, June, 2005, p.4.

vertebrae fail to close), anencephaly (a condition in which the brain is incomplete or missing), and many rare, inherited metabolic disorders.[38]

Amniocentesis is the most widely used method for sex determination. Amniocentesis is the granddaddy of modern prenatal testing. This procedure has been available to expectant mothers for some 30 years and has now become routine for the increasing number of pregnant women over 35 when the choice of problems with the baby goes up. Doctors recommend amniocentesis when either parent or a previous child has a chromosome abnormality, when either parent is a carrier for certain disorders, when an earlier child was born with a neural tube defect such as spina bifida (a partially open spinal column), or when there is a family history of such chromosomal disorders as down syndrome. Physicians also suggest amniocentesis if the mother has a history of miscarriage. Another potential reason is the presence of too much alpha-fetoprotein in the mother's blood. This substance is produced by the baby and an excessive amount could indicate a potentially serious problem with the pregnancy. During the pregnancy, the baby floats in a liquid called amniotic fluid. As the baby matures, cells from his or her body are discarded into the fluid. Amniocentesis enables physicians to retrieve these cells and study the genetic information's they contain. The presence or absence of certain chemicals in the fluid also helps doctors determine how well the baby is doing.

Amniocentesis is generally performed during the 16th or 17th weeks of pregnancy. The procedure can be done any time from week 14, through week 20. Before week 12, it's unlikely that the body has produced enough amniotic fluid for a good specimen. The problem with waiting until the 19th or 20th week is that the mother will be in her fifth month by the time the test results are available, and the longer you wait the more difficult it is to perform a

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[38] Stranc, L.C. Evans, J. A. and Hamerton 12 (1997) Chrorinic Villis Sampling and Amniocentesis of Prenatal Diagnosis, p. 349 as quoted by Dr. Shakeel Ahmad, "Pre-natal Diagnostic Techniques: A source of Gender Bias", Kashmir University Law Review, Srinagar (2003), pp. 205-6.

therapeutic abortion should the couple decide the terminate the pregnancy. Amniocentesis is something done towards the end of the pregnancy to see whether the baby's lungs are mature enough to allow him or her to breathe independently in case of premature labor or the need for an early delivery due to a medical problem.[39] This is a technique where, under ultrasound guidance, a needle is inserted into the amniotic sac through the abdominal wall. About 10 m/s of amniotic fluid is removed. The risk of harming the foetus or causing the miscarriage is 0.5 to 1 percent.[40]

After separating a foetus cell from the amniotic fluid a chromosomal analysis is conducted on it. The test is appropriate for women over 40 years because there are higher chances of children with these conditions being produced by them. A sex determination test is required to identify sex specific conditions such as hemophilia and retorted in muscular growth which mainly affects male babies.

Scenario During the 1980's:

The law which was enacted in 1974 originally to detect fetal abnormalities mainly at the All India Institute of Medical Science (AIIMS), and was no way meant for sex-selection as a basis for a legal abortion, was being misused for amniocentesis, an invasive procedure done after 14 weeks of pregnancy. Since it was an expensive procedure, the technology was mostly confined to urban areas. But there were public protests and women's organization including NFIW had taken out a protest deputation to ban amniocentesis.

In Delhi, the AIIMS started conducting a survey of amniocentesis in 1974 to find out about fetal genetic condition. 11000 pregnant women got

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[39] Srivastav, V.P. "Pre-natal sex determination and sex selection test", A Handbook on Crime Against Women, 1st ed. 2005, pp. 280-81.

[40] Dr. Ahmad Shakeel "Pre-Natal Diagnostic Techniques: A source of Gender Bias", Kashmir University Law Review, 2003, p.206.

enrolled as volunteers for its research. The main interest these volunteers were to know the sex of the fetal. Once the clinical reports were out, those women who were carrying female fetuses asked for abortion.[41] This experience led to ban selection determination tests for sex selection in all government hospitals in 1978.[42] Since then. the private sector started expanding its tentacles the early eighties amniocentesis bread and butter for many gynecologists.

Amniocentesis became popular in the last thirty years though earlier they were conducted in government hospitals on an experimental basis. Now this test is conducted mainly for sex determination (SD) and thereafter for extermination of female foetus through induced abortion carried out in private clinics. private hospitals, or governmental hospitals. This perverse use of modern technology is encouraged and boosted by money minded private practitioners.

During 1980s, while in other countries, the SD tests were very expensive and under strict government control, in India the SD test could be done for Rs 70 to Rs 500. Hence. not only upper class, but even working class people could avail themselves of this facility.

A survey of several slums in Bombay showed that many women had undergone the test and after learning that the foetus was female. had an abortion in 18th or 19th week of pregnancy. Their argument was that it was better to spend Rs.200 or even Rs 800 now than to give birth to a female baby and spend thousands of rupees for her marriage when she grew up. In 1984-85, hundred percent of 15914 abortions were done after sex determination tests by a well known abortion centre in Bombay.[43] S.D soon become a booming business in Delhi, Maharashtra, Punjab, Haryana, U.P. and spread like an

[41] Chakravartty Gargi "PCPNDT Act, 2003- A Challenge Before Us" Women's Watch, April-June, 2007, p. 34.
[42] Supra note.39, p. 294.
[43] The Times of India 20th June, 1985.

epidemic in north and west India. This was the region which had shown a much sharper skewing of the sex ratio (adverse to females) in the past decades.[44]

b. Chorionic Villi Sampling (CVS)

The Chorinic Villi are slender projections attached to the chorion, a membrane which eventually becomes the part of the placenta closest to the baby. Since this membrane begins to develop as the result of fertilization, the material contained within the chorion- and the chorionic villi- accurately reflects the baby's genetic recipe. Physicians can test a sample of this material for a wide range of congenital conditions. Chorionic villi sampling offers a big advantage over amniocentesis because it can be done as early as the eight week of the pregnancy. Test results are generally completed within two weeks. Therefore, the pregnancy can be terminated if necessary, early in the second trimester- or even within the first trimester- when a therapeutic abortion is most safely performed. The relatively early diagnostic also allows couples to make this difficult decision in private, before the pregnancy is apparent to family and friends.

The procedure is currently performed in a hospital, generally between weeks 9 and 12 of the pregnancy. The sample is obtained by snipping or suctioning the tiny, finger-like villi. Chorionic villi are microscopic finger-like projections that make up the placenta. They develop from the same fertilized egg as the foetus and reflect the fetal genetic makeup. This newer alternative to amniocentesis removes some of the chorionic villi and tests them for chromosomal abnormalities, such as Down syndrome. Its advantage over amniocentesis is that it can be performed earlier, allowing more time for expectant parents to receive counseling and make decisions. This test is performed in one of two ways:

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[44] "Fighting Female Feticide - A Long Way to Go", the Lawyer Collective, August,1991, p.4.

(i) **Transcervical-** Using ultrasound as a guide, a thin tube is passed from the vagina into the cervix. Gentle suction removes a sample of tissue from the chorinic villi. No anesthetic is used, although some women do experience a pinch and cramping.

(ii) **Transabdominal-** A needle is inserted through the abdominal wall-thin minimizes chances of intrauterine infection, and in women whose uterus is tripped, reduces the chance of miscarriage. After the sample is taken the doctor will check the fetal heart rate.[45]

c. Foetal Biopsy or Chrorion Villi Biopsy (CVB) - Other tests, in particular CVB and pre-selection of the unborn baby's sex have also been used for SD and SP tests. Diet control method, centrifugation of sperm, drugs (tablets known as SELECT), vaginal jelly 'sacred beads called rudraksh and recently advertised Gender select kit are also be used for getting boys. Compared to CVB and pre-selection through centrifugation of sperm amniocentesis is more hazardous to women's health. In addition, while, this test can give only 95-97 percent accurate result, in 1 percent of the cases the test may lead to spontaneous abortions or premature delivery, dislocation of hips, respiratory complications or needle puncture marks on the baby.[46]

d. Ultrasonography– Ultrasonography was another technique which came in around the early 80s, which changed the scenario for the worse. It does not require much specialized training to conduct the sex determination test. It is cheaper compared to amniocentesis. The machine being portable can be easily taken in a vehicle. Multinational marketing agencies went on importing in ultra-sound scanner and with the nexus of unethical corrupt doctors who had been indulging in illegal sex determination tests for monetary gains, a network of commercial business soon flourished.[47] In this test, sound waves are bounced

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[45] Supra note. 39, pp. 285-287.

[46] Vibhuti Patel "Sex-Selection and Pre-Birth Elimination of Girl Child", The Radical Humanist, Vol. 69, No.3 June 2005, p.4.

[47] Chakravartty Gargi "PCPNDT Act, 2003- A Challenge before Us", Women's Watch, April-June 2007, p.35.

off the baby's bone and tissues to construct an image showing the baby's shape and position in the uterus.

Ultrasound scanning can be used in order to determine the sex of the fetus, but only after the development of external genitalia, during third trimester of pregnancy. Ultrasound was once used only in high-risk pregnancies but has become so common that they are often part of routine prenatal case. In addition to showing the fetus age, rate of growth position, movement, breathing and heart rate, it shows the number of fetuses and the amount of amniotic fluid in the uterus. The test is used most often to detect Down syndrome and other chromosome abnormalities, structural defects such as spino bifida and anencephaly, and inherited metabolic disorders.[48]

At present ultrasound machines are most widely used for sex determination purposes. "Doctors motivated in past by multinational marketing muscles and considerable financial gains are increasingly investing in ultrasound scanners".[49]

Dr. Anirudh Malpani, the most vocal pro-sex selection activist in India. He supports the use of pre-implantation genetic diagnosis for sex selection, and says nothing wrong with it.[50]

Although sex-determination test have been banned in India since 1994, the ultrasound centers flourished openly throughout the country, often by bribing corrupt police and health officials. Ultrasound centers and private hospitals in the area earn more than three-quarters of their income from sex determination and abortions. The sex determination tests is done secretly, and no report by the ultrasound center follows when the foetus is found to be

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[48] Srivastav, V.P. "Pre-natal Sex Determination and Sex Selection Test", A Handbook on Crime against Women, 1st ed. 2005, pp. 289-290.

[49] George, Sabu and Dahiya Rambirs; "Female Feticide in Rural Haryana" Economic & Political Weekly, Volume XXXIII, No. 32, Aug 8-14, 1998. p.2196

[50] Unchaahi: Against Female Feticide in India: Killer Doctors
http://unwantedgirlchild.blogspot.com/search/ label/ killer% Doctors

female and banned for an abortion; said Dr. Shabbir Husain in Aligarh "Afterwards, the unscrupulous doctors issued certificate stating it was a natural miscarriage".[51]

C. Abuse of Genetic diagnostic Technology in Sex-Selection

Declining sex ratio is an issue of grave concern in India. Family and social pressures to produce a son are immense. In most regions, sons are desired for reasons related to kinship, inheritance, marriage, identity, status, economic security and lineage. A preference for boys cuts across caste and class lines and results in discrimination against girls even before they are born. A gross misuse of the technology that facilitates pre-natal diagnosis of any potential birth defects and associated conditions, female fetuses are selectively aborted after such pre-natal sex determination. This is happening across the country in spite of a massive influx of legal regulations banning the same. Unfortunately, the test which was primarily aimed at detecting genetic disorders of the fetus is being frequently abused by parents after knowing that the unborn fetus is a female and then secure an abortion.[52] Son preference is one of the most evident manifestations of gender discrimination in our society. In our country there is an unholy alliance between tradition and technology started in the 80's with amniocentesis. Today ultrasound is the sex-selective technology that is widespread in most prosperous states. The reasons are easy to define '*prosperity ensured better infrastructure more machines and more doctors to perform the tests*'. All this made feticide rampant. Medical science and technology are being misuse by medical practitioners who provide such options for people at large. They posses the skill and expertise to use these technologies and are also economically benefiting from them by their misuse. By indulging in such practice they not only violate the law but also the medical

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[51] Sex Selection- A New Generation Technology, Women's Watch, July-September,2007, p.25.
[52] Shakeel Ahmad "Legalised Abortion: A Gender Selective Feticide", Military Law Journal,1995, pp. 231-32.

professions our code of ethics and conduct with also put forth sex selection as a concern of medical ethics. Most importantly, sex selection also is a breach of human rights as far as women are concerned. The selective elimination of women even before birth is a breach of their right to equality and existence. This genetic diagnostic technology has been misused to know the sex of the unborn child which results into female feticide.[53]

These techniques certainly instigate seen preferring minds and leads to an increase in the number of abortion of female foetus. This abuse of medical sciences, derive a female foetus to be born alive. Law does not confer a right on unborn person to be born. However the increasing incidence of female feticide seems to an encroachment on right of a child and a worst form of discrimination. The practice hurt not only social morality but is counter-productive. If allowed to continue unchecked it may de-establish the natural proportion of male and female population.[54]

The studies suggest that doctors in government hospitals and other private medical practitioners have been conducting this test to determine the sex of the foetus and have been aborting if it happens to be female. A survey conducted in 1992 even in cosmopolitan Bombay revealed that 7,999 out of 8,000 aborted fetuses were female.[55] It has been reported in a national daily that as many as 50,000 female foetus are aborted every year after such tests. In Delhi alone, there are 2,000 clinics conducting sex determination tests and 70 percent of all abortion in capital is female feticide.[56]

Aborting the foetus only on the ground of sex is not allowed under any law. Article 21[57] says that no person shall be denied his/her right to life and

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[53] Srivastav V.P, "Pre-natal Sex Determination and Sex Selection Test", A Handbook on Crime Against Women, 1st ed. 2005, pp.293-94
[54] Supra note 52, p.233.
[55] The Hindustan Times, Aug 9, 1994, p.18.
[56] The Hindustan Times Sept. 28, 1994, p.13.
[57] Article 21 the Constitution of India, 1950.

personal liberty except according to procedure established by law. Therefore, a female foetus has as much a right to life as a male fetus. To deny that would be to deny the very basis of right to life. An unborn foetus/child is also protected under various international instruments. The unborn foetus includes a male foetus as well as a female foetus. The rights of a child are further reiterated in internationally recognized instruments. The Declaration of the Right of the Child, adopted on 20th November, 1959, proclaims in its preamble, whereas the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth. This has been again stated and recognized in the preamble to the United Nation's Convention on the Rights of the Child, 1989. Once conception has occurred, a new and a separate human life have been created. It has the same right to life irrespective of the fact that it is a male or a female.

What does this mean? A female foetus or a male foetus would have a right to live except in cases where the mother's life or that of the child is itself in danger.[58] Than why this unnecessary bias in favor of a male child over a female? Just because of the fact that the female foetus is vulnerable and cannot defend it itself, is no reason to deny her right to life. Nobody ought to have the right to kill or harm an unborn child for the reason that she is a female. A female's right begins when she begins. The right to life is a 'core' right without which all other rights are meaningless.[59] This right is available to all persons regardless of the status that they occupy in society.

D. Legal Measures to Curb Sex Selective Abortion of Unborn Child

The Ministry of Health and Family Welfare (G.O.I.) is well aware of the problem of female feticide in India. Repeatedly the government has expressed its policy, both inside of the parliament and outside of dealing effectively with

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[58] See Section 3 MTP Act, 1971.
[59] The Right to Life is the Most Important of all, http\\www.arha.org-au\index\Rita- Joseph

this social malaise. The Government policy is based on the constitutional guarantees that state shall not discriminate only on ground of sex in the matter of employment or appointment. The mandate contained in Articles 15 and 16 of the constitution would remain dead letters if a female child is not allowed to born and grow as a citizen to enjoy the constitutional right.[60]

Curbing sex pre-selection is possible only if a law against S.D., symbolizing the state's accompaniment to intervene in medical technology on grounds of 'right to equality' and 'preserving the sex ratio balance is brought into effect and implemented. Self-regulation would have been preferable to state intervention. However, the medical establishment has consistently refused to take a stand on the issue of S.D. or for that matter on any issue of medical ethics. Issues raised by S.D. techniques are too important to be left to technocrats alone. But ultimately, progressive legislation is not a substitute for cultural changes and consciousness rising. However, the former is at least in the Indian context a prerequisite for social action. Female infanticide and sati could not have been curbed if not eliminated, without the aid of suitable legislation.[61]

a. The Maharashtra Regulation of Prenatal Diagnostic Techniques Act, 1988

In 1986, a committee headed by Dr. Sanjeev Kulkarni of the Foundation of Research in Community Health carried on an investigation on the prevalence of sex determination (SD) Test in Bombay. It was revealed that 84 percent of the gynecologists interviewed have been performing amniocentesis for sex selection test. An average of 270 amniocentesis test per month was done by them.

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[60] Ahmad Shakeel, "Legalised Abortion: A Gender Selective Feticide", Military Law Journal,1995,p.232

[61] "Fighting Female Feticide- A long way to go", Lawyer's Collective, Vol. 6, August6 1991, p.5.

To arrest this evil, the Forum Against Sex Determination and Sex Pre Selection (FASDSP), a broad forum of feminist and human right groups were formed in 1984, and it has been lobbying for legislation to ban the female feticide. How can we stop deficit of Indian women? This question was asked by feminists, sensitive lawyer, scientists, researchers, doctors and women's organizations such as Women's Centre (Bombay), Saheli (Delhi), Samata, (Mysore), Sahiar (Baroda) and Forum Against SD and SP (FASDSP)- an umbrella organization of women's groups, doctors, democratic rights groups, and the people since movement. They challenged the "highly educated", enlightened, scientists, technocrats, doctors and of course, the state who help in propagating the tests. Concerned groups in Bangalore, Chandigarh, Delhi, Madras, Calcutta, Baroda and Bombay demanded that these tests should be used for the limited purpose of identify serious genetic conditions in selected government hospitals under strict supervision.[62]

In March 1987, Maharashtra Government appointed an expert committee to bring out legal provisions to restrict SD test. This was the outcome of continuous pressure from a public forum to bring a law to check sex selection test. The Government put forward a Bill for regulation of the use of medical or scientific techniques for pre-natal diagnosis. In June 1988, the Bill was passed by the Maharashtra Legislative Assembly and became a Act.[63] The government of Maharashtra is the first ever legislation on this issue. It also catalyzed a socio-cultural movement on this issue. Today although most people even in the remotest corners know about the existence of SD service, they are also aware of the campaign against it.

FASDSP has an issue based campaign group performed a versatile rate – researching, disseminating information and ideas, lobbying, having protest

[62] Patel Vibhuti, "Sex Selection and Pre-Birth Elimination of Girl Child", The Radical Humanist Vol. 69, No. 3, June,2005, p.7.
[63] Das Shyamasree, "Gender Based Inequalities and Female Feticide", Women's Watch, April-June 2007, p. 35.

action, helping in drafting legislation, and coordinating and networking. Similar groups have emerged in other parts as well- Forum Against Sex Determination (FASD), Gujarat Voluntary Health Association (GVHA),Gram Gujrat and Baailancho Social in Goa, to name a few. Their campaign has prompted the introduction of Bills in their respective state legislative assemblies.[64]

Although the law has been passed, it has several loopholes such as the victim that is the woman, was seen as the culprit. The penalty was imprisonment up to three years but the practicing doctor and the clinic remained excluded from the penalty provision. Moreover, this Act was confined to Maharashtra. Further the Acts purview was limited only to SD test; it did not say anything about the SD techniques. It admitted that medical technology could be misused by doctors and banning of SD tests had taken away the respectability of the Act of the SD test. Not only is this but now in the eyes of law both the clients and the practitioners of the SD test culprits. Any advertisement regarding the facilities of the SD test is declared illegal by this Act. But the Act had many loopholes. Two major demands of the Forum that no private practice in SD test should be allowed and in no cases, a woman undergoing the SD test be punished, were not included in the Act. On the contrary the Act intended to regulate them with the help of an appropriate authority constituted by two government bureaucrats, one bureaucrat from the medical education department and one bureaucrat from the Indian Council of Medical Research, one gynecologist and one geneticist and two representatives of voluntary organizations made a mockery of people's participation. Experiences of such bodies set by the Government have been that they merely remain paper bodies and even if they function are highly inefficient, corrupt and elitist.

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[61] Supra note. 61, p5.

The medical mafia seemed to be the most favored group in the Act. It has scored the most in the chapter on offences and penalties, the last clauses of this chapter empowers the court, it so desires and after giving reasons, to award less punishment than the minimum stipulated under the Act. That is, a rich doctor, who has misused the techniques for female feticide, can with the help of powerful lawyers, persuade the court to award the minor punishment" The court shall always assume, unless proved otherwise, that a woman who seeks such aid of prenatal diagnosis procedures on herself has been compelled to do so by her husband, or members of her family". The Act made the victim culprit who could be imprisoned up to three years. For the women, her husband and her in-laws, using SD tests became a "Cognizable, non-bailable and non-compoundable" offence'. But the doctors, centers and laboratories were excluded from the above provision. The Act also believed in victimizing the victim. With this Act, the medical lobby's fear that the law would derive SD test underground, vanished.[65]

b. The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994[66]

In response to an official directive, Government hospitals slapped the misuse of this technique for sex determination, but it resulted in opening the floodgates for large scale commercialization in the private sector. Sex Determination soon became a booming business in Delhi, Maharashtra, Punjab, Haryana, Uttar Pradesh, and spread like an epidemic in north and west India. This was the reason which had shown a much sharper skewing of the sex ratio (adverse to females) in the past decades.[67]

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[65] Patel Vibhuti, "Sex Selection & Pre-Birth Elimination of Girl Child", The Radical Humanist,vol.69,no.3, June 2005,p.7

[66] The PNDT Act, 1994(as amended by 2002 Amendment).The Act extends to the whole India except the state of Jammu & Kashmir. The Scheme of the Act is such that it consists of 34 sections spread over eight chapters.

[67] See Sherwani,A. A.K, "Illegal Abortions and women's Reproductive Health", 3SCJ, 1997, p. 113.

The Act of 1998 failed to achieve the very objective because of the government's lack of determination and political will. Private clinics and laboratories also allowed and gave licenses to do prenatal tests. Since tests is simple and the same does not require any sophisticated equipment etc; and all that is required is a qualified doctor to remove the amniotic fluid which can be tested by a geneticist in any pathological laboratory. The net result was that the test continued, private clinics flourished and female fetuses aborted thereby bringing down the female population.[68]

Although scientists and medical professionals doing all responsibility of social consequences of sex selection as well as sex determination tests but the reality in this regard shelters the myth of the neutrality of science and technology.[69]

Women's organizations were on the street campaigning for bringing in a proper central legislation. Since the problem had spread like wild fire throughout the country particularly in northern India. It was in 1988 that NFIW's Executive Committee urged upon the Government to ban the SD test immediately everywhere and anywhere. The resolution mentioned that for determination of congenital abnormalities of the foetus, the government can have a few recognized registered and trusted centers should remain under strict observation of the authorities and government. The situation was so grim that soon a decline in the sex ratio could be seen in the 1991 Census. In fact, it was the lowest ever sex ratio in the previous century.

The alarm bell brought several women's organizations together and soon protest marches, deputations etc. The nationwide support and international coverage received by the campaign has also resulted in the appointment by the Union government of an expert committee on SD and female feticide. It was

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[68] Ahmad Shakeel, "Pre-Natal Diagnostic Techniques: A Source of Gender Bias", Kashmir University Law Review, Srinagar, 2003, p.208.
[69] Kulkarni S.K. and Patel S, "Abuse of New Technology", Seminar, March 19, 1988, p17.

considered necessary to bring out a legislation to regulate the use of and to provide deterrent punishment to stop the misuse of such techniques. In 1991, the Prevention of Prenatal Diagnostic Test (Prevention of Misuse and Regulation) Bill[70] was tabled in the parliament, was then that women's organizations demanded not to penalize the victim, that is the women's, and to bring ultrasound technique within its ambit, which was not included in the Bill, and also to cover within its purview any form of medical technology used for sex determination including sex-pre selection. The Lok Sabha after discussions adopted a motion for reference of the said Bill to a joint committee of both the Houses of Parliament in September, 1991. The joint committee presented its report in December, 1992 and on the basis of the recommendation of the committee the Bill was considered by both the House of parliament.

The campaign went on for three years, and finally in 1994, prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) – known as PNDT Act was passed.[71] In 1996, the Act came into force with the rules framed under the Act. It was the Act No. 57 of 1994, dated 20th September, 1994.

Thus, with a view to educating the masses the government has launched a program of drawing the attention towards the social evil. The government had declared its policy that it shall not discriminate between male and female and that both have an equal status. The government is handling this problem both at social level and through law.[72]

i. Purpose of the Act

The purpose of this Act is to control the misuse of pre-natal diagnostic techniques (Amniocentesis test). The Act provide for the regulation of the use

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[70] For a comment on the Bill See Kusum, Pre-natal Diagnostic Techniques/Regulation and Prevention of Misuse) Bill, 1991: A Critique (33), JILI (1991) p. 413.

[71] Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994.

[72] Ahmed Shakeel "Legalised Abortion: A Gender selective Feticide", Military Law Journal,1995,p.233

of pre-natal diagnostic techniques for the purpose of detecting genetic or metabolic disorder or chromosomal abnormalities or certain congenital formations or sex linked disorders and for the prevention of the misuse of such techniques for the purpose of pre-natal sex determination leading to female feticide.[73]

The Act, inter alia, provides for the -

(i) Prohibition of the misuse of pre-natal diagnostic techniques for determination of sex of foetus, leading to female feticide;
(ii) Prohibition of advertisement of pre-natal diagnostic techniques for detection or determination of sex;
(iii) Permission and regulation of the use of pre-natal diagnostic techniques for the purpose of detection of specific genetic abnormalities or disorders;
(iv) Permitting the use of such techniques only under certain conditions by the registered institutions; and
(v) Punishment for violation of the provisions of the PNDT Act;
(vi) To provide deterrent punishment to stop such inhuman acts of female feticide.[74]

The PNDT Act, 1994, a central legislation which has two aspects viz., regulatory and preventive as the title of the Act indicates. It aims to regulate the use of pre-natal diagnostic for legal and medical purposes and prevention of misuse for illegal purposes.

ii. Prohibitive Aspects of Pre-natal Diagnostic Techniques

The Pre-Conception and Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 is an Act to prohibit the selective abortion

[73] Ibid.
[74] Kashyap Amit "The cursed Creature: A focus on Female Feticide in India", Civil and Military Law Journal, Vol. 45, No.3 July-Sept. 2009,p144

of foetus on the basis of sex under the PNDT Act, prenatal diagnostic for the purpose of sex determination is prohibited. The Act prohibits the disclosure of the sex of the fetus.[75] The Act also prohibits that no genetic counseling centre, Genetic Laboratory or Genetic Clinic unless registered under this Act, shall conduct or associate with, or help in, conducting activities relating to pre-natal diagnostic technique.[76]

Centre, Genetic Laboratory or Generic Clinic shall employ or caused to be employ or caused to be employed any person who does not possess the prescribed qualifications.[77] It further prohibits that no medical geneticist, gynecologists, pediatrician, registered medical practitioner or any other person shall conduct or cause to be conducted or aid in conducting by himself or through any other person, any pre-natal diagnostic techniques at a place other than a place registered under this PNDT Act.[78]

Another prohibitive aspects of the PNDT Act which prohibits Genetic counseling centers, Genetic Laboratories or clinics to conduct or cause to be conducted any pre-natal diagnostic technique including ultrasonography to determine the sex of a fetus[79] and also prohibits individuals from associating themselves in any such act of pre-natal exercise of determining the sex of the foetus of the child in the mother's womb.[80] The Act also prohibits any such genetic counseling centre, Genetic Laboratory and Genetic Clinic to conduct activities relating to pre-natal diagnostic techniques unless it is registered under the said Act or to employ any person who does not possess the prescribed

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[75] Section 5(2) PNDT Act 1994- No person including the person conducting pre-natal diagnostic procedures shall communicate to the pregnant woman concerned of her relations or any other person the sex of the fetus by words, signs or in any other manner.
[76] Section 3(1) PNDT Act 1994.
[77] Section 3 (2) PNDT Act, 1994.
[78] Section 3 (3) PNDT Act, 1994.
[79] Section 6 (a) PNDT Act, 1994.
[80] Section 6 (b) PNDT Act, 1994.

qualifications. The medical practitioners are prohibited to conduct such techniques at any place which are not registered under this Act.[81]

iii. Regulatory Aspects of Pre-natal Diagnostic Techniques

The PNDT Act Provides[82] for the regulation of pre-natal diagnostic techniques. The conducting of pre-natal diagnostic techniques is strictly prohibited except for detection of certain abnormalities in the foetus. These are:[83]

(i) Chromosomal abnormalities;
(ii) Genetic metabolic diseases;
(iii) Haemoglobinopathies;
(iv) Sex linked genetic diseases;
(v) Congenital anomalies;
(vi) Congenital anomalies;
(vii) Any other abnormalities or disease as may be specified by the central supervisory board

No medical practitioner can used or conduct any such pre-natal diagnostic techniques unless he is satisfied that any of the following conditions are fulfilled even for the specified purpose, are, namely:

(i) Age of the pregnant woman's is above thirty five years;
(ii) The pregnant woman had been exposed to potentially teratogenic agents such as drugs, radiation, infection or chemicals;
(iii) The pregnant woman has a family history of mental retardation or physical deformities such as spasticity or any other genetic disease;

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[81] Ahmad Shakeel "Pre-natal Diagnostic Techniques: A source of Gender Bias", Kashmir University Law Review, 2003, p. 208.
[82] Section 4 PNDT Act, 1994.
[83] Section 4 (2) PNDT Act.

(iv) Any other conditions as may be specified by the Central Supervisory Board.[84]

It further says that no person including a relative or husband of the pregnant woman shall seek or encourage the conduct of any prenatal diagnostic test on her except for the purpose mentioned in the indication. It also says that no person including a relative or husband of the pregnant woman shall seek or encourage the conduct of any sex-selection technique on her or him or both.

