



Balance Of Scales: A Mother and An Unborn

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ABSTRACT

The relationship between a mother and an unborn child is a convoluted line. Abortion has garnered an array of opinions due to its conflicting positions in socio-cultural and religious dimensions in society. Article 21: It is a multifaceted right, envisaging various other rights. Article 14 is another such essential guarantee; the dilemma thus here is a peculiar predicament in circumstances where there is a devolution of connection between the two bodies, i.e., where the mother wishes to abort the unborn and the life of the unborn itself. En ventre sa mere is treated as a legal person in India, and therefore, the unborn is provided with a few legal rights. The Medical Termination of Pregnancy Act, 1971, and Medical Termination of Pregnancy (Amendment) Act, 2002. Read along with the Medical Termination of Pregnancy Rules. Do the statutes and rules, respectively, deal with the legal termination of pregnancy? Although India may be progressive when compared to other nations on this subject matter, the legislation has faced challenges and impasses that require a decisive segregation and analysis of the rights available to both the mother and the unborn.

KEYWORDS

Abortion, Medical termination, Rights of Unborn, Reproductive freedom, Bodily autonomy

1. INTRODUCTION

The Indian Constitution guarantees to everyone certain rights that are inalienable and cannot be taken away. But the question to be enquired into is whether “everyone” could include an unborn person, someone who is yet to come into existence. An affirmation of this assertion would mean restricting a woman’s reproductive rights, making abortion unlawful. This comes with an array of associated risks that could endanger a mother’s physiological health. In India, abortion per se is unlawful; medical termination is only an exception and not a rule, a measure to ensure the mother’s well-being.

The law must evaluate the dichotomy of interests of both the foetus and the mother when determining this dilemma. This disputation and the necessity for a resolution to this have only increased in the light of changing modern morals. At one point, marriage had been recognised as a social institution, legalising sexual relations; however, this institution and its relevance are fading with time. Contemporary times have garnered women engaging in variant roles of society; parenthood and personhood have diverged in paths from being milestones in life to individual choice. In an unsettling incident on a May morning in Kochi (2024), the city witnessed the demise of a newborn hurled out from a balcony by its young mother, minutes after she had given birth to him in her bathroom.¹ The questions one must ponder over with respect to this tragedy are not on the offence alone, but whether this occurrence could have been prevented. Was the offence committed entirely by her to bear? Did our legal mechanism fail them? Would the incident have ever happened if she had been given the right to abort or had known she had an alternate option?

2. UNDERSTANDING ABORTION

Abortion refers to the process of terminating a pregnancy, resulting in the death of the embryo or fetus.² According to Black’s Law Dictionary, it is “the artificial or spontaneous termination of pregnancy before the embryo or foetus can survive on its own outside a woman’s uterus.”³ Abortion can be distinguished broadly into two kinds: spontaneous abortion and induced abortion. Unlike induced abortion, spontaneous abortion or miscarriage is an occurrence that triggers the

¹ M. P PRAVEEN, *Newborn hurled to death in Kerala: A premium residential colony in Kochi is in shock*, THE HINDU (May.03, 2024), <https://www.thehindu.com/news/national/kerala/newborn-hurled-to-death-in-kerala-a-premium-residential-colony-in-kochi-is-in-shock/article68135497.ece>

² MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/abortion#:~:text=noun-,abor%C2%B7%E2%80%8Btion%20%C9%99%2D%CB%88b%C8%AFr%2Dsh%C9%99n,weeks%20of%20estation%20compare%20miscarriage> (last visited Jun.14, 2024).

³ BLACK’S LAW DICTIONARY (2nd edn. 2007).

cessation of pregnancy, without an inducement or an external force per se.⁴ The words medical termination and abortion have indistinguishable connotations. The etymological distinction of the terms abortion and medical termination is, firstly, in its usage, and secondly, by implication of procedure. The Medical Termination of Pregnancy Act, 1971, identifies termination of pregnancy as a procedure of surgical or medical methods to end pregnancy.⁵

Medical termination of pregnancy is considered for the complete expulsion of the embryo via non-surgical methods; the same is not affected if the gestation period has crossed the nine-week mark. Risk factors for this procedure depend entirely on the accuracy of calculating gestational age.⁶ This technique is executed with prescription drugs, such as mifepristone. In *FDA v. Hippocratic Medicines*,⁷ The Supreme Court of the United States of America held the approval of Mifepristone as a drug to induce medical termination, upholding the FDA's initial approval. These non-invasive methods prevent further risks that may be present in surgical methods, particularly where the pregnancy is at an earlier stage. Surgical methods are invasive procedures involving the removal of the embryo or foetus; this could include the use of suction as a technique.⁸ This method is often preferred when the gestation period is between 13 and 24 weeks.⁹ The health system provides sufficient means to have abortions. Still, women are unable to access these resources due to heavy State regulations and common societal norms that create fear in them.

