

**THE RIGHT TO LIFE: LEGAL STATUS OF THE
FOETUS**

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FOETUS**

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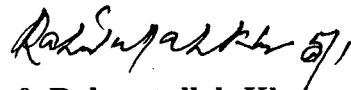
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This is to certify that the dissertation entitled, "**THE RIGHT TO LIFE: LEGAL STATUS OF THE FOETUS**", submitted by **ARCHNA NEGI**, in partial fulfilment (7 credits) of the requirement for the award of the degree of **MASTER OF PHILOSOPHY** has not been previously submitted for any other degree of this or any other University and is her own work. We recommend that this dissertation may be placed before the examiners for consideration and evaluation.


5/1/98
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FOR
MY PARENTS

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INTRODUCTION

The demand that human rights and fundamental freedoms of the individual be respected and assured throughout the world has grown over the years, and today International Law contains a fairly well developed body of Human Rights. Thus, human beings have been recognized as possessing certain fundamental rights¹ The rights of the child are separately provided for, as children are the 'vulnerable' and 'weak' of society and need special consideration and protection². The law is however mostly silent and at best unclear on the status of the foetus in law.

Today, the foetal community is the subject of much discussion and debate. Science has brought out in the open the mysteries of the womb and the foetus is no longer shrouded in enigma. Law is therefore forced to acknowledge the problems of foetal life. According to Daniel Callahan, "If the life of a defenceless foetus is not respected, then there is good reason to believe that the

¹ The Body of human rights documents include:
Universal Declaration of Human Rights
International Covenant on Civil and Political Rights
European Convention on Human Rights
American Convention on Human Rights
African Charter on Human Rights

² U.N. Convention on the Rights of the Child, 1989.

most fundamental of all human rights - the right to life - will have been subverted at its core... The test of a humane society is not the respect it pays to the strongest and the most articulate, but that which it accords to the weakest and least articulate".³ Many rights are envisaged for the foetus today. The most fundamental however is the right to life and it is best to clarify at the outset that this study attempts to address only this right.

Of the norms of International Law, the right to life is the most basic and fundamental and all other human rights obviously derive their *raison d'etre* from this fundamental right. Many international documents enshrine the right to life. But the right to life is a norm of international customary law or a general principle of international law which transcends particular statements of the right. Narrow approaches to the right to life are no longer adequate. The modern concept of this right goes far beyond the traditional views. B.G. Ramcharan in, "The Right to Life" acknowledges that social issues like abortion raise the need to take a fresh look at this right⁴.

Though there is hardly any international legislation dealing with the issue of right to life of the foetus, the conviction that human life is deserving of legal protection even when *in utero* can be inferred from a variety of international

³ Daniel Callahan, "Abortion : Some Ethical Issues" In David F. Walbert & J. Douglas Butler, *Abortion, Society and the Law* (Ohio, 1973), p. 89.

⁴ B.G. Ramcharan, ed., *The Right to Life in International Law : International Studies in Human Rights* (The Netherlands, 1985).

human rights documents. The UN convention on the Rights of the Child states that "... the child, by reasons of his physical and mental immaturity, needs special safeguards and care including legal protection, *before as well as after birth*"(emphasis added). The American Convention on Human Rights, 1978 declares in Article 4(2) "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" (emphasis added). Article 6(4) of the International Covenant on Civil and Political Rights declares "sentence of death shall not be... carried out on pregnant women". This provision recognizes the right to life of the unborn.

The medical profession has also variously recognized that unborn life must be preserved. The Hippocratic Oath, which binds all doctors declares, "I will give no deadly medicine to anyone if asked, nor suggest any such counsel; and in like manner *I will not give to a woman a pessary to produce abortion*". (emphasis added) Likewise, the Declaration of Geneva⁵ declares, "I will maintain the utmost respect for human life *from the time to conception*". (emphasis added)

So, it is accepted that a foetus deserves its right to life to be protected. However, the foetus falls in a special category because it depends for its life on its mother, who is another human being. What happens in cases where the

⁵ As amended at Sydney, 1968.

woman carrying the foetus does not want to carry it to term? This brings up the issue of a conflict of rights, and it is this that makes abortion a knotty problem. It must be further specified that it is in this specific case that the problem manifests itself in its full form and so it is in light of the problem of abortion that the right to life of the foetus will be studied.