It is essential that side and after effects of such diagnostic procedures should first be explained to the pregnant woman concerned; and her written consent to undergo such procedures in the language which she understands should have been obtained.[85] It is categorically laid down that no person conducting pre-natal diagnostic procedures shall communicate to the pregnant woman concerned or her relatives the sex of the foetus by words, signs or in any other manner.[86] Further conducting of pre-natal diagnostic techniques including ultrasonography for the purpose of determining the sex of a fetus is totally prohibited.[87] The Act expressly prohibited any pre-natal diagnostic techniques including ultrasonography by any Genetic counseling centre or Genetic Laboratory or Genetic clinic for the purpose of determined the sex of a foetus, leading to female feticide.

The Act specifically prohibits advertisement relating to pre-natal determination of sex[88] and provides punishment for contravention. Punishment is imprisonment for a term which may extend to three years and fine which may extend to ten thousand rupees. "Advertisement" includes any notice,

[84] Section 4 (3) PNDT Act, 1994.
[85] Section 5 (1) PNDT Act, 1994.
[86] Section 5 (2) PNDT Act, 1994.
[87] Section 6 PNDT Act, 1994.
[88] Section 22 PNDT Act, 1994.

circular, label, wrapper or other document and also includes any visible representation made by means of any light sound, smoke or gas.[89]

Any medical geneticist gynecologist registered medical practitioner or any person who owns a Genetic Counseling Centre, a genetic Laboratory or a Genetic Clinic or is employed in such a centre, Laboratory or Clinic and renders his professional or technical services to or at such centre, Laboratory or clinic, whether on an honorary basis or otherwise, and who contravenes any of the provisions of this Act or rules made there under shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees and on any subsequent conviction, with imprisonment which may extend to five years and with fine which may extend to fifty thousand rupees.[90] The name of the registered medical practitioner who has been convicted by the court has to be reported by the Appropriate Authority to the respective state medical council for taking necessary action including the removal of his name from the register of the council for a period of two years for the first offence and permanently for the subsequent offence.[91]

A person who seeks the aid of a Genetic Clinic for conducting pre-natal diagnostic techniques on any pregnant woman (including such woman unless she was compelled to undergo such diagnostic techniques) for purposes other than those specified in clause (2) of section 4, shall be punishable with imprisonment for a term which may extend to ten thousand rupee and on any subsequent conviction with imprisonment which may extend to five year and with fine which may extend to fifty thousand rupees.[92]

Notwithstanding anything in the Indian Evidence Act, 1872, the court shall presume unless the contrary is proved that the pregnant woman has been

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[89] Section 22 Explanation, PNDT Act, 1994.
[90] Section 23 PNDT Act, 1994.
[91] Section 23 (2) PNDT Act, 1994.
[92] Section 23 (3) PNDT Act, 1994.

compelled by her husband or the relative to undergo pre-natal diagnostic technique and such person shall be liable for abetment of offence under sub section (3) of section 23 and shall punished for the offence specified under that section.[93]

Whoever contravenes any of the provisions of this Act, or any rules made there under, for which no penalty has heen elsewhere provided in this Act, shall be punishable with imprisonment for a term which may extend to three months or with fine which may extend to one thousand rupees or with both and in case of continuing contravention with an additional fine which may extend to five hundred rupees for every day during which such contravention continues after conviction for the first such contravention.[94] There is also a provision providing for punishment for offence by companies.[95] Further the persons conducting ultrasonography on a pregnant woman are required to keep a complete record thereof in the clinic in such manner as may be prescribed, and any deficiency or inaccuracy found therein shall amount to contravention of the provisions of section 5 or section 6 unless contrary is proved by the person conducting ultrasonography.[96]

The PNDT Act, however for all intents and purpose has proved to be a toothless piece of legislation. The problem with the Act is two-fold that is the Interpretation of thc Act, and the implementation of the Act.[97] The intent and the objective of the Act is undoubtedly being, prevention of the sex determination. Despite this, it has been interpreted by the ultrasonologist, abortionists, doctors and more shocking the government alike, to exclude pre-conceptual sex selection. This has conveniently allowed the medical practitioners using modern technology such as ***Ericsson's Techniques*** and the

[93] Section 24 PNDT Act, 1994.
[94] Section 25 PNDT Act, 1994.
[95] Section 26 PNDT Act, 1994.
[96] Section 29 PNDT Act, 1994.
[97] Kashyap Amit, "The Cursed Creature: A focus on Female Feticide in India", Vol. 45 (3) July-Sep 2009, Civil and Military Law Journal, p. 144.

Pre-implementational Genetic Diagnosis to escape the legislative net. Using these new techniques, sex selection of the foetus can now take place pre-natal even before conception.[98] The two new methods for pre-conceptual are the *Ericsson's method* and *pre-implementional Genetic Diagnosis* (PGD)

In the ***Ericsson's method*** first a semen sample is diluted and then centrifuged X and Y bearing sperms are separated when placed in a chemical solution. The faster moving Y sperms penetrate the solution's denser bottom layers, which are collected and centrifuged. The process is repeated and the Y concentrate is collected for artificial insemination. The method is said to have a success rate of about 70 percent of producing a male child and is very expensive, but is still being tried by many families in the metropolitan cities.[99]

The pre-implementation Genetic Diagnosis is a much more complicated technique which is done in order to study the genetic blue print to determine whether the embryo is male or female. The extricated cell from this technique for the sex selection purpose is doused with two fluorescent probes: chemical stains that single out the X and Y chromosomes from the intricate genetic master plan. It is then bathed in a stainless water bath to wash away unwanted cellular debris that could interfere with the analysis. Freshly scrubbed X (female) shows up as a pink dot under a special fluorescent microscope, while Y (male) reveals itself as a bright green speck. The embryos that turn out to be male which are always fewer in number are then implanted in the woman's uterus and the remaining female embryos are simply discarded.

This is procedure finally results in sex selection of embryos which for the doctor and government alike falls out of the purview of the PNDT Act, as it is pre-conceptual and not pre-natal.

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[98] Mehta Swati and Kathari Jayan, "It's a Girl Pre-Natal Sex Selection and the Law", Lawyers Collective, November. 2001, p.6.
[99] Ibid.

There is no scarcity of doctors who are ready to use these techniques for handsome money and they even go to the extent of justifying these techniques. They claim "if we allow people when to have babies, how many to have and even to terminate pregnancies if they in advertency get pregnant then why not allow them to select the sex of their child if it is possible? One would like to ask, whether they would then logically extend their argument and justify sex determination of the child in the mother's womb and respect the wish and the choice happens to be a girl.[100] For a proper implementation of PNDT Act, especially convicting doctors who are carrying on scans for sex determination is essential.[101]

iv. Implementing machinery

In order to look into various policy and implementation matters, the Act provides for the setting up of various bodies along with their composition, powers and functions. These are Central Supervisory Board. Appropriate Authority and Advisory Committees.

a. *The Central Supervisory Board* which consists of Minister in charge of the Family Welfare as Chairman, Secretary of Government of India for Family Welfare as Vice-chairman, two members from law and judiciary department and women and child department and other eminent medical geneticist, gynecologist, pediatrician, social scientist and representatives of women welfare organizations.[102] The Central Supervisory Board which shall meet at least twice a year.[103] The main functions of the board are as follows:

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[100] Ibid.
[101] Ahmad Shakeel "Pre-natal Diagnostic Techniques: A Source of Gender Bias", Kashmir Law Review, 2003 p. 211.
[102] Section 7 PNDT Act, 1994.
[103] Section 9 PNDT Act, 1994.

- To advise the Central Government on policy matters relating to use of prenatal diagnostic Techniques, sex selection techniques and against their misuse;
- To review implementation of the Act and the rules made there under and recommend changes in the said Act and Rules to the Central Government
- To create public awareness against the practice of prenatal determination of sex of the fetus leading to female feticide
- To lay down code of conduct to be observed by persons working at genetic counseling centre, genetics laboratory or genetic clinic.[104]

b. To enforce the law in individual state Appropriate Authority[105] constituted whose main functions are:

- Grant, suspend or cancel registration of the genetic centre, clinic or laboratory
- To enforce prescribed standards
- To investigate complaints of breach of provision of Act
- Summoning of any person who is in possession of any information leading to violation of the provisions of this Act or rules
- Issuing search warrant for any place suspected to be indulging in sex selection techniques or prenatal sex determination

v. Working of PNDT Act, 1994

Though the Act came into force eight years back till date not a single conviction has been made under it. Similarly, contrary to the general exceptions, the Act has continually failed to deliver when it comes to the

[104] Section 19 PNDT Act, 1994.
[105] Section 17 PNDT Act, 1994.

concrete part of improvement in sex-ratios. The 2001 Census reveals that there has been a dramatic drop in the child sex ratio (0-6 age group).

In 1901 there were 3.2 million fewer women then men in India- a hundred years later the deficit increased over 10 times to 35 million at the time of Census 2001. The most disturbing decline is seen in the age group 0-6 years. The sex ratio (number of girls for every 1000 boys) within this age group plunged from 1010 in 1941 to 927 in 2001. In 1991 the child sex ratio was 945; in 2001 it is 927. Thus, there is decline by 18 points. The sex ratio of 927 in the 0-6 age group is only the national average for India. There are areas within the country where the ratio has draped to well below 900. The ratios for some of the states are: Himachal Pradesh 896, Punjab 793, Chandigarh 845, Uttaranchal 906, Haryana 819, Delhi 865, Rajasthan 909 and Gujarat 879. These are not the most economically backward areas of the country. On the contrary, Punjab with the lowest 0-6 sex-ratio in the country is the most economically prosperous state of India. The Rajasthan government has been in the news recently for increasing cases of female feticide, an indicator of violence against women. Its sex ratio, as per 2001 Census, is only 922 females per 1000 males. There is no let up in female feticide in Rajasthan despite government claims to the contrary.[106]

Delhi, the national capital region of India, has a declining 0-6 sex ratio. In fact, some of the poorest states have a sex-ratio well above the national average and have recorded a fairly high literacy rate. Several reasons are attributed to the decline in the number of girl child. Sex-selective abortions have been greatly facilitated by the misuse of diagnostic procedures such as amniocentesis that can determine the sex of the fetus.[107]

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[106] Times of India, 23rd June 2008.
[107] Bakshi Roopa, "Declining Sex Ratios- A Matter of Concern", Nation and the World, February, 2009 p.15.

It may be pointed out that as adequate records are not maintained by the clinics it is difficult to identify the purpose for which an ultrasound test has been conducted. The absence of such records affects the inquiry. Although the act has been on the statute book since 1994, it remained largely ineffective in checking the proliferation of ultrasound machines and mobile clinics clandestinely offering sex-selection services throughout the country.

It is a matter of shame that PNDT Act has not been implemented in the sprit in which it was enacted in 1994. The Central Supervisory Board has not been meeting every six months as required by Act. The Appropriate Authorities in the states of Punjab, Haryana, Gujarat, Chandigarh has not been constituted as of June 2000.[108] Even now, despite the Supreme Court order asking states to implement the Pre-Natal Diagnostic Techniques (Regulation and Prevention of misuse) Act which bans sex-determination tests, its business as usual at nursing homes and clinics. A source in the Bangalore state women's Commission says, "It's difficult to take action against doctors because they have close links with politicians.[109]

Unfortunately, during the last 8 years, this very important technique is misused much more than is applicable in its proper use. This is a technique for the pre-natal diagnosis of diseases which interferes with normal life of the new born with an incurable disease; the procedure is being widely misused to determine the sex of a normal child which is absolutely unnecessary. Genetic clinics are meant to use PNDT for genetic counseling regarding genetic diseases but instead they are engaged in large-scale misuse in determining the sex of a female child.

[108] Times of India, New Delhi April 20, 2001.
[109] Times of India, New Delhi, July 10, 2005.

E. Supreme Court and PNDT Act

PNDT is an Act to provide for the regulation of the use of prenatal diagnostic techniques for the purpose of detecting genetic or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex linked disorders and for the prevention of the misuse of such techniques for the purpose of prenatal sex determination leading to female feticide. Even though, PNDT Act 1994 is a stringent law, but this Act could not check the growing misuse of sex determination test, rather this crime spread to remote areas because of its poor implementation.

Recognizing the misuse of prenatal diagnostic tests leading to female feticide which rapidly declining sex-ratios turning into a demographic nightmare of frightening proportions, a public Interest Litigation was filed in the Supreme Court under Article 32 of the constitution by the Centre for Enquiry into Health and Allied Themes (CEHAT), Mahila Sarvangeena Utkarsh Mandal (MASUM) and Dr. Sabu M. George urging effective implementation of the Act. The Supreme Court passed an order on 4th May, 2001[110] which aims at ensuring the implementation of the Act, plugging the various loopholes and launching a wide media campaign on the issue. The second goal of filing the PIL is the amendment of the Act to include pre- and during conception techniques, like X and Y chromosome separation Pre-implementation Generic Diagnostic (PGD). The order largely concerns only the implementation of the Act and putting the required infrastructure in place. However, the order entrusted the responsibility of examining the necessity to amend the Act to the Central Supervisory Boards, keeping in mind emerging

[110] Supreme Court, Civil Original Jurisdiction Writ Petition (Civil) No. 301 of 2000.

technologies and the difficulties encountered in the implementation of the Act and to make recommendation to the Central Government.[111]

After filing of this petition, the Supreme Court issued notices to the concerned parties on 9-5-2000. It took nearly one year for the various states to file their affidavits in reply/written submissions prima facie it appears that despite the PNDT Act being enacted by the parliament five years back, neither the state Government nor the Central Government has taken appropriate actions for its implementation.

Following directions are issued on the basis of various provisions for the proper implementation of the PNDT Act[112]:

a. Direction to the Central Government

i. To create public awareness against the practice of pre-natal determination for sex and female feticide through appropriate release/programmes in the electronic media. This shall also be done by the Central Supervisory Board.

ii. To implement with all vigor and zeal the PNDT Act and the Rules framed in 1996. Rule 15 provides that the intervening period between two meetings of the Advisory Committees constituted under sub-section (5) of section 17 of the PNDT Act to advice the appropriate authority shall not exceed 60 days. It would be seen that this rule is strictly adhere to.

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[111] Dr. K. Sanmuga Velayuttam, "The Pre-Conception and Pre-Natal Diagnostic Techniques(Prohibition of Sex Selection) Act, 2002- A Bold step", Legal News and views Vol. 17, No. 5, May 2003, Quoted in Kashyap Amit, "The cursed creature": A focus on female feticide in India", Civil and Military Law Journal, vol. 45, No.3, July-Sep. 2009, p.144

[112] CEHAT & others Vs Union of India & others, Supreme Court of India, Civil Original Jurisdiction, Writ Petition (Civil) No. 301/2000, decided on 4th May 2001.

b. Direction to the Central Supervisory Board (CSB)

1. Meeting of the CSB will be held at least once in six months. (Re-proviso to section 9(1)). The constitution of the CSB is provided under section 7. It empowers the Central Government to appoint ten members under section 7(2) which includes eminent medical practitioners including eminent social scientists and representatives of women welfare organizations. This power will be exercised so as to include those persons who can genuinely spare some time for implementation of the Act.
2. The CSB shall review and monitor the implementation of the Act.
3. The CSB shall issue directions to all state/UT Appropriate Authorities to furnish quarterly returns to the CSB giving a report on the implementation and working of the Act. These returns should inter alia contain specific information about:
   i) Survey of bodies specified in section 3 of the Act.
   ii) Registration of bodies specified in section 3 of the Act.
   iii) Action taken against non-registered bodies operating in violation of section 3 of the Act inclusive of search and seizure of records.
   iv) Complaints received by the Appropriate Authorities under the Act and action taken pursuant thereto
   v) Number and nature of awareness campaigns conducted and results flowing there form.
4. The CSB shall examine the necessity to amend the Act keeping in mind emerging technologies and difficulties encountered in implementation of the Act and to make recommendations to the Central Government.
5. The CSB shall lay down a code of conduct under Section 16(iv) of the Act to be observed by persons working in bodies specified therein and to ensure its publication so that public at large can know about it.

6. The CSB will require medical professional bodies/associations to create awareness against the practice of pre-natal determination of sex and female feticide and to ensure implementation of the Act.

c. Direction to state Governments/UT Administrations

1. All state Governments/UT Administrations are directed to appoint by notification, fully empowered Appropriate Authorities at district and sub-district levels and also advisory committees to aid and Advise the Appropriate Authority in discharge of its function (Re-section 17 (5) for the Advisory Committee also, it is hoped that members of the said committee as provided under section 17 (6) (d) should be such persons who can devote some time for the work assigned to them.
2. All state Governments/UT Administrations are directed to publish a list of the Appropriate Authorities in the print and electronic media in its respective state/UT.
3. All state Governments/UT Administrations are directed to create public awareness against the practice of pre-natal determination of sex and female feticide through advertisement in the print and electronic media by hoardings and other appropriate means.
4. All state Governments/UT Administrations are directed to ensure that all state/UT Appropriate Authorities furnish quarterly returns to the CSB giving a report on the implementation and working of the Act. These returns should inter alia contain specific information about:
   (i) Survey of bodies specified in section 3 of the Act.
   (ii) Registration of bodies specified in Section 3 of the Act.
   (iii) Action taken against non-registered bodies operating in violation of section 3 of the Act inclusive of search and seizure of records.
   (iv) Complaints received by the Appropriate Authorities under the Act and action taken pursuant there to

(v) Number and nature of awareness campaigns conducted and results flowing there from

d. Direction to Appropriate Authorities

1. Appropriate Authorities are directed to take prompt action against any person or body that issues or causes to be issued any advertisement in violation of section 22 of the Act.
2. Appropriate Authorities are directed to take prompt action against all bodies specified in section 3 of the Act as also against persons who are operating without a valid certificate of registration under the Act.
3. All state/UT Appropriate Authorities are directed to furnish quarterly return to the CSB giving a report on implementation and working of the Act, specific information about:
   (i) Survey of bodies specified in Section 3 of the Act.
   (ii) Registration of bodies specified in Section 3 of the Act including bodies using ultrasound machines
   (iii) Action taken against non-registered bodies operating in violation of Section 3 of the Act, inclusive of search and seizure of records
   (iv) Complaints received by the Appropriate Authorities under the Act and action taken pursuant thereto
   (v) Number and nature of awareness campaigns conducted and results flowing there from
4. The CSB and the state Governments/Union Territories are directed to report to this court on or before 30th July, 2001.

The Supreme Court directed the Centre, the States and Union Territories to implement the provisions of the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act banning sex determination test and sex selection to prevent female feticide. The Bench said it was an admitted fact

that girls were being discriminated against in India and dowry was still prevalent. Expressing concern over the growing imbalance in sex ratio because of female infanticide and feticide, the Bench noted that "with no change in mindset about females, the sex determination tests add to the adverse situation". And the court would not be able to change the mindset of the population. Advancement of technology was to bring succor to the populace but with the mind set remaining unchanged and the technology was being used for illegal removal of the female fetus and this "*add to pressure on male-female ratio.*"[113]

Thus the Supreme Court of India ordered strict enforcement of the Act and giving direction to Government of India and state Governments to implement the provisions of PNDT Act 1994. Accordingly, the parliament passed the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of sex selection) Act 2003.

Recently the Supreme Court issued notices to popular web search engines run by Google, Microsoft and Yahoo appear to have cocked a shook at the Supreme Court order directing the Centre and State governments to strictly implement the Pre-Natal Diagnostic Technique (PNDT) Act banning sex determination of fetus. A PIL filed by Sabu Mathew George presented evidence to a bench comprising Chief Justice K. G. Balkrishnan and Justice P. Sathasivam and J. M. Panchal about the impunity with which ads and links provided in the search engines were promoting sex-determination.

The bench issued notices to the Ministers of health and communications and information technology as well as to Google India, Yahoo India and Microsoft Corporation (I) Ltd, seeking their response to the PIL, which has sought punitive action against them for breaching PNDT Act provisions. George, who has been active in campaigns against female feticide, said the

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[113] Ibid.

Apex Court in 2003 had ordered strict implementation of the PNDT Act, which aims to prevent pre-natal sex determination that in India, lead to female feticide. The Section 22 of the PNDT Act prohibits advertisements relating to pre-natal determination of sex and punishment for contravention, he said and lamented that the web-based advertisements were denting the government's efforts to implement the PNDT Act on account of the pressure exerted by civil society organizations and the governments, there has been a shift in advertisements in sex selection from the print media to the internet and this is resulting in continuing violation of the provisions of PNDT Act.[114]

F. The Pre-Conception and Pre-natal Diagnostic Technique (Prohibition of Sex Selection) Act, 2002

The PNDT Act, 1994 does not specify the pre-conception sex selection even though it refers to pre-natal sex determination and "matters connected therewith or incidental thereto".

Keeping in view the alarming increase in the cases of selective abortion of female feticide across the country, the Supreme Court ordered strict enforcement of the Act by:

1) Registration of all ultrasound centers including machines,
2) Registration of clinics, centers, counseling centers with ultrasound machines,
3) Registration of the doctor owning and using the machines,
4) Putting up of boards proclaiming that sex determination tests are not done,
5) Asking ultrasound manufactures to submit a list of purchasers of ultrasound machine

[114] Times of India, 15 August, 2008.

Based on the Central Supervisory Board recommendations, the parliament passed the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex-Selection) Act 2002. The title of this Act in its original form was "*The pre-natal Diagnostic Techniques Act*, 1994, but the same has been re-named in the present form so as to give a wider scope and greater effect in the protection of female folk. The Amended Act came into force from 14th February 2003. Since then it has been known as PCPNDT Act of 2002. The title of the Act has been so amended that the general public Para-medical and medical personnel comprehend the purpose and message of the Act from reading the title of the Act itself. Various recently developed techniques of sex selection at the time of conception itself, like Ericsson method (X and Y chromosome separation) and pre-implementation Genetic Diagnosis (PGD) have been brought under the ambit of the law. Thus, the amended Act has the following objectives:

(1) The prohibition of sex selection, before or after conception

(2) To regulate the use of pre-natal diagnostic techniques by allowing them their use only to detect:
   - (a) Generic abnormalities;
   - (b) Metabolic disorders;
   - (c) Chromosomal abnormalities;
   - (d) Certain Congenital malformations;
   - (e) Haemoglobinophathies;
   - (f) Sex linked;

(3) No laboratory or centre or clinic will conduct any test including ultrasonography for the purpose of determining the sex of the fetus

(4) No person, including the one who is conducting the procedure as per the law, will communicate to sex of the foetus to the pregnant

woman or her relatives by words, signs or any other means or method

(5) To ensure the proper implementation of the Act at all levels by various authorities, organizations and communities as well.

Recognizing the importance of the trends emphasized in the Census 2001 data, the Planning Commission of India incorporated gender equity as an integral part of the broader strategy.[115] The most prominent feature of the amended Act seems to be the inclusion of pre-conception sex selection processes. This concept has been introduced very recently to tackle the problem posed by US based company Gen select who have introduced a method called Fully Integrated programme by which couples can select the gender of their next child even before its conception. Another important change introduced in the amended[116] Act is that the explanation of the terms Genetic Clinic and Genetic Laboratory' in Section 2(d) and 2(e) respectively have heen made to include even a vehicle which has an ultrasound machine, or a scanner or an imaging machine or other equipment or a portable equipment which can determine the sex of the foetus. Though the 1994 Act had used the phrase 'or any place' in an attempt to include all such vehicles, the amended Act, expressly speaks about them to be a part of Genetic clinics of Laboratory.

In Ujjagar Sing Suri Vs State of Punjab and Others, the petitioner Ujjagar Singh Suri is running a hospital under the house and style of Suri Hospital. Bhaddi Road, Balachaur. A complaint under pre-conception and pre-natal diagnostic Techniques (prohibition of sex selection) Act 1994 and the rules framed there under in 1996 and subsequently amended in 2003 was filed

[115] Bakshi Roopa "Declining Sex Ratio- A Matter of Concern", National and the World, Feb 1, 2009, p.15.

[116] The Act was initially the Pre-Natal Diagnostic Techniques(Regulation of Misuse)Act,1995,which came into force on 1.1.1996,the Act was renamed in 2002 by the Pre-Natal Diagnostic(Regulation of Misuse)Amendment Act,2002(14 of 2003).The said amended Act came into force on 14.2.2003.The central Act is on the same lines as the Maharashtra Regulation of use of Pre-Natal Diagnostic Techniques Act,1988.Several other states like Karnataka,Haryana and Rajasthan have also passed a similar legislation.

against the petitioner in the court of the sub divisional judicial magistrate Balachur. During the pendency of the complaint sub divisional operative authority-cum-senior medical officer, primary health centre, Balachaur and sealed the scan centre run by the petitioner under section 23 of 1994 Act read with sub Rules 2 and 3. It is stated that petitioner was acquitted in the complaint case.

In case any person is running a scan center without having a registration as envisaged under section 3 of the 1994 Act to what extent the authorities can act against him? Is a question raised before the court. A simple answer to the same is that if appropriate authority pass an order whether same is appealable or not or whether the order has been passed without jurisdiction or not cannot be entertained in a petition under section 482 Criminal Procedure Code. Merely because pendency of a criminal case was one ground mentioned in the order will not vest any jurisdiction in this court under section 482 cr. Pc.

It was stated that two more FIRs were registered against the petitioner under Section 4/5 of Medical Termination of Pregnancy Act, 1971 and under section 15 of the Indian medical council Act. After these two FIRs, operation theater and labor room were sealed there is no document to show that this action was taken by the authorities in the grab of two files. An application by the petitioner to remove the sales from operation theater and labor room of Suri hospital, Balachaur declined by the sub divisional judicial magistrate, Balachaur on the grounds that it is pertinent to mention here that at case under are accepted at this stage and operation theater/labour room is ordered to be opened, there is every like hood of him repeating the same offence again and frustrating the very purpose of noble Act enunciated by legislature to control decreasing ratio of female population in the country."[117]

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[117] Criminal Misc No. M-18044 of 2008, Date of Decision 16.2.2009.

The term "sex selection" under section 2(o) of the Amended Act, has also been defined extensively and the Act has also used the term 'particular sex' is an attempt to ensure that both male and female feticides are made a crime, though the presence of the former is rarely anticipated in the Indian scenario. The amended Act has also inserted section 6(C)[118] which tries to plug the loopholes created by Sections 6(a) and 6(b) of the previous Act. While Section 6(a) prohibits sex determination of the 'foetus' only a person who carries out sex determination tests on an 'embryo' or a 'concepts[119] by whatever means would escape liability under Sections 6(a) and 6(b). Clause C to section 6 has been inserted to deal with this kind of problem.[120]

It may be said that the PC and PNDT (prohibition of sex selection) Act 2003 is a land mark legislation that recognizes the right of an unborn female child. The Act prohibits sex selection before or after conception. It regulates but does not deny use of pre-natal diagnostic techniques, such as ultrasound for the purpose of detecting genetic abnormalities or other sex linked disorders in the fetus.[121] An unborn child either male or female has right not to be terminated on the ground of sex. The Medical Council of India has stated that undertaking sex determination tests with the intent to terminate the life of a female fetus is misconduct.[122]

In *Vinod Soni & Anothers Vs Union of India*,[123] the petitioners ,a married couple challenged the Constitutional validity of Pre-conception and Pre-natal diagnostic techniques(prohibition of sex-selection) Act,1994,on the grounds that it violated Articles 14 and 21 of the Constitution of India.

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[118] Section 6(c) PCTPNDT Act 2002-No person shall by whatever means, cause or allow to be caused selection of sex before or after conception.

[119] Concepts-any product of conception at any stage of development from fertilization until birth including extra embryonic membranes as well as the embryo or fetus. See 2 (b a) PC PNDT Act, 2002.

[120] See All India High Court Cases Vol. 102, July-Sept, 2006 (3).

[121] Patel Tulsi, "Female Feticide, Family Planning and State-Society Intersection in India" in Sex-Selective Abortion in India, Gender, Society and New Reproductive Technologies,ed.1st 2007,Sage Pub.p.322

[122] Modi's Medical Jurisprudence and Toxiology, 23rd ed.2006, p. 1043.

[123] 2005,CRILJ 3408.

The Supreme Court held that the right bestowed by Article 21 even if further expanded to the extremes of the possible elasticity of the provisions of the Article cannot include right to selection of sex whether pre-conception or post conception. Article 21 is now said to govern and hold that it is a right of a every child to full development. The sex-selection Act of 1994 is enacted to further this right under Article 21.Referred to be the statement of Objects and Reasons of the said Act, which state that, "The pre-natal diagnostic techniques like amniocentesis and sonography are useful for the detection of genetic or chromosomal disorders or congenital malformations or sex linked disorders.

Dr. Varsha Gautam Vs State of UP[124] the High Court held that sex-determination includes not only determination of the sex, but also includes anything done from fertilization until birth which increases the probability that the embryo will be of a particular sex. Therefore sex-selection cannot only be conferred to the determination of the sex of the fetus. The Court further observed that Section 6(c) had been introduced by the amendment Act for ensuring that all aspects of sex selection, starting from the initial activity of determination of sex by pre-natal diagnostic procedures and thereafter all the step taken by any person or specialists for facilitating sex-selection before or after conception would be brought under its ambit.

In *Vijay Sharma Vs Union of India*[125] the petitioners challenged the constitutional validity of section 2, 3-A, 4(5), 6(e) of the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 as amended by amendment Act, 2002 on ground as being discriminatory and hence violative of Article 14 of the constitution. The Amendment Act, 2002 seeks to put ban on Pre-Conception Sex Selection Techniques and use of Pre-Natal Diagnostic Techniques for Sex Selection Abortions. On the other hand the medical termination of pregnancy Act, 1971, permits termination of

[124] MANU/UP/0857
[125] AIR 2008 Bom 29.

pregnancy of women by medical practitioners on ground of matter's health, i.e. when pregnancy arises from a sex crime like rape or intercourse with a mentally ill women etc. The MTP Act does not deal with sex selection. Both the Acts operate in different fields and have different objects.