The lawfulness of abortion across the globe varies, depending on laws and policies, which are evidently inconsistent. A plenitude of cultures, religions and social dimensions has immensely influenced the notions about abortion. The abortion database has been recorded globally since the early 1960's; however, the United Nations attempts at the same have only begun by late 1980's.¹⁰ The last three decades have particularly seen a degree of liberalisation of abortion regulations, with around sixty countries reducing the stringent strains on regulatory frameworks.¹¹ Thirty-eight

⁴ Timothy F. Murphy, *The Moral Significance of Spontaneous Abortion*, 11 J. Med. Ethics 79, (1985).

⁵ *Supra* note 3.

⁶ Sophie Christin-Matire, Philippe Bouchard, Irving M. Spitz, *Medical Termination of Pregnancy*, N Engl J Med. 946 (2000).

⁷ *FDA v. Hippocratic* 602 US 367.

⁸ Traci C. Johnson, *What Are the Types of Abortion Procedures?*, WEBMD (May. 28, 2024), <https://www.webmd.com/women/abortion-procedures> (last visited 2 Sept. 2024).

⁹ *Abortion procedure- surgical*, BETTER HEALTH CHANNEL, (Apr. 14, 2023), <https://www.betterhealth.vic.gov.au/health/healthyliving/abortion-procedures-surgical>, (last visited Sept. 2, 2024).

¹⁰ Brooke Ronald Johnson Jr, Antonella Fransческа Lavelanet & Stephanie Schlitt, *Global Abortion Policies Database: a new approach to strengthening knowledge on laws, policies, and human rights standards*, BMC International Health and Human Rights, (2018) (available at <https://doi.org/10.1186/s12914-018-0174-2>) (last visited Sept. 2 2024).

¹¹ WORLD HEALTH ORGANISATION, <https://www.who.int/news-room/fact-sheets/detail/abortion> (last visited Sept. 2, 2024).

per cent of women of reproductive age are subject to restrictive abortion laws, which range from minimal to absolute restrictions subject to State liberties, grounded on social and economic reasons, to the prohibition of termination conclusively.¹² Statistics illustrate that six out of ten pregnancies end up in induced abortion globally, of which forty-five per cent are unsafe and illegal.¹³ An illegal or unsafe abortion is one carried out either by a person lacking the necessary skills or in a setting that is insufficient in medical standards, or both; maternal death and damage from invasive techniques cause tremendous impairment to women. It is inferred that around ninety-seven per cent of unsafe abortions occur in low and middle-income countries, and eleven percentage of such procedures result in maternal deaths.¹⁴ In India, one would find young women of the age slab between fifteen and nineteen being most vulnerable to the vices of illegal abortion, with societal facets such as religion, illiteracy and caste having an impact on the graph.¹⁵ The denial of the right to abortion to women creates a very dangerous trend of illegal abortions in unsafe environments. From the statistics, it is clear that the most abortions of this kind happen in the developing world, which are already struggling with many health-related indicators; thus, encouraging free will abortions via safe and secure methods would aid in ensuring that the maternal mortality rate is kept at a minimum.

Abortion has been treated as a polarising topic characterised by a range of radical opinions. In recent years, particularly in the light of *Dobbs v. Jackson Women's Health Organisation*,¹⁶ it has sparked massive lobbies of two separate ideologies, namely Pro-life and Pro-choice. While ambivalence and neutrality of thought have persisted, it brands itself with an array of social, economic, cultural, and religious dimensions, thus marking it as a volatile thread. The increasing participation of women in the workforce, catalysed by the expansion of education, coupled with the decreasing real income of families, propounded the conviction against unwanted pregnancies as a hindrance to growth. Religious sentiments, too, have had an immense influence on restrictive legislation against abortion in many countries.¹⁷ As mentioned in the introduction, the world, for

¹² *The World's Abortion Laws*, CENTER FOR REPRODUCTIVE RIGHTS, (Jun. 9, 2023) <https://reproductiverights.org/maps/worlds-abortion-laws/> (last visited Sept.2, 2024).

¹³ *Ibid.*

¹⁴ *Unsafe Abortion: Consequences, Facts & Statistics*, MSI REPRODUCTIVE CHOICES, (October 1 2022), <https://www.msichoice.org/latest/unsafe-abortion-consequences-facts-statistics/> (last visited Sept.2, 2024).

