

ISSN: 2582 - 2942



LEX FORTI

LEGAL JOURNAL

VOL- I ISSUE- IV

APRIL 2020

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**ONGOING TUSSLE BETWEEN MATERNAL RIGHTS AND
FETAL RIGHTS IN INDIA**

Shidhin Thampi

ABSTRACT

As the new MTP(Amendment)Bill,2020 has been passed by the Lok Sabha a few days ago, the conflict between maternal rights and fetal rights has regained its momentum. It is of immense importance to analyse this matter in detail as it involves the question of Right to Life guaranteed under Art 21 of the Indian Constitution to two individuals; the mother and her foetus. This article aims to throw some light on the effect of the present MTP Act of 1971 on the mother and her foetus, arguments in favour of both the mother and her foetus and the global stance on this issue. The line of growth of maternal and fetal rights can be clearly inferred from the article so that the reader can imbibe the reality on the issue. It also put forwards solutions on this issue in the concluding part.

INTRODUCTION

The tussle between maternal rights and fetal rights had commenced from time immemorial. Tracing back to the period of the great philosophers, Aristotle and Pythagoras, it is evident that maternal rights and fetal rights stood at two extremes. Aristotle, who propagated the idea of a foetus attaining life step by step as it develops in the womb of the mother, was equally opposed by the idea of Pythagoras who believed fetal life begins from the very moment of conception. Even Hindu texts in India, such as the Dharma sastra ,provides foetus with right to life from the moment of conception. Later on, during the emergence of the Industrial revolution, ideas such as the Freedom of Womb or reproductive right became a powerful weapon in the hands of the Women Liberation Movement. This movement emphasised that women are human beings like men. They are not second sex, chattels or child producing machines. In short, it advocated for the idea that woman is the master of her own body and it includes right to terminate unwanted pregnancies.

It becomes the need of the hour to throw some light on this issue, as there has been notable developments in the MTP Act,1971 of India. The Lok Sabha has passed the MTP(Amendment) Bill,2020 on 17th March 2020 by making repairs in S.3 and S.5 of the Act. S.3 of MTP,1971 permits termination of the foetus up to 12 weeks, under the guidance of one registered medical practitioner and also from 12-20 weeks under the guidance of two medical practitioners, provided that there is sufficient mental or physical injury caused to the pregnant woman or the child suffers from any fetal abnormality.Also,S.5 permits abortions beyond 20 weeks only if it

is necessary to save the life of the mother. These stand as a hurdle for rape victims and mothers whose fetal abnormality is detected on a later stage of 22 or 24 weeks.

Considering the other side of the coin, the pro-life activists make vital arguments which also has to be given ears. MTP Act which was enacted in 1971, has turned out to be an old fashioned law which adhered to the social conditions that existed in that era. Also, it is quite ruthless to terminate the life of a defenceless life who has the potential to become a full born human being. It is to be remembered that we live in this era where we address the disabled ones as ‘specially abled ones’ and ‘differently abled ones’. Hence, the society has changed to such a position where they care and respect the defenceless and disabled. Legally speaking, even the IPC provisions from S.312 to S.316, which provides for causing miscarriage in a woman, also recognises the right to life given to the foetus. Therefore, it is of great importance to examine and debate on this issue so that the most refined form of it comes out in the process.

VIOLATION OF MATERNAL RIGHTS BY THE MTP ACT OF 1971

S.3 (b) is violative of Art. 14 and 21 in case of rape victims and pregnancies where fetal abnormality is detected.

S.3-“ Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,-

a. where the length of the pregnancy does not exceed twelve weeks if such medical practitioner is, or

b. where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners 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 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.”

A pregnant lady on the last day of the 20th week and another on her first day of the 21st week do not have any drastic changes in her foetus, which means, they are in equal circumstances.

Art. 14¹ which provides for equal treatment in equal circumstances stands violated in the above said situation. A rape victim or a pregnant woman with foetus abnormality in her 21st or 22nd week will undergo the same mental anguish experienced in the 18th or 19th week. Therefore, there is no point in fixing the gestation limit as 20 weeks and not allowing women in these situations to undergo MTP. It is a clear violation of their ‘Right to Bodily Integrity and Reproductive Choice’² guaranteed under Art 21³. Moreover, the 20 weeks stipulation for a woman to avail abortion services under Section 3(2) (b) of the MTP Act,1971 may have been reasonable when the section was enacted but has ceased to be reasonable today when technology has advanced and it is perfectly safe for a woman to abort at any point during the entire period of pregnancy.