A prospective mother who does not want to bear a child of particular sex cannot be equated with a mother who wants to terminate the pregnancy not because of the sex of the child but because of other circumstances laid under the MTP Act. To treat her anguish as injury to mental health is to encourage sex selection which is not permissible. Therefore, the process of comparative study, the provision of the said Act can not be called discriminatory and hence voilative of Article 14 of the constitution. The court also held that the sex selection also violates women's right to life and it also ignores Article 51A (e) and it insults and humiliates womanhood. The provisions of the imposing ban on sex-selection before conception or thereafter are clear, unambiguous and in tune with the avowed object and are valid.

i. Major Provisions of PC and PNDT Act, 2002

The Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act 2003, is an Act to provide for the regulation of the use of pre-conception and pre-natal diagnostic techniques for the purpose of detecting genetic or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex linked disorders and for prevention of the misuse of such techniques for the purpose of pre-natal determination leading to female feticide

a. Compulsory Registration

The Act mandates compulsory Registration of all Diagnostic Laboratories. All Genetic Counseling Centers, Genetic Laboratories, Genetic Clinics and ultrasound clinics, irrespective of whatever they are involved as regards diagnosis for gynecological or other purposes would now have to maintain records of all the tests conducted by them. Only qualified persons can use pre-natal diagnostic techniques. The reasons for testing should be recorded in writing.

The amended Act provides that no person shall sell any ultrasound machine or imaging machine or scanner or any other equipment capable of detecting sex of foetus to any Genetic counseling centre, Genetic laboratory, Generic Clinic or any other person not registered under the Act.[126] The amended Act further prohibits sex selection by any person who conduct or cause to be conducted or aid in conduction by himself or by any other person, sex selection on a woman or a man or on both or on any tissue, embryo concepts fluid or gametes derived from either or both of them.[127]

b. Prohibition from Communicating the Sex of Fetus U/s 5(2)

The amended Act provides for the prohibition of communicating the sex of the foetus. It provides that any person even the person conducting the pre-natal diagnostic procedures should not communicate to the pregnant woman concerned or her relatives or to any other person the sex of the foetus by words, signs or in any other manner.[128]

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[126] Section 3 B PC&PNDT Act 2002.
[127] Section 3 A PC&PNDT Act 2002.
[128] Section 5 (2) PC&PNDT Act 2002.

c. Use of Pre-natal Diagnostic Test for Pre-natal Sex Determination and Pre-Conception Sex-Selection banned

The Act has expressly prohibited the use of pre-natal diagnostic tests for pre-natal sex determination and pre-conception selection as well. It states that no genetic counseling centre or Genetic Laboratory or Genetic Clinic or any person shall conduct or cause to be conducted any prenatal diagnostic techniques including ultrasonography for the purpose of determining the sex of the fetus.[129] It further provides that no person shall by whatever means cause or allow to be caused selection of sex before or after conception.[130] It also prohibits any person in conducting or aiding by himself directly or indirectly by any other person for sex selection on a woman or a man or on both or on any tissue, embryo, concepts, fluid or gainers derived from either or both of them. The Act regulates the use of pre-natal diagnostic techniques like ultrasound and amniocentesis by allowing them their use only to detect:

(a) Generic abnormalities;
(b) Metabolic disorders;
(c) Chromosomal abnormalities;
(d) Certain congenital malformations;
(e) Haemoglobinopathies;
(f) Sex linked disorders;
(g) Any other abnormalities or disease as may be specified[131]

Only qualified persons can use pre-natal diagnostic techniques. The reason for testing should be recorded in writing. The techniques can be used in the following conditions:

(a) Age of the pregnant woman is above 35 years

[129] Section 6(b) PNDT Act 1994.
[130] Section 6(c) PC & PNDT Act, 2002.
[131] Section 4(2) PNDT Act 1994.

(b) The pregnant women have undergone two or more spontaneous abortions or fetal lost

(c) The pregnant woman had been exposed to potentially teratogenic agents such as drugs radiation, infection or chemicals,

(d) The pregnant woman has a family history of mental retardation or physical deformalities such as spasticity or any other genetic disease, and

(e) The Central Supervisory Board may specify and other condition as required

Only in such specified conditions, the pre-natal diagnostic tests can be used.[132]

d. Constitution of State Level Supervisory Board (SLSB) and Union Territory Supervisory Board

A new section 16A[133] has been inserted in the Act which provides for the setting up of State level Supervisory Board and Union Territory Supervisory Board. The board shall meet at least once in four months.[134] There is already central supervisory board in operation at the central level. The state supervisory board will consist of[135]:

(a) The minister in charge of family welfare in the state who shall be the chairman, ex-officio

(b) Secretary in-charge of Development of Family Welfare who shall be the Vice-chairman, ex-officio

(c) Representative of Department of Women and Child Development and Law

(d) Director of Health and Family Welfare of the State Government, ex-officio

[132] Section 4(3) PNDT Act, 1994.
[133] Section 16-A PC & PNDT Act 2002.
[134] Section 16-A (3) PC & PNDT Act, 2002.
[135] Section 16-A (2) PC & PNDT Act, 2002.

(e) Three women members of Legislative Assembly

(f) Ten members to be appointed by the state government two each from amongst:

(i) Eminent social scientist

(ii) Eminent woman Activist from NGOs or otherwise

(iii) Eminent Gyncacologist and Obstetricians

(iv) Eminent Pediatricians or medical geneticists

(v) Eminent Radiologists or Sonologists

(g) An officer not between the ranks of Joint Director in-charge of Family Welfare will be member Secretary ex-officio

The functions of the state supervisory board are[136]:

i. To create public awareness against the practice of pre-conception sex selection and pre-natal determination of sex of foetus leading to female feticide in the concerned state;

ii. To review the activities of the appropriate authorities function in the state and recommend appropriate action against them in case of contravention of rule;

iii. To monitor the implementation of provisions of the Act and Rules and make suitable recommendations relating thereto to the Board;

iv. To send consolidated reports as may be required under the rules, in respect of the Central Supervisory Board and the Central Government

e. Powers of Appropriate Authority

After section 17 of the pre-natal Act, a new section 17-A has been inserted to give more powers to Appropriate Authority for better

[136] Section 16-A (1) PC & PNDT Act, 2002.

implementation of the Act. The Appropriate Authority shall have the powers in respect of the following matters, namely.[137]

(a) Summoning of any person who is in possession of any information relating to violation of the provisions of this Act or the rules made there under;
(b) Production of any document or material object relating to clause (a);
(c) Issuing search warrant for any place suspected to be indulging in sex selection techniques or pre-natal sex determination; and
(d) Any other matter which may be prescribed;

f. Stringent Punishment

The law dealing with sex-selection and its prohibition is very comprehensive and provides various procedures, authorities and other provision to that effect. More stringent provisions have been added in the Act. The Act has been amended which prohibited the advertisement relating to pre-conception and pre-natal determination of sex, provides that no person or organization, genetic counseling centre or centre having ultrasound machine or any other technology capable of undertaking determination of sex of foetus or sex selection shall issue publish or cause to be issued or published any advertisement in any form regarding facilities of pre-natal determination of sex or sex selection before conception available at such centre, laboratory, clinic or at any other place.[138] Further, counseling centre or genetic clinic shall issue, publish, distribute, etc, and advertisement in any manner regarding pre-natal determination of sex by any means whatsoever, scientific or otherwise.[139] Any person who contravenes the prohibition shall be punished with imprisonment for a term, which may extend to three years and fine not exceeding Rs.10,

[137] Section 17-A PC & PNDT Act, 2002.
[138] Section 22(1) PC & PNDT Act, 2002.
[139] Section 22 (2) PC & PNDT Act, 2002.

000.[140] The name of medical practitioner shall be reported by the appropriate authority to state medical council for necessary action including suspension of registration if the charges are framed by the court, if he is convicted, name shall be removed from register for five years and permanently for the subsequent offence.[141] The Act further states that any violation, including unlicensed labs, of the Act leads to seize of equipments. The fine for those who indulge in sex selection procedure has been doubled from Rs. 50,000 to Rs. 1, 00,000 (One lakh).[142]

In addition to that there is presumption in the case of conduct of pre-natal diagnostic technique. The court shall presume, unless the contrary is proved, that the pregnant woman was compelled by her husband or any other relatives to undergo pre-natal diagnostic techniques and such person shall be liable for abatement of offence.[143] Every offence under this Act shall be cognizable, non-bailable and non-compoundable.[144] The Act should he backed by stringent implement ion machinery by the state.[145]

In *Qualified Private Medical Practitioners and Hospitals Assaham Vs State of Kerala,*[146]the High Court held that therefore, with a view to prevent misuse of any pre-natal diagnostic techniques the authorities were free to conduct monodics inspections and to tape action in case any person or institution indulged in activities contrary to the provisions of the Act. This equally applied to non-registration institutions as well. While the registration any permuted pre-natal diagnostic techniques being used for restricted purposes mentioned in section 4(2), it cannot be said that meanly because the Institutions

[140] Section 22 (3) PC & PNDT Act, 2002.
[141] Section 23 (2) PC & PNDT Act, 2002.
[142] Section 23 (3) PC & PNDT Act, 2002.
[143] Section 24 PC & PNDT Act, 2002.
[144] Section 27 PC & PNDT Act, 2002.
[145] See Dr. K. Sanmugavelayutham, "The Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex -Selection, Act 2002- A Bold step", Legal News and Views, Vol. 17, No. 5, May 2003.
[146] 2006 (4) Kar. LJ81.

were not registered they could indulged in the use of such techniques even for the purposes clearly prohibited under the Act.

The prejudice against the girl child continues to be an issue of concern for UNICEF in India, which together with its partners conceptualized the project Initiative to reduce sex determination and pre-birth elimination of Females' to address the problem of female feticide. As a result of the project activities in Mandya district in the state of Karnataka, the issue of sex selection and female feticide was put on the public agenda and created mass awareness among the people in both rural and urban areas.[147]

In path breaking initiative, the five head priests of the Akal Takht have declared the practice of killing the girl-child as "*bajjar Kurahit*" (unpardonable sin). The highest spiritual seat of the Sikhs has issued a stern directive to all the followers of the faith those found violating the order against infanticide would be declared a '*tankhaiya*' (guilty of religious misconduct) and would be ex-communicated from the *Panth.*[148]

The five head priests deserve the gratitude of the entire nation for their positive stand on the issue. Community and religious leaders from among the Hindus and Muslims and others to should raise their voice against the pernicious custom of killing the girl child.

Recognizing the importance of the trends emphasized in the Census 2001 data, the planning commission of India incorporated gender equity as an integral part of the broader strategy.[149]

As per the Government reports from states and Union Territories issued on 24th December 2003, within ten months of the enactment of the amended PCPNDT Act, 2003, by February 21, 600 centers conducting pre-natal

[147] Nation and the World, Feb. 1, 2009, p.15.
[148] Indian Express, April 17, 2001; The Tribune, April 21, 2001, Times of India, April 20, 2001.
[149] Nation and the World Feb. 2009 p.15.

diagnostic procedure including ultrasonography have been registered under the PCPNDT Act 2002. Within ten months, 400 complaints have been filed in various courts for violation of the Act and rules.[150]

NFIW National Council at Lucknow in December 2006, realizing the grave situation gave a call for a national campaign against female feticide. The state units are carrying out the campaign through awareness programmed, legal workshop etc. This campaign has two fold aspects- one, to expose paradoxes of this national tragedy and second, to survey the network of clinics as an operational move to implement the PCPNDT Act 2002.[151]

In frequent appeal to citizens for an affirmative action to empower the girl child in every possible way, the Prime Minister Manmohan Singh said in "Save the Girl child" National Conference in New Delhi on April 2008. He said, "No nation, no society, no community can hold its head high and claim to be part of the civilized world if it condones the practice of discriminating against one half of humanity. We are an ancient civilization and we call ourselves a modern nation, and yet we live with the ignoring of an adverse gender balance, due to social discrimination against women". As he has rightly routed out, the empowerment of the girl child should begin at home. It is a matter of national shame that the number of girls born in India has been declining. Expressing concern over the continuous decline in child sex ratio (0 to 6 age groups) statistics in the past four decades is declining, girls per 1000 boys from 962 in 1981 to 927 in year 2001 was alarming. In 2001 Census indicated that the problem was most acute in some of the richer states as Punjab, which had only 798 girls, Haryana 819, Delhi 868 and Gujarat 883, per 1000 boys.[152]

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[150] Women's Watch, April-June 2007, p.36.
[151] Ibid p. 37.
[152] See The Tribune, "Endangered Gender Stop killing Unborn Daughters", 29th April, 2008.

It laid emphasis on the strict enforcement of the pre-natal diagnostic techniques Act, Union Health Minister Anbunani Ramadoss said the legislations alone could not solve the problem. At the heart of the problem are the deep-rooted pre-judices and the patriarchal social framework and a value system based on son preference.[153]

Despite the directives of the Supreme Court of India and the amended Act of the PC and PNDT Act 2003, sex-selection and subsequent abortion of female fetuses continue. Although the various affirmative steps being taken by the civil society to curb the nefarious tendencies that have led to the prevalence of problems such as female feticide, but the problem still persists. Directives have failed to check the alarming decline of sex-ratio. In Delhi itself the birth registration data for 2005 reveals that sex-ratio at birth has dropped to 813 girls per 1000 boys. It means that one in seven female fetus is aborted.[154]

ii. Reasons for the Lack of Success of PC & PNDT Act 2002

Dr. Ratan Chand, in charge of the PNDT Cell at the Union Ministry of health and Family Welfare, reported on the equality of enforcement after touring the country as part of the National inspection and monitoring committee. The committee visited selected districts in Maharastra, Punjab, Haryana, Himachal Pradesh, Delh, Gujrat and West Bengal. It found that appropriate authorities did a poor job of monitoring registered clinics, even going through their documentation for accuracy many clinics had poorly maintained records, with missing information incomplete forms, blank signed forms, forms not signed by the doct etc. The authorities did not follow up courts cases properly, or monitor the use of portable ultrasound machines which are likely to be used for sex selection. The state authorities say there is

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[153] The Tribune, 28th April 2008.
[154] Women's Watch April-June 2007 p.36.

not enough staff. Another problem is that the appropriate authorities don't know their functions and responsibilities.[155]

In fact, the nature and gravity of the situation is such that it is virtually impossible to eradicate the malaise in one single going. However, it is felt that the strategy adopted to remedy the situation is still deficient on more account than one. The basic issues resolve around the lack of effective implementation mechanisms and the relative failure of agencies to regulate such activities. The reasons for the lack of success of the legislation may, thus, be summarized as follows:

1. The mechanism to effectively implement the rules under the Act was not available at all under the earlier version of the Act. Though the same has been introduced in the amended PCPNDT Act of 2003, it remains largely on paper with the advisory bodies meeting too in frequently and without any conclusive action being taken on the ground. Even the court had earlier ordered compulsory registration of all diagnostic centers across the country and empowered the state appointed committees to seize the ultrasound machines if they were misused.
2. The lack of implementing PCPNDT Act 2003 lie in criteria set for establishing a genetic counseling centre, genetic laboratory and genetic clinic/ultrasound clinic/imaging centre and person qualified to perform the tests
    - The terms genetic clinic/ultrasound clinic/imaging centre can not be used interchangeably but the Act does
    - Moreover, the amended Act should have categorically defined persons, laboratories, hospitals, institutions involved in preconception sex-selective techniques such as artificial reproductive techniques and pre-implementation genetic diagnosis

[155] htpp://infochangeunder.or/2006031077/women/analysis/challenges-in-implementing-the born-on-sex-selection.html

- Who is a qualified medical geneticist? As per the Act, "a person who possess a degree or diploma or certificate in medical genetics in the field of PNDT or has minimum 2 years experience after obtaining any medical qualification under the MCI Act 1956 or a P.G. in biological sciences". Many medical experts feel that a degree or diploma or 2 years experience in medical genetics can not be made synonymous.
- As per the Act, an ultrasound machine falls under the requirement of genetic clinic, while it is widely used also by the hospitals and nursing homes not conducting pre-implementation Genetic Diagnosis (PGD) and PNDT.

3. The malpractice of feticide continues unabated because of the evolution of alternate means, which are beyond the scrutiny of the law. Thus, the sex determination tests may be done simultaneously with other essential tests but the results are communicated separately and under guise. The abortion may then be carried out secretly by employing simple techniques available at various private clinics.
4. The mechanism introduced to check the menace of feticide is largely confined to the actions taken by the medical community itself. Most of the members of the committed formed under the Act belong to the medical fraternity, whether government doctors or private practitioners. Because of the close knit structure, strict and swift action against the erring doctor is rarely taken, with the experts adeptly taking advantage of the lacunas of the law.
5. The most important reason for the persistence of the malaise lies not in the technological or legal factors; rather the attitude of the people determines the failure of the legislation. Thus, an incessant fascination for the male child, reinvigorated by enhanced scientific techniques, available easily, mark the trend towards selective

abortions and sex selective child births. Even though large scale measures have been employed to bring about changes in the mind set of the determined orthodox thinking still remains averse to adaption of any progressive demographic pattern. Whatever is the large picture, the individual desire for male or the fairer determines their fate before their destiny may take over. Moreover, the irony lies in the fact that the mother, a female herself, induced largely by the mother-in-law, another female, takes the final decision perhaps the unfriendly experiences of a lifetime in a male dominated and male oriented society, impels. Such a negative view towards the birth of a female, even if that comes about at the risk of a stringent and harsh law.

6. Finally, persistence of some of the most heinous practices such as those of dowry and the related marital violence and harassment of the women, also results in an attitude of hate for the weaker sex and a commonensurate attraction towards the male child, resulting in sex selection.[156]

Although the legislation is aimed at achieving high aspirations, it suffers still from some lacunae and the most important being the implementation of law. Ashish Bose has commented: "The law which bans prenatal sex-selection test is totally ineffective".[157] The key provision of this law is the prohibition on the disclosure of the sex of the foetus. But the information of the sex of the foetus takes place behind closed doors". Often the information is communicated orally or by signs: Hence it is difficult to obtain evidence. The Act is therefore extremely difficult to implement. Since educated people are party to the practice and it is difficult to bring the perpetrators to book as those involved are the prospective mother, family and doctors, it is important to bring

[156] Sex determination Tests: Centre, states, told to enforce ban, Sep. 11, 2003, The Hindu

[157] Ashish Bose "Fighting Female Foeticide: Growing Greed and shrinking Child sex Ratio" vol.36.no.36,September 8-14 Economic and Political Weekly, 2001,p.3427

in fear against the practice of sex determination.[158] To bring in fear enforcement authorities shall have to be very strict. The Delhi Commission for Women (DCW) has rightly proposed establishment of a monitoring cell under the commission's control to monitor implementation of the Act.[159]

Unless the Health and Family Welfare Ministry carries out sting operations against unethical medical practitioners, as then secretary of Health P. K. Hota had publically committed, nothing would change. Poor monitoring mechanisms and lack of implementation of the PCPNDT Act is repeatedly being questioned, by civil right activists and women's organizations.

It is relevant to note here that recently the National Human Rights Commission (NHRC) took suo motu cognizance of a report in a newspaper that 21 doctors were allegedly involved in sex determination tests in Rajasthan. This encouraging action of the NHRC would create fear in the mind of the concerned persons who resort to female feticide and would in turn lead to effective implementation of the Act.[160] The Supreme Court rightly pointed out that with no change in the mind set about females, the sex determination tests added to the adverse situation and the "Court would not be able to change the mindset of the population.[161] Hence there is a need to bring about a change in the mindsets of people and to spread anti female feticide message that if there were no women, there would be no men. The era of yearning after a son to carry the family name is over. At present day and age, men and women are equal.

Recently the Delhi High Court rules in favour of empowering women in Army, a coordinate bench strongly advocated taking a lenient view of mothers convicted for female infanticide. The court observed "Crime against the female

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[158] P. Anima, "Cell proposed to combat foeticide", The Hindu, 27 May, 2007.
[159] Ibid.
[160] NHRC Takes Cognizance of News Report on Sex Tests" The Hindu, May 18, 2006.
[161] J. Venkatesan, "Sex determination tests; Centre, States told to Enforce Ban" The Hindu 11 Sep. 2003.

child is a product of perverse social norms and perverse social thinking the mother is a mere puppet with strings being pulled by men who lecture here and the turbulent waves of social thinking have called her folly and the desert has called her to doom" The court "recommended" to the Delhi government to frame rules that allow the government to decide if remission of sentence or clemency can be granted to women convicted of killing their own children.[162]

Deprecating the "mentality" against the girl child, the Bombay High Court observed that women were necessary for society to progress. The court asked, why should one be so anxious to known the sex of a child? They will naturally renew after nine months." Why are people so much against the girl child? We are in the 21st century the judges observed in their order that the issue required "serious debate" and directed a notice to the Union government saying it was necessary to known its say. We have to keep public interest in mind. We are also concerned with the life of child.[163]

The question of survival and fulfillment of human needs has always been central to human society. Charles Darwin's concepts of "Survival of the fittest and struggle for existence has rightly to be described in the context of female feticide. It is the man who thinks himself to be the fittest survive in this world and at the same time struggles to exist by surpassing the woman and at times, even destroying their population. It is not that the women have a never been the fitte4st or have never struggled for their survival, but it is the iniquitous man and unjust society who have always served as hindrance in their survival.

Nothing is unachievable in this world. From time immemorial, man has constantly transgressed a path of growth and advancement. Archaic and socially undesirable practices have been constantly uprooted in favor of a more

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[162] Times of India 15 March, 2010.

[163] Women Must for Progress,High Court Deprecates Indian Society's 'Mentality'Against Girl Child; The Times Of India,October,7,2011,P 12.

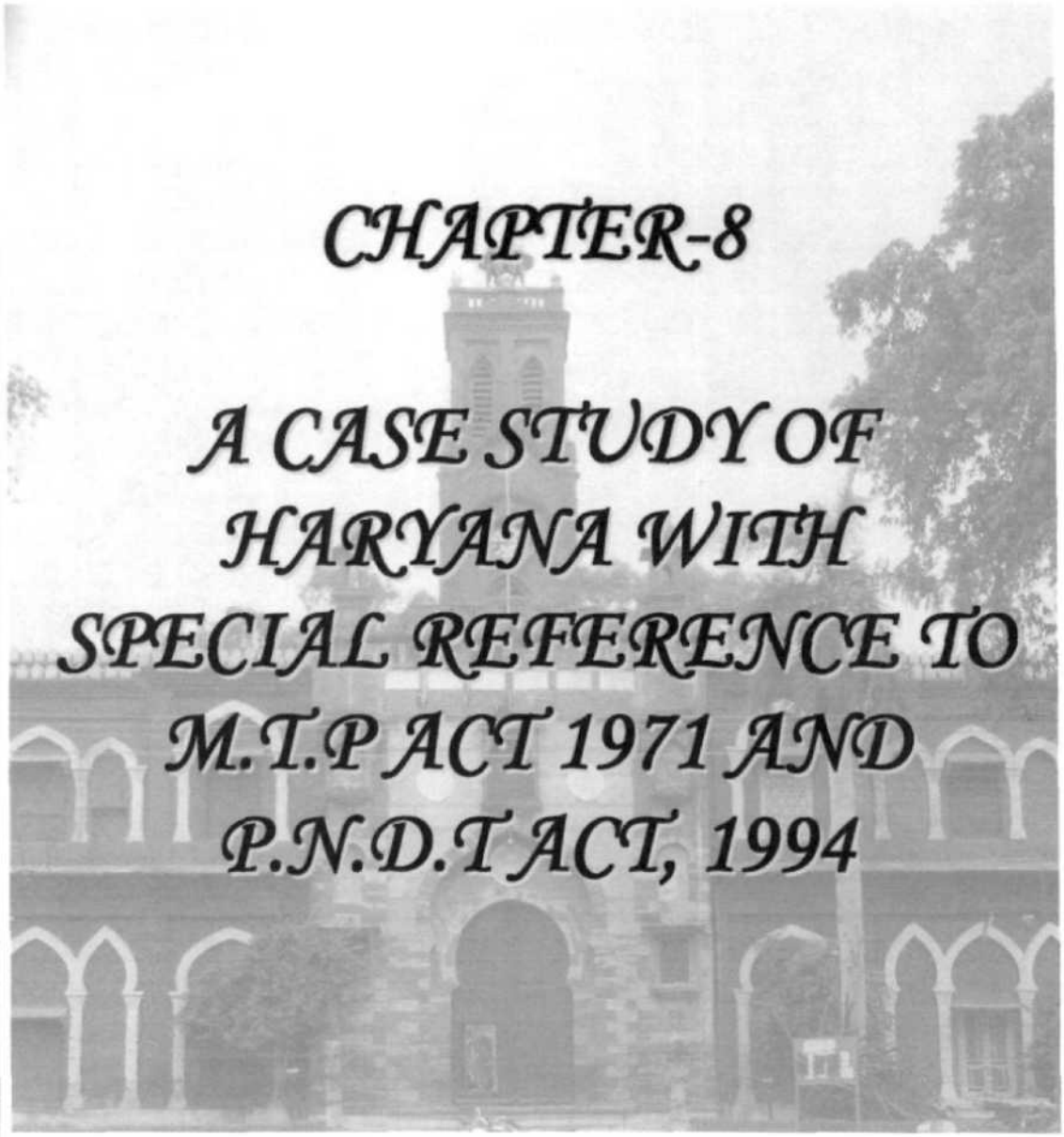
egalitarian social structure. There is a need to clarify the gender-just position from the anti-abortionist-position. "Women should have a right to their bodies and unconditional access to abortion is not in conflict with the claim that sex selection and sex-selective abortions are unethical. It is not the abortion which makes the act unethical, but the idea of sex selection. Nevertheless, with constantly reinvigorated efforts any social malaise can be remedied. There has to be reform in all spheres of life so that woman can salvage her lost respect and status in the society. There is also an urgent need to take appropriate measures to empower the women in all spheres of life so that there can be equality in the decision making without any fear of pressure and intimidation. It will lead us towards a just society, free of gender discrimination. To stop a gender imbalanced society we will have to convince doctors and clients state and civil society that "Daughters are not for slaughter".[164] Technological innovations have revolutionized our lives-some positively while others in its mischievous usage. Prenatal diagnosis is one such instrument, which has immense potential to curb the menace of genetically oriented problems, but has unfortunately led to adverse impact.

A child is God's gift and none must try to know its sex in advance. Sonography is only for diagnostic purpose and not a medicine in itself for providing treatment. Sonography is not like oxygen that a person can not wait. It is not an emergency. Every USG machine must be registered under the provision of the pre-conception and pre-natal diagnostic Act to prevent detection of sex of the fetus. Sex determination tests are going on surreptitiously in various part of the country to discourage the work of legislature. No society can exist without a woman and for growth of society

[164] Patel Vibhuti, "Sex Selection and Pre-Birth Elimination of Girl Child", The Radical Humanist, Vol. 69, No. 3 (June) 2005, p.10.

and nation man and woman both are equally important. The only way to curb possible misuse is by enacting appropriate laws, rules and guidelines.[165]

[165] The Times of India 19 November 2011.



CHAPTER-8

A CASE STUDY OF HARYANA WITH SPECIAL REFERENCE TO M.T.P ACT 1971 AND P.N.D.T ACT, 1994

CHAPTER- 8

A CASE STUDY OF HARYANA WITH SPECIAL REFERENCE TO M.T.P. ACT, 1971 AND P.N.D.T. ACT, 1994

A real world consists of numbers but shapes and sizes. It is topological rather than quantitative. Quantification for the most part is a prosthetic device of the human mind, though certainly a very useful one. Anyone, who thinks that numbers constitute the real world, however, is under an illusion and this is an illusion and this is an illusion that is by no mean's uncommon (Boulding 1980: 833)

A. Haryana Background

There is a region called Haryana, which is like a heaven on earth- *Vikrami Samvat* (1385).Haryana the land where 3000 years ago, *Lord Krishna* preached the *Bhagvad-Gita* and admonished *Arjuna*, .your right is to do your duty and not bother about the fruits.; the land which formed the battle ground in the famous epic Mahabharata. It was here that *Ved Vyas* wrote *Mahabharata*. In this epic, this land was referred to a *Bahudhhanyaka*, .land of plentiful grains and *Bahudhana*, .land of immense riches. One myth propagates that *Prajapati* created the world and the four castes at *Prithudaka*, the contemporary *Pehowa*. Another legend traces the birth of *Brahma* to *Brahmayoni* in the same place.

Archaeological excavations reveal Haryana to have been one of the cradles of Indian culture and civilization. It was the home of the legendary *Bharata* dynasty, which has given the name Bharat to India. The region has been the scene of many a war as the Gateway to north India. It has witnessed decisive battles with successive streams of Huns, Turks and Afghans. It became the seat of early Indian empires.

In the middle ages, Panipat became the ground for two major battles with the Mughals1 and by 1556 Mughals had established their rule over this land.. Haryana and Haryanvis equally held fort during the struggle for independence and Haryana remained one of the major sites for the independence struggle.

Post independence, Haryana became a part of Punjab province, which had been divided during the Partition into East and West Punjab. It was only in 1966 following the Punjab Reorganisation Act, that Haryana emerged as a separate entity in the Indian Political landscape.

Located on the doorstep of the national capital, Delhi, Haryana is bounded on the north by the Shivalik Hill range, in the east by the River Yamuna, in the south by the Aravalli Hills and the Thar Desert and in the west by River Sutlej. A number of streams flow down the Shivalik Hills; the most significant ones are the Ghaggar, Markanda, Chautang and the Saraswati. However, there is no perennial river, except for the Yamuna, which flows in the eastern side and irrigates the land. The Haryana plain is part of the Indo-Gangetic plain, formed by alluvial deposits of the Himalayan Rivers.

It is bordered by Himachal Pradesh in the north, Punjab in the west, Rajasthan in the south and Uttar Pradesh and Delhi in the east. It shares its capital city, viz. Chandigarh with Punjab.

Gurgaon is one of the most promising areas of Haryana and has developed a lot in recent times. Gurgaon has been the center of development for many IT companies thus there has been an influx of youth population into the state. Haryana shares its capital with the state of Punjab. Chandigarh is the capital of both Punjab and Haryana. Haryana has often been criticized for its low sex ratio something the state government has to work on.