¹⁵ Ryo Yokoe, Rachel Powe, Saswati Aniyal Choudhury, Anjali Rani, Farzan Zahir and Manish Nair, *Unsafe abortion and abortion related to death among 1.8 million women in India*, *BMJ Global Health* 1 (2019).

¹⁶ *Dobbs v. Jackson Women's Health Organisation* 597 U.S. 215 (2022).

¹⁷ Jennifer Strickler & Nicholas L. Danigelis, *Changing Framework in Attitudes towards Abortion*, 17 *Sociological Forum* 187 (2002).

the most part, is stuck in a transitional period in which modern paradigms are reflected among the younger population, while traditional roots are still grappling with society.

3. AN UNBORN

An unborn is a “potential life”,¹⁸ a contingent being whose existence can only be determined by the progression of time, fettered by unpredictable variables. An unborn child connotes a child in the womb, or a child in or otherwise is in utero,¹⁹ Thus referring to any homo sapiens at whichever stage of development. The jurisprudence of the foetus has been theorised in manifold ways, encompassing an unborn child as an object to granting personhood; theorising it to the degree of legal fiction. The concept may be broached in three variations: an unborn is, firstly, on par with a legal person; secondly, non-existent or treated as an object; or thirdly, a limited legal subject. “En ventre sa mere” translates to in the womb, has been granted legal status or personhood in India, often times treated at the capacity of a minor who has not attained the age of majority.²⁰ In *M. Siddique v. Suresh Das*, the court emphasised the concept of granting rights and imposing duties through personhood and identified the recognition of legal personhood as a function of law.²¹ Validation of an unborn having a legal status and personhood has been observed to have come with the advent of technology and debates with respect to legalisations on abortion.²²

The idea of personhood has been contested at various points in time. Many have attempted to understand the idea of personhood distinct from the notion of when life begins.²³ Conversely, a baby or a minor cannot be denied personhood for reasons that they do not possess adequate calibre, often associated with a full adult, which may be similarly deficient or absent as in an unborn. Thus, it would be a biased and inequitable approach to governance and protection granted by the armour of law. The underlying pitfall of this deep rhetoric is determining whether an unborn is the law’s object. Personhood is an edifice of common law, where one proposition may not attract the same conclusion as another.²⁴ According to Salmond, a child in the mother’s womb is deemed born as a legal fiction following the maxim of *nasciturus pro jam habetur*, the essence of which means law considers the apparent birth of him.²⁵ There exist arguments where many believe that there are

¹⁸ *Roe v. Wade* 410 U.S. 113 (1973).

¹⁹ Protection of Unborn Child Act, 1841 (U.S.).

²⁰ *Priyesh Vasudevan v. Shameena P.*, 2005 SCC OnLine Ker 718 (India).

²¹ *M. Siddique v. Suresh Das* AIR ONLINE 2019 SC 1420 (India).

²² Johanna Schoen, *From Object of Inquiry to Subject of Public Policy: A History of the Foetus*, 40 AHR 651 (2012).

²³ Jane E.S Fortin, *Legal Protection for the Unborn Child*, 51 MLR 54 (1988).

²⁴ David Fagundas, *What We Talk about When We Talk about Persons: The Language of a Legal Fiction*, 114 Harvard Law Review 1745 (2001).

²⁵ JOHN W. SALMOND, JURISPRUDENCE (4th edn, 1913).

unique characteristics that a human being possesses even before their birth. An assertion postulated in this regard enumerates that the quality of being human is not a precursor to birth itself. It is held that the embryo at conception is the same person as the individual born at birth, because of them having unique characteristics ab initio.²⁶

Throughout history, we see a dynamicity and variety in understanding the idea of an unborn's legal existence. The Roman Catholic approach had been a metaphysical one, in which legal protection was to be granted from the moment the ovum was fertilised. This conjecture was based on a moral consequence of killing a human soul invested in the embryo, and according to Thomas Aquinas, hypothesised that the human soul can only be infused through sufficient development of the human form. Michael Lockwood resolves that a human being must consist of certain discernible continuities, including memory and personality, that represent unchanging elements which create a unique blueprint in the individual. He believes that an unborn or an infant may be treated as a person, being an object of law.²⁷ While theories may purport to vastation of personhood, therefore imbibing the character of law's object onto the unborn. Another discussion that is to be observed is the Warnock Report, which explored a similar conundrum, for which Mary Warnock came to the conclusion that leaned heavily on the moral and ethical considerations.²⁸