In hearing women’s and girls’ petitions for MTPs beyond 20 weeks, courts have repeatedly emphasized the rights of pregnant women as decision makers over their own bodies. In a case from July 2017 in which the Supreme Court granted a petition for an abortion to a woman who was more than 20 weeks pregnant, the court stated,

*“The right of a woman to have reproductive choice is an integral part of her personal liberty, as envisaged under Article 21 of the Constitution. She has a sacrosanct right to have her bodily integrity.”*⁴

Another case in January 2017 the Supreme Court stated,” This Court, as at present being advised, would not enter into the medico-legal aspect of the identity of the foetus but consider it appropriate to decide the matter from the standpoint of the right of the petitioner to preserve her life in view of the foreseeable danger to it, in case she allows the current pregnancy to run its full course”⁵.The court was of the stand that women’s and girls’ rights must be the focus of decisions on MTP.

While considering right to reproductive choice of a woman, relevance of bodily autonomy guaranteed to a citizen under Art 21 of the Indian Constitution which forms the base of the reproductive right is inevitable. Bodily autonomy is the right to self-governance over one’s own body without external influence or coercion. Advocates of pro-choice believe that individuals have unlimited autonomy with respect to their own reproductive systems, as long as they don’t breach the autonomy of others.

¹ The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

² Suchita Srivastava v. Chandigarh Administration AIR 2010 SC 235

³ No person shall be deprived of his life or personal liberty except according to procedure established by law.

⁴ Sarmishtha Chakraborty v. Union of India, W.P. (C) 431 of 2017, at 7, S.C.C. 3 July 2017.

⁵ Meera Santosh Pal v. Union of India (2017) W.P. (C) 17 of 2017, at 4, S.C.C, 16 Jan. 2017.

Indian courts have also recognised right to bodily autonomy as a fundamental right in a plethora of cases. It is contended that each individual has an inherent right to bodily autonomy which is an inextricable facet of Art 21. One such case is *Anuj Garg v. Hotel Assn of India*⁶ which declared -

“...personal autonomy includes both the negative right of not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India.”

Also, in a liberal democracy, recognition of the individual as an autonomous person is an acknowledgement of the State’s respect for the capacity of the individual to make independent choices.⁷ The fundamental concept relating to bodily integrity, personal autonomy and sovereignty over a woman’s body has to be given respect.⁸

Hence, pro-choice defenders recognise the gestation limit of 20 weeks to be arbitrary and give weightage to the fundamental rights of a mother. Words of Dr Rishma Dhillon Pai, former President of the Federation of Obstetrics and Gynaecological Societies of India, has to be noted-*“There is greater focus on the time frame than what needs to be done in the best interest of the mother and the baby. You can’t say that abortion is safe at 19-and-a-half weeks, but unsafe at 20-and-a-half weeks”*⁹.

At a short glance taken globally, most of the countries have fixed their gestation limit above 20 weeks (Ireland, North Macedonia etc). Even the Parent Act of Medical Termination of Pregnancy 1971 which is the Abortion Act, 1967 which was later amended as the Human Fertilisation and Embryology Act, 1990 specifies the upper limit to be 24 weeks.

S.5 (1) is violative of Art. 14 and Art. 21

S.5-“ Sections 3 and 4 when not to apply -

(1) 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 practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of opinion, formed in good

⁶ *Anuj Garg v. Hotel Assn. of India* (2008) 3 SCC 1.

⁷ *Navtej Singh Johar v. UOI through Secretary Ministry of Law* AIR 2016 SC 76.

⁸ *Ms Z v. State of Bihar & Ors* C.A. 10463 of 2017, at 59-60, S.C.C. 17 Aug. 2017

⁹ Sonali Kokra, Huffington Post, *Why Is India’s Abortion Law Failing Its Women on So Many Fronts?* (2017).

faith, that determination of such pregnancy is immediately necessary to save the life of the pregnant woman.”

A rape victim or a pregnant woman with fetal abnormality who has no life threatening situations but has crossed 20 weeks and has considerable amount of mental anguish cannot be treated equally like a normal pregnant woman who has crossed 20 weeks and denied abortion. It is clear that a normal pregnant woman seeking abortion after 20 weeks and, women with rape induced pregnancies and fetal abnormality are treated on equal planes which is a clear violation of Art.14. These are situations which are to be treated differently. Likewise Art. 21 of these rape induced women and women with fetal abnormality are violated. The above said viewpoint had been expressed by the Punjab and Haryana High Court when they held that denying MTP and counselling services to pregnant survivors of rape could constitute violations of the right to freedom from inhuman and degrading treatment¹⁰. Several other High Court and Supreme Court decisions in post 20 week cases have also recognised that compelling a woman or girl to continue a pregnancy against her will violates her fundamental rights to bodily integrity, privacy, and dignity, as well other basic rights, such as the right to work and the right to receive an education¹¹. These post 20 week decisions that recognise fundamental rights violations echo a growing body of judgements on issues ranging from maternal health, coerced and unsafe sterilization, child marriage and marital rape, and MTP can interpret Article 21 to include women’s and girls’ rights to survive pregnancy and childbirth and decision-making over their own bodies¹².