One of the most developed States of India; Haryana has a basically agrarian economy, with about 80 per cent of the population dependent upon

agriculture. Haryana, as much as neighbouring Punjab, witnessed the successful Green Revolution, which led to a great deal of prosperity in its rural economy. The city of Panipat is known as the .weavers city of India, for its exquisite handmade woollen carpets and handloom products. It has one of the highest per capita incomes of the country and the incidence of poverty is relatively low.[1]

Map of Haryana

B. Demographic Profile

Haryana Population 2011

Demographic indicators are significant indices of the status of women in any given society.As per details from Census 2011, Haryana has population of 2.53 Crore, an increase from figure of 2.11 Crore in 2001 census. Total population of Haryana as per 2011 census is 25,353,081 of which male and female are 13,505,130 and 11,847,951 respectively. In 2001, total population was 21,144,564 in which males were 11,363,953 while females were 9,780,611.

[1] ncw.nic.in/pdfreports/gender%2520pr/Haryana

There is a huge influx of population into Gurgaon, which is a part of Haryana from Delhi. The state is spread over an area of about 44000sq. km. making it the 20th largest state in the country in terms of area. The density of population per sq. Km. is about 570 which are above the national average. The state has a growth rate of about 19% which slightly exceeds the national growth rate of about 17%. The population of the state is rising considerably due to rapid efforts towards development and progress. The literacy rate in the state is about 76% a figure that has improved tremendously in the last few years due to the consistent efforts of the government. The sex ratio in Haryana leaves a lot to be desired as it lags behind the national average by 70 points. The statistics in the Haryana Census 2011 reveal facts that can be instrumental in planning for a better development plan for the State.

The largest city in the state of Haryana is Chandigarh while Faridabad is the capital city of the Haryana. The languages spoken in the Haryana state includes Hindi and Haryanvi. In total Haryana (HR) state comprises 21 districts. The ISOCODE assigned by International Organization for Standardization for Haryana state is HR. The official census 2011 of Haryana has been conducted by Directorate of Census Operations in Haryana. Enumeration of key persons including Chief Minister of Haryana was also done by officials conducting population census.

Figures of population census 2011 Haryana have been represented in the chart.

Figure.1

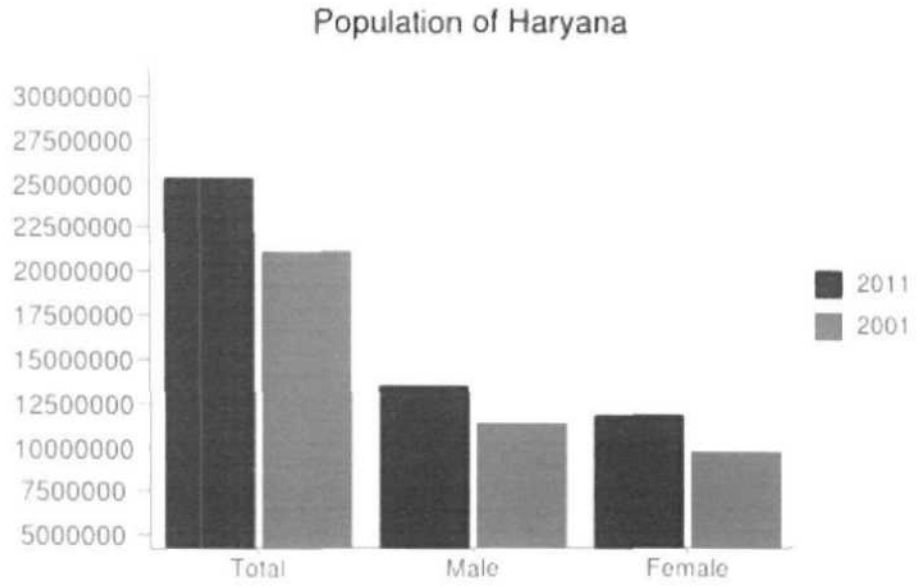
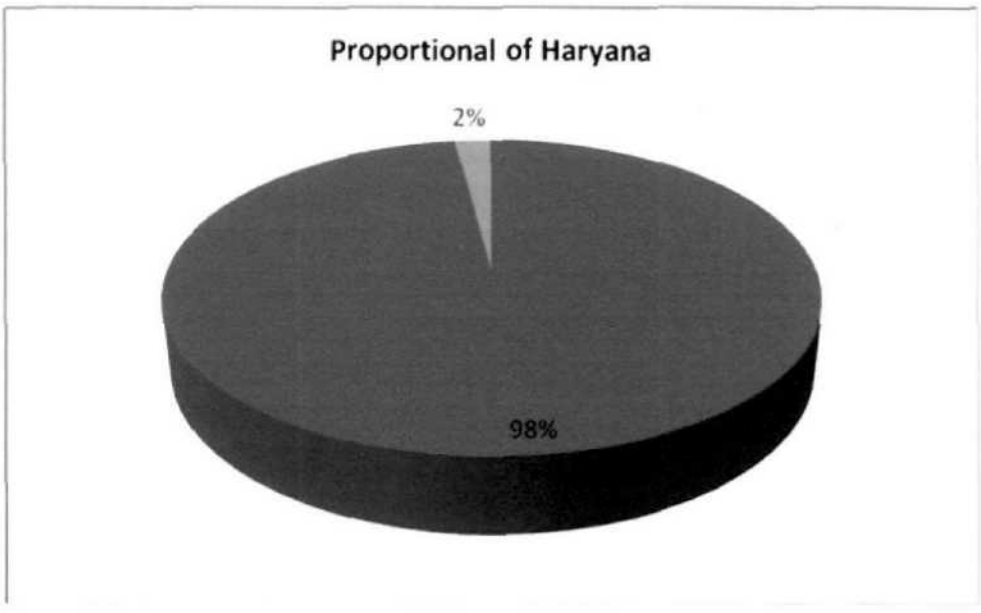


Figure.2



Source: Census data 2011

Haryana Population Growth Rate

The total population growth in this decade was 19.90 percent while in previous decade it was 28.06 percent. The population of Haryana forms 2.09 percent of India in 2011. In 2001, the figure was 2.06 percent.

Haryana Urban Population 2011

Out of total population of Haryana, 34.79% people live in urban regions. The total figure of population living in urban areas is 8,821,588 of which 4,714,094 are males and while remaining 4,107,494 are females. The urban population in the last 10 years has increased by 44.25 percent.

Sex Ratio in urban regions of Haryana was 871 females per 1000 males. For child (0-6) sex ratio the figure for urban region stood at 829 girls per 1000 boys. Total children (0-6 age) living in urban areas of Haryana were 1,054,823. Of total population in urban region, 11.96 % were children (0-6).

Average Literacy rate in Haryana for Urban regions was 83.83 percent in which males were 89.37% literate while female literacy stood at 77.51%. Total literates in urban region of Haryana were 6,510,733.

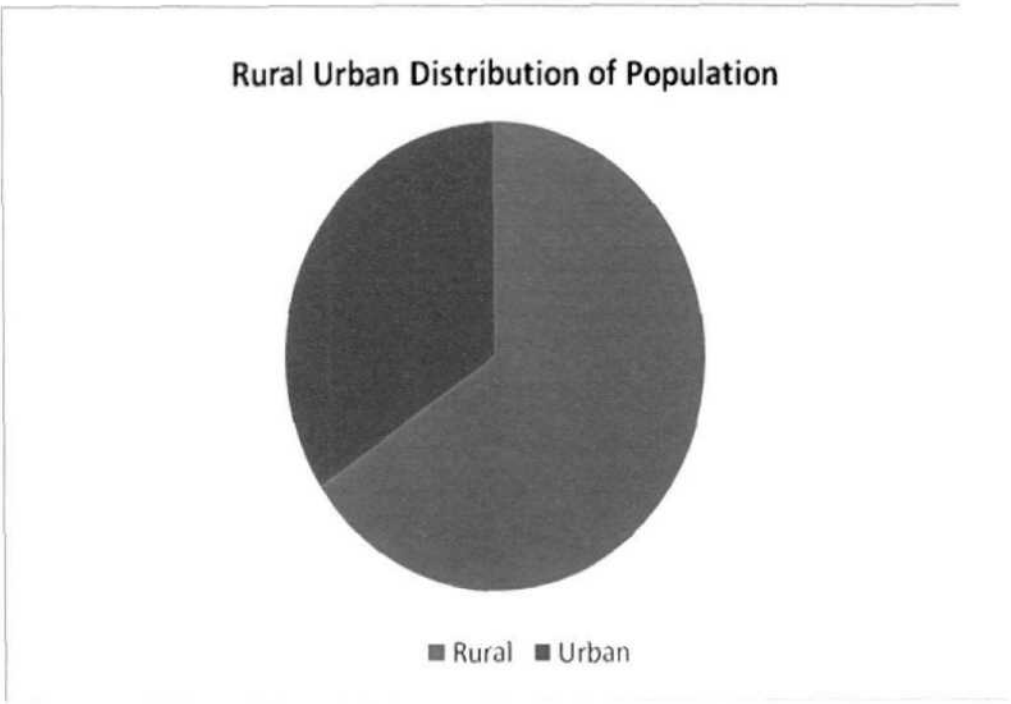
Haryana Rural Population 2011

Of the total population of Haryana state, around 65.21 percent live in the villages of rural areas. In actual numbers, males and females were 8,791,036 and 7,740,457 respectively. Total population of rural areas of Haryana state was 16,531,493. The population growth rate recorded for this decade (2001-2011) was10.00%.

In rural regions of Haryana state, female sex ratio per 1000 males was 880 while same for the child (0-6 age) was 831 girls per 1000 boys. In Haryana, 2,242,901 children (0-6) live in rural areas. Child population forms 13.57 percent of total rural population.

In rural areas of Haryana, literacy rate for males and female stood at 83.20 % and 60.97 %. Average literacy rate in Haryana for rural areas was 72.74 percent. Total literates in rural areas were 10,393,591.[2]

Figure.3



C. Depleting Child Sex-Ratio's in State of Haryana

It is widely agreed that sex ratio is a powerful indicator of the social health of any society. It conveys a great deal about the state of gender relations. The Sex-Ratios recorded in the Census carried out after every ten years from 1901 to 2001 was 867,835,844,869,871,868,867,870,865 and 861, questions the relationship between social development and sex ratio. That is why the adverse sex ratio has been linked with the low status of women in Indian communities both Hindu and Muslim. The status of women in a society can be determined by their education, health, and economic role, presence in the professions and management and decisions making power with the family. It is

[2] Census 2011:Provisional data

deeply influenced by the beliefs and values of society. The birth of a son is regarded as essential in Hinduism and many prayers and lavish offerings are made in temples in the hope of having a male child. Modern medical technology is used in the service e of this religion-driven devaluing of women and girls.[3]

Sex Ratio in Haryana is 877 i.e. for each 1000 male, which is below national average of 940 as per census 2011. In 2001, the sex ratio of female was 861 per 1000 males in Haryana. It is clear that girls are missing. How and why are not they not there in the society? Is it that sex selective abortion is responsible for the unfavorable female-male ratio? For the past two decade Censuses (i.e. 1991 and 2001) the adverse sex ratio at birth signals the severity of this problem. Interstate and inter district com parisons, pointing to the increasingly unfavorable sex ratios in richer districts and more so in questions to the trick le down and prosperity the sex, not withstanding differential calorie consumption, immunization health care, morbidity and mortality trends.

Medical termination of pregnancy has created a social imbalance in Indian society.[4] The view of sex-selective abortion as horrifying, especially when seen in what light the medical termination of pregnancy (MTP Act, 1971) has been projected. MTP as a family planning and population control measure is projected by the state as supportive and being medical technological procedure, devoid of any emotional politics.[5]

Development in medical science relating to prenatal diagnostic techniques added a new dimension to the sex selective abortion. Sex determination technologies arrived in India in 1975 for determination of genetic abnormalities after the enactment of the MTP Act. It became possible, using prenatal diagnostic techniques, to find out the sex of the fetus in mother's

[3] www.iheu.org/modules/wfsection/article

[4] Singh K.P. & Nagpal Vijay "Medical Termination of Pregnancy in India: A Socio-Legal Audit", CBI Bulletin, Vol. 13, Jan-Jun 2005, p.39.

[5] Patel Tulsi "Sex-selective Abortion in India, Gender Society and New Reproductive Technology" ,ed.1st 2007,Sage Pub. p.46.

womb. This technique came as a boon for the Indian society where, for socio-cultural and economic reasons, birth of a son was preferred in the family. In the cultural milieu, prenatal sex determination tests came up in every town, Mohalla and street. Fetuses of female child were destroyed in the womb in these tests and girl child in large number were not allowed to take birth. The results of prenatal sex determination test soon started finding reflections in the demographic statistics. Although sex determination test during pregnancy, followed by induced abortion of female fetuses are banned by law, continues with impurity leaving a trail of murder.[6]

The decreasing child sex ratio (F/M) has been an important concern in India's demography in recent times. The 2001 census of India shows an unusually low sex ratio (females per 1,000 males) for children less than 0-6 years of age in the country as a whole. Though there has been an increase in the overall sex ratio from 927 in 1991 to 933 in 2001 which is good news, the worrying news is that the sex ratio figures of children (between seven years has decreased markedly from 945 in 1991 to 927 in 2001.[7] However, overall sex ratio at the national level has increased by 7 points to reach 940 at Census 2011 as against 933 in Census 2001. This is the highest sex ratio recorded since Census 1971 and a shade lower than 1961. Increase in sex ratio is observed in 29 States/Union territories. Child sex ratio (0-6 years) is 914. Increasing trend in the child sex ratio (0-6) seen in Punjab, Haryana, Himachal Pradesh, Gujarat, Tamil Nadu, Mizoram and A&N Islands. In all remaining 27 States/UTs, the child sex ratio show decline over Census 2001. Mizoram has the highest child sex ratio (0-6 years) of 971 followed by Meghalaya with 970. Haryana is at the bottom with ratio of 830 followed by Punjab with 846.[8]

There is no gender equity. Haryana a developed state has one of the lowest sex ratios as well as a declining female/male ratio in the last two decades.

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[6] See Belu Jain Maheshwari, "Status of Girls child in the slums of Haryana", The Bright Law House, Delhi, 2004.

[7] Sayeed Unisa, Sucharita Pujari Rusha "Sex selective Abortion in Haryana: Evidence from Pregnancy History and Antenatal Care", Eco & political weekly, January 6, 2007, P.60.

[8] Census 2011: Provisional Data.

Table 8.1

Census years and Sex ratio

India		Haryana
Census year	**Sex ratio**	**Sex ratio**
1921	955	844
1931	950	844
1941	945	869
1951	946	871
1961	941	868
1971	930	867
1981	934	870
1991	927	865
2001	933	861
2011	940	877

Source: Census of India (1921-2011)

As per the data by Census 2011, the state of Haryana has both good news and bad as for as the State's skewed Sex-ratio is concerned. The State of Haryana has reported a rise in the sex-ratio 877 female per 1,000 males, the best figure in the last 110 years. The last Census in 2001 showed the sex-ratio to be 861.Whithin Country in 1901 the latest provisional figures has shown a marked improvement in the State sex-ratio. Even though, the State of Haryana ranks lowest among all 28 States on the Sex-ratio front. Haryana reports a sorry number of just 877.

D. Comparison between the overall female sex ratio of Census 2001 and Census 2011

Table 8.2

Comparative Sex Ratio, Child Sex Ratio, Literacy of Haryana Districts: 2001 and 2011

State/District	1901	1911	1921	1931	1941	1951	1961	1971	1981	1991	2001	2011
HARYANA	867	865	844	844	869	871	868	867	870	865	861	877
Panchkula	765	747	749	765	805	799	805	819	833	839	823	870
Ambala	928	866	783	789	795	807	828	882	902	903	869	882
Yamunanagar	811	763	783	789	580	841	836	848	855	883	863	877
Kurukshetra	NA	NA	NA	NA	NA	858	853	859	872	879	866	889
Kaithal	NA	NA	NA	NA	NA	849	837	843	848	853	854	880
Karnal	NA	NA	NA	NA	NA	860	853	856	856	864	864	886
Panipat	NA	NA	NA	NA	NA	866	857	852	849	852	830	861
Sonipat	872	850	856	860	908	886	886	866	866	840	839	853
Jind	NA	NA	NA	NA	NA	849	857	860	856	838	853	870
Fatehabad	NA	NA	NA	NA	NA	853	852	870	881	877	886	903
Sirsa	871	837	877	855	878	843	845	865	877	885	882	896
Hisar	NA	NA	NA	NA	NA	871	866	859	859	853	852	871
Bhiwani	NA	NA	NA	NA	NA	880	880	878	897	878	880	884
Rohtak	883	848	840	845	904	881	885	878	869	849	847	868
Jhajjar	NA	NA	NA	NA	NA	911	802	903	891	861	848	861
Mahendragarh	NA	NA	NA	NA	NA	972	961	910	939	910	919	894
Rewari	NA	NA	NA	NA	NA	930	926	927	926	927	901	898
Gurgaon	905	878	858	859	880	895	891	886	880	871	874	853
Faridabad	905	878	858	859	880	854	848	810	811	828	839	871
Mewat	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	899	906
Palwal	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	862	879

In Haryana, the sex ratio of 877 in Census 2011 is the highest since 1901.Among the neighbouring states, sex ratio of Punjab is 893 and of Himachal Pradesh 974.Thoug the State of Haryana was created Nov.1966,the sex ratio figures of earlier Census included the districts of erstwhile Punjab now part of Haryana. Haryana is one of the nine states in the country in which the child sex-ratio (0-6 years) has also shown an increasing trend. In all remaining 27 states and Union territories, the child sex ratio shown over that in Census 2011.

As per Census 2001 the sex ratio of Haryana at birth was 819 females per 1,000 males. However, as per provisional census report of 2011, Haryana has been able to arrest the declining trend. The 0-6 year's child sex ratio had increased to 830 per, 1,000 males.

In Haryana, there are 218.02 lakh boys between 0 and 6 years of age. In the same age group, there are only 14.95 lakh girls, a difference of 3 lakh. Though the overall sex ratio in the state has improved from 819 in 2001 to 830 in 2011, in some district there is a sharp slide.

However the study shows an interesting correlation between literacy level and the sex ratio. The sex ratio among Haryana's literate population is as low as 692 though it has raised from 617 in 2001.In contrast the child sex ratio has been found to be highest in districts that have the lowest levels of literacy, especially among the woman.

Mewat one of the most backward regions has the best child sex ratio in the state at 903 girls per 1,000 boys. In fact it is only the region to cross the 900 mark. The next best child sex ratio is the Palwal district at 862 girls per 1,000 boys, where the literacy rate is the third worst in Haryana with 564 Percent literate women. The correlation continue with Sirsa where the literacy is among the lowest in the state, recording a sex ratio of 852:1000.Thoug sporadic data from other parts of the country over the years had been pointing towards a trend that the educated classes are increasingly indulging in female foeticide.[9]

[9] Census 2011: Provisional data.

Table 8. 3

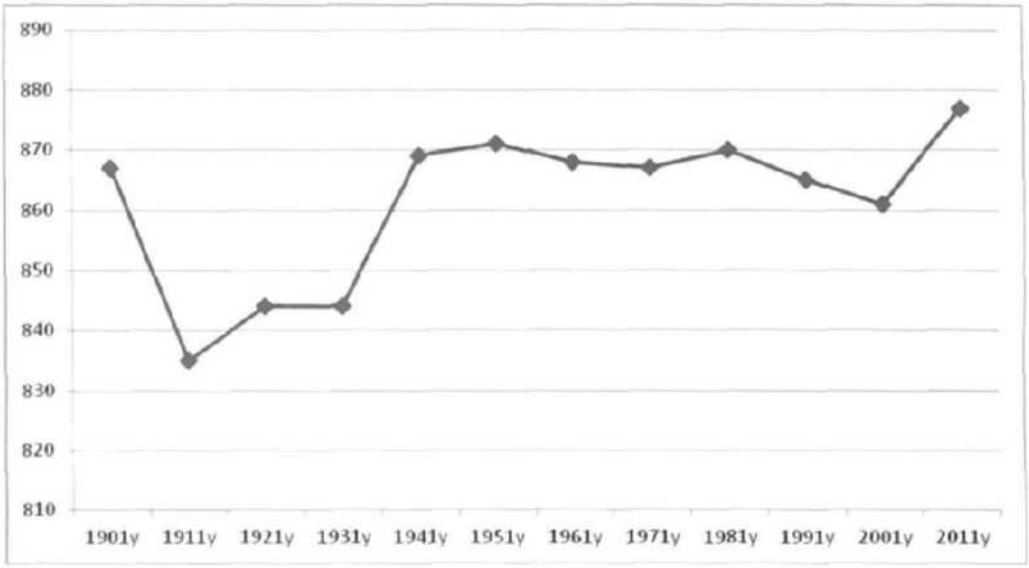
Sex Ratio since 1901 for Haryana and Its Districts

State/Distrct	Sex Ratio		Percent 0-6 pop		Sex Ratio 0-6 pop		Literacy Rate (Persons)		Literacy Rate (Males)		Literacy Rate (Females)	
	2001	2011	2001	2011	2001	2011	2001	2011	2001	2011	2001	2011
HARYANA	**861**	**877**	**15.8**	**13.0**	**819**	**830**	**67.9**	**76.64**	**78.5**	**85.4**	**55.7**	**66.8**
Panchkula	823	**870**	14.1	**11.7**	829	**850**	74.0	**83.4**	80.9	**88.6**	65.7	**77.5**
Ambala	868	**882**	13.2	**10.9**	782	**807**	75.3	**82.9**	82.3	**88.5**	67.4	**76.6**
Yamunanagar	862	**877**	14.4	**11.8**	806	**825**	71.6	**78.9**	78.8	**85.1**	63.4	**72.0**
Kurukshetra	866	**889**	14.2	**12.0**	771	**817**	69.9	**76.7**	78.1	**83.5**	60.6	**69.2**
Kaithal	853	**880**	15.4	**12.6**	791	**821**	59.0	**70.6**	69.2	**79.3**	47.3	**60.7**
Karnal	865	**886**	15.1	**12.9**	809	**820**	67.7	**76.4**	76.3	**83.7**	58.0	**68.3**
Panipat	829	**861**	16.4	**13.7**	809	**833**	69.2	**77.5**	78.5	**85.4**	58.0	**68.2**
Sonipat	839	**853**	15.4	**12.7**	788	**790**	72.8	**80.8**	83.1	**89.4**	60.7	**70.9**
Jind	852	**870**	15.8	**12.4**	818	**835**	62.1	**72.7**	73.8	**82.5**	48.5	**61.6**
Fatehabad	884	**903**	16.1	**12.6**	828	**845**	58.0	**69.1**	68.2	**78.1**	46.5	**59.3**
Sirsa	882	**896**	15.0	**11.9**	817	**852**	60.6	**70.4**	70.1	**78.6**	49.9	**61.2**
Hisar	851	**871**	15.5	**12.1**	832	**849**	64.8	**73.2**	76.6	**82.8**	51.1	**62.3**
Bhiwani	879	**884**	15.7	**12.6**	841	**831**	67.4	**76.7**	80.3	**87.4**	53.0	**64.8**
Rohtak	847	**868**	14.5	**11.9**	799	**807**	73.7	**80.4**	83.2	**88.4**	62.6	**71.2**
Jhajjar	847	**861**	15.0	**12.1**	801	**774**	72.4	**80.8**	83.3	**89.4**	59.6	**71.0**
Mahendragarh	918	**894**	15.8	**11.9**	818	**778**	69.9	**78.9**	84.7	**91.3**	54.1	**65.3**
Rewari	899	**898**	15.2	**12.5**	811	**784**	75.2	**82.2**	88.4	**92.9**	60.8	**70.5**
Gurgaon	850	**853**	15.5	**13.1**	807	**826**	78.5	**84.4**	88.0	**90.3**	67.5	**77.6**
Mewat	899	**906**	25.1	**22.3**	893	**903**	43.5	**56.1**	61.2	**73.0**	23.9	**37.6**
Faridabad	826	**871**	15.8	**13.2**	847	**842**	76.3	**83.0**	85.1	**89.9**	65.5	**75.2**
Palwal	862	**879**	20.0	**16.5**	854	**862**	59.2	**70.3**	75.1	**82.6**	40.8	**56.4**

Significantly, Haryana had started off the 20th century with a sex ratio of 867 and it ended it with a sex ratio of 865. It entered the 21st century with an even lower sex ratio of 861. What is worse is that while the sex ratio in Haryana had witnessed a sharp drop between the years 1901 and 1911, it had been inching upwards till 1951. The two census years of 1961 and 1971 saw a reversal of this trend with the sex ratio falling. 1981 again witnessed an increase of 3 points over the last census, but the 1991 census again revealed a decline of 5 points followed by another decline of 4 points in the current census, taking the sex ratio to a point below the 1901 ratio.

Figure.4

Sex Ratio in Haryana



The same grim picture of unfavourable sex ratio prevails at the district level. Table 2.3 below reveals that none of the districts in the State have a sex ratio higher than the national average. As a matter of fact the district with the highest sex ratio, Mahendragarh has a sex ratio which is 14 points lower than the national average. Only two districts, viz. Rewari and Mahendragarh have crossed the 900 mark in respect of sex ratio. All the other 17 districts of this State have a sex ratio falling between 823 and 886. Another noteworthy factor in this respect is the fact that it is Panchkula, a district bordering Chandigarh (which ranks almost at the bottom of the scale in sex ratio) which has the lowest sex ratio in the State. This would seem to give rise to a poser: Does location have an impact on sex ratio?[10]

[10] Census of India (1901-2011)

Table 8.4

Census year and District below Average in Haryana

Census Year	State Sex Ratio	District Below Sex Average
1971	867	Panchkula, Faridabad, Hisar, Jind, Kaithal, Karnal, Kurukshetra, Panipat, Sirsa and Yamunagar (10 District)
1981	870	Panchkula, Faridabad, Hisar, Jind, Kaithal, Karnal, Panipat, Rohtak, Sonepat & Yamunanagar (10 District)
1991	865	Panchkula, Faridabad, Hisar, Jind, Kaithal, Karnal, Panipat, Rohtak, Jhajjhar & Sonepat (9 District)
2001	861	Panchkula, Faridabad, Hisar, Jind, Kaithal, Panipat, Rohtak, Jhajjhar & Sonepat (9 District)
2011	877	Panchkula, Faridabad, Hisar, Jind, Faridabad, Panipat, Rohtak, Jhajjhar & Sonepat (9 District)

Source: Census of India (1971-2011)

The above table reveals that 2011 census reported an improvement in Sex ratio since Haryana came into existence in 1966.

The table shows that 9-10 districts have always been below the state average and six districts namely, Punchkula, Faridabad, Hisar, Jind, Kaithal and Panipat have their sex ratio below the state average in all the census reports since 1971.[11]

The story of national scheme continues for the second decades in a row for Haryana. Provisional Census figures for 2011 show that two districts of the state Jijjar and Mahandergarh have the lowest child sex-ratio in the country.

Son is a major obsession in Haryana like most of northern India. Haryana's proximately to Delhi has led to a lot of metro values and ways pro-liferating the State, eroding traditional values with nothing to replace it with. Urban consumer dreams have spun their yarns leaving the chance simple people in the money-

[11] Census of India 2001

myself-bind. As a result a new breed of rustic smart have cropped up, unable to completely break free of their conventional would yet trying to emulate the city culture. The Green Revolution of the 60s brought prosperity and it also changed the class structure in the traditional society. The landed became more prosperous and set up brick kilns, factories, and whole sale grains business or took to politics which is considered very puffing. The middle class became comfortable rich and the lower income group of schedule castes because the new middle class. However, in the new hierarchical structure the old feudalistic traditions in the man-woman relations remained unchanged.

"The Chaudhary cult' (landlord) is so strong that there is no way it can be replaced by the 'Chaudhrian," (landlady) that in her clearly demarcated role a woman can never be the 'head'. Despite the younger generation blindly following the urban values, the traditional ways of Haryanvi mechanism in the man-woman identity can never change. Women still find themselves ensconced in the traditional mould, victims of their own social orientation, with little space for maneuver. This is especially true when they are to have a child.

The easy availability of diagnostic techniques in Haryana's remote villages thanks to mobile doctors who get their ultra sound equipment to the doorstep making sex determination easy and accessible. An anesthetist in the busy by-lanes of Rohtak speaking on the promise of anonymity does brisk business. In his 40s, unmarried with slight receding hairline, he chain-smokes in his clinic which smells faintly of antiseptic and more of cigarette fumes.

The social desire for sons has trapped women in the never-ending bind for a boy-child at any cost. They leave no stone unturned in their quest to produce a male heir.

The fate of the girl-child if born has its own price. A report on population conducted by Centre for Rural and Industrial Development (CRID), Chandigarh, between 1987 – 1994 in Haryana, found female children between the age of one to five years having 81 percent higher mortality risks than male children. Moreover

the infant mortality rates were nearly one and a half times as high in rural as in urban areas.

The 1991 Census showed Haryana's sex ratio at 874 females to 1000 males, already lower than the All India sex ratio of 927 females for 1000 males. In fact four districts, Jind, Hissar, Kaithal and Kurukshetra all fall in Haryana and account for the country's 10 worst inverse sex ratio districts.

We don't see the obsession for sons changing in the future. Even if laws are amended and strengthened, people in Haryana respond to them like tortoises, withdrawing till the threat is gone or find ways to bypass them. The youth may have got the trappings of modernism but the social orientation is such that they will continue with traditional ways." The change has to come from society which agrees that a girl child has a right to life and blossom as a woman.[12]

Leela Visaria has attempted to estimate the magnitude of deficit of girls in India as a whole and in some of the female disadvantaged states and have compared the situation in them with that in Kernala which is considered a female-advantaged state.