The independent and autonomous identity of a foetus was not perpetually recognised. In the case of *Dietrich v. Inhabitants of North Hampton*, the court rejected the plea for compensation on the death of an unborn child based on the foetus not having "a separate, distinct and individual entity".²⁹ Many jurists, including Coke, affirm the perception that law and many judicial interpretations consider an unborn child as an apparent expectation of his birth. Consequently, the personality allocated to him shall ab initio become redundant if he does not attain existence through complete birth.³⁰ Viability of a foetus has become a determinant in the realisation of medical termination, a criterion laid down in *Roe v. Wade*.³¹ Foetal viability refers to the ability of a foetus to survive on its own outside of its mother's uterus with medical assistance. The foetus attains this development by the twenty-second week of gestation; this is regardless of subject

²⁶ RITA JOSEPH, HUMAN RIGHTS AND UNBORN 47-49 (2009).

²⁷ *Supra* note 28.

²⁸ U.K. Committee of Enquiry into the Education of Handicapped Children and Young People, *Special Educational Needs: Report of the Committee of Enquiry into the Education of Handicapped Children and Young People*, Cmnd. 7212 (1978).

²⁹ *Dietrich v. Inhabitants of North Hampton* 138 Mass. 14 (1884).

³⁰ DR. V.D MAHAJAN, JURISPRUDENCE AND LEGAL THEORY (5th edn. Eastern Book Co.1987)

³¹ *Supra* note 23.

variations from case to case.³² In *Prakash v. Arun Kumar Saini*, the Delhi High Court assumed an unborn child aged five months and above in a mother's womb as a legal person, liable to be compensated.³³

Even in the absence of judicial trends, statutes have acknowledged the legal footing of the unborn. A few demonstrations of this, without which the topic would remain fragmented, include the scope it's in: the Law of Property and the Law of Crimes. Transfer for the benefit of the unborn is held valid under s.13 of the Transfer of Property Act,³⁴ condition to the general principle encompassed in sections 14, 15, 16, along with s.30 of the Act.³⁵ The Act does not prescribe a mode of direct transfer, which would be a product of impossibility, but directs a transfer of estate in the existence of a living thereafter to the unborn. Additionally, s.20 of the Hindu Succession Act endorses inheritance favours to a child in the womb.³⁶ Therefore, a foetus is granted property rights.

An equivalence of personhood and thread of life can be seen reflected in the criminal laws. The *Bharatiya Nyaya Sanhita* makes causing miscarriage of a child in sections 88, 89 and 90³⁷ while supporting the death of a quick unborn with the intention of it not being born as punishable, sufficiently holding to an act that amounts to culpable homicide in s.92.³⁸ This simpliciter renders the act of abortion illegal. Other provisions that affect legal recognition of an unborn include s.457 of *Bharatiya Nagarik Suraksha Sanhita*,³⁹ s.6 of the Limitation Act.⁴⁰

These conflicting provisions create an ambiguity with regard to the status of an unborn and its legal status of legal personhood. It is of critical importance to understand whether there is an ingrained personhood in an unborn, because law can extent it's protection where there sense of permeance or if an entity that holds rights is present. The laws as examined in the above paragraphs create a scenario where there is a strong presence of law treating the unborn as a legal person or entity, but at the same time treating it as if it does not exist. The concept of abortion is an abstraction that even the law is not entirely clear about. There is a legal gap when it comes to such clarity; therefore, an uncertainty in the position of abortion as a right in itself

³² Breborowicz GH, *Limits of foetal viability and its enhancement in Early Pregnancy*, 5(1) PMID 49 (2001).

³³ *Prakash v. Arun Kumar Saini*, MAC.APP.No.602/2009 (India).

³⁴ Transfer of Property Act, 1882, No.4, Acts of the Parliament, 1882 (India).

³⁵ *Ibid.*

³⁶ The Hindu Succession Act, 1956, No.30, Acts of Parliament, 1956 (India).

³⁷ *Bharatiya Nyaya Sanhita*, 2023, No. 20 Acts of Parliament, 2023 (India).

³⁸ *Ibid.*

³⁹ *Bharatiya Nagarik Suraksha Sanhita*, 2023, No.30, Acts of Parliament, 2023 (India).

⁴⁰ The Limitation Act, 1963, No.36, Acts of Parliament, 1963 (India).