Women need access to termination of pregnancy after 20 weeks not ‘only’ for saving the life the woman but also for several reasons, including where there have been procedural barriers

¹⁰ R v. State of Haryana, W.P.(C), 6733 of 2016, H.C. P.& H., 74, 30 May 2017.

¹¹ Ms Z v. The State of Bihar and Others, C.A. 10463 of 2017, at 59-60, S.C.C. 17 Aug. 2017 (“The fundamental concept relating to bodily integrity, personal autonomy and sovereignty over her body have to be given requisite respect.”); Meera Santosh Pal v. Union of India (2017) W.P.(C) 17 of 2017, at 5, S.C.C., 16 Jan. 2017 (“The right to bodily integrity calls for permission to terminate the pregnancy.”); R v. State of Haryana, W.P.(C), 6733 of 2016, H.C. P.& H., 74, 30 May 2016 (reading the Constitution, the High Court cited article 39(e), “the health and strength of women is not to be abused,” article 41 (work, education, public assistance), article 42 (maternity relief), 47 (improvement of public health), article 51(A)(e), “it shall be the duty of every citizen of India to renounce practice derogatory to the dignity of the women.” and article 21, “right of free enjoyment, right to human dignity, right to have access to justice, right to privacy” to conclude that no woman should be compelled to go through a pregnancy against her will); Mrs X and Ors. v. Union of India, W.P. (C) 81 of 2017, at 4, S.C.C., Feb. 7, 2017 (the Court emphasizes the fact that it is a woman’s right to make reproductive choices, and that this is part of her “personal liberty as understood under Article 21 of the Constitution,” and states, “in these circumstances we find that the right of bodily integrity calls for a permission to allow her to terminate her pregnancy.”).

¹² Independent Thought v. Union of India, W.P. (C) 382 of 2013, S.C.C. 11 Oct. 2017; Laxmi Mandal v. Deen Dayal Harinagar Hospital & Others, W.P. (C) No. 8853 of 2008; Hallo Bi v. State of Madhya Pradesh, W.P. (C) 408 of 2013, H.C. M. & P. 16 Jan. 2013; Devika Biswas v. Union of India, W.P. (C) 95 of 2012, S.C.C. 14 Sept. 2016.

causing delay in accessing services and in circumstances where pregnancy or pregnancy-related risks were only recognised after the 20 week mark. Some of these reasons include:

1. Delay due to Practical barriers

A significant barrier women face in accessing safe, timely and legal abortion services is the **inadequate numbers of registered health care providers** trained to provide abortion services and a **dearth of facilities** that are properly equipped to perform the procedure. These shortages remain throughout India, despite policy guarantees requiring abortion services be available in all government health facilities¹³. Women in poor, rural areas are disproportionately affected by these barriers. They also face delays in accessing abortion early in pregnancy due to lack of awareness about their legal rights, confusion about the law, and societal stigma surrounding abortion. In some areas, such as Bihar, up to 75 per cent of women are unaware that abortion is legal¹⁴. The judiciary's case-by-case approach has led providers to continue referring women and girls to the courts. Yet only those women and girls who have access to financial and legal resources can consider pursuing judicial channels; others are left with no other recourse but to continue an unwanted pregnancy or risk their lives by going to an unsafe provider. Furthermore, even those who can file petitions are then subject to public scrutiny and stigma, invasive and often repetitive medical exams by medical boards, and distress from the uncertainty of their rights during an already difficult time.

2. Delay due to Legal barriers

A review of case law as well as medical studies show that misconceptions concerning the law also contribute to delays in accessing abortions, including improper requests by providers for spousal consent despite it not being required under the law, and courts' imposition of requirements that rape survivors prove their allegations before being permitted to access abortion. Delays are also caused by providers' misconceptions those abortions before 20 weeks also require judicial authorization.