With the staggering rise in the rate of abortion it has become one of the most widely debated subjects in the human rights sector. According to Dr. Paul Marx, "The greatest World War of all times is abortion, if by war one means death by violence". Being an issue that touches on life, death and procreation, abortion has been the subject of a passionate debate which shows no signs of abating. Though every country has laws to regulate the issue, the laws are far from satisfactory and no country claims to have found the perfect solution to the problem. Mencken's comment is apt for the abortion issue : "To every human problem, there is a solution - easy, simple and wrong".⁶

Abortion legislation has been in state of flux. To understand the core issue involved, one has to look into the background of the problem. Chapter 1 deals with religious and ethical perspectives on abortion. Religion has a profound influence on law, especially in matters relating to life. The moral debate surrounding the issue is also of importance as one's stand on public policy (or legislation) depends on one's moral stand. Two other factors that

⁶ Famous American Social Commentator.

influence abortion legislation - public policy (or demographic concerns) and scientific progress are also dealt with briefly.

Chapter II takes a quick look around the world to see what the global scenario is like concerning abortion legislation. For every region, examples of permissive, restrictive and moderate legislation are seen. Finally, a glance is taken at judicial decisions concerning abortion which have had an impact on legislation.

The last chapter covers the abortion legislation in India. The evolution of abortion law is seen in the background of Indian society and culture and the problems peculiar to India.

It will be too optimistic to expect clear-cut solutions tailor-made to our needs considering the complexity of the problem; a major task would be accomplished if one can put the problem in perspective and comprehend the urgency of addressing it.

CHAPTER I

ABORTION LAW : PERSPECTIVES

INTRODUCTION

The issue of abortion has always been in the eye of the storm. It has become a primary cause of social, religious and political controversy. Any law aimed at addressing the issue has a difficult task ahead. It must reconcile or at least take into account conflicting rights (foetal vs. maternal, individual vs. societal), hierarchize them, give due regard to religious sentiments, find some bit of solid ground in the shaky moral morass surrounding the issue and keep pace with the scientific progress in the field. Undoubtedly, a Herculean task to fulfil. It is essential to understand the myriad factors that influence and are formative elements of abortion law.

RELIGIOUS BELIEF

The abortion debate cannot be seen in isolation from the religious beliefs regarding the issue. Religious beliefs and philosophy, like ethical precepts cannot be experimented upon or proved scientifically- they are based on faith and are inextricably linked with culture. The influence of religion on society

is profound in all aspects of human life- but especially so in core issues like life, death and procreation. Scientific truths constantly change as new discoveries render former truths obsolete. But because theology professes eternal truths, religious beliefs persist through the ages. Religion can neither be disregarded nor its principles deliberately flouted. Any abortion law which is to govern a society cannot afford to ignore the basic religious values of the people.

Although all religions have a philosophy of life, none provides a uniform response to all the questions raised by the human embryo or by the issue of abortion. One must therefore understand the complex evolution of religious attitudes to the embryo and the foetus.

The Christian View of Abortion:

- (a) **Catholic View:** The Roman Catholic Church has always stood for complete prohibition of abortion, considering it 'wilful destruction of life'.¹ It holds that a new life begins at conception. Biblical teaching is clear that individual human life is precious in the sight of God because man is made in his image. Jeremiah 1:5 saying, "Before I formed you in the womb, I knew you, and before you were born, I consecrated you",

¹ S. Chandrashekhar, *Abortion in Crowded World: The Problem of Abortion with Special Reference to India* (Chatham, 1974), p.28.

is said to show God's caring concern for the unborn.² The *Didache*, an early source of Christian law treated abortion as a sin equal in magnitude to a breaching of the Ten Commandments. The Epistle of Barnabas said clearly, "You shall not slay the child with abortion".³

By the fifth century A.D., however, distinctions were being drawn between the "formed" and the "unformed" foetus. It was believed that the soul entered the female foetus at eighty days gestation and the male foetus at forty days. This view was based on the Aristotelean belief that the foetus, though possessing soul potentially, passes through stages from the plant-like to the animal-like, when it acquires sensation. So, abortion should ideally be carried out before sensation and life have begun.⁴ Accordingly, interruption of pregnancy before 40 days was punishable by fine, whereas abortion after 'ensoulment' was recognized as murder.⁵

But since 1588, the Catholic Church has considered as murder the killing of any human fruit from the moment of conception. In 1869, Pope Pius IX

² Allister Vale, *Medicine and the Christian Mind* (London, 1980), p. 132.