4. REPRODUCTIVE FREEDOM

Reproductive freedom is a right granted to women over their option of reproduction.⁴¹ Bodily autonomy forms the core of gender equality, traversing not just matters of abortion alone, but also many other gender-based cruelties.⁴² Both these paradigms have been reciprocally used. According to Dworkin, bodily autonomy refers to an individual's ability to make choices about how their body is to be treated by others; a realm of control over one's own body.⁴³ It is the right of a woman or a girl to make informed and autonomous decisions concerning her body, which augments to a core that forms the basis of her fundamental rights of equality and privacy.⁴⁴

The revolution in the abstraction of bodily autonomy of women in the international community came with slow progression from the notion of "reproductive health of women" to "reproductive freedom". Reproductive freedom as a sluice consists of various branches, such as the right to have safe facilities for abortion and use contraceptives, including birth control. Often, this freedom comes from the status of the woman in question, marital or otherwise. The concept of reproductive freedom is not singularly concentrated on unmarried women but also on married women. However, the operation of this right has been seen to be accompanied by stigmas and hindrances. Frequently, women do not have control over their own realm of decision making, and are subject to the decisions of others, including their husband or any other guardians in their life, who dictate their lifestyle and living. It is also to be noted that women in such circumstances are often stripped of their rights, including reproductive freedom.⁴⁵ It has been supposed that no woman has reproductive rights; if there is any presumption of the same, it has been internalised by social norms.⁴⁶ This can be evidenced even by nearer events of many nations like Ghana, where child

⁴¹ X v. State (NCT of Delhi), (2023) 9 SCC 433 (India).

⁴² *Human Rights Require Bodily Autonomy for At All times*, UNFPA (Dec. 9 2023) <https://www.unfpa.org/press/human-rights-require-bodily-autonomy-all-%E2%80%93all-times> (last visited Sept.4, 2024)

⁴³ James Stacy Taylor, *Autonomy, Constraining Options, and Organ Sales*, 19 J. Appl. Philos. 273 (2009).

⁴⁴ Office of the High Commissioner for Human Rights, Working Group on the Issue of Discrimination Against Women in Law and in Practice & Special Rapporteur on Violence Against Women, Its Causes and Consequences, *Joint Letter to the President of the Human Rights Council on the Protection of the Family* (Sept. 4, 2024), <https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/JointLetterPresidentHRCProtectionFamily.pdf>.

⁴⁵ Lori L. Heise, *Reproductive Freedom and Violence against Women: Where Are the Intersections?* 21(2) JLME (1993), available doi:10.1111/j.1748-720X.1993.tb01243. (last visited Sept. 2 2024)

⁴⁶ Elizabeth Moen, *Women's Rights and Reproductive Freedom*, 3 Hum Rts Q (1981) 53.

marriage is still prevalent,⁴⁷ or Afghanistan, where women have been removed from numerous positions of power.⁴⁸

Reproductive rights refer to the ability of women to exercise the option of owning their choices on what can or cannot be done to their bodies.⁴⁹ It includes whether or when to have children; the gamut of the same extends to other socio-economic factors.⁵⁰ Convention on Elimination of All Forms of Discrimination against Women (CEDAW) gives primacy to women to freely decide and to be responsible for the number and spacing of children and to have access to information, education and the means to enable them to exercise these rights.⁵¹ The discussion on reproductive rights would be inchoate without *X v. State* (NCT of Delhi), the court observed that the reproductive right is a constellation of rights encompassing attributes as furnished in Article 16(e).⁵² The court held that reproductive rights are inclusive of the right to live life with dignity and in contradiction to the classification rule as enshrined in Article 21 and Article 14,⁵³ The reproductive rights of women must be harmonised in the light of principles enshrined in the Constitution.⁵⁴ Additionally, the court held that exceptions as given under Rule 3B of the Medical Termination of Pregnancy Act Rules,⁵⁵ would be available to all women regardless of their marital status. In the case of *Suchita Srivasta v. Union of India*, the court held that reproductive right is to be practiced by the individual alone; the role of the State is merely passive.⁵⁶ Reproductive rights are not an impediment to women; the State must accommodate the effects within spheres of balance.⁵⁷

⁴⁷ Gloria Aradi & Favour Nunoo, *Outrage as traditional Ghanaian priest, 63, marries 12-year-old girl*, BBC NEWS (Apr. 1, 2024), <https://www.bbc.com/news/world-africa-68692997>, (last visited Sept, 4 2024) .

⁴⁸ *UN Women deeply concerned by new Afghanistan morality law*, UN WOMEN (Aug. 28 2024), <https://www.unwomen.org/en/news-stories/statement/2024/08/un-women-deeply-concerned-by-new-afghanistan-morality-law> (last visited Sept. 2 2024).

⁴⁹ Agenda: Empowering Women for Gender Equity, *Defining Reproductive Rights*, <https://www.jstor.org/stable/4065965>, (last visited Sept.2 2024).