The most dismal data revealed by the result of the 2001 census of India relate to the low child sex ratio (girls per 1000 boys in the age group 0-6 years) in almost all the states of India. This could not have happened without the widespread use of pre-birth sex determination tests, followed by sex-selective abortion in case of female fetuses. This is what Ashish Bose called it a system of civilization collapse. Ashish Bose has undertaken a study of this tragic phenomenon at two levels:

(i) through a detailed district-wise analysis of the 2001 census data and Provisional data of Census2011.

(ii) through intensive fieldwork in the worst states of India, namely Punjab, Haryana and Himachal Pradesh.

[12] Gurung Madhu "Female Foeticide 1999 @ http:// http://www.hsph.harvard.edu/grhfosia/forums/foeticide/articles/foeticide.html

The district with the lowest child ratios may be classified into three categories as follows:

D1: Child sex ratio 850 – 900

D2: Child sex ratio 800 – 850

D3: Child sex ratio 750 - 800

The worst category in this classification is obviously D3. All the states and districts in India can be classified according to the level of child sex ratio. D stands for four acronym- DEMARU-to indicate daughter eliminating male aspiring rage for ultrasound. The summary picture in the districts of Haryana is as follows:

Table 8.5

Haryana: Overall rating D2 (830)

Child Sex Ratio in Haryana (830) in 2011		
Districts	Sex Ratio	Rating
Faridabad	842	D2
Mewat	903	D1
Gurgaon	826	D2
Jhajjar	774	D3
Panipat	833	D2
Karnal	820	D2
Yamuna Nagar	825	D2
Rewari	784	D3
Mahendragarh	778	D3
Jind	835	D2
Sirsa	852	D1
Hissar	849	D2
Fatehbad	845	D2
Punchkula	829	D2
Bhiwani	831	D2
Kurukshetra	817	D2
Sonepat	790	D3
Rohtak	807	D2
Ambala	807	D2
Kaithan	821	D2
Palwal	862	D1

Source: Census 2011: Provisional Data

It will be seen in this table that Jhajjar is the worst district in the Haryana where child sex ratio is 774. Although all 21 districts of Haryana are in the D2 category-*DEMARU*-to indicate daughter eliminating male aspiring rage for ultrasound.[13]

The distortion in the sex ratio was brought out starkly also by an analysis of the data from the Second National Family Health Survey (NFHS) conducted in 1989-99. It showed that at the all India level, the male to female sex ratio of the last births was 1,434 (or 697 girls for every 1,000 boys), among currently married women who did not want any more children, which was much higher than the sex ratio of 1,069 (FMR of 935) for all the other births. However, there were significant interstate variations and in the states of Haryana, Punjab and Gujarat. The strong son reference was manifested in the sex ratio of last births, which ranged between 1,752 and 2,173 implying that for every 1,000 girls who were last births, there were more than 1,750 boys who were last births, reflecting a strong effect of gender preference on the reproductive behavior. This distortion is very likely due to the use of sex selection abortions, which helps parents, get rid of unwanted daughters before birth or due to avoiding having children once the minimum desired number of sons were born. In either case, the preference for sons was evident in the behavior of the couples.

Leels Visaria has attempted to estimate the magnitude of deficit of girls in India as a whole and in some of the female disadvantaged states and also discussed some indirect evidence of female-selective abortion from primary data collected from one district of Haryana, the voices of women are documented to understand what compels women or their families to abort female fetuses.[14]

The results for Haryana is presented in the table given below

[13] Bosh Ashish, "Female Foeticide: A Civilisational Collapse, Sex- Selective Abortion in India, Gender, Society and New Reproductive Technologies, 2007, P.80-89.

[14] Visaria Leela "Deficit of Girls in India: Can it be Attributed to Female Selective Abortion?" sex selective Abortion In India, Gender, society and New Reproductive Technologies, 2007 P.61-69.

Table 8. 6

Sex-Ratio of Births and Birth Order by Women in Haryana Villages

Characteristics	Sex ratio of all live births	Sex ratio of first live birth	Sex ratio of second live birth	Sex ratio of third live birth	Sex ratio of fourth & higher order births	Sex ratio of the last birth
All	853	951	824	829	774	553
Age of women						
15 – 24	863	1020	742	560	800	755
25 m- 34	836	962	833	716	716	434
Women's education						
Illiterate	870	903	883	906	782	483
Primary level	852	-	-	-	-	500
Upper primary level	815	1168	649	482	947	404
Above upper primary level	854	887	934	583	-*	614
Women's Activity**						
Agriculture/manual labor	889	904	907	990	775	576
House work	839	978	813	700	761	420
Caste composition						
Upper caste	801	973	792	571	686	414
Other backward caste	853	867	778	918	873	612
SC + ST	926	1067	935	903	789	443
Land ownership						
Yes	815	980	786	573	782	415
No	876	970	858	882	773	503

Notes: # in Haryana there was only a total of 50 births to 33 women whose level of education was up to primary level. Our data indicated (not shown here) that women in Haryana who enter the school system, continue to pursue education beyond primary level. As against only 3 per cent of all women having studied up to primary level, 53 per cent were reported to have studied beyond class IV. As a result, no stable estimated of sex ratio by birth order for women with primary level education are possible and are not estimated.

*There were no women in Haryana who were educated above upper primary level or class VIII who had given fourth or higher order birth.

** The number of women in the categories of cultivators-cum-animal husbandry and other miscellaneous activities was very small and hence the sex ratios of the children of these few women are not estimated.

The above Table shows that the preponderance of male children increased as the birth order increased. Sex selective abortion during the first pregnancy was not practiced, but by the time women had their second or third children almost 50

percent more boys were born compared to girls. This preponderance of males was observed more among those women who were better educated, who belonged to higher castes and whose families were landed. With the advent of new technology, this in human practice has apparently been replaced by sex-selective abortion. The recent increase in the juvenile sex ratios has very likely resulted from the rapid spread of ultrasound and amniocentesis tests for sex determination in many parts of the country, followed by the sex-selective abortions. Just because of simplicity of the tests and their easy availability on the one hand and strong son preference on the other hand, female specific abortions appear to have become popular and widely used.

It is important to understand the emergency of this phenomenon in a wider perspective.[15] The process of liberalization of the abortion law in India began in 1964. India pioneered in legalizing induced abortion under the medical termination of pregnancy (MTP) Act, 1971. The two main driving forces behind the Act are:

(a) those who were proponents of family planning and population control and saw the legalization of abortion as a potential way of lowering birth rate;

(b) those who were concerned with abortions being conducted by non-qualified untrained and ill-equipped medical practitioners under unhygienic conditions and therefore were concerned with the health factor.[16]

The Act specified the reasons for which an abortion can legally be performed and it also clearly specified who can legally perform the abortions and the kind of facilities in which they can be carried out. The stipulated conditions are such that abortions performed by the trained doctors who are not registered in facilities not specifically approved for abortion services are termed illegal. The purpose of the MTP Act is to provide women with-safe, legal, timely abortion services which given the stringent nature of the medical termination of pregnancy Act. But many safe abortions are not classified as legal. At the same time the

[15] Banerjee Atreyee "Female Foeticide and the Medical Termination of Pregnancy Act, 1971- A critical Evaluation" All India High Court cases Vol. 102 July-Sept, 2006 (3) P.99.
[16] Section 3 MTP Act 1971.

availability of and access to legal abortion services is so limited for a large proportion of women living in remote rural areas that in the three decades since the passing of the Act, but are often performed in unsafe conditions leading to post-abortion complication and also to death.

Under the Act, abortion is legal if the pregnancy that it terminates endangers the life of the woman or causes grave injury to her physical or mental health or is likely to result in the birth of a baby with physical or mental abnormalities or is a result of rape or contraceptive failure. The act further state that abortions could only take place in government approved health facilities specifically approved for conducting abortions and by registered medical practitioners.[17] Methods to detect deformities in the fetus such as sonography fetoscopy, needling, chorionic biopsy and the most popular one amniocentesis are increasingly becoming private medical practices that are eager to use newer technologies for diagnosis. However, the technologies that help to detect physical or mental abnormalities in the unborn child can also identify the sex of the fetus at no extra cost or effort.

There was increasing indirect evidence from some parts of India that termination of pregnancies was resorted not for the reasons stated under the MTP Act but because there is strong son preference leading to female-selective abortions. The gender bias was flagrantly aided by a combination of medical technology that helped to detect the sex of the fetus on the one hand and the liberal abortion law that helped compels to abort female fetus on the other hand. In view of the widespread misuse of this technique the Maharashtra government enacted the Maharashtra Regulation Act, 1994 by the Prenatal Diagnostic Techniques (PNDT) Act in 1988. This Act was repealed by the enactment of a central legislation based on the Prenatal Diagnostic Techniques (Regulation and Prevention of misuse) Act, 1994 by the government of India.[18] Under this law, the availability of facilities for sex determination was banned and the individual practitioners, clinics or centers

[17] The PNDT Act further amended in 2002.

[18] Visaria Leela "Deficit of Girls in India can it be Attributed to Female Selective Abortion?", Sex Selective Abortion In India Gender,Society and New Reproductive Technologies, ,ed.1st 2007,Sage Pub.pp.70-76.

cannot conduct tests to determine the sex of the fetus or inform the couples about it. However, in spite of putting monitoring systems in place, both at state and the central levels, and with the Act in place for 6-8 years at the time of the 2001 census, it is fairly evident that in many places the Act has been violated with impunity. Since the two activities of sex detection of the fetus and abortion need to be linked at the stage of using the services, it has became possible to made the law inconvenience with the clinics have ultrasound facilities and doing sonography.

Although the release of the 2001 census results have sparked serious concern about the widespread use of ultrasound and amniocentesis tests to detect the sex of the fetus, followed by sex-selective abortions, our understanding of many issues around this practice, at the level of the household or from the perspective of women who undergo such abortions is extremely limited. It is also limited about what actually compels couples or their families to resort to such a practice, who the real decision makers in the family are, what impact does aborting female fetus have on the physical or mental health of the woman who typically undergoes abortion in the second trimester of her pregnancy. The question often raised is: does the desire for fewer children compel parents to produce children of the sex that they want or that conform to the social norms and regulate their fertility behavior accordingly.

A report of the focus group discussions conducted by Leela Visaria, stated that women from all communities categorically indicated that if the first born child was a daughter, then the couples would want to and do find out the sex of the next child. Women know where to go for sex determination tests, how much the test cost etc. They were aware that such tests were not done in public hospitals one had to go to private facilities, majority of which according to them also provided abortion services. In fact, almost all women were able to describe the sex determination procedure quite accurately and in great detail.

Women also indicated that after the birth of a daughter, when they become pregnant again, there was some pressure from the elders in the family to ensure that the new child was a boy. Women themselves also wanted to produce a son.

There is a deep internalization of patriarchal values that are linked to their sense of security. The son preference was internalized to such an extent that women had no hesitation in saying that they would want the sex of the fetus to be known if they had already given birth to one daughter. Although almost all of them had to consult and get permission of their husbands (partly because the sex determination test involved a cost of few hundred rupees), they themselves saw nothing wrong in finding out the sex of the fetus. As articulated by a chaudhry woman from Haryana:

Women definitely get the test done if it is a girl they abort the fetus and if is a boy, they keep the baby. Everybody knows about the test the women themselves want to know whether they are carrying a male or a female child.

Although the parents or parents-in-law of the women very probably had given birth to several children, it appears that they do not wish their daughters-in-law to do so. As the women indicated, the facilities (for sex determination and abortion did not exist in the earlier times and so the parents had no choices but to bear several children. But in present times, the mother-in-law herself often suggest that the daughter-in-law should get the son determination test done, especially after producing one daughter. The parents of the woman, however, generally have no say in the matter except for wishing that their daughters produce at least one son because their well-being and status in the families of the in-laws depends, to a great extent on bearing sons:

Mothers-in-law also have changed with the time. They are also aware about the price rise. They might have had raised their several children, but it's difficult to raise more children today (Backward Caste woman from Haryana)

The analysis clearly points to a collusion of culture or social norms and technology that is all pervasive. On the one hand the son preference is so strongly entrenched in Indian society especially in the north-western region and on the other hand the well-being and status of girls is so precarious once they are married, that couples avoid having girls at all costs. Facilities conducting sex detect ion

tests with ultrasound machines have proliferated and are found even in some of the relatively large villages.[19]

Haryana has seen no significant social movements to counter these prejudices. For some reason, the state has been unfortunate with its voluntary sector. The total literacy movement has not had half the effect here as it has had in neighboring Rajasthan. Surinder Megpal, a Rohtak-based physician who with his wife runs a flourishing practice in the heart of Rohtak town, believes that in traditional those society men don't want to acknowledge they can be unfertile. "It is the women who are blamed for everything from infertility to the inability to produce a male child. Sometimes this is taken as sanction to marry again.[20]

A declining child sex ratio has been one of the important concerns of India's demography. Haryana is a developed state showing a falling trend in the child sex ratio over the last-two decades.

Most of the women in Haryana are engaged in their own family farm or business. The investment in children's education indicates to what degree the preference for a son is prevalent in a particular society. A large proportion of women believed that a son should be given as much education as he desired compared to 48 percent of women who believed that a girl should be given as much education as she desires. Thus, the inclination for educating a male child is stronger than the female child.

E. The Evidence of Sex-Selective Abortions in Haryana

a. Availability of sex determination technologies

In the selected town and its periphery, all together 40 health facilities were found. With regard to availability of sex determination technologies, it was found that out of 22 allopathic nursing homes/clinics operating in Jind, 10 were providing ultrasonography and three of them had color sonography machines as

[19] "Girls vanish, Harayana men hardpressed for brides" 17th April, The Indian Express, 2001, P.17.
[20] Retherford, R. D. and T. K. Roy " Factors Affecting sex selective Abortion in India", National Family Health Survey Bulletin,2003, 17.

well. Apart from regular nursing homes providing the ultra sonography, mobile ultrasound facilities were also available in the villages. The cost of an ultrasound was Rs. 300/- to Rs. 500/- which was quietly affordable for the villagers.

It was found that the nursing homes had put up signboards displaying, the availability of color/black and white ultrasound facilities (in towns as well as in nearby villages) and at medical shops and RMP clinics. Information about the availability of an operation theatre blood test/urine test facilities that are essential for antenatal and natal services was not displayed on the signboards. Thus, solely displaying the availability of ultrasound machines indicates the ulterior motive of medical practitioners to true innocent villagers for an ultrasound, and if a female fetus it detected, to abort the fetus and thereby make large profits.

According to the National Family Health Survey 1998-99, in Haryana, only 60 percent of pregnant women had gone for antenatal care, for at least one check-up. Percentage of births assisted by health professional was only 42 percent for Haryana, in comparison with neighboring Punjab (62 percent and Kerala (90 percent). This raises a question so as to what is the need for the existence of so many nursing homes and clinics in a place which does not serve a very large population and also where the level of antenatal and natal care is low. Why have so many new nursing homes come up in the small town of Haryana?

b. Abortions based on pregnancy history of the women

To determine the prevalence sex-selective abortions in the study area an attempt is made to see what percentage of live births and abortions have occurred to women starting from their first pregnancy until their sixth pregnancy and above. A table given below shows the percentage distribution of the outcome of pregnancies by order of pregnancy and sex ratio at birth.

Table 8.7

Percentage Distribution of pregnancies by outcome according to order of pregnancy

Order of pregnancy	Live birth	Still birth	Spontaneous Abortion	Induced Abortion	Total pregnancies	Sex Ratio of live Birth (F/M)
1	91.4	2.8	5.7	0.04	2362	800
2	92.9	1.5	5.1	0.34	2078	820
3	93.2	1.4	5.0	0.26	1541	787
4	90.4	1.8	6.7	1.01	890	847
5	87.9	2.3	8.0	1.6	473	847
6 and above	89.0	1.9	8.0	0.98	410	800
Total	**91.8**	**2.0**	**5.8**	**0.40**	**7754**	**820**

Source: Based on Survey data.

The table shows that out of the total of 2362 pregnancies, 91 percent have resulted in a live birth and 6 percent of the pregnancies ended in a spontaneous abortion whereas less than 1 percent pregnancies turned out to be induced abortions. This percentage has more or less remained steady until the third parity after which there is a decline in the percentage of live births and subsequent rise in the percentage of spontaneous and induced abortion. From the table, it may be observed that with increasing parity the chances of having a live birth is decreasing and there is an increase in the reporting of spontaneous abortion ns. Two things can be deducted from this. One is due to the preference for a bigger family size, the percentage of women reporting induced abortions is perhaps low until the first three pregnancies and the increase in the reporting of spontaneous abortions. Two things can be deuced from this. One is due to the preference for a bigger family size; the percentage of women reporting induced abortions is perhaps low until the first three pregnancies and the increase in the reporting of induced abortions after the third party could be most likely because of sex-selective abortions. Sex ratio at birth is another important indicator of sex selective abortions. The sex ratio at birth

given by sample registration system (SRS) 2002 is also the same as observed for the sample population, i.e. 820 females per 1,000 males. From Table, it is seen that the overall sex ratio is low in all the orders of pregnancy but the sex ratio is the lowest for the third pregnancy. This shows that abortions have occurred mostly during the third pregnancy and these abortions certainly may have been sex selective abortions and may have been induced.

c. Frequency of Abortions

A table has been given below which shows the frequency of abortions and their rates.

Table 8.8

Percentage of Women who had Abortions by its Frequency

No. of Times Abortion	No. of Women Who had Abortions*	Abortion Rate**
1	199	7.52
2	83	8.14
3	19	0.72
4+	14	0.53
At least one abortion	315	11.9
Total	482	18.22**

Notes: * Total abortion, induced + spo0ntaneous
** Abortion rate: (no of women who had abortion/total no of women in 15-49 age group)*100.
*** (Total no. of abortions/total no. of women in 15-49 age group/*100)

Source: Based on Survey date.

From the table it is seen that a noticeable percentage of women have had two abortions, and a small percentage of women have undergone three or more abortions. There is a possibility that quite a significant number of these women may be undergoing repeated abortions, showing indirect evidence of the practice of sex selective abortions in the study area. Overall, 18 percent of women have had abortions.

Again a table is given below which highlights the percentage of women who had abortions due to their socio-economic background characteristics.

Table 8.9

Percentage of Women who had Abortions by Socio-economic Background Characteristics

Background	Women with at least one Abortion	Number of Women
Standard of living:		
Low	12.5	512
Medium	14.2	1193
High	13.7	1011
Women's education:		
Illiterate	10.6	1712
Literate<primary	17.6	34
Primary school complete	15.8	400
Middle school complete	13.6	214
High School complete	16.8	190
Higher secondary complete and above	17.7	98
Husband's occupation:		
Cultivator	11.5	1246
Daily wager labourer	12.6	720
Other	14.0	680

Source: Based on Survey data.

As the table shows that 12 percent of the women reported to have had least one abortion most of these women had high standards of living, were educated beyond higher secondary level, and with husbands in jobs (other than daily wage laborers or cultivators). This shows that abortion seekers are women who are economically and sexually well off. It has also been reported that educated women

who have frequent exposure to the media are the ones most likely to seek a sex selective abortion.[21]

d. Ultrasound before live births and Abortion

It would be interesting to see in how many pregnancies out of the total live births that occurred or pregnancies that resulted in abortions, women went for antenatal check-ups (ANC), the urine pregnancy test, the blood test and the ultrasound test. The ultrasound test is a part of ANC and is used for monitoring the pregnancy. However it is misused to determine the sex of the fetus. There is a marked increase in the proportion of pregnancies with ultrasound test from 1986-1990 (less than 5 percent) to nearly 16 percent in 1996-2001, which resulted in abortion. Thus the percentage of women undergoing an ultrasound for pregnancies that are resulting in an abortion in the recent period is much higher than for pregnancies that resulted in live births for the same period.

Table 8.10

Percentage of Women Who Underwent an Ultrasound as a Part of Antenatal Checkups

No. of pregnancies	No. of women	Ultrasound Rate*
1	155	5.9
2	42	1.6
3	15	9.6
4+	10	0.4
At least one ultrasound in any pregnancy	299	8.4
Total no. of ultrasound for all women	330	12.5**
Total no of ultrasound for all pregnancies	330	6.1**

Note: (No of women who underwent ultrasound/total no of women in 15 age group)*100
** (Total no of ultrasound/total no of women in 15-49 age group)
*** (Total no of ultrasound/all pregnancies after 1985)**100

Source: Based on Survey data.

[21] Unisa Sayeed, Pujari Sucharita and Usha R. "Sex-selective Abortion in Haryana, Evidence from pregnancy History and Antenatal Care", vol. 42, Nov. 1-10 Economic and Political weekly,2007,pp.60-66.

The above table revealed that overall, 12 percent of women in the study area underwent ultrasounds. Nearly 8 percent of women had undergone at least one ultrasound. A small percentage of women have undergone an ultrasound three of more times. A detailed information has been sought about their ultrasound status, i.e. who motivated them to have an ultrasound, the reasons for undergoing the ultrasound and whether the sex of the baby was revealed during the ultrasound by order of pregnancy and attempts have been made to see whether there is turn are associated with sex selective abortions. The detailed information about these issues has been given in the table.

Table 8.11

Percentage of women by Reason, Motivation, Timing and Result of Ultrasound by Order of Pregnancy

Reasons and Suggestion/Parity	**Order of Pregnancy**				
	1	2	3	4	5
Percentage of women who went for ultrasound	4.6 (112)	3.7 (78)	3.8 (59)	4.3 (39)	5.4 (42)
Reasons for undergoing ultrasound					
Sex of the child	5.8	10.0	11.	22.9	33.3
Position of the baby	2.9	1.4	-	2.9	2.3
Child's health	52.4	55.7	55.6	54.3	33.3
Abnormality	14.6	10.0	9.3	11.4	*
Mother's health	24.3	22.9	24.1	8.6	7.1
Persons who suggested they undergo an ultrasound					
Self	28.5	29.4	32.2	23.0	30.9
Husband	23.2	19.2	27.1	25.6	28.5
Family and relative	7.1	5.1	5.0	7.6	16.6
Nurses	11.6	10.2	13.5	12.8	7.1
Doctors	47.3	37.1	32.2	30.7	19.0
Others	-	-	-	-	-
Percentage of women who underwent ultrasound after three months gestation	57.1	58.3	64.8	59.5	61.9
Sex of the baby revealed after ultrasound	14.2	15.3	28.8	35.9	42.8

* Not available

Source: Based on Survey data.

Use of the ultrasound test by order of pregnancies shows that nearly 4 to 5 percent of women in their first order have undergone the ultrasound test and this has remained constant till the fourth parity after which there is an increase in proportion of women who underwent an ultrasound. Around half of the women (47 percent) reported that it was on a doctor suggestion that they underwent an ultrasound during their first pregnancies. It is also observed that for the subsequent pregnancies the doctors' influence has gradually declined. More than one-fourth of women and their husbands have turned out to be the primary decision-makers for undergoing ultrasounds from the third pregnancy onwards. This shows that an ultrasound on a doctor's suggestion could be primarily because of medical reasons whereas in other cases the test was done most-likely to determine the sex of the unborn child.

Over the years the incidence of abortion has been increasing and one of the reasons for undergoing an ultrasound could be to know the sex of the baby and subsequently to resort to induced abortion if the fetus is unwanted. Interestingly, as the order of pregnancy increases, the desire to know the sex of the baby has come out as the major reason for undergoing an ultrasound. Though a major chunk of the women reported that health of the baby was the main reason for undergoing an ultrasound, this looks quite dubious. This could be true for women who are going under the doctor's initiation during their first pregnancy but not for later pregnancies (as shown in above table). Except abnormalities and position of the baby (to know the position of the baby, a test is conducted after seven month gestation) all other reasons look defensive. Further more than 60 percent of women underwent an ultrasound after three months of pregnancy. This shows that the sex of the baby (which can be determined reasonably accurately after the first trimester) was the main reason for undergoing an ultrasound after the initial three months.

Fourteen percent of women reported that sex of the baby was revealed to them during the ultrasound test conducted for their pregnancy. It is surprising to note that 36 percent of these women who went for an ultrasound during their

fourth pregnancy reported that they came to know the sex of the baby during this test. Thus, the inquisitiveness to know the sex of the baby probably is more among women in the third or fourth pregnancies and this could be largely due to the preference for a son. Only nine women reported that they had an abortion after knowing the sex of the baby. Out of nine cases, seven reported the sex of the fetus as female and other two as male fetus. However, the possible reason for why money women did not report the sex of the sex selective abortions could be that women are aware of the fact that abortion due to sex selection is illegal.

To reach at any specific c conclusions regarding sex selective abortions, pregnancy outcome by parity was observed for all pregnancies for those women who underwent an ultrasound test and those pregnancies for which women who underwent an ultrasound test and those pregnancies for which women did not resort to ultrasound. A table is given below to understand the percentage distribution of all pregnancies for which women underwent an ultrasound.

Table 8.12

Percentage Distribution of all Pregnancies by Outcome, according to Ultrasound Status during Pregnancies, 2001

Parity	Ultrasound	Live Birth	Still Birth	Spontaneous Abortion	Induced Abortion	Twins	Total
1	**Yes**	82.2	2.8	12.1	0.9	1.9	100
	No	91.8	2.9	5.3	-	-	100
2	Yes	86.1	2.8	8.3	1.4	0.4	100
	No	93.2	1.5	4.8	0.3	0.2	100
3	**Yes**	86.2	1.7	12.1	-	-	100
	No	93.8	1.5	4.5	0.2	-	100
4	Yes	73.7	5.3	9.2	11.8	-	100
	No	90.4	1.9	7.0	0.5	0.2	100
Total	Yes	81.8	3.2	10.5	3.5	1.0	100
	No	92.3	2.0	5.4	0.2	0.1	100

- Not available

Source: Based on Survey data.

The table shows that among the pregnancies for which women underwent an ultrasound the percentage of live births are less than those pregnancies without an ultrasound test. The likelihood of termination of some pregnancies after the ultrasound test (on knowing that it is a female fetus) cannot be ruled out. And also after the fourth pregnancy, the induced abortion rate has increased for all pregnancies for those women who underwent an ultrasound test. Similarly the rate of spontaneous abortion is also found among pregnancies with an ultrasound than without an ultrasound test.

It is expected that antenatal care is independent of the sex of the live birth and it mostly depends on the parity, unless there have been sex selective abortions which may be used to avoid births of children of an undesired sex after the sex of the fetus has been determined. To ascertain this, antenatal care by the sex of the live birth is examined and presented in the table given below.

Table 8.13

Percentage of Women Who Underwent at least one ANC, Urine Test, Blood Test and Ultrasound during Pregnancy by Sex of Live Births

Parity	ANC			Urine			Blood			Ultrasound		
	Male	Female	Total	Male	Female	Total	Male	Female	Total	Male	Female	Total
1	21.0	20.4	20.8	17.2	18.4	17.8	15.9	16.0	16.0	3.5	4.9	4.2
2	19.4	15.5	17.7	16.4	13.4	15.1	14.7	12.5	13.8	3.2	3.6	3.4
3	16.9	12.8	15.1	14.3	11.5	13.1	13.0	9.7	11.6	5.0	1.6	3.5
4	10.8	12.2	11.5	9.1	10.8	10.0	8.6	10.0	9.2	4.0	3.1	3.5
5	11.4	11.8	11.8	10.5	10.2	10.5	10.0	9.1	9.8	5.0	3.7	4.7
6	13.3	9.8	11.8	15.0	9.6	12.7	13.3	7.2	10.8	7.5	4.8	6.4
Total	17.8	15.7	16.8	15.0	14.0	14.6	13.7	12.4	13.1	4.0	3.5	3.8

Source: Based on survey data.

From the above table it appears that for the first two pregnancies, antenatal care is almost same for male or female, births. From third pregnancy onwards, a rise in the antenatal care was found for male births. A slightly different pattern emerges when an ultrasound is linked with the sex of the live birth and among those women who had at least one ANC, blood and urine test and sex of the live birth. In the case of ultrasounds it is seen that the use of an ultrasound was less for male births till the second order or pregnancy but there is a rise in the use from the third pregnancy onwards. Thus, it can be concluded that from the third pregnancy onwards, the chances of a female fetus being aborted is more after the ultrasound.

In the context of analysis and evidence presented above, we see that in rural Haryana, ample of evidence of sex selective abortions is to be found. Before 1975, medical technology to determine the sex of the baby was not available and in the subsequent years, spontaneous abortion increased three times. As with the advancement of medical technology and use of antenatal care, it is expected that spontaneous abortions will decrease or remain more or less constant over a short period. Therefore, we assume the level of spontaneous abortion in 2011 to be same as in 1975. Consequently, the increase in the level of spontaneous abortions is due to some induced abortion being reported by women as spontaneous. Apart from that, the use of an ultrasound in the sample population is one out of eight women, out of which one third had undergone the test to know the sex of the fetus. Similarly, around one fifth of the women had abortions, out of which more than one-third had sex selective abortions. The figures for ultrasound tests seem to be low as many women may not have reported the results because of awareness about the PNDT law. Thus women may not have directly reported the induced as well as sex selective abortions, but may have reported it as a spontaneous abortion.[22]

No doubt, this study provides useful information on and insight into the clandestine practice of sex selective abortion in India in general and Haryana in particular. The real significance of a recent discovery in Punjab, one of India's most prosperous states. In the vicinity of a private hospital in patron, Patiala

[22] Babies in the well, The Hindu 2006, Sep. p.3

district, 930 ft. deep well fielded to dead fetuses, all female. The location of the well near the clinic was not accidental. For clearly despite the pre-natal diagnostic Techniques (Regulation and Prevention of Misuse) act, 1994, the aborting of female fetus continues virtually unchecked. A few days after this discovery, in the well near the same clinic homes that appeared to be those of fetuses were found, although their sex was not evident. The owner of the hospital has been arrested and the Punjab Government has misdialed checks into private clinics and hospitals across the state.[23]

Table8.14

Indicators of Sex Preference

	Mean ideal number of							
Back ground characteristic	**Sons**	**Daughters**	**Either sex**	**Percentage who want more sons than daughters**	**Percentage who want more sons than sons**	**Percentage who want at least one son**	**Percentage who want at least one daughter**	**Number of women**
Residence								
Urban	1.1	0.8	0.3	25.9	0.5	84.4	78.4	820
Rural	1.5	0.9	0.2	42.2	0.5	92.0	82.0	2017
Education								
Illiterate	1.6	1.0	0.2	46.2	0.3	92.4	83.4	1550
Literate < middle school complete	2	0.8	0.3	37.3	0.6	89.4	80.0	479
Middle school complete	2 3	0.8	0.3	31.1	0.9	87.6	78.3	234
High School complete and above	1.0	0.8	0.3	16.9	0.7	84.0	76.1	574

Source: NFHS-II, Haryana, 1988-99.