Further, studies have repeatedly documented that providers' **fear of prosecution** under other laws, such as the Pre-Conception and Pre-Natal Diagnostic Techniques Act (PCPNDT Act) 1994 and the Protection of Children from Sexual Offenses Act (POCSO) of 2012, lead to

¹³ Government of India, Framework for Implementation: National Health Mission 2012-2017 2, 32 (2014).

¹⁴ Unintended Pregnancy and Abortion in India: Country Profile Report

denials of abortion or requests for judicial authorization¹⁵. The PCPNDT Act which prohibits sex determination but intentionally does not regulate abortion on any grounds has been improperly implemented to target MTP providers in government crackdowns on sex-selection. The chilling effect caused by the PCPNDT Act particularly leads to the denial of abortion requested during the second trimester, which is when much severe and fatal fetal impairment are detected, despite studies showing that only a small proportion of these abortions are sex-selective. Providers also fear backlash or investigation arising from a provision in the POCSO Act that calls for mandatory reporting by providers of sexual assault of a minor. The law recognized any sexual activity involving a minor as rape, without exception, leading providers to interpret it as requiring mandatory reporting of any pregnant adolescent patient, even where she is seeking an abortion.

3.Pregnancy resulting from rape

Frequently, in the case of rape victims, the pregnancy itself may not even be discovered until well into the second or third trimesters. For women and girls in this situation, the forced continuation of pregnancy is linked to foreseeable and preventable physical and mental health harm. Due to stigma and personal risks surrounding reporting, many victims of rape only come forward to request an abortion, either directly or through their parents, once their pregnancy is identified through medical testing or made public. A review of the post-20 week cases shows that many petitioners, particularly minors, do not even realize they are pregnant until beyond the 20 week cut-off because of a lack of awareness of the possibility of becoming pregnant from rape or the symptoms of pregnancy¹⁶. Furthermore, the case law shows that delays in detecting pregnancy may be compounded where state authorities fail to properly respond to, and investigate charges of rape; fail to offer pregnancy testing kits to rape victims as required under national guidelines; or question petitioners' rape allegations. There have also been cases where several petitioners seeking approval for abortion after 20 weeks have emphasized the psychological trauma and suffering, including suicidal thoughts, caused by being forced to continue their pregnancy¹⁷. Indian courts have recognized the severe physical and mental

¹⁵ Lalita Panicker, Hindustan Times, The MTP Act 2014 Makes Safe Abortion Easier, It Should Be Passed (2017)

¹⁶ Alakh Alok Srivastava v. Union of India & Ors. W.P.(C) 565 of 2017, S.C.C. 28 July 2017

¹⁷ R v. State of Haryana, W.P.(C), 6733 of 2016, H.C. P.& H., 74, 30 May 2016 (the Court stated, "Due to the less evolved society, more so in this part of the world, till date the rape victim carries more stigma than the person accused of the offence of rape.

health risks that pregnancy can cause women and girls¹⁸. These risks are compounded for younger girls for whom pregnancy is twice as likely to result in maternal mortality. In cases concerning rape victims' requests for termination beyond 20 weeks, courts have echoed the MTP Act's existing recognition of the 'grave anguish' that may be caused by pregnancies resulting from rape¹⁹.

4. Health Risks Caused by Fetal Impairments Diagnoses

Fetal impairments often cannot be detected until after the 20-week, since the foetus is not sufficiently developed for many conditions to be diagnosed, even in the most developed healthcare settings. The Royal College of Obstetricians and Gynaecologists in the United Kingdom has clarified that "the majority of fetal impairments will only be identified on an anomaly scan at 18-20 weeks²⁰". Restricting legal abortions to 20 weeks' gestation may deny women the time they need to make a well-informed decision. It has also emphasized that "the emotional impact of a diagnosis of abnormality is highly significant and causes considerable distress" and that women facing a diagnosis of fetal impairment must not feel pressured to make a quick decision, but once a decision has been made, the procedure should be organized with minimal delay.

Decisions allowing MTP after 20 weeks in cases of fetal impairment have also emphasized the impact on a woman's mental health.