⁵⁰ *Reproductive Rights*, INSTITUTE FOR WOMEN'S POLICY'S RESEARCH, (Apr. 2015) <https://statusofwomendata.org/explore-the-data/reproductive-rights/> (last accessed Sept. 2 2024)

⁵¹ Convention on the Elimination of All Forms of Discrimination Against Women, July 30, 1980, 19 I.L.M. 33 (1980).

⁵² *Ibid.*

⁵³ INDIA CONST. art. 14 & art. 21.

⁵⁴ *Supra* note 46.

⁵⁵ *Supra* note 5.

⁵⁶ *Suchita Srivasta & Anr v. Union of India*, AIR 2010 SC 235 (India).

⁵⁷ *Athira P v. State of Kerala*, 2023 SCC OnLine Ker 10331 (India).

5. DILEMMA

International law does not actively voice for the rights of either the mother or the unborn; it subtly enunciates that every living human being has rights, without acknowledging the latter.⁵⁸ The preamble to the Universal Declaration of Human Rights gives recognition to “inherent dignity and inalienable rights to all members of the human family”.⁵⁹ Many scholars have assumed this as a deliberate choice, thereby obliquely assuming the inclusion of the foetus in its scope.⁶⁰ The debate remains unsolved, and is still conflicting even in Public International Law, illustrated by the inconsistency of international bodies such as the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women.⁶¹ The entirety of this discourse is deciding whose right is to triumph over another.

The Medical Termination of Pregnancy Act, 1971 (MTP)⁶² came into force to enable certain abortions as legal. Contrary to conventional belief, the parliament did not enact MTP as a response to embrace the act in its entirety as lawful. The purpose of the legislation ought to be understood as four different segments; firstly, to counterbalance the necessity of abortion that arises in the case of medical seriousness. Secondly, as a solution for birth control recommended by the Committee of Family Planning of the Health Ministry. Thirdly, as a measure to reduce illegal abortions in the country. Fourthly, to exempt a registered medical practitioner from criminal liability as imposed under the BNS,⁶³ upholding this claim as seen in *Rex v. Bourne*.⁶⁴ Although it is to be noted that, irrespective of the purpose aimed at, it would be remiss to disregard the matter as a stepping stone to an unconditional freedom for women.⁶⁵ However, the tenacity and efficacy of the same as a device to control population growth are doubtful. Besides, the Act is a humanitarian allowance and leniency on the part of the law enforcement towards abortion.⁶⁶ The Act allows for the medical termination of pregnancy by a registered medical practitioner in cases where the period of viability has not been attained, i.e., before the twenty-week mark,⁶⁷ or otherwise between the twenty and twenty-four week frame, for reasons of risk associated with

⁵⁸ Patrick J. Flood, *Does International law Protect the Unborn Child*, 16 *Life and Learning* 3, 4-25. (2000)

⁵⁹ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948).

⁶⁰ *Supra* note 31.

⁶¹ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3. ; *Supra* note 39.

⁶² *Supra* note 4.

⁶³ *Supra* note 42 & 43.

⁶⁴ *Rex v. Bourne*, (1039) 1 K.B. 687 (United Kingdom).

⁶⁵ Savithri Chattopadhyaya, *Medical Termination of Pregnancy Act, 1971: A Study of the Legislative Process*, 16 *J. Indian L. Inst.* 549 (1974).

⁶⁶ K.D Guer, *Abortion and the Law in India*, 28 *J. Indian L. Inst.* 348. (1986).

⁶⁷ *Supra* note 4.

defective physical and mental health to either the mother or the child.⁶⁸ Alternatively, no other reason beyond those given in the parent Act and rules would be considered as a valid reason for medical termination. In the Bombay High Court in *Vijay Sharma v. Union of India*, held that, despite the desires of the petitioner, selective sex abortion cannot be entertained for reasons of family planning alone. The court in another case remarked that the MTP had been brought forth as a stringent measure against the arbitrary termination of pregnancy.⁶⁹ Thus, the court duly acknowledges the right to life of the unborn while substantiating a rationale against abortion. One of the major criticisms against the introduction of the Act had been that the right to abortion was a license to commit homicide of a living being; this inadvertently meant refusing a human being their right to be protected by law and life with dignity.⁷⁰ Another rationale that has often arisen is the question of preservation of mankind and economic benefits, are that corollary to power in numbers; procreation has perpetually been about the continued existence of human beings on earth. With dwindling fertility rates, countries are providing monetary benefits to people so as to encourage them to have more children.⁷¹