Mean ideal number of sons, daughters, and children of either sex for ever-married woman, percentage who went more sons than daughters, percentage who want more daughters than sons, percentage who want at least one son, and percentage who went off least one daughter by selected background characteristics, Haryana,

[23] Girls, Interrupted, How to combat female feticide. Times of India, 20th Oct. 2010, p.14.

Table 8.15

Neonatal, Post Neonatal, Infant Child and Under Five Mortality Rates for the 10 years period preceding the Survey by Selected Demographic Characteristics, Haryana, 1998-99.

	Neonatal mortality	Post neonatal mortality	Infant mortality	Child mortality	Under Five mortality
	(NN)	(PNN)	(1q0)	(4q0)	(5q0)
Sex of Child					
Male	32.2	20.6	52.9	13.8	66.0
Female	36.0	30.0	66.0	30.2	94.2

It is, however, the mortality rates of infants and children, which are actually indicative of the prevailing gender discrimination and in egalitarian status of women in the State of Haryana. A look at the table above reveals that as against 32.2 per cent of male children dying in the first month of life, 36.0 female children die in this period. This situation becomes even grimmer when post neonatal mortality is considered. As against 20.6% of male babies dying in the period between the first month of life but before the first birthday, 30.0 percent of female babies die in this period. Still more horrifying is the picture for infant mortality where the mortality differentials are 13.1 points. To make the portrait even more horrendous, the child mortality figures (probability of dying between the first and fifth birthdays) reveal a differential of nearly 17 points. On the whole, the less than five mortality rate for males is 66.0 as compared to a gigantic 94.2 for females. Notwithstanding the fact that female babies are supposed to be healthier and sturdier at birth with less chances of dying as compared to baby boys, such prevailing gender differentials in mortality are indicative of the extreme bias and discrimination which continues in this highly patriarchal State. Herein lays one of the causes for the abysmal sex ratio of the State.

Haryana might have won laurels for the Nation in the Common Wealth Games held in the capital but girls in Haryana continue to be out of favor. What is alarming is despite several government schemes addressing female feticide, the

unbalance seems to have great worse. Advances in medical science have compounded the problem, facilitating early sex-selective abortion. Although laws against sex determination exist, their implementation has been rendered ineffective due to an unholy nexus between clients, clinics and law enforcement officials.[24]

The present study shows that there exists extreme sex selective discrimination against girl child through conception to their raring and bearing. Also extreme discrimination by women sometimes results into the sex selective abortion in the society in the desire for male child. Therefore, it can be said that there exists women's life course impact on the discrimination against girl child. Women who herself had a worst childhood experience in terms of discrimination in all spheres including childhood status,food,education,morbility etc.,had less autonomy in various dimensions (such as decision making,monetary,morbility,fertility,etc) feels high instability in her married life or perceive a sad married life is more responsible for the discrimination against girl child from conception through her childhood leading to a vicious cycle gender deprivation.

F. Haryana Steps up Measures to Improve Sex-Ratio

Besides, the pre-natal Diagnostic Technique (Regulation and prevention of misuse) Act 1994 which has also been enacted in the state of Haryana and which has been amended in 2002 and the Rules have also been amended in 2003. The state Government of Haryana has also taken the following measures to implement the Pre-Natal Diagnostic Techniques (PNDT) Act-2002 and check pre-natal sex determination leading to female feticide:

1. The state has also constituted a multi member state appropriate authority under the chairpersonship of Director General Health Services, Haryana besides Joint Legal Remembrance, Law Department and Deputy Director, women and child Development, Haryana as its members.

[24] Haryana Media Consultation Female Foeticide, Karnal, March 28-29 Haryana http://www.increation.com/sv/pdf/Haryana.medical consultation Female foeticide report.pdf.

2. Civil Surgeons of all the districts have also been appointed as District Appropriate Authorities for effective implementation of the Act.

3. State Supervisory Board under the chairpersonship of Hon'ble Health Minister, Haryana has been constituted to monitor the implementation of this Act.

4. State Advisory Committee has been constituted under the chairmanship of Head of the department of Gynecologist and obstetrician department, Rohtak consisting of Head of Pediatrician department, Medical Geneticist, Deputy Legal Remembrance Secretary, Indian Red Cross Society, Secretary, State Council for Child Welfare and Smt. Prem Sharma, Social Worker as members and State MCR Officer as member secretary.

5. District Advisory Committees with the District Family Welfare Officer as Chairman and district immunization officer, a gynaecologist, pediatrician and 3 women social worker including Secretary District Red Cross Society as members have also been constituted in the districts.

6. A State Task Force under the chairmanship of State Appropriate Authority has been constituted consisting of a team of dedicated officers of the department. Apart from conducting raids/ inspection of ultrasound centers to curb the illegal activities this task force is also doing intelligence work in the state which is followed by the raids. This task force is doing its work with the help of local health officials, media persons, NGO's and police.

In order to keep a check the misuse of ultrasound machines, the following steps have been/are being taken:

1. A survey of all bodies/persons using ultrasound machines has been completed and continuing 912 ultrasound clinics. Genetic clinics and 66 Genetic counseling centre's under the PNDT Act have so for been registered with various district Appropriate Authorities.

2. 46 ultrasound machines have been registered in Govt. Sector.
3. 94 ultrasound machines have been seized and sealed by respective district Appropriate Authorities on account of being unregistered/unserviceable/for violation of the various provisions of PNDT Act 1994/Rules 1996.
4. 4809 inspections of various ultrasound clinics have been conducted till date.
5. Registration of ISI-ultrasound centres has been suspended/cancelled for violation of various provisions of the PNDT Act.
6. Recently the following actions are taken against the sex selective abortions and the violators of the PNDT Act:

   (i) Prohibit ultrasound centre, B. K. Chowk, Faridabad was raided and caught red handed with Rs.5000/- taking from a decoy patient for conducting sex determination test and inform the decoy patient regarding the sex of the fetus i.e. "*FEMALE*". The ultrasound machine was seized and sealed on the spot registration was suspended and show cause notice was issued.

   (ii) Registration of Dhir Hospital, Bhiwani has been suspended and ultrasound machine has been seized and sealed.

   (iii) In district Hisar, 4 ultrasound centres and 3 MTP Centers have been seized and sealed.

   (iv) In district Sirsa, the Garg Diagnostic Centre has been sealed by the authorities after receiving a complaint of female feticide in the centre. According to information, sex determination test of a pregnant woman was held at the centre and not only the test but subsequent abortion of the female fetus was done at Garg Diagnostic Centre.[25]

   (v) In district Ambala, 1 ultrasound centre has been seized and sealed.

[25] Haryana Media Consultation Female Foeticide, Karnal, March 28-29 Haryana http://www.increation.com/sv/pdf/Haryana.medical consultation Female foeticide report.pdf.

To check the declining sex ratio, the Haryana government strictly enforces the Pre-natal Diagnostic Techniques (PNDT) Act in the state. So far, inspections of 14,576 clinics had been carried out by health authorities, 346 licences had been suspended or cancelled and 30 persons, including 24 doctors had been convicted by court for violation of PNDT Act in the state. Apart from this, 82 court cases were pending in lower courts and 4 in High Court against those who violated the Act.

In the state of Haryana, new initiatives had been taken for effective implementation of the Act included registration of ultrasound machines used at veterinary hospitals and incentive up to Rs. 20,000, given to informer for providing information regarding violation of PNDT Act. The Awards for district PNDT team had been started to curb the female feticide and sex-determination.[26]

All the District Appropriate Authorities been directed to take personal interest and play a proactive role in conducting and raids in the clinics operating and violating various provisions of the PNDT Act by deploying decoy customers. Just because of the active role played by the District Appropriate Authorities 34 prosecution complaints have been filed in the respective courts against the violators of various provisions of PNDT Act 1994 and Rules 1996.With a ban on the sex determination tests, health officials in Haryana had conducted over 11,600 searches in private clinics and health centre to see if there was any violation of the Pre-Natal Diagnostic Techniques (PNDT).

A table is given below to show how many complaint cases have been filed in the district of Haryana.

[26] www.hindustantimes.com/punjab/chandigarh

Table 8.16

34 Prosecution complaints

S. No.	No. of complaints	Districts
1	7	Faridabad
2	6	Gurgaon
3	5	Hisar
4	3	Rewari
5	2	Ambala
6	2	Rohtak
7	2	NA
8	1	Bhiwani
9	1	Fatehabad
10	1	Jhijjar
11	1	Karnal
12	1	Panipat
13	1	Sirsa
14	1	Yamuna Nagar

Source: http://www.imicreation.com/sv/pdf/haryanamedicalconsultationfemalefoeticidereport.pdf

In addition to 34 prosecution complaints a one more *FIR* has been lodge in the district of Hisar against the violators of various provisions of PNDT Act 1994 and its Rules 1996. Again a table is given below to show that for what offences these 34 cases have been filed in their respective districts.

Table 8.17

Offences for which complaint files

S. No.	No. of cases	Offences
1	18	Sex-Determination
2	5	Issuing of Prohibited Advertisement
3	9	Non-Maintenance of Records
4	2	Unregistered

Source: http://www.imicreation.com/sv/pdf/haryanamedicalconsultationfemalefoeticidereport.pdf

The above table shows that major cases have been filed for sex-determination of the fetuses which lead to sex-selective abortion, if the test revealed the sex of undesired fetus. First three court cases under PNDT Act 1994 were launched in Haryana (district Faridabad which were first of its kind in the whole country and thus become a trend setter.

It is a story that has remained in the front pages of all the newspapers: First Indian Doctor jailed under law on showing unborn baby's gender[27] or Doctor jailed for girls abortion scan[28] or Haryana witnesses the country's first conviction for using sex determination technologies, on a complaint filed in 1997[29] or India sex selection doctor jailed[30] etc.

Twelve years after a law was passed banning Indian doctors from helping pregnant women to select the sex of their children, the *State Vs Anil Sabhani* is reported to be a first case where a doctor in India has been jailed after revealing the sex of an unborn child via an ultrasound to official conducting a sting investigation. This is the first time a physician has been convicted under a new law

[27] http://www.lifenews.com/net 2173.htm
28 http://businesstimesonline.co.uk/to1/business/law/article698854.ece
29http://www.hinduonnet.com/fline/f/2308/stories/2006050/500019100.html
30http://news.bbc.co.uk/2/hi/south-asia/48556.82.htm

preventing revealing a baby's gender that is an attempt to stop sex-selection abortions.

The sub-Divisional Magistrate in Faridabad on March 28 has ordered against Dr. Anil Sabhani and Mr. Kartar Singh, Technician to undergo simple imprisonment for a period of two years and to pay a fine of Rs.5000/ each.

Under Indian laws, ultrasound tests on a pregnant woman to determine the gender of the fetus are illegal. Both, the Dr. Anil Sanbani and his x-ray technician Kartar Singh were using the technology to determine the sex of an unborn child and the termination of pregnancies on the basis of gender is illegal. Despite the law being widely flouted since it was introduced 12 years ago, no doctor had until now had been sentenced to jail; previous conviction led only to fine. Dr. Sabhani was caught in a sting operation when government officials sent three pregnant women to his clinic in Faridabad, on the outskirts of Delhi in 2001. He was captured on video and audio recorders telling one woman that she was carrying a girl and that it could be taken care of". His clinic was immediately raided by the team and documents recording the procedure were seized. The entire episode involving the decoy patient had been video making the conviction possible. While, passing the prison sentence, the judge said that the declining number of girls was horrific. "It is due to the illegal acts of persons like the convicts that the sex ratio is declining day by day" he said campaigners welcomed Dr. Sabhanis prison sentence. "This is what can happen when someone decides to implement the law", said activist Sabu George. But Faridabad is just one district in the country and the situation won't improve until there is similar action in every district.[31]

In two other cases *State Vs Surinder Yadav Gurgaon* and *State Vs S. N. Indora*, Faridabad, the charges have been proved against the accused. A team of six senior health officials raided Bhargava Nursing Home, Rewari on 11.04.2006. A decoy customer, who was a four month pregnant, was sent to Bhargava Nursing Home with numbered currency notes. Dr. (Mrs.) Vijay Bhargava conducted the sex

[31] Case no.295/2 of 2001, Date of Decision;28.3.2006

determination test and disclosed the sex of the fetus. Dr. Ashok Bhargava (husband of Dr. Vijay Bhargava) was caught red handed in this raid while taking Rs.2350/- from the patient for conducting the test. The health officers raided the clinic and recovered the currency notes. The ultrasound machine has been seized and sealed at the spot and a show cause notice was served.

In a judgment in the Court of Sh. N. P. Dewett, Addl. Session Judge, Gurgaon in a case *State Vs Rajini and others* under the MTP Act on 02.03.2006, Dr. Rajini has been convicted to undergo vigorous imprisonment for a period of one year and to pay a fine of Rs.1000/- under section 15 (2) and 15 (3) of the Indian Medical Council Act, 1956 and in default of payment of fine the convict Dr. Rajiv shall undergo simple imprisonment for a period of one month more. The convict Neera (patient undergoing the MTP) has also been sentenced to undergo vigorous imprisonment for a period of 2 years for commission of offence under section 315 IPC. She is also sentenced to undergo vigorous imprisonment for a period of 2 years for offence under section 317 IPC. The convicts have been sent to district jail Gurgaon for execution for the sentence awarded.

Smt. Joginder Kaur, Trained Dei and her Assistant Smt. Rekha wasrunning a clinic in Ambala city on dated 23.10.2006, the then Civil Surgeon and his team raided the clinic and caught them red handed for conducting illegal Medical Termination of pregnancy. On dated 14.03.2007 , a fast track court has convicted Smt. Joginder Kaur and her Assistant Smt. Rekha to undergo imprisonment for a period of two years and a fine of Rs.2000/- for conducting illegal medical termination of pregnancy.[32]

Haryana may have finally found a way to prevent the declining CSR, the most serious fallout of sex selection abortions, but the lone conviction will not make the implementation of the law easy in the country.[33]

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[32] Haryana Media Consultation Female Foeticide, Karnal, March 28-29 Haryana http://www.increation.com/sv/pdf/Haryana.medical consultation Female foeticide report.pdf.

33 Small gain for the girl child http://www.hinduonnet.com/fline/f/2308/stories/2006050/500190100.htm

The conviction comes as a morale-booster for those who have been crying out against the decline in the numbers of girl children. For long it has been felt that those sections of the medical community that peddle sex-selective technologies with impunity should be brought to book. Balbir Singh Dahiya, retired Civil Surgeon former Director of Health Services, Haryana, who initiated the complaint in 1997, is however, not very happy. The reason is the delay in the course of justice.

The PCPNDT Act regulates but does not deny the use of pre-natal diagnostic techniques, including ultrasonography, to detect genetic abnormalities or other sex-linked disorders in a fetus. The problem therefore, does not lie with the Act but its implementing authorities. Under the Act, the Appropriate Authorities[34] have the Powers to summon any person who may be in possession of information relating to violation of the provisions of the Act. They can issue search warrants for any place suspected to be practicing sex selection techniques or pre-natal sex determination and seize and sealing objects used for the purpose. The authorities can conduct independent investigations on a complaint against a breach of the provisions of the Act, take the complaints to the court; and initiate suo motu and appropriate legal action against the use of any sex selection technique. The main violations under the Act pertain to non-registration of centers or clinics, non-maintenance of records, communication or determination of the sex of fetuses and advertisements about facilities for such determination. The Act is clear that the court will take cognizance of an offence only on the basis of a complaint made by the Authority and that the investigating powers rest with the latter alone. Independent *"Sting"* operations conducted by sections of the media with the knowledge of the compliance of basic procedures of the Act by state agencies.[35]

A huge state boo-boo in failing to notify the pre-natal diagnostic Techniques (PNDT) Act in the official gazette threatens to under Haryana's claim of being the first state in the country to convict a doctor under the Act. The PNDT Act, 1994 is

[34] Section 17.A.PNDT (Regulation and prevention of misuse) Amendment Act 2002
[35] Small gain for the girl child http://www.hinduonnet.com/fline/f/2308/stories/2006050/500190100.htm

the chief statute to prevent illegal sex determination tests and female feticide, rampant in Haryana and Punjab. But now just because of the government goof up, different courts in the state have been forced to acquit five people booked under the Act, while 60 other medical practitioners caught in the past 12 years await their turn to walk free.

In a startling revelation which exposes government functioning, the Act was notified a mandatory exercise before implementation of law, only on March 4, 12 years after it should have been put in place. Terming arrests made so for basically illegal because it's a sailed ground to seek relief as government teams were not authorized to arrest doctors without gazette notification of the Act. "No notification means that the appropriate authority (Civil Surgeon) as defined in PNDT (Prohibition of sex Selection) act, 1994 neither has legal jurisdiction nor powers to act against violators". Coming as a boon for those facing prosecution n, the RTI reply is reportedly being tabled in court. The government has admitted in court that no gazette notification of 1997 is available. The order of appointment of appropriate authority is also not notified, rendering illegal all actions taken by designated officers, said Gopal Krishan, Chief Judicial Magistrate of Sirsa, while discharging Dr. Sanjeev Kaushal on March 19.

In a similar Case, Sunil Kumar, Judicial Magistrate of Faridabad on May 25, let go Dr. R. D. Negi- proprietor of Taneya hospital on December 24, 2008, when a complaint was filed against the accused, Faridabad Civil Surgeon was not the appropriate authority to do so under section 28 of the Act, said the magistrate.

Realizing the blunder a few months back, Haryana government published the notification this year. But courts say the Act would be effective only from the date on which it is published.

Dr. Anil Sabhani of Faridabad district was the first person in India to be convicted in 2005. Since then five others were hauled up under PNDT Act in the state. Convicted doctors and rest facing prosecution may now seek relief on this legal lacuna related with the gazette notification. The government is planning to

appeal in the higher court, taking the plea that it was a technical mistake, which has now been rectified.[36]

Indian culture values makes above females and the targeting of girl babies has produced a starting gender ratio that is already causing societal problems. It is not difficult to stop the crime everybody knows which doctor is doing it any town or any village. So this public knowledge where it is happening. But somehow the civil society iregonizations to not give it adequate priority in terms if stopping the crime, they are not seeing it as genocide. Assumed to be prevalent among Hindus, because of their custom requiring male progeny to perform, cremation elites sex selective abortion of female focticide in fact found today to be equally rampant among Sikhs and Muslims.[17]

After Haryana, the State of Punjab has witnessed conviction for sex selection abortion. Moga (Punjab) has been in the headlines for a declining sex ratio and failure if the pofencement to crack down on clinics illegally offering sex determination tests, an offence under the pre-natal Diagnostic Techniques Act. In a judgment that could serve as a determent to hundreds of families that terminate female fetuses, sometimes forcibly, four members of a family were sentenced to ten years vigorous imprisonment and additional sessions judge B. S. Sandlul also slapped a fine of Rs.2, 000 each on each of the four convicts for forcing a woman to undergo an abortion after a sex detection test.

The victim Muskan had in her complaint stated that her husband Surinder Kumar, his brother Satpal their mother Shimla Rani and Sunita Rani, a nurse related to them, forced her to go for an abortion after finding out the sex of the child from a Moga-based doctor. Convictions under the PNDT Act have been few and far between, mostly due to connivance between law enforcers and quacks and clinics that offer illegal ultrasound test. Successive raids have failed to nail the guilty, more so, due to silence from the victims themselves.[38]

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[36] Haryana government goof-up lets "killer" does off the hook, The Times of India, 24th June, Wed. 2009
[37] First India Doctor jailed under law on showing Baby's Gender http://www.lifenews.com/net2173.htm
38 Husband, in-laws get 10-yrs RI for feticide,Times of India, 19th May, 2008.

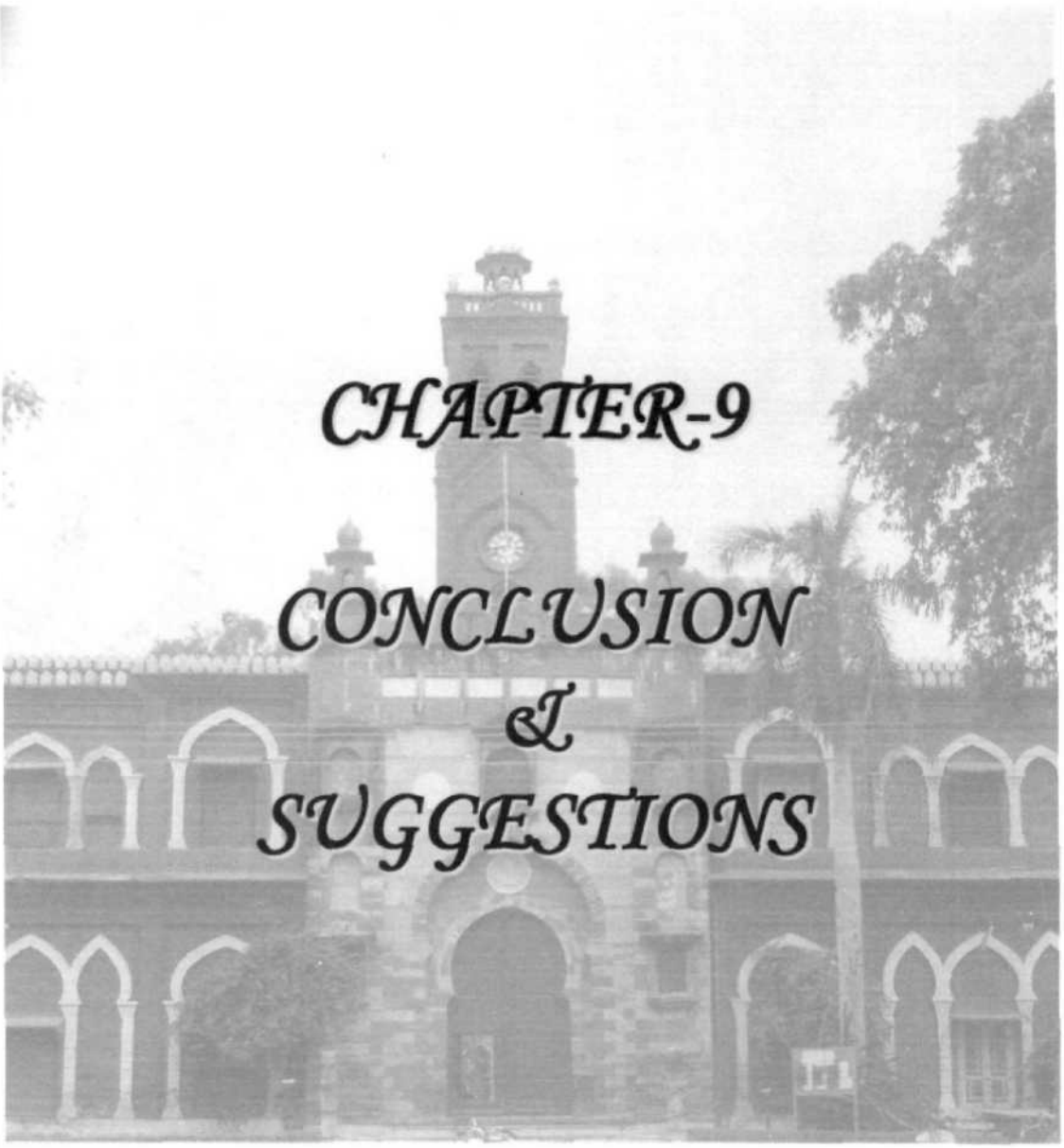
The Haryana Medical Council has cancelled the registration of a doctor for five years for being convicted by a Court for violating of Pre-Natal Diagnostic Test Act. Registrar of Medical Council, Haryana, Dr. K. K. Kapoor said, the medical council notice states: "the medical council has decided to remove the name of Dr. M. P. Kamboj, registration no. HM2740, from the registrar of registered medical practitioners maintained by the Haryana Medical Council under Section 11 of the Punjab Medical Registration Act, 1976 for being convicted by Chief judicial Magistrate, Hisar as pronounced on January 10, 2008 for committing offence under Section 14 (3) and 5(1) (b) read with rule 9 of PNDT Act and Rules which are punishable under section 23(2) of the Act and his name has accordingly been removed from the register. Dr. Kapoor said charges have also been framed against another doctor, N. C. Bansal of Hissar, for violation of PNDT Act. Director General, Health Services Dr. Avinash Sharma said strict action would go a long way in checking malpractices in the health system. She said Haryana was the first state in the country to have recorded five convictions for sex-determination under PNDT Act and was the only state in the country having the highest no of conviction for sex determination.[39]

If such dishonorable acts happen in states like Punjab and Haryana, it is shame for Punjabis. We should be united to curb this crime said Punjab and Haryana High Court Chief Justice. A skewed sex ratio of 888 women per 1000 men in the state has left the intellectuals and experts worried.[40]India supports a plural or heterogeneous society consisting of numerous stratifications based on religion, caste and class. Dual structures of law exist side by side, the religious sanctions condoned against constitutional ones. As we find that preference for sons runs high amongst all religious groups and social classes. This preference is due to shared civilization patterns on the Indian subcontinent and underlying principle of a patrilocal,patrilineal and patriarchal society.

[39] http://www.expressindia.com/latest.new/pndt-act-Docp.registration-cancelled/266282

[40] Judiciary steps into tackle female feticide, The Hindu May 25, 2007, p.3.

However, as per the data by Census 2011, the state of Haryana has reported a rise in the sex-ratio 877 females per 1000 males from 861 in the last census 2001.No doubt, the strict implementation of the pre-conception and pre-natal diagnostic Techniques (PC-PNDT) prohibition of sex-selection. Act has helped in creating a positive trend with respect to the female child sex ratio in several districts. Despite this improvement the sex-ratio in Haryana leaves a lot to be desired as it lags behind the national average by 70 points. However, the statistic in the Haryana Census 2011 reveals facts that can be instrumental in planning for a better development plant for the State.



CHAPTER-9

CONCLUSION & SUGGESTIONS

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It is evident from the present research study that what is required as far as unborn is concerned is protection rather than personality. Conferring legal personality would only create problems to the mother, father, third persons and state. In such a situation, the questions relating to the liability of the unborn arise. For the purpose of protection, law has to be introduced by the state. The law has to take care of the liberty of the mother as well as the public interest in protection human being in protecting the potential human being in unhorn child.

Woman by nature posses a right to have a child. Thus a mother has got a natural duty to provide the maximum best possible to her offspring. However, situations may arise where she indulges in activities which injuriously affect the fetus. The most important right of an unborn child is its right to birth. Procuring abortion is condemned as an offence except for preserving the life of the mother.

The practice of abortion, the termination of pregnancy so that it does not result in birth dates back to ancient times. Pregnancies were terminated through a number of methods including the admission of ahortifacient herbs, the use of sharpened implements, the application of abdominal pressure and other techniques. Medically three distinct terms, viz. abortion, miscarriage and premature labor are used to denote the expulsion of a fetus at different stages of gestation.

The term 'abortion' is used only when an ovum is expelled within the first three months of pregnancy before placenta is formed. 'Miscarriage' is used when a fetus is expelled from the fourth to the seventh months of gestation, before it is viable, while premature labor' is the delivery of a viable child possibly capable of being reared before it has become fully matured. In ancient

India abortion was denounced as a sin of the highest order, thereby recognizing the legitimacy of protecting the unborn. The ancient Hindus gave women a very high position in society and great honor was given to motherhood. Child bearing was considered their essential function which they should discharge without any hindrance. The cases where to preserve life and health of the expectant mother the pregnancy might have been terminated are hard to find. The loss of a mother could have been borne out but not of a child. The Muslims who are still polygamous too, must have cared more for the child than its mother. The view in India from time immoral has not been very different and termination of pregnancy has been considered as an offence. The Hindus as well as Muslims considered it to be a forbidden act.

Hinduism teaches that abortion is a greater crime and one of the worst sins. It is one of the six kinds of murder described in Hindu Culture. Moreover, abortion warns a soul in its progress towards God, like any other act of violence. It teaches that a fetus is a living, conscious person deserving of protection. Hinduism has traditionally taught that a soul is reincarnated and enters the embryo at the time the embryo is conceived in fact, one of the seven legendary immortals or Chiranjeevin in Hinduism Ashwathama, was cursed by Lord Krishna, Avtar of Vishnu to immortality and internal suffering partly for killing the fetus later in his mother's womb. Hindu scriptures refer to abortion as grabhapata (womb killing) and bhoorna hatya (killing the undevelnped one).

Atharva Veda one of the original sources of Hinduism, denounces that "beyond him who committed an abortion (bhrunhan) the sin does not pass". Foeticide was forbidden and classified as murder equivalent to neglect of Vedas, incest and drinking of spirituous liquors. Hindu law givers of later ages also treated abortion as a crime. The Hindu faith in *Ahimsa* (non violence) which was many times strengthened by the Bhudhism and Jainism, worked against any recognition of abortion. Buddhism which denounces any destruction of life, certain that the bhikhu "who intentionally kills a human

being, driven to procuring abortion, is no Samana, and no followers of the sakyaputta." The Jains who even screen the air and water that they take in for fear that the smallest life in form of bacteria or insect may not be killed, cannot be think of destroying a human embryo.