- For instance, in February 2017, the Supreme Court allowed a petitioner to terminate her pregnancy after being diagnosed with a severe fetal impairment, stating, "From the point of view of the petitioner the report has observed risk to the mother since the continuation of pregnancy can endanger her physical and mental health".²¹
- In another Supreme Court case from August 2017, the Court allowed a petitioner to terminate her pregnancy with a fatal fetal impairment at 25 weeks, explaining, "the report of the Medical Board, which we have produced, in entirety, clearly reveals that the mother shall suffer mental injury if the pregnancy is continued and there will be

¹⁸ X v. Govt of NCT of Delhi, W.P.(CRL) 18262 of 2013, H.C. Del., at 3, 6 Dec. 2013 ("To carry a child in her womb by a woman as a result of conception through an act of rape is extremely traumatic, humiliating and psychologically devastating."); Bashir Khan v. State of Punjab, W.P.(C) 14058 of 2014, P. & H. H.C., 2 Aug. 2, 2014 (the Court considered that since the victim was raped it should be presumed that the pregnancy could cause her severe mental harm);

¹⁹ X v. Govt of NCT of Delhi, W.P. (CRL) 18262 of 2013, H.C. Del., at 3, 6 Dec. 2013

²⁰ Royal college of Obstetricians and Gynaecologists, termination of pregnancy for Fetal abnormality in England, Scotland, and Wales 17 (2010)

²¹ Mrs X and Ors. v. Union of India, W.P.(C) 81 of 2017, at 4, S.C.C., Feb. 7, 2017.

multiple problems if the child is born alive²².” The Court also cited a medical board’s findings, which emphasized the knowledge that her foetus was unlikely to survive had caused her “immense mental agony.” Decisions allowing termination at even more advanced states, such as at 32 weeks gestation, have similarly expressed significant concern for the petitioner’s mental health if forced to continue the pregnancy.²³

- In a June 2017 case concerning a 25-weeks-pregnant woman’s plea for termination after a diagnosis of potentially fatal fetal impairments, the Supreme Court emphasized that a more ‘holistic’ approach is needed in dealing with such cases. The Justices explained, “You have to also see the quality of life of the mother after pregnancy. The mother will have to live under the constant threat of losing her child. The law must be stretched to make it meaningful.”²⁴
- In a 2017 case decided by the Supreme Court, the Court granted the petitioner a medical termination of pregnancy when she was 25 weeks pregnant, relying on a medical board’s report to explain that the petitioner was at risk of “severe mental injury” if the pregnancy continued after being diagnosed with a severe fetal abnormality.²⁵ Both the Court and the medical board cited, among other factors, mental health suffering to the petitioner should she be forced to continue her pregnancy?

CLAIMS FOR FETAL RIGHTS

The MTP Act,1971 was formulated by the suggestions proposed by the Shantilal Shah Committee which was set up to draft the abortion laws. As it was the result of a lot of mental toil, it is illogical to do the Act away with. Also, the legislature in its wisdom incorporated strict conditions for carrying out abortions, keeping in mind that the state was morally and duty bound as the guardian of its citizens and has the power to safeguard the life of a foetus in the womb after it attains the stage of viability. The right to reproductive autonomy does not outweigh the state’s interest in protecting the life of a foetus and therefore the ceiling of 20 weeks for abortion cannot be extended in an extensive manner. The Centre in its reply to the Supreme Court after a plea challenging the provisions of the MTP Act recently said that,

²² Mamta Verma v. Union of India and Ors. W.P. (C) 627 of 2017, S.C.C., 9 Aug. 2017.

²³ X v. State of H.P. and Others, W.P. (C) 2250 of 2017, H.C. H.P., 17 Oct. 2017.

²⁴ Amit Anand Choudhary, Times of India, Supreme Court Favors Relaxing Abortion Deadline (2017).

²⁵ Sarmistha Chakraborty & Anr. v. Union of India & Ors. 431 of 2017, 19 June 2017 (the Courts instructed the medical board “to evaluate the mental and physical health” of the petitioner and also the “state of health of the foetus.”).

*"Petitioners on their right to reproductive autonomy does not outweigh the interest of the state in protecting the life of foetus in the womb, especially from the point of viability i.e. from the period of 20 weeks onwards. It is a settled law that personal freedom of choice of an individual cannot curtail the freedom or choice of other individuals, especially the most vulnerable and persons who are defenceless. An unborn child cannot protect itself from the harm designed by his/her very own mother."*²⁶

The gestation limit of 20 weeks is fixed by the legislature as the answer lies in the fact that the baby becomes viable at this stage. Viability of a foetus means the ability of a foetus to live outside the womb of the mother, under normal conditions. As it grows, it becomes more and more capable of independent survival and from seven months of gestation onwards, the chance of its survival upon birth becomes bright. So terminating a foetus after it's viability equals to committing murder.