The Supreme Court in 2022 emphasised the matter of reproductive rights and bodily autonomy of a woman as paramount, that in simpliciter the denial of these rights would be violative of one's fundamental rights.⁷² The court indeed brought about novelty by widening the web of rights concerning legal abortion to all women. However, no Indian court has yet ventured into the unconditional right of abortion. Rule 3B, lay exceptions for when termination may take place when it is beyond twenty-four weeks, (i) victim of sexual assault or rape or incest, (ii) minor, (iii) change in marital status, (iv) mentally ill, (v) foetal malformation rendering the unborn majorly disabled and (vi) women who had been subject any humanitarian emergency or disaster as the State may declare.⁷³ In an effort to effect the same, the hon'ble apex court in *A v. State of Maharashtra (2024)*⁷⁴ reversed the decision of the Bombay High Court, with respect to the case of a minor sexual assault survivor who had been thirty weeks pregnant. However, in a similar context, the Kerala High Court⁷⁵ held it to the contrary, denying the plea of a thirty-six-week pregnant minor,

⁶⁸ *Vijay Sharma v. Union of India*, 2007 SCC OnLine Bom 806 (India).

⁶⁹ *X v. Union of India*, Writ petition No. 1137/2023 (India).

⁷⁰ *Supra* note 48.

⁷¹ *Falling Fertility Rates leave India Staring at a Looming Demographic Challenge*, The Economic Times (Mar. 26, 2024) <https://economictimes.indiatimes.com/news/economy/policy/falling-fertility-rates-leave-india-staring-at-a-looming-demographic-challenge/articleshow/108786449.cms?from=mdr> (last accessed Sept. 4 2024)

⁷² *Supra* note 46.

⁷³ *Supra* note 5.

⁷⁴ *A v. State of Maharashtra*, 2024 SCC OnLine SC 835.

⁷⁵ *XYZ v. State of Kerala*, 2023 SCC OnLine Ker 10457 (India).

despite benefitting from exemptions under MTP Rules, because the organs of the child were fully developed. Thus, there is a delineation where the rule of statutory abortion is inconsistent from variance of jurisdiction and on a case-by-case basis.

Restrictive abortion laws do not provide any safeguard to women with regard to unwanted pregnancies, while also not aiding in family planning. Reproductive rights as furnished under CEDAW,⁷⁶ would mean endorsing the absolute and monochrome right to abort; a freedom and option women can exercise at will. A woman's choice to abort may be antecedent to numerous factors, including predictability of one's future, financial reasons, socio-cultural stigmas and taboo, physiological elements, etc. These factors are absent when reviewing India's legislation on medical termination of pregnancy. Furthermore, as a resultant to these dreadful paradigms, many women resort to illegal abortions, which are punishable under the penal law and the MTP.⁷⁷

The Supreme Court of Nepal had expressed that the foetus can only exit at the expense of the mother; if rights of the foetus were to be granted, one would be placing him at a higher pedestal than the mother, which would be a gamble with her life; it is impossible to risk the mother's health for the protection of an unborn.⁷⁸ France has enshrined voluntary termination of pregnancy as a constitutional right, amending Article 34 of the Fifth Constitution.⁷⁹ The fact that these two dispositions were possible indicates the shift in global outlook on the constituents of a woman's reproductive rights.

6. CASE LAW ANALYSIS

In the case of *Dr Jacob George v. State of Kerala*, where the death of a woman was caused following a procedure of consensual miscarriage or abortion. The procedure was done by a doctor who was named a quack by the court.⁸⁰ Here, the doctor was not given the benefit of section 3 of the Medical Termination of Pregnancy Act.⁸¹ A registered medical practitioner has legal or statutory protection from carrying out a miscarriage or medical termination on the following grounds, where it may cause serious risk to the physical or mental health of the mother. Herein, the court differentiated between section 314 of the Indian Penal Code and section 3 of the Medical

⁷⁶ *Supra* note 57.

⁷⁷ *Supra* note 42 & 3.

⁷⁸ *Lakshmi Dhikta v. Govt. of Nepal*, Writ No. 0757 of 2007 (Federal Democratic Republic of Nepal).

⁷⁹ LA CONSTITUTION CONST. art. 34 (France).

⁸⁰ *Dr. Jacob George v. State of Kerala* (1994) SCC 430 (India).

⁸¹ The Medical Termination of Pregnancy Act, 1970, §3, No. 64, Acts of the Parliament, 1970.