Like Hindus, the Muslim religion attaches great importance to protecting the life of an unborn child. Islam in general condemns the killing of unborn as a mode of fertility control. Abortion in the sense of destroying a baby after the creation of soul that is when the fetus has acquired life is forbidden and is considered as haram. Islam is the religion of nature. Its laws like the laws of nature are founded on the eternal and unchangeable principles which the human mine accept a priori. Islam is quite a human as it is divine. All the rules lay down by it individual as well as collective, are based upon a fundamental principle that man should behave and act in consonance with natural laws that he finds working in this universe and that he should refrain from a course of life that might force him to deviate from the purpose for which nature is operating. No one has the power or capacity to against the prescribed course. If man chooses to violate the laws of nature and the guidance the God has given for individual and social life, this is band to lead his astray from the right course and produce disturbing consequences here and hereafter.

God is the only owner of life. Life is sacred in Islam and no one should take steps intentionally to end innocent human life. The Holy Quran Ordains:

> "Kill not your children on a plea of poverty. We provide sustenance for you and for them ..... verily the killing of them is a great sin."
>
> Whoever kills a human being (without any reason like) man slaughter, or corruption on earth, it is thought he had killed all mankind."

> "Losers are those who killed their children foolishly, without knowledge, and have taken as prohibited what Allah has provided them a fabrication against Allah. They have gone astray, and they are not on the right path.

To kill an innocent human life is like killing the whole of mankind and to save a human life is like the saving of all mankind and is highly rewarded by Allah killing any person is strongly condemned in the Quran. God has made life sacred. Killing the children is specifically condemned as they are the helpless victims in every society. God is ordering not to kill the born or the unborn children because every child is considered a great gift from the creator. The Prophet regarded the killing of an unborn child as a crime irrespective of the stage of its development that is an embryo as well as fetus. However, despite giving much sanctity to the life, the Islam has allowed under certain circumstances to sacrifice the life of fetus to save the life of the mother, because it sees the abortion as the lesser of two evils and there is a general principle in Sharia (Muslim law) of choosing the lesser two evils. It is clear that Islam provides for the health of the unborn child, family and generation.

The most important right of the unborn child is to born, in other words not to be aborted. We have a fundamental right to life. But surprisingly we don't have a fundamental right to be born. In the womb, we do not enjoy even a status of human being and that is why the killing in the womb is not considered homicide. What to talk of culpable homicide! By implication, we do not have even rights in the womb.

One can ask a question, is it true? The answer to this question is provided by the Indian Penal Code itself. There are of course, certain provisions to check feticide, but section 299 of Indian Penal Code clearly says that it shall amount to homicide to kill inside womb. What is the net result? We are going on killing unborn children, legally and illegally, in the womb. Since the illegality of feticide does not attract severe punishment as compare to

homicide, we are going on even identifying the sex of the child in the womb and then at times we kill if it the doctor says it is female child. There are large number of such cases creating a serious threat to the sex ratio and teaching towards creation of unsafe society especially for women, and ultimately it turns against all human beings.

A very complex problem arises when the pro-abortion persons argue that they, under the constitution have a right to personal liberty which includes the right to or not to bear or beget a child, the right to be or not to be a parent the right to or not to use contraceptive, the right to or not to sterilized oneself, the right to have sex without the nuisance of sex, by artificial insemination. The right may accordingly held to include the right to stoppage of parenthood in transit, that is, the right to terminate pregnancy prematurely.

Each person has the right to "life, liberty and security". These rights are inalienable and are expressed in many National Constitutions and International Charter. It is a 'core' right without which all other rights are meaningless.

If the society accepts that unborn child are human beings then it follows that they are entitled to the protection afforded by this right. The fact that human fetus is week, vulnerable and inconspicuous is no reason to ignore or override his or her right to life. In India the right to life is guaranteed to every person under the constitution of India. This protection of life flows from Article 21 of the Constitution of India, if the right to terminate pregnancy is thus comprised in and follows from the right to personal liberty guaranteed as a fundamental right by and under Article 21 of the constitution, then under the mandate of that Article, as amplified by the Supreme Court in *Menaka Gandhi* and later cases, no person can be deprived of such personal liberty except according to procedure established by law which must be 'reasonable, right, just and fair". The relevant provisions sections 312-316 of the Indian Penal Code, however prescribed very severe punishments for termination of pregnancy in all cases except when caused in good faith for the purpose of

saving the life of the woman concerned. These provisions, drawn up more than a century ago in keeping with the then English law on the point and the concept of social morality then prevailing have accordingly rendered themselves liable to be questioned as violative of the fundamental right to personal liberty. But, the Medical Termination of Pregnancy Act, 1971 has abated the rigor of these provisions to a considerable extent. Having provided for termination of pregnancy in cases of unwanted motherhood would appear to be more filling with the wide triumphal arch being currently constructed for the 'Right to personal liberty.

But granting that the right to personal liberty of a woman includes her right to terminate pregnancy the question that has been raised is whether or not the exercise of such a right could affect the right to life of the unborn child. Your may have the right or liberty to swing your arm, but not to give a blow to another's nose thereby. The answer to this question would depend on the answers to the questions, namely, whether or not an unborn child is a person within the meaning of the life and liberty clause of the constitution and whether or not it has life.

An unborn child in the mother's womb is not a natural person within the meanly of Indian Penal Code. However, a child in womb is recognized as legal persons. capable of inheriting or otherwise acquiring and holding property and also other rights. The word 'person' in Article 21 does not apparently include an unborn person. It is certainly not true that unborn is not a legal person for other purposes. But an unborn person is not treated as non entity under the other areas to law. It would be odd if the fetus had property right which must be respected but could he be extinguished. It would be strange if a fetus had right enforceable by a parent to recover damages for infliction of injuries while in the womb but could himself be abolished by a parent. It would be unjust and unfair if a fetus has a right to get partition of the coparceners of the

coparcenery property or joint family property reopened and let has no right to be protected from abortion.

The protection of the human rights of an unborn child is vital not for his or her own sake but reducing tension in the society and ensuring peace and development in the country. Thus there is common perception that an unborn child or fetus has legal standing all personality. Contrary to popular belief that unborn person is a legal person. The law recognizes legal personality to unborn children. A child in mother's womb (*en ventre sa mere*) is by fiction treated as a already born and regarded as a person for many purposes. The Hindu Law has equated 'person in womb' to a 'person in existence' for many purposes. Similar is the position under the Transfer of property Act, 1882. Some of the instances are:

i) Hindu Law partitions required a share to be allotted to a child and along with other living hairs. If pregnancy is none the partition should be postponed tell the birth, but if (male) coparceners do not agree to this, then a share equal to share of a son should be reserve. If a son is born, he takes it, and if a female is born of marriage provision should be made for her. In case no share is reserved for a son in womb, he can, after his birth demand reopening of partition. However if the child does not take birth alive, his share may be equally partition between the surviving hair.

ii) A child in womb can interest property. Under the Hindu succession Act 1956, the property of a male Hindu dying intestate (without making a will) shall devolve firstly upon the class I hair, which includes son/daughter. "Son seems *inter alies* a posthumos son (i.e. child in womb at the time of death of intestate, born alive later). The position of daughter is seems as that of a son. Likewise, posthumous children are included in the scheme of succession to the property of a female Hindu dying intestate

iii) The traditional Hindu law did not recognize gifts to unborn person. The rule of pure Hindu law that a gift in favor of an unborn person is wholly void so that it cannot be made even through the medium of a trust was modified by the Hindu disposition of property Act 15 of 1916, by the Madras Act 1 of 1914 and by Act 8 of 1921.Thus, a gift can be made to a child in venture as venture as mere and could be accepted on its behalf. A person capable of taking under a will must either in fact, or in contemplation of law, be in existence at the death of testator. Thus, a bequest can be made to an unborn person.

iv) A child in worm may be beneficiary of a trust Section 9 of the Indian Trust Act, 1882, says, "Every person capable of holding property may be a beneficiary". If same of the beneficiaries of a trust are unborn persons, the trust cannot be varied without obtaining court's consent on their behalf. The recognition of the legal personality of child in the womb of the mother is illustrated in the rule of procedure, which lies down that a pregnant woman condemned to death cannot be executed until she had delivered her child. Under the Indian Penal Code 1860, injury to a child in womb is a punishable offence. Willful or negligent injury inflicted on a child in the womb, by reason of which it dies after knowing been born alive, amounts to murder or manslaughter under the Indian Penal Code.

A special mention should be made of the fundamental right provided by Article 21 (protection of life and personal liberty). It lies down that, "no person shall be deprived of his life or personal liberty except according to the procedure established by law." Right to life includes right of an unborn child to be born, as unborn child is also a person having legal personality. While 'right to education' has been made a fundamental right recently. Such right of an unborn child should also be expressly made a fundamental right. This will

result in an enhancement of the status of an unborn child. When the parents themselves want to get rid of an unborn child, the state can claim such right on behalf of the unborn child. Further the state providing early childhood care and education for all children of 0-6 age group is significant in the context of practice of female infanticide still prevalent in many parts of the country.

Termination of pregnancy is a problem around the world. It affects the rights of unborn child of all races, ethnic groups' classes and nationalities. It is a life threatening problems for unborn child and a serious problem for societies. In many countries, unborn child fall victim to traditional practices that violate their human rights. Practice of abortion affects the lives of millions of unborn child worldwide in all socio-economic and educational classes.

In an era of globalization, human rights concept has recently assumed global importance because of its wide spread concern for universal respect and human dignity. All persons have those rights by virtue of the fact that they are human beings. These rights are essential for their survival, protection, participation and development. In today's scenario this right has received a global reorganization and it has been incorporated in almost all the human rights legislations all over the word. Of late, the horizon of the right to life, a basic human right has been widened by judicial interpretation and today it encompasses all the elements which one can think of as an aspect for leading a complete, clean, healthy and dignified life.

International instruments stress 'participation's a core value along with survival protection and development. Laws and legal strategies must be devised to encourage these values. The Supreme Court of India has held that once signed, any international treaty or convention will be treated as a party of law unless otherwise stated. The Indian government is thus bound in its obligation to implement any convention or treaty that is signed.

The Universal Declaration has inspired all of the human rights Conventions and subsequent Declarations adopted since it was proclaimed by the General Assembly in 1948. It speaks in its preamble of the "equal and alienable rights of all members of the human family" and it states in Article 3 that "Everyone has right to life..." and in Article 6 that "everyone has the right to recognition everywhere as a person before the law'. These affirmations are not qualified as to age or limited to the born and it would be difficult to understand them as not including the living but not yet born. Abortion was not a major political or legal issue in 1948, and very few countries allowed it on any but the most serious grounds, notably when necessary to prevent the death of the mother. Although the drafters of the declaration decided not to deal directly with the unborn, they opted for the broadest and most inclusive language possible to describe the subjects of human rights.

The UN General Assembly on November 20, 1959 reaffirmed unanimously and explicitly the universal declaration's recognition of the rights of the child before birth. The concept of formal universal recognition of the child before birth as legitimate subject of inherent and inalienable human rights, including entitlement to legal protection, is critical. The nature of inherent and inalienable human rights means they can never be claimed by court of law or legislatures. In every premeditated abortion, deprivation of life is the intended, outcome for the child. Despite the current ideologically driven campaign to decriminalize abortion, arbitrary deprivation of life under modern international human rights law is still strictly prohibited. The unborn child's right to life especially protected under Article 6(5) of the International Covenant on Civil and Political Rights (ICCPR). The ICCPR recognizes in Article 6(5) that the pregnant woman does indeed carry within her womb another human being who is entitled by virtue of the child's in maturity to special protection from the death sentence. Human rights documents specifically condemn "choices" that entail lethal damage to the child's health and development. Abortion "choices" as human rights violations by adults in positions of power over children in

positions of dependency are logically incompatible with protections of child before birth.

Implicitly all Convention recognize the rights of unborn child. Article 1 of the UN 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 meter the law applicable to the child, majority is attained earlier." Therefore, "Every human being below the age of eighteen years" clearly does not exclude the unborn, as it does exclude human beings who have attained the age of eighteen. Again, applying the rules of interpretation of the Vienna Convention on the law of treaties, concerning. "The ordinary meaning of the words in their context" and the "contact of the treaty including .... Preamble", one finds strong grounds for state parties to maintain that the Convention does guarantee protection to the unborn child. There is in fact a chain logic extending, from the preamble through Articles 1 and 6. In the preamble, it is "the child" that needs "appropriate legal protection before as well as after birth." In Article 1 "the child" is every human being below the age of eighteen years." And in Article 6 it is "every child" who in Para 2 it is "the child" whose "survival" states parties "shall ensure to the maximum extent possible. Who are they talking about her, if not the unborn as well as the born child?

Several delegations entered into the record of the commission their understanding that the definition of a child does in fact apply to unborn children, since they are mentioned in the preamble as needing legal protection, and the object and purpose of the convention is to protect the rights of children. Additionally, several states attached reservations or understandings regarding the status of the unborn when signing or ratifying the convention.

Thus, while Articles 1 and 6 do not explicitly endorse a right to life for the unborn, child and a state's obligation to protect that right, the weight of these Articles taken together with the preamble provides solid ground for a claim that unborn child is entitled to legal protection under the convention. There is no evidence in the convention of a right to abort. Moreover, there is general agreement that international law does not affirm an international right to obtain an abortion. There is no indication of a right to abortion, even by

implication. This was done to avoid debate over abortion, which could have threatened the acceptance of the conventions.

Further several regional Conventions on Human Rights also protect the life of unborn child. The American Convention on Human Rights in Article 4(4) also guarantees "every person has a right to have his life respected. This shall be protected by law and in general from the moment of conception. No one shall be deprived of his life. The Cairo declaration of Human Right in Islam provides that lie is a God given gift and the right to life is guaranteed to every human being. It is the duty of individuals, societies and states to protect this right form any violation and it is prohibited to taken away life except for a Shari'ah prescribed reason. However, the problem of enforcement of these conventions has hampered the answering of the issue.

Like International Conventions, very few countries explicitly recognize the right of fetus. Article 40(3) of the Irish constitution recognizes the right life of the unborn it was added by vide amendment to the constitution in 1982. It says that 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 for as practicable by its laws to defend and vindicate that right. The Constitution of Ireland is the sole example where any Constitution has expressly recognized the right to life of a fetus. In USA, fetus is a "person" within the languages and meaning of the "due process cleanse" of the Fourteenth Amendment to the Unites States Constitution. Like Indian Constitution (Article 21 right to life), there is however, no explicit recognition. The Canadian law recognizes legal personality of an unborn child in the lustrous case of *Mont Real Tramways Com Vs Heveille (1890),* a claim was made by female infant against the tramway Company for the deformity caused to her while in her mother's womb due to defendant's negligence. The Court awarded damages. In the USA similar claims have been allowed. A tortuous act may affect the unborn. Assuming that an unborn is a legal person, claims may

be brought against a tortfeasors at three levels. Want of prenatal care, wrongful life where he is born with deformities or been with mental or physical ill health; and wrongful death where the fetus itself dies as a result of the tort committed on it. Adverse effects of environmental pollution (like lead, mercury, uranium etc.) on an unborn child have been well recorded. These include spontaneous abortion, still birth and convulsions to name just a few. An unborn child has a right to birth which violate without justification would lead to the premature extinction of its life and to the prosecution of the parents under the concerned Penal laws. The right to grow and develop with health and in unpolluted environment is also available to an unborn child and if this right violated resulting in the child being born with deformities, the child has a right under law of tort to sue the person or authority responsible for the deformities.

It is doubtful whether compensation on wrongful death would provide absolute protection to the infants. The quantum of damages may vary on whether there is an injury to the parent or there is a loss of life of the unborn. Whatever be the ground for award of damages, it will necessarily have an impact in favor of the protection of the unborn. Civil sanctions may keep the people more careful while they deal with expectant mothers. Both wrongful life and wrongful death claims may promote the interest of the unborn child .The defective child is burden to the parents as well as the community. There is thus a general public interest favoring a state intervention by fixing the liability on the wrongdoers as we see in England under the Congenial Disabilities (Civil Liability) Act, 1976.

Sometimes health interests of expectant mother and fetus may come in conflict. As it is, the world population is divided among prolife and prochoice or anti prolife. It would be useful to briefly know the stance of these groups as any legislative exercise in relation to abortions would depend upon balancing the rival demands of these ideological ethical and religions groups. The law requires a balance between the interests of the woman, the spouse and her

family the unborn and the state. The pro-life group commonly used to oppose abortion and support fetal rights. The term describes the political and ethical view, which maintains that fetuses and embryos are human beings, and therefore have a right to live. Contrary to this, pro-choice group accept that having a child is a personal choice affecting a woman's body, personal health and future. In fact, pro-choice group has its justification in terms of individual liberty reproductive freedom and reproductive rights. The individual liberty has been accepted as guiding political norm in 20th century in the wake of spread of democracy.

So far as Indian scene is concerned in our country, the pre-independence legislation relating to abortion is contained in the Indian Penal Code. The law made abortion punishable for both the expectant mother and abortionist. It permitted only abortion performed in good faith to avert a serious, medically indicated threat to life of the pregnant woman. The restricted nature of the law had resulted in the incidents of a large number of illegal abortions annually in India and thus affecting the rights of unborn child to survive. It was estimated that before the enactment of MTPA, 1971 as many as five millions abortions were carried out in India every year at the hands of inexperienced and unqualified persons such as quacks and paramedical personnel like nurses, midwives etc through a variety of crude and unhygienic methods with all risks of morbidity and mortality.

In 1971 a liberal law on abortion, the Medical Termination of Pregnancy Act, was enacted according to which an abortion performed by registered medical practitioner on health, eugenic or life ground is legal. A woman can procure abortion where pregnancy is the result of some sexual offence or contraceptive failure or it is likely to pose a threat to her mental or physical health. This law has been passed to provide better health services for women to replace the hidden illegal abortions by persons having sufficient experience in gynecology. What is to be noted here is that the Medical

Termination of Pregnancy Act, 1971 does not recognize the right of the mother to abort, this right to decide on termination of pregnancy to vests with a registered medical practioners. In broader sense abortion is still a crime in India and is not legally available on demands. It may be noted that nowhere in the existing framework of legislations of abortion in India, has a right to abortion only upon the fulfillment of the specified and limited conditions under the MPTA, 1971. These grounds are:

i) Health ground: When there is a danger to the life or risk to physical or mental health of the woman.

ii) Humanitarian ground: When pregnancy is caused as a result of a sex crime or intercourse with a lunatic woman etc. and

iii) On eugenic ground: When there is substantial risk that the child if born, would suffer from deformities and disease.

Thus the right to birth is conferred on the unborn child who can be restricted in the interest of the health of the mother or the child itself. The Medical termination of pregnancy ensure that in any circumstances only a duly authorized medical practioners can terminate the pregnancy where the pregnancy does not exceed 12 weeks and hy two medical practioners in case the pregnancy exceed 12 weeks but does not exceed 20 weeks:

In India, termination of pregnancy beyond 20 weeks is not possible except when the case comes under section 5 of the MTPA, 1971 that is to serve the life of the expectant mother on emergency. Clearly, India fixes viability of fetus at 20 weeks. Considering that in the UK and USA it is 24-28 weeks, the cap of 20 weeks is a hindrance or a constriction on the liberty of the expectant mother to terminate the pregnancy. In Western world, the expectant mother can abort even at 24-28 weeks of gestation but a woman in India is legally prevented to do the same. An Indian mother, once she has crossed 20 weeks gestation must compulsorily continue with the pregnancy till delivery unless some emergency causes threat to her own life.

The rights which provided and the restriction which are imposed under the MTPA shows that the very purpose of the state is to protect a living woman from dangers which may arise during an abortion process. It is the protection to the pregnant woman that protects the unborn child. It is to be mentioned that the MTPA, has not been enacted to legalize abortions. Instead the Act aims at termination of pregnancy in the interest of the woman or to be unborn child.

The questions as to when does life begin and what is the nature of obligation of the state to protect the potential human life were not discussed or debated at all in the Constituent Assembly at the time of enacting Medical Termination of Pregnancy Act, 1971. As the life begins at or near conception and the obligation of the state to protect such life begins from the moment of conception under Article 21, the state cannot permit the deprivation or destruction of such life without the authority of law and without following just, fair and reasonable procedure under such law. Advances in medical science have proved beyond doubt that the human embryo or fetus is biologically separate from its mother. From the moment of conception, a new individual comes into existence, far from being part of the mother; the unborn child is infecting foreign tissue to the mother. Thus fetus is a separate and distinct legal existing in the womb of the pregnant mother and its destruction without following the provisions of Article 21 under a law like MTPA, 1971 would tend to make such law constitutional, invalid, illegal and null and void. The medical termination of pregnancy Act, 1971 provides the substantive aspect for the deprivation of life which exists in fetus hut it fails to provide procedural aspect required under Article 21 for such deprivation of life. Further the state cannot discriminate against persons who are fetus by offering them less or no protection than other persons. In doing so, the equality clause also be said to have been violated. In order to save MTPA, 1971 from being constitutional what is needed is an amendment of Article 21.

Although MTPA, 1971 has legalized abortion in India, but the advancement of modern techniques of ultrasound and in utero sex testing, which one designed to make pregnancy safer are being misused leading to abortion in case of female fetus. The MTPA, 1971 does not deal with sex selection. A prospective mother who does not want to bear a child of particular sex cannot be equated with a mother who wants to terminate the pregnancy not because of the sex of the child but because of other circumstances laid under the MTPA, to treat her anguish as injury to mental health is to encourage sex selection which is not permissible.

Before the liberalization of abortion law in the United Kingdom, the protection of the unborn child created a lot of confusion as the degree of protection varied from period to period. In early English law, abortion came to be regarded as a misdemeanor only and not a criminal offence punishable under the law. As the law codified abortion was included among the punishable offence. In mid-thirteen Century, *Henry de Bracton* for the first time placed abortion under legal offences punishable under civil law provided the fetus had already been animated but the abortion seekers did not fixed difficult to escape punishment. However later commentator, Coke and Blackstone followed the view and opened that after quickening abortion was man-slaughter though not murder.

In 1803, the miscarriage of woman Act was introduced by which abortion was made statutory crime in England. The statute made abortion of woman quick with child a capital crime but provided lesser punishment for the felony of abortion before quickening. The quickening distinction was finally removed in 1937. It did not reappear even in the Offences Against the Person Act, 1861; which was a basic anti-abortion law till abortion was legalized in 1967. The Offences Against Person Act, 1861, made procuring or attempting to procure abortion a felony. The Act of 1861 has removed any distinction as to the fetal age. In 1929, the Infant Life (Preservation) Act was passed to protect

the interest of the fetus and which created the offence of child destruction and provided a defence of abortion to save the life of the mother in good faith.

In 1938, the famous Bourne case brought public opinion in open support of abortion law reforms in England that led to the passing of Abortion Act, 1967 which substantially liberalized the law of abortion. The Abortion Act, 1967 modified the strict provision of the law of abortion contained in sections 58 and 59 of the offences against the persons Act, 1861 that in fact was doing more harm than good. The women, who had been raped, deserted by their husbands, and over burdened mother living in poverty with large families failed to get a medical abortion. As a result, most of the women would go to back street abortionist's wilding a knitting needle, syringe or stick leading to a great risk to their life. As a result a strong opinion grew that a woman has a right to control her own fertility and that the abortion should be legalized. On the other hand a powerful religions lobby basing itself upon the sanctity of life was opposed to any move for change in law and as a compromise measure the abortion Act, 1967 was passed.

Thus, the Abortion Act, 1967 has liberalized the law of abortion and new a pregnancy may lawfully be terminated by a registered medical practitioner on health and eugenic grounds formed in good faith that the continuance of the pregnant would involve risk to the lie of the pregnant woman or of injury to the physical or mental health of the pregnant women or that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Under the abortion Act, 1967, the pregnant woman is given the right to choose whether or not to proceed with the abortion process provided, she satisfies the medical requirements. Husband has no say with regard to the termination of pregnancy. The approach of the judiciary is also in favor of providing necessary freedom to the woman regarding termination of pregnancy:

It may be submitted that the spousal consent could in certain circumstances serve a very useful purpose. As D.C. Janasuriya, a Sri Lankan writer and Attorney at law states in context of spousal consent said that the intervention of the spouse, who after all in most cases is the person who is best familiar with wife's condition, problems and aspirations could be a very useful input in the decision – making process as regards her own decision as well as that of the two doctors who have to give the green light for the termination to be proceeded with. The presence of the husband could add a significant dimension to the issues which have to be taken cognizance of in arriving at a final decision.

In most circumstances the unborn child is much more likely to be harmed not by a third party but by his own mother. The statutory creation of a maternal offence such as behaving with reckless disregard for the unborn child's development would be extremely problematic. It is in the earliest stages of pregnancy that fetal abuse and neglect are likely to cause the most serious damage and it would be difficult to prove the mother's intention to harm the fetus at such stage of her pregnancy but is submitted that the imposition of a supervision order on the mother, would involve a gross invasion of her privacy.

To achieve such purpose to some extent cash benefit payable on successful completion of a scheme of ante-natal care stands a greater chance of success. In England a well established rule of law is that an unborn child shall be deemed to be born whenever its interests require it. Defective children are burdens not only for parents but also for the society. After the famous Thalidomide case, where children were born deformed of mothers consuming medicine, the Congenital Disabilities (Civil Liabilities) Act, 1976 was passed. The policy behind the Act is that a child should have a right of action for prenatally inflicted injuries if as a result it was born disabled.

Whenever it is foreseeable that negligence may result in a wrongful life, it is desirable to find the defendant liable for damages. In unenforceable

instances, there is no meaning for leaving the wrongful child unpaid for it suffers not of its own wrong. In such instances, it is better to have wide insurance coverage. A Civil sanction may keep the people more careful while they deal with expectant mothers.

Under the provisions of the Congenital Disabilities (Civil Liability) Act, 1976, a duty of care is owed to an unborn child by his or her mother although this duty of care is naturally owed to an unborn child who is independent of the statute. Thus, it is clear that the law protects the child before birth in the form of an action for damages brought on his or her behalf in respect of disabilities caused during the mother's pregnancy by some one's negligence. Whatever be the ground for award of damages, it will necessarily have an impact in favor of the protection of the unborn child.

In July 1982, the Warnock Committee was established to consider and recommend recent and potential developments in medicine and science related to human fertilization and embryology. Nevertheless, they agree without explanation that the human embryo was entitled to respect than other animal and concluded that the status of the embryo is a matter of fundamental principle which should be enshrined in legislation and the embryo of the human species should be afforded some protection in law. The Committee of Enquiry into Human Fertilization and Embryology, popularly known as Warnock Committee received representations from the public, deliberated the issues and reported in 1984. Finally, the Human Fertilization and Embryology has been enacted in the year 1990 which is a milestone in biomedical regulation. The Human Fertilization and Embryology Act, 1990, amended the short comings of the abortion Act of 1967, besides it covers several areas like licensing of human fertility treatment, the storage of human embryos and also research on human embryos. It may be noted that in recent years, advances in the technology of medical ultrasound have made available to distinguish between the early embryo and the more developed fetus of 10 week's gestational

development. Whilst the embryo is merely a human organism, the measure of brain development, sustained by fetus of at least 10 weeks gestation justifies it being accorded the special status of human being. Further the Act of 1990 also lowered the abortion limit from 28 weeks to 24 weeks.

The law of abortion in America in all but few states until mid nineteenth century was the pre-existing English common law. Abortion not being a federal subject under the United States Constitution, the states have enacted their own laws. Gradually in the middle and late nineteenth Century the quickening distinction (i.e. woman with child and woman quick with child) disappeared from the statutory law of most of the states and the degree of offence and the penalties the increased. By the end of 1950's a large majority of the states banned abortions, unless done to save or preserve the life of the mother. But Alabama and the district of Colombia permitted abortions to preserve the health of the pregnant mother.

The act of procuring abortion at every period of gestation except for preserving the life of either mother or child was condemned as an offence. In 19th Century in United States of America many legislation come into force providing for the protection of the fetus from the moment of conception through the entire period gestation. A gestational time-limit for therapeutic abortion is prescribed in a certain states. On the other hand in a number of states, the time limit does not apply where the mother's life is in danger or where the foetus is dead. But neither the statutes nor the case law have provided exact definition of such expressions as to preserve the life and health.

To combat the backstreet abortionist and the dangers of any form of surgery at the time of abortion, American Law Institute in 1959 as a part of its Model Penal Code developed a statute that would permit abortion by a physician where pregnancy caused danger to the physical or mental health of the woman where the pregnancy was caused by rape or incest or where there is probability that child will be mentally or physically deformed.

Accordingly many states passed the legislation on the lines proposed by the ALI. The issue of abortion, therefore, has become a subject of public debate and courts intervention become necessary. Some of the cases decided by the United States Supreme Court have assumed great constitutional importance.

The Supreme Court has favored the liberalization of abortion laws by invalidating restrictive state legislation. In 1973, the two Unites States Supreme Court decisions in Roe and Doe cases are significant. The two cases were resisted by the respective defendants on the ground that the unborn child is a person within the meaning of the fourteenth amendment of the United States Constitution, and therefore, he cannot be deprived of his life without due process of law. Secondly, the state has an interest in the health protection and existence of a potential of independent human existence, justifying the state abortion laws. It was also concluded that the right to privacy as claimed by the plaintiff is not an absolute right under the constitution.

The Court held that states not categorically proscribed abortions by making their performance a crime, and that states prescribing elaborate procedural guidelines. The constitutional basis for the decisions rested upon the conclusion that the Fourteenth Amendment right of personal privacy embraced a woman's decisions whether to carry a pregnancy to term.

In relation to the right to abortion, the court found that the state has two legitimate and important interests which are separate and distinct. One is to preserve and protect the health of the pregnant woman. The other is to protect the potential human life embodies in the fetus. Despite these interests being legitimate and important the state is nevertheless prohibited from regulating the fundamental right to abortion until the time when these interests becoming compelling. The Court determined that these interests grow as the pregnancy develops and at different points in time during the determination of when each interest becomes compelling. The determination of when each interest becomes compelling was based upon the medical technology available at the time of *the*

Roe decision. The Court divided the term of a woman's pregnancy into three segments, now commonly known as the "*trimester analysis*".