With the growth of science & medicine newer conditions are being described as diseases or deformities. At the same time, new cures are also emerging. It is not to be forgotten that those people who despite being severely handicapped have made outstanding contributions to society, for example Oscar Pistorius, who was born with fibular hemimelia (congenital absence of the fibula) in both legs and were amputated halfway between his knees and ankles went on to become a Paralympic and Olympic champion and Nick Vujicic, an Australian motivational speaker born with tetra-amelia syndrome, a rare disorder (called phocomelia) characterized by the absence of arms and legs. At that time, had there been mechanisms to detect such disabilities in the foetus, these people may never have been born. In other words, we cannot completely ignore the possibility of committing grave mistakes by extinguishing potentially great life with our limited understanding of the future & our exaggerated fear of deformity. Advancement in medical science bestows great power on humanity that must be used for noble causes. Unfettered or arbitrary misuse of such power may lead to grave consequences for the society on multiple fronts. Also, removal of the gestation limit would result in an increased rate of social evils such as foeticides.

In March 2017, a 28-year-old woman from Mumbai approached the Supreme Court to seek permission to terminate her 27-week pregnancy after discovering that the foetus was suffering from Arnold Chiari Type II syndrome - a condition which prevents the normal development of

²⁶ <https://economictimes.indiatimes.com/news/politics-and-nation/ceiling-of-20-weeks-for-abortion-cant-be-extended-centre-to-sc/articleshow/71189677.cms?from=mdr>

the brain and spine. The Supreme Court, relying on the Medical Board's report, completely dismissed the possibility of mental anguish. She was denied permission for an abortion, ruling that there are chances the baby may be born alive.²⁷

Recognition of fetal life in IPC provisions

Sections 312 -316 of Chapter XVI deals with causing of miscarriage and injuries to unborn children. While S.312 mentions about causing miscarriage, S.316 specifies causing miscarriage to a quick unborn child. Quick child is a foetus that has developed to such a stage that it moves within the womb of the mother. The important point that is to be highlighted is that the punishment for both these offences is different. While the punishment for causing miscarriage to a child extends to three years of imprisonment, the same done to a quick child extends to seven years of imprisonment according to S.312 and for causing death to a quick unborn child, it is imprisonment for a term of ten years. This indicates that law recognises the difference between a foetus and a quick child. It is around 20th week into pregnancy that the child becomes able to move in the womb, or otherwise it is considered to be viable. So permitting termination beyond 20 weeks is in the nature of culpable homicide. Moreover, the commentary to the definition of a 'person' in S.11 of the Indian Penal Code, 1860 has included an unborn child.²⁸ Under General Clauses Act 1897, the word person has been defined [Section-3 (42)] in the same way as under Section-11 of Indian Penal Code, 1860. Hence, Right to life enshrined in Art 21 of Indian constitution can be conferred on a foetus as it comes within the purview of a 'person'.

Foetus as a person from the moment of conception

A foetus as a person starts from the moment of conception as the entire genetic character of the person is determined. Apart from growing and developing, there is nothing that will be added or taken away in genetic terms of the person; the embryo is the same physical organism that develops into a person. The rightful time in certifying the personhood of a foetus is during the conception, as there is no other clear point of time when a foetus can be identified as a person. There is no other point in fetal development that is as dramatic as conception and as clear an indicator of the beginning of life. The fact that the foetus in its early stages is microscopic,

²⁷ Sheetal Shankar Salvi v. UOI, W, P. (C) 174 of 2017, S.C.C, at 3 Mar 27, 2017.

²⁸ According to Indian Penal Code, 1860, it includes any company or association or body of persons, whether incorporated or not. Commentary to this section says that, this term includes both natural person as well as artificial person and an unborn child within the mother's womb is a person for the purposes of section-11 of this code.

virtually indistinguishable from other primate fetuses to the untrained eye and lacking in the capacities that make human life meaningful and valuable is not deemed relevant by the self-appointed defenders of fetuses. In *Webster v. Reproduction Health Services*²⁹ the Supreme Court of America upheld a Missouri Statute which declared that the life of each human being begins at conception and that unborn children have protectable interest in life, health and well-being. In *Davis v. Davis*³⁰, the Judge concluded that as a matter of law, human life begins at conception.

Right to reproductive choice is not absolute

Another contention raised by pro-life groups is that right to reproductive choice can be restricted through the 'procedure established by law' in Art 21. Fetal rights stand just, fair and reasonable and comes under the 'procedure established by law' under Art 21. Adhering to the ruling in *Maneka Gandhi v. UOI*³¹, the word law in Art 21 does not necessarily mean merely an enacted piece of law but must be just, fair and reasonable law ,i.e., which embodies the principles of natural justice. Here, the fetal rights are just, fair and reasonable and embodies the 'principles of natural justice'. Art 14, which is one of these 'principles of natural justice', provides that equals should be treated alike whereas equals and unequals should not be treated alike. Here, foetus and the pregnant woman cannot be considered on the same plane, which means they are not to be treated equally. Since, foetus forms the weaker and defenceless person, law is bound to recognise right of a foetus on a higher note when compared to that of a pregnant woman.