Termination of Pregnancy Act.⁸² The court has, in many previous cases, enunciated the need to grant the medical practitioners legal protection when performing legal medical termination of pregnancy. This is particularly important since the law must distinguish between causing a miscarriage with mens rea and a procedure done in exercise of a statutory right.

In the case of *Sarmishtha Chakraborty & Anr. V. Union of India*, the petitioner was twenty weeks pregnant and prayed for a Medical Board to be constituted for medical termination of her pregnancy. Herein, the matter was absolutely clear to the Medical Board that medical termination was essential as it would lead to severe mental injury to the petitioner and the unborn, if born, would suffer from many risks, including a cardiac deformation. The court observed that cases of such nature rest on the facts of each case. Additionally, the court held that there was an inseparable part of her personal liberty under Article 21 of the Indian Constitution, and she had the sacrosanct right to have her bodily integrity.⁸³ However, the question that ought to be asked is whether it should be on a “case-to-case basis” – should there not be an objective criterion that allows women to exercise the right of medical termination, in order to avoid this constant litigation? An objective criterion already exists where the pregnancy may be terminated when under twenty weeks at the discretion of a registered medical practitioner and of two medical practitioners where it is between twenty and twenty-four weeks. It, however, seems insufficient where a woman is unable to exercise her reproductive freedom to the full extent, as she is bogged down with an obstacle of the state machinery.

In the case of *Tapasya Umesh Pisal v. Union of India*, the foetus was diagnosed with Tricuspid and Pulmonary Arteries, where even if the foetus were to be born would have to undergo morbid and highly mortal surgeries. In this case, the court concluded that the baby would not reach adulthood. Therefore, the court allowed for medical termination.⁸⁴ The factor that the child, even if born, would have been under grave danger and would not have had a healthy life can be seen as an underlying reason for medical termination in many cases. This should be extended to cases where the child would not have a safe and fulfilling childhood as well; where the parents or a mother is unable to afford a child should be given due regard and must find some probative value while considering a possible case of medical termination.

⁸² *Ibid.*

⁸³ (2018) 13 SCC 339 (India).

⁸⁴ *Tapasya Umesh Pisal v. Union of India* (2018) 12 SCC 57 (India).



In another interesting case of *Z v. State of Bihar*, the court allowed a mentally disabled woman to be a parent. The court here held that mental disability did not dictate either the intelligence quotient or the emotional quotient, and the mental age of the woman; they understood a possibility where the woman could indeed be a socially and emotionally aware mother.⁸⁵ Here, the court went with the choice of the woman, while emphasising the right of reproductive freedom she has. The author here advocates for a right to abortion with a nuanced and sophisticated sense that allows a woman to choose whether she wants to abort or not. Therefore, the right to reproductive freedom is a larger periphery within which the right to abort would find its place. While acknowledging the same, the court in *Poonam Sharma v. Union of India*, considered the unpreparedness of the mother in different facets of her life, including physical, mental and the financial constraints in granting the medical termination of pregnancy. Highlighting how the mother, being the primary caregiver, was ill-equipped to have a child was part of the court's decision. The same must be found in the legislative framework beyond the grounds that have been given in the Act.⁸⁶

7. CONCLUSION

At one scale, we must identify and recognise the unborn as a person who has rights of his own, at another, the rights of a woman who has not or cannot accept the position of a mother. And, any denouement would inevitably be antagonistic to the other. Law of Property, Criminal law and Law of Torts give legal validation to a foetus, thus in the eye of the law an unborn is a person with some degree of rights. The philosophy of life and birth, the implications on economic and survival guarantee, along with risks of sex selective abortion, are major concerns that can always tip this discourse to an edge. However, it is equally pertinent to weigh the rights of the mother.

The author, however, is of the opinion that women should not be curtailed by limited reproductive freedom, and a woman's right to abort must be an absolute right. This would substantially decrease the stalemates and inconsistencies in its exercise. It is inarguable that a foetus is dependent on the mother. Regardless, say the child was given a shot at life, there is no guarantee that he would have a life free of impediments. He may be subject to neglect, abuse or even worse; while the recourse of placing the child up for adoption may exist, it would be insufficient as he would be pinned onto a State system, with odds of being adopted. The issue of not having legal means of abortion and the consequences it may have on women, along with the unborn, is far-reaching enough that they

⁸⁵ *Z v. State of Bihar* (2018) 11 SCC 572

⁸⁶ *Poonam Sharma v. Union of India*, 2023 SCC OnLine SC 1333 (India).



have no recourse at all. Therefore, in effect, denying both the child and the mother of their fundamental rights enshrined under Article 21 and Article 14.⁸⁷

⁸⁷ *Supra* note 60.