According to which the freedom of the woman may be absolute in the first trimester of pregnancy that is twelve weeks following conception. After this stage, the state may regulate, even proscribe abortion in the interest of the preservation of the life and health of the mother. The court relied on the fact that until the first trimester, abortion had a lower mortality rate than child birth and later abortion becomes more hazardous. The state's interest in potential life becomes compelling at the point when the fetus reaches viability, approximately at the end of the second trimester. This is when the fetus has the capability of surviving outside the woman's womb. At such time, the state – can even prohibit the abortion except when it is necessary to protect the life or health of the pregnant woman.

Thus the two medically determined times, the time when the hazards of abortion surpassed those of child birth and the time of fetal viability appears to form the structural foundations of the trimester framework propounded by the Court.

Later in 1989, the Supreme Court modified its stand taken in *Roe* in *Webster* Vs *Reproductive Health Services*. In this case a Missouri statute provided that the life of each human being at conception and an unborn child has protectable interest in life, health and wellbeing. This statute had put stringent conditions for obtaining abortion. The Supreme Court held that it was constitutional for a state to declare an interest in human life at all stages of pregnancy. The *Roe* decision has been controversial since the day it was handed down. In 1992, the U.S Supreme Court in deciding the *Casey case* which is clearly the product of another era, reaffirmed the basic constitutional right to abortion while simultaneously allowing some new restrictions. In the opinion of the Court the state laws, which contained on outright ban on abortion would be unconstitutional. Nevertheless the court rejected the

trimester framework set forth in *Roe* and the strict scrutiny standard of judicial review of abortion restriction and held that states have legitimate interest in protecting the health of the woman and the life of the unborn child from the outset of the pregnancy. It had adopted a new analysis '*Undue burden*'. The Court will now need to ask the questions whether a state abortion restriction has the effect of imposing an undue burden on a woman's right to obtain an abortion. "*Undue burden*" was a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.

The protection of right to life under the United States Constitution is very wide unlike the Indian Constitution because it does not use the word 'person'. Thus, in the wake of the recent judgments of the US Supreme Court which deal with legal protection of human life before birth led to the enactment of statutory restriction on the right to abortion? The Legislation beings to pass feticide statutes which protect the interests of unborn child.

In 2003, Partial Birth Abortion Ban Act was passed to ban partial birth abortion that is an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery and the person performing such procedure knows will kill the unborn child and does kill the unborn child. It's a gruesome and in humane procedure which is never medically necessary to preserve the health of a woman. President Bush called partial birth abortion an "abhorrent procedure that offends human dignity." In other words, it can be said that the Act of 2003 has been passed to protect the unborn child from destruction.

Another development in the protection of unborn child is the Unborn Victims of Voilance Act of 2004 which recognizes a "*child in utero*" as a legal victim, if he or she is injured or killed during the commission of any of over 60 listed federal crimes of violence. The "*child in Utero*" is defined as a member of the species Homo sapiens, at any stage of development, which is carried in

the womb. First time the unborn child is recognized in federal law as the victim of a crime of violence. The important feature of the Act of 2004 is that the punishment for injuring or killing an unborn child would be the same as the punishment under existing federal laws if the same conduct had resulted in the same degree of harm to the mother. Another Act, with regard to unborn child is Unborn Child Pain Awareness Act, 2005 which amends the Public Health Service Act. Thus the fetus enjoys a greater degree of protection under USA. It does not matter whether a fetus is a legal person or not what is required is substantial protection of its reasonable and justifiable interests. The state can do it without conferring the unborn a legal personality in whichever areas it is necessary. The unborn, though not a legal person, has its own interests. Its interests are taken over by the state and protect from destruction as seen in abortion statutes.

In India and England, Parliament balancing is based on the health of the mother as well as the child on birth. The woman acquires the right on showing that continued pregnancy may affect the life or health of her, or there is substantial risk of mental or physical abnormalities to the child on birth. Thus the balancing is more in favor of the potentiality of life that is, in favor of the state interest, as seen in *Webster*.

Indiscriminate medical termination of pregnancy, especially of female fetus and lack of proper nutrition for pregnant woman which causes physical and mental retardation in children were blatant violation of the human rights of unborn child.

Over the last two decades, the trend has been to move towards a more integrated multidimensional" modeled in order to better understand and address the complexity of crime against women, which has psychological, interpersonal, social, cultural and legal aspects. An analysis of various forms of discrimination especially female fetus reflects that this phenomenon is so complex that a single theory does not and cannot explain all sorts of

discrimination against woman. There are numerous factors such as socio-cultural, structural, economic, pathological and psychological, responsible for it. Changing social norms and values shape the evolution and typology of discrimination against female child. Following adoption of economic liberalization Policies by India in 1991, several multinational companies have entered the domestic ultrasound market. Some have even began to manufacture the equipment in India. Increased competition has led to the appearance of lower priced portable models, flexible credit and dependable service for the customer.

In a large and complex country like India, the dimensions and problems of female feticide do not yield easy solutions. Setting standard is a first step, and while it is an important and necessary one, it is not enough. There must be effective implementation at the national, regional and international levels. The rule of law and recourse to legal remedies for violation of rights and entitlements most be observed.

It is said that the law without the public opinion is nothing but a bundle of papers. The gap between the men and women cannot be bridged by just enacting laws without any public support and opinion as social engineering laws are different from penal laws which are just related the injuries and punishment and deterrent in nature but social engineering laws enacted to uplift the norms of the society are progressive in nature and therefore it should be backed by the will of the people for whom it was enacted. It is also clear that centuries old practices cannot be eliminated in one or two days, it lakes much time and when laws are enacted to bring radical change in society and one not backed by the will of the people or laws are ahead of public opinion then it has to face great resistance and opposition from the conservative thinking of the society and they are like dead law, which have no effect on society.

In India most of the laws were not effective as they were ahead of public opinion and willingness of the people to change the society and give the

women the status of equality. So in order to give women their respective position in the society strong public opinion should be created through, education, seminars and by taking the help of various other instruments of the society such as media etc. The people in the society should get educated and change their centuries old thinking and willingly support the implementation of the laws enacted for the emancipation of women. It must be asserted that social, reforms, social thinking, behavior and law would be effective only if they are backed by major section of the society.

The history of legal abortion goes back to the year 1971, when the medical termination of pregnancy Act was passed to legalized abortions. But in reality abortion is now increasingly resorted to for gender selective feticide. The doctor is required to base his opinion on a variety of complex, medical, humanitarian, socio-economic and moral considerations. With an increase in abortion on demand, the prospect of commercialization of abortion by medical practitioner has increased. It was meant for cases where pregnancy carries the risk to the fetus or the mother in cases where a child may be born with abnormalities. But soon the problem began with the secret misuse of this law to determine the sex of the unborn child and terminate it if found to be female fetus.

With the advancement of medical technology, sophisticated techniques can now be used or rather misused to get rid of her before birth. Such advances in medical science have resulted in sex-determination and sex pre-selection techniques such as sonography, fetoscopy, chromic villi biopsy (CVB) and the most popular amniocentesis and ultrasound. The commercial intent behind the growing use of these techniques becomes apparent from the way these facilities come to be publicized through advertisements in newspapers in trains, buses on wells and pamphlets. Even training pregnancy for fetal sex testing becomes promising base! And everywhere the idea was to prevent the birth of an unwanted girl child.

Apart from passing a serious threat to the demographic balance, the growing resort to pre-natal diagnostic technologies for sex selection exposes women to additional health risks. The increased risks of abortion or congenital malformation in the fetus apart, the health of the women is also known to have been adversely affected in several cases, either directly because of the use of the methods or because of their being used in certain conditions or due to the action taken in response to the information made available through these health risks for late abortion.

The inherent risks lies in the fact that amniocentesis is not possible before 15-16 weeks of pregnancy and an ultrasound, which happens to be the most widely misused technique at present, can help diagnose the sex of child only after 26-28 weeks of pregnancy.

The evil of gender discrimination with the accelaration pace of modernization of medical technology, the chances of abuse of liberal abortion rule by members of medical profession are increasing. The lists are so rampant that no state is far from these sex-determination technologies. These tests have had serious implications, which is extent from the provisional results of census of 2011 that are released. The scene of sex ratio in India has been worsening in the recent decades. The 2001 census has been more gender sensitive than before. The social cultural bias against the girl child might have been possibly aggravated by recent medical support in terms of sex-determination test. The most recent data the census 2011 reaffirms a fact so disturbing that it could cast a shadow on the positive developments. The data show that the sex ratio for children below 6 years has dropped from 927 to a dismal 914 for every 1000 males. Registrar of General of India, C Chandramouli said "this is a matter of Grave Concern." The gender imbalance continues despite a ban on sex determination lists based on ultrasound scan, and sex-selective abortion. The government policies aimed at arresting the declining child sex-ratio needed a complete review and whatever measures that have been taken over the last 40

years have had not had any impact on the child sex-ratio. The reasons one easy to define '*prosperity ensured better infrastructure more machines and more doctors to perform the tests*".

The sharpest decline in the child-sex ratio after independence was observed during 1991-2001.Masked by the national ratio, for grimmer ratios prevail in selected parts of India in relatively prosperous states such as Punjab and Haryana. In Haryana the child sex ratio has gone down to 820.There is dearth of studies which explored the relationship between woman's autonomy and sex preference or her marital instability and sex preference or any influence of her own childhood experience with her reproductive behavior and its linkages with the ultimate process of active and passive elimination of females.

Perhaps, the greatest irony of modern age is the fact that with the increase in literacy there has been a steady deterioration of moral values in almost every section of the society.

The selective elimination of women even before birth is a hreach of their right to equality and existence .Most importantly that sex selection is also a breach of human rights as far as women are concerned .Law does not confer a right on unborn person to be born. However, the increasing incidence of female feticide seen to an encroachment on right of a child and a worst form of discrimination. The practice hurt not only social morality but is counterproductive. If allowed to continue in unchecked it may destablished the natural proportion of male and female population.

Aborting the fetus only on the ground of sex is not allowed under any law. Article 21 says that no person shall be denied his/her right to life and personal liberty except according to procedure established by law. Then why this unnecessary bias in favor of a male child over a female? Nobody ought to have the right to kill or harm an unborn child for the reason that she is female.

This right is available to all persons regardless of the status that they occupy in society.

Considering the problem of female feticide, the Government of India, enacted 'the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 1994. The PNDT Act, 1994 has two aspects viz., regulatory and preventive. It seeks to regulate the use of pre-natal diagnostic techniques for legal and medical purposes and prevent misuse of illegal purposes for the sex determination.

These are – chromosomal abnormalities, genetic metabolic diseases, haemoglobinopathics, sex linked genetic diseases, congenital abnormalities and any other abnormalities or diseases as may be specified by the central supervisory board. The Act further provides certain conditions which must be fulfilled before the medical practitioner can conduct any such tests even for the above mentioned specified purposes are namely:

i) The age of the pregnant woman's is above thirty five years.
ii) The pregnant woman has undergone two or more spontaneous abortions or fetal loss;
iii) The pregnant woman has been exposed to potentially teratogenic agents such as drugs, radiation, inflation or chemicals;
iv) The women has a family history of mental retardation or physical deformities such as spasticity or any other genetic diseases in family of the pregnant women;
v) Any other condition as may be specified by the central supervisory board.

The intent and the objective of the Act is undoubtedly being prevention of the sex-selection. Despite this, it has been interpreted by the ultrasonologist, abortionists, doctors and more shocking the government a like to exclude pre-conceptual sex selection. The Act, of 1994 strictly prohibits the conducting of

pre-natal diagnostic techniques except for detection of certain abnormalities in the fetus. This has conveniently allowed the practitioners using modern technology such as *Ericssion Techniques* and the *Pre-implementional Genetic Diagnosis* to escape the legislative net. Using these new techniques, sex-selection of the fetus can now take place prenatally even before conception.

Despite legislation, abortion of female fetuses continues. It is a matter of shame that PNDT Act has not been implemented in the sprit in which it was enacted in 1994. Recognizing the misuse of prenatal diagnostic tests leading to female feticide which rapidly declining sex-ratios turning into a demographic nightmare of frightening proportions, the Supreme Court ordered strict enforcement of the Act and giving direction to the Government of India and state Governments implement the provisions of PNDT Act, 1994. Accordingly, the parliament passed the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act 2002. The Act has been renamed in the present form so as to give a wider scope and greater effect in the protection of female folk.

It laid emphasis on the strict enforcement of the PNDT Act but the legislations alone could not solve the problem. At the heart of the problem is the deep-rooted pre-judices and patriarchal at social framework and a value system based on son preference. Although various affirmative steps being taken by the civil society to curb the nefarious tendencies that have led to the prevalence of problems such as female feticide but the problem still persists.

Reforms are needed in substantive law and also in the procedural law to achieve the desired objective. The recent amendments in the MTP, Act and rules have enhanced access to safe abortion services. A strict interpretation of the law may only strengthen the gender bias against women today. There is, however, on urgent need to check the sex-selective abortions. For that particular purpose, the Act needs to be strictly construed.

The questions one generally raised whether the increase in female fetus is due to the failure on the part of law or due to the fallacy of judiciary or police authorities. Time and again, various eminent jurists, psychiatrists, law enforcement officers and social activists have expressed their valuable connotations on the nightmarish subject, but the green eyed monster is still surviving.

Whatever may be the constraints of the present legal system and the broader social system within which it operates, a comprehensive and improved nationwide law on sex-determination is both essential and possible. The law is by no means an end itself, nor will it be sufficient to tackle the misuse of new reproductive technologies effectively. Although monitoring thousands of sex-determination clinics spread all over India is very challenging, yet indicating few culprits might send the right signals to the medical community, which we are confident would be welling follow the law.

To eradicate sex-selective abortion, we must convince the world that destroying female fetus is horribly wrong. We need something akin to the abolitionist movement; a moral campaign waged globally, with the victories declared one conscience at a time.

Though the need for state intervention through appropriate legislation is admitted here, we does not suggest that law or even policy support can by themselves provide any final relief to women systematically expressed to the exploitative mechanisms of patriarchics structures, which themselves decline both the nature and meaning of technologies that become a way of life in these societies. Nor do we suggest that the meaning of law or policy can be written irrespective of the nature of state power and its relationship to dominant structures of power. Supportive legislation, nevertheless, does strengthen the hands of those who struggle against these forces, much as its absence adds to the power of the dominant interests.

The challenge, so to say, lies not simply in getting appropriate laws prompted. It lies in demolishing these mechanisms and altering the structures, which provide then space for growth and expansion so as to almost take charge of the lives of unborn child. The challenge lies in demolishing the subtle mechanism of the victimizing discourse of exploitation by systematically turning law, policy and technology in the service of power structures.

All legal systems are concerned with the regulation and organization of relations between human beings by making laws. Such a legal system provides with basic unit before the legal relationship is devised for organizing the social facts. The basic unit is the legal person. The emphasis here is on the duties. In the case of an unborn, it is difficult to control it by imposing duties. For the protection of the unborn, it is desirable to control the behaviors of others.

What is required as far as unborn is concerned is protection rather than personality. Conferring legal personality would only create problems to the mother, father, third persons and state. In such a situation, the questions relating to the liability of the unborn arise. For the purpose of protection law has to be introduced by the state. The law has to take care of the liberty of the mother as well as the public interest.

We need a law to recognize the legal status of an unborn child and recognize pre-natal existence. Acton should be allowed in case of injuries suffered while in *Utero*. An insurance scheme at the national level contributed by drugs manufacturers, expectant mothers, medical professionals and the Government for the benefit of defective children is necessary.

Changing people's attitude and mentality towards protection of potential human life will take a long time, at least a generation, many believe, and perhaps longer. Nevertheless, raising awareness of the issue of protection of the rights of unborn child in the development of a society and in the attainment of peace are just as important as taking legal steps to protect human rights of all.

Children at the risk of abortion are not being deprived of the protection of the law as the right to life is inalienable to engage in or condone the arbitrary taking of a human life.

To ensure that opportunities are provided for all the children to develop physically, mentally, sexually, spiritually and morally, they have been bestowed with certain basic rights in the international and national laws. The child needs special safeguards and care including its appropriate legal protection before as well as after birth. National and International efforts with will and commitment shall bring hope for such social and burning issue. Medical fraternity as well as society can add sufficient to provide right to the unborn child.

SUGGESTIONS

There is only one problem and it is human development in its totality, once this is achieved in any unit- child or nation-everything else follows spontaneously and harmoniously.

Humanity can look its future only through a child. It is not possible to visualize a special or scientific explanation. It is the biggest reality which every eye that can see must observe and every mind that can perceive must realize. So the first issue that deserves the primary attention of the whole humanity is to ponder that humanity is not acquired but is inherent in all members of the human race, including the unborn from the moment of conception. The job however, is not an easy one. It is an uphill task that requires a joint endeavor of community and criminal justice functionaries. Several preventive measures need to be taken and policies need to be adopted dealing with family, society, media, police, judiciary and other relevant agencies.

On the basis of above discussion, it is clear that for the purpose of protection of unborn, the law has to be introduced by the state. In its present from it is not sufficient to encompass all challenges faced by the unborn. Hence

it becomes necessary to submit some suggestions to make existing laws more protective and effective as for as unborn is concerned.

- The right to conception, the right to abortion and right to birth are very much conflicting rights and become controversial subject matter in law and procedure of the time. Any rigid Statute to regulate these rights will pose critical problems and challenges both to the well being of a woman and unborn child. Abortion laws have to be amended in such a way so that the law has to take care of the liberty of the mother as well as the public interest in the potential human being.
- Taking viability of a legal standard, the necessary protection should be provided to the unborn child. Viability is the point at which the fetus is potentially able to live outside the mother's womb, albeit with artificial aid.
- Any act which directly or indirectly affects an unborn resulting in a defective life may be made liable for compensation provided a forseeability could be established. In this respect a law in the line of U.K's Congenital Disabilities (Civil Liability) Act, 1976, is a welcomining step.
- It would be better to have wide insurance schemes to cover claims based on lack of prenatal care, wrongful life and wrongful death. Insurance scheme also prevent the parents from thinking of destroying the foetus itself instead of incurring a likely liability.
- Law should keep pace with modern medical technology. No doubt, it is only through the development of medical science an unborn child is to get protection and safety. It is high time that the law makers and policy makers accepted this reality.
- With regard to International law, the Preamble to the U N Convention on the Rights of Child,1989 mentions the legal protection of the child

both "both as well as after birth", but in none of its fifty four Articles there is any reference to the unborn child. State parties must at all time take positive steps to effectively protect the right to life, a legal duty that is equally applicable to child before birth as to the child after birth.

- Female feticide is the product of perverse social norms and perverse social thinking. Hence there is a need to bring about a change in the mindsets of people and to spread anti-female feticide message that if there were no women, there would be no men. The era of yearning after a son to carry the family name is over. At present day and age, men and women are equal.
- The evil of gender discrimination with the accelerated pace of modernization of medical technology, the chances of abuse of liberal abortion rule by members of medical profession are increasing. Soon the problem began with the secret misuse of this law to determine the sex of the unborn child and terminate if found to be female fetus. To meet such type of abuse MTP should only be permitted only after the approval of the PNDT Authority/Committee/Gazetted female officer/Mahila Punchayat Members/NGO's implementing RCH.
- The awareness about the MTP Act as well as availabity of service of facility should be created among the women. As the services available at the district level has proved to be inadequate. They need to be strengthened and augmented to meet the demands of the contemporary society. More number of medical personnel should be trained and services should be extended to the rural area to the nearest door step.
- The unregistered and unqualified medical practitioner should be prosecuted and punished severely to avoid more number of maternal deaths.
- With regard to mother's right to destroy any fetus of her own without the consent (even of her husband) of others, it is suggested that once a woman wishes to abort the fetus then the consent of all those (at least

the husband) who are directly affected by such act of her may be considered. There are numerous cases where doctors will be anxious to ascertain the husband wish and to obtain his consent to an abortion being carried out so that the discontent may be avoided.

- Under Article 21 of the Indian Constitution the term 'life' may include '*Potential human life*' and as life begins at or near conception, the term 'person 'may be interpreted to include unborn person also. Therefore, at no stage of pregnancy, a mother can be allowed to terminate pregnancy for the mere asking unless Article 21 of the Constitution is suitably amended to provide clearly that 'Person' does not include an unborn child in the mother's womb.
- In order to save the MTPA,1971 from being unconstitutional what is needed is an amendment of Article 21 to the following effect:

  Article 21(2): ''Nothing in this Article shall prevent the parliament from making any law or shall affect the operation of any existing law depriving an unborn person of its life by termination of pregnancy by a woman if the continuance of pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health or if there is substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

  Thus the effect of clause(2) would be to save the MTPA,1971 from being unconstitutional as it would operate as an exception to Article 21(1) and thus the Constitutional validity of the MTPA,1971 would not be jeopardized in any way.
- Efforts should be made through education and measures to change the attitude of the community that carries the centuries old bias against the girl child, believing that the girl child is an expense, a waste and a burden.

At the basic level, there is a need for a change in the attitude of the people, who must understand the emerging quality of male and female counterparts in the modern open era of abounding opportunities. The agriculturally designed psychological set up giving precedence to the male progeny, who must be done at any cost even if it comes at the cost of sex selective abortions and feticide, must be eliminated with the utmost vigour. The social aspect of this issue cannot be ignored. There is a need to address the ideology of son preference in our society. It is easier to eliminate the girl child than eliminating dowry. Similarly the issue of empowering women becomes no more than a theoretical discussion as subjects for this emancipation are being systematically eliminated. This extermination is a way to prevent daughters from inheriting property. Patriarchal authority with a feudal approach towards personal and social responsibility, such as looking after old parents as the prerogative of sons and not daughters, or the so called lineage issue compound the paradoxes of this social ideology of son preference. However, Indian society has for long been feudal, but the national tragedy of the skewed sex ratio creating a demographic imbalance with far-reaching social implications, brings into focus the pertinent question- why has female feticide taken such an alarming proportion? The misuse of the technology, meant for detection of ailments, has created this catastrophe and there lies the importance of the implementation of PC PNDT Act.

For the effective implementation of the PCPNDT Act and Regulations it is of great importance that the media and law enforcement join hands together. The important area were the two can join hands and work are:

i. To see if any unregistered centers are being operated in the area;

ii. To keep watch whether qualified doctors (as provided by PCPNDT Act) are employed and actually perform the ultrasonography;

iii. Quacks and unregistered doctors performing ultrasonography must be identified, exposed and punished;

iv. Form 'F' provisioned in the PCPNDT Act must be traced and assessed and verified to random to check any violation of the provisions of the Act;

v. Training programmes regarding the provisions of the Act must be undertaken for the different stakeholders and varied sections of the society, so that the society plays a vigilant role and informs the law enforcers in case of any violation of the provisions of the3Act;

vi. The efforts for carrying the message against the sex selection-heinous crimes must be carried through more basic media, reaching out the larger sections of the masses, with emphasis on personal contacts. Wide publicity and intense public awareness must be done by means of meetings at different levels-schools, Mohall/sector, police, non-governmental organizations and other civil society organizations;

vii. Continuing monitoring and vigilance must be sustained for the clinics engaged in sex detection or determination (selection) such clinics must be identified and evidence must be gathered against them for effective action against them;

viii. Media persons must maintain close touch and assisting relations with the local health authorities with an object of achieving good results in effective implementation of the PCPNDT Act.

- The involvement of the women in the entire process is the most important, for it is woman who takes the final decision, for it is woman who shapes the attitudes and thought process of the individuals, for it is woman who ultimately carries out all the stages of the crime. The fate can be accomplished through the existing network of Aganwadi

workers, who with their wider reach and social acceptability can became effective carriers of the modern approaches to life.

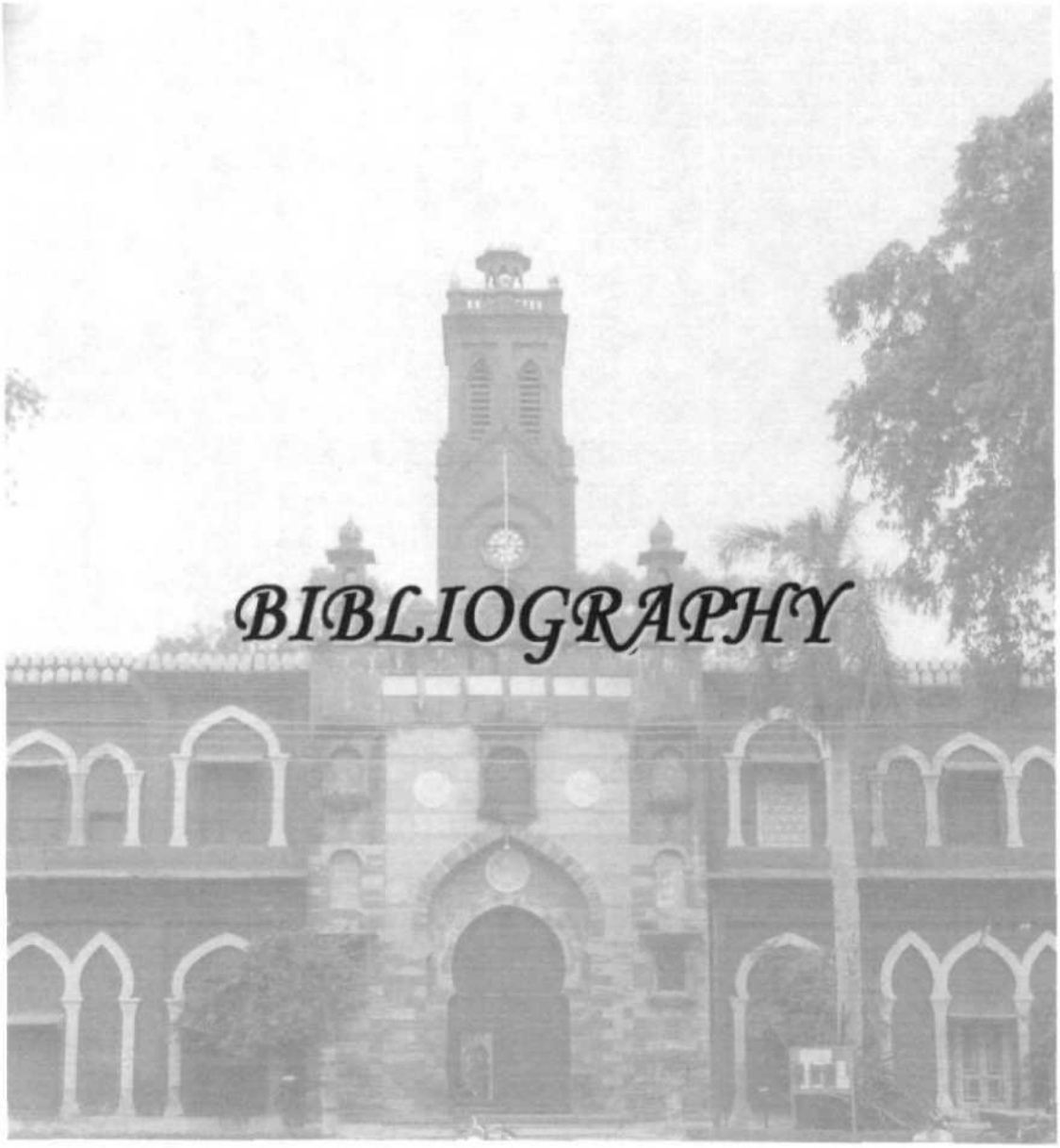
- Religious leaders are other important stakeholders and play a very influential role in society. As a part of the awareness campaign, religious and spiritual leaders have been approached to speak against sex selection, video spots on girl child and sex selection aired on national and private television networks.[132] Efforts are necessary to involve the religious leaders and to advocate with them the concern in rightful manner without offending religious feelings and assimilating modern democratic values with religious beliefs and understandings.
- Turning attention to the specific question of the PC PNDT Act, the most important feature of the Act is the most lacking part. The implementation process of the Act must be strengthened with renowned enthusiasm. The power to keep vigil on the malpractices involved must be conferred on special bodies, empowered with overall powers to inquire, inspect, seize and arrest. The conferring of such powers on the already burdened police force does not solve the problem, because of the diffused interest it has in the social order maintenance.
- The medical audit of clinics is being considered for the purpose of institutionalization to add more teeth to the PCPNDT Act to spread awareness about the provisions of laws that ban sex determination. To launch dynamic website on PNDT to solve the existing problem of improper processing of clinic records due to lack of proper monitoring mechanism in the states. Now every clinic will have a user ID and well file their report on to the web-based application which will have three levels of command- central, state and district. Though periodic inspections at the prospective centers of misuse, and better enforcement of the registration clauses should ensure as a for environment for the girl child.

- The techniques employed for sex selective abortion and feticide need to be better managed and regulated. A high powered screening of manufacture and import of instruments as potential abortion machines must be ensured to enable their better management.
- Registration of persons opting for techniques for determining fetus abnormalities must be ensured, so that such cases may be followed up for checking abortion of the fetus by them. A centrally administered registration process of such treatment as local levels for a strict and swift vigilance on the malpractices is a highly desirable measure.
- Ministry of Health and Family Welfare (MOHFW) needs to take an active role in the implementation of the PCPNDT Act 2003. It must ensure that the concerned states file cases in the court, not with the police under the PCPNDT Act. Where the states fail to comply with the directives of the Union Health Ministry within two weeks, it is imperative for MOHFW to move the case to the Supreme Court. If required the minister should transfer all cases on sex-selection and subsequent abortion of female fetus related to police investigation from the state agencies to CBI.[133]
- Finally, the failure of the PNDT Act is inextricably linked with the relative failure of some of the other social welfare legislations such as the Dowry Act. What underlines the growing inability of such progressive legislations is their wider disregard and unacceptability by the people at large. Thus, a constant effort for generating awareness among the people with a view to generating greater acceptability of such welfare efforts among the masses is the need of the hour.

Let us hope that with the incorporation of above stated suggestions in protecting the rights of the fetus to survive, on the equality with human beings generally, the State is not violating the rights of the mother.

"The test of the morality of a society is what it does for its children".

(*Dietrich Bonhoeffer (1906-1945)*)



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