Also, the state has a **compelling public interest** which increases at each stage of pregnancy. In *Govind v. State of M.P.*³² it was held that "Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, the fundamental right must be subject to restrictions on the basis of compelling public interest". Right to privacy of a woman in the context of abortion can be restricted or else increased rate of foeticides and misuse of the law will prevail, which will affect the public order of the country, where great importance is given to society and cultures. So it is in the public interest to consider the rights of a foetus with more vitality under Art 21.

²⁹ *Webster v. Reproduction Health Services* 492 U.S 490(1989).

³⁰ *Davis v. Davis* 305 U.S 32(1938).

³¹ *Maneka Gandhi v. UOI* AIR 1978 SC 597.

³² *Govind v. State of M.P* AIR 1975 SC 1379

Hence restrictions can be imposed by the State even though right to reproductive choice is guaranteed as a fundamental right.

GLOBAL ATTITUDE TOWARDS ABORTION

Position in U.S

U.S has one of the landmark ruling of Roe v. Wade³³, which is still considered to be the bible of abortion laws. The Supreme Court recognised that the right to abortion is a fundamental liberty protected by the Fourteenth Amendment of the Constitution. This ruling guaranteed each individual the right to make personal decisions about family and childbearing. Later on, Roe's judgement was partially overruled by Planned Parenthood of South-eastern Pennsylvania v. Casey³⁴ but Roe's take on reproductive right of women was sustained in this judgement too. It held that "the ability of women to participate equally in the economic and social life of the nation has been facilitated by their ability to control their reproductive lives." The Casey Court elaborated that abortion "involves the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy" and is "central to the liberty protected by the Fourteenth Amendment." Like other fundamental rights, the right to abortion recognised in Roe was subject to strict scrutiny-the highest level of constitutional inquiry-which required that infringements on the right be narrowly tailored to serve a compelling government interest. The Court recognised two interests-potential life and women's health-and announced that it would use the trimester system to determine when each of these state interests was compelling, disallowing state regulation of abortion in the first trimester, but permitting more regulation as pregnancy advanced. Another case of Whole Women's Health³⁵ permitted access for thousands of Texas women and signalled that laws similar to those challenged in that case are unconstitutional. Roe, Casey and Whole Women's Health developed a strong framework for protecting fundamental constitutional values of critical importance to women.

Position in Ireland

Article 40(3) of the Irish Constitution recognizes the right to life of the unborn. It was added vide Amendment to the Constitution in 1982, it says: the State acknowledges the right to life

³³ Roe v. Wade,410 U.S 113(1973).

³⁴ Planned Parenthood of Southeastern Pennsylvania v. Casey,505 U.S 833,856(1992).

³⁵ Whole Women's Health v. Hellerstedt,136 S.Ct. 2292(2016),as revised(June 27,2016).

of the unborn, and with regard to the equal right to life of the mother, guaranteed in its laws to respect and as far as practicable by its laws to defend and vindicate that right". However, Ireland has a history of cases which recognised the mental agony undergone by a pregnant woman. Amanda Mellet, an Irish woman, was 21 weeks pregnant when she was informed of a fatal fetal impairment. She decided not to continue with the pregnancy; however, because Irish law outlaws abortion except when the life of the pregnant woman is at risk, she was prohibited from accessing abortion services in Ireland³⁶ and was forced to travel abroad. In 2016, the Human Rights Committee ruled that by legally preventing a woman with a diagnosis of fetal impairment from accessing an abortion, Ireland had caused "*a condition of intense physical and mental suffering*" and violated Amanda's rights to privacy, equality before the law, and freedom from cruel, inhuman, and degrading treatment³⁷". The Human Rights Committee echoed this decision in the 2017 case of Siobhán Whelan, who was 20 weeks pregnant when she was informed of a fatal fetal impairment and denied an abortion in Ireland. The decision held that the state's legal restriction "*caused her mental anguish and constituted an intrusive interference in her decision as to how best to cope with her pregnancy.*"³⁸

Universal Declaration on Human Rights

Article-1 of the Universal Declaration on Human Rights provides "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." This provision indicates that the Universal Declaration was intended to protect only born human beings since only born human beings can exercise reason and conscience and act towards one another in a spirit of brotherhood. The proposition that mere possession of these traits by the foetus would make human rights provisions applicable to the foetus inconsistent with the first line of Article 1 which grants freedom, equality, dignity and rights only to born human beings.

International Covenant on Civil and Political Rights (ICCPR)

The ICCPR rejects the proposition that the right to life, protected in Article 6(1), extends to prenatal life. The drafters of the ICCPR specifically rejected a proposal to amend this article to provide that "the right to life is inherent in the human person from the moment of conception;

³⁶ Constitution of Ireland, 1937, art. 40.

³⁷ Mellet v. Ireland, Human Rights Committee, Commc'n No. 2324/2013, U.N. Doc. CCPR/C/116/D/2324/2013 (2016).

³⁸ Whelan v. Ireland, Human Rights Committee, Commc'n No. 2425/2014, para.7, U.N. Doc. CCPR/C/119/D/2425/2014 (2017).

this right shall be protected by law.” The Human Rights Committee, which interprets and monitors state compliance with the ICCPR, has further clarified that the ICCPR’s right to life protections may be violated when women are exposed to a risk of death from unsafe abortion as a result of restrictive abortion laws.

Convention on the Rights of the Child(CRC)

Although the Preamble of the Convention on the Rights of the Child (CRC) provides that “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,” the history of negotiations makes clear that this language is not intended to extend Convention protections, including right to life protections, prenatally. The Committee on the Rights of the Child, which interprets and monitors state compliance with the CRC, supports the understanding that the CRC does not protect a prenatal right to life. The Committee, instead, protects the right of women who are prone to unsafe abortions and voices against violation of their rights.

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

The jurisprudence of the Committee on the Elimination of Discrimination against Women (CEDAW Committee), which interprets and monitors state compliance with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), makes clear that the fundamental principles of non-discrimination and equality require that the rights of a pregnant woman be given priority over an interest in prenatal life.

American Declaration on the Rights and Duties of Man & American Convention on Human Rights

Article 1 of the American Declaration on the Rights and Duties of Man provides that “every human being has the right to life, liberty, and the security of his person. “Drafters of the American Declaration specifically rejected a proposal to adopt the following language: “Every person has the right to life. This right extends to the right to life from the moment of conception.” They reasoned that such a provision would have conflicted with existing abortion laws in the majority of the member states. Article 4 of the American Convention on Human Rights states: “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,” but the Inter-American Commission on Human Rights, one of two adjudicatory bodies that interprets and monitors compliance with the American Convention, has clarified that this protection is not absolute.

European Convention on Human Rights

Article 2(1) of the European Convention on Human Rights provides: “Everyone’s right to life shall be protected by law.” The European Commission on Human Rights, in *Paton v. United Kingdom*³⁹, held that the Convention language “tends to support the view that [Article 2] does not include the unborn”, and acknowledged that recognition of an absolute right to life before birth would “be contrary to the object and purpose of the Convention.” In *Vo v. France*⁴⁰, the European Court of Human Rights, which interprets and monitors compliance with the European Convention, affirmed that “the unborn child is not regarded as a ‘person’ directly protected by Article 2 of the Convention and that if the unborn do have a ‘right’ to ‘life,’ it is implicitly limited by the mother’s rights and interests, “including her rights to life, health, and privacy.

African Charter on Human and Peoples’ Rights

Article 4 of the African Charter on Human and Peoples’ Rights states that “human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. “Drafters of the African Charter specifically rejected language protecting a right to life from the moment of conception.

³⁹ *Paton v. United Kingdom* 3 Eur. H.R. Rep. 408 (1980)

⁴⁰ *Vo v. France* (2004) ECHR 326

CONCLUSION

The MTP(Amendment)Bill,2020 is a notable signal that the reproductive autonomy of a woman has been recognised by rectifying the provision which prescribes 20 weeks as upper gestation limit to 24 weeks for rape survivors and no gestation limit for women with substantial fetal abnormalities. But lack of expanded healthcare provider base at the rural level still stands as a far-reaching goal to achieve. Also, lack of awareness of the law has caused poor implementation among many illiterates. This does not mean that life of an unborn, defenceless baby should be arbitrarily and unreasonably deprived. Situations, which are out of the MTP Act should not be entertained and stringent penalties should be imposed on women who unnecessarily seek abortions. It would act as a deterrent for others who practise this culture. Therefore, 'to serve justice to the rightful individual', implementation of the Act has to be taken care of. This can be made into a reality through the medical practitioners whose opinion decides the right and the life of the mother and the foetus respectively.