³ Daniel Callahan, *Abortion : Law, Choice and Morality* (New York, 1970), p. 476.

⁴ G.R. Dunstan, ed., *The Human Embryo : Aristotle and the Arabic and European Traditions* (Exeter, 1990).

⁵ Kenneth R. Niswander, "Abortion Practices in the United States," In David F. Walbert & J. Douglas Butler, *Abortion, Society and the Law* (Ohio, 1973), p.200.

rejected the notion of ensoulment. He declared that life begins at conception and the removal of a zygote, embryo or foetus is considered a murder and is hence forbidden under all circumstances, the only possible exception being a case of indirect abortion.⁶

Since the mid eighteenth century, the papal stand has been towards an increasingly stringent prohibition of abortion. A series of strong, uncompromising papal statements have continued down to the present. The Catholic case against abortion in the words of Pope Pius XII is as follows: "The unborn child is a human being in the same degree and by the same title as its mother... every human being, even the child in its mother's womb, receives its right to life directly from God, not from its parents, not from any human society or authority... from the very first moment of its existence ... The life of an innocent human being is inviolable".⁷ Pope Paul VI, in his encyclical *Humanae Vitae*, 1968 said, "... abortion, even if for therapeutic reasons, is to be absolutely excluded".⁸ The 1974 Declaration on Procured Abortion proclaimed that a new life begins at the time of fertilization and this life belongs

⁶ When an operation is performed to cure a fatal disease of the women which incidently leads to the destruction of a foetus, it is known as a indirect abortion. An ectopic pregnancy or a cancerous pregnated uterus may be removed as these operations have the primary purpose of saving the life of the mother, not the destruction of the foetus.

⁷ Chandrashekhar, n.1 p.27.

⁸ ibid, p.27.

to a new human being and not to the father or mother. The 1987 "Instruction on Respect for Human life" upheld the 1974 teaching as valid.⁹

More recently, Pope John Paul II's 1995 encyclical letter "The Gospel of Life" emphasized the vulnerability and neediness of nascent life in the womb, "The unborn child is totally entrusted to the protection and care of the woman carrying him or her in the womb. The work ... of serving life ... must be fulfilled above all towards life when it is at its weakest"¹⁰ He confirmed that even if a doubt exists about whether a foetus is human or not, it would be a sin to dare to risk murder. Abortion is classified as a crime against life and human liberty and is punishable under the Code of Canon Law by excommunication. In a message from the Vatican, the Pope (John Paul II) recently declared that women who use abortion pills (RU486) will face excommunication from the Roman Catholic Church. He called the use of these pills as "tantamount to murder".¹¹

Hence, the Catholic Church never tolerates any direct abortion, even when by allowing the pregnancy to continue, both mother and child will perish;

⁹ William Werpehowski, "Persons, Practices and the conception Argument", *The Journal of Medicine and Philosophy* (Netherlands), vol.22 (1997), pp.479-94.

¹⁰ *ibid*, p. 481.

¹¹ *Asian Age* (New Delhi), 2 August 1996.

"better two deaths than one murder".¹² Catholic theology has maintained its rigid stand on abortion to the present day and seems changeless.

The influence of the Roman Catholic view has had tremendous influence on abortion laws throughout the world and it has been very vocal in the abortion debates.

(b) The Protestant View

Till the first quarter of the twentieth century all Protestant denominations were hostile to the idea of abortion on the grounds that it is immoral, unchristian and contrary to divine law. But the Lambeth Conference of 1958 declared that..."The responsibility for deciding upon the number and frequency of children has been laid by God upon the conscience of parents everywhere...." and approved abortion at the dictate of strict and undeniable medical necessity, broad enough to cover health as well as life.¹³ The sanctity of potential life is stressed and abortion as a method of birth control is condemned. But, abortion is tolerated when the life or health of the mother is threatened. The American Baptist convention in 1968 recognized that "abortion should be a matter of responsible personal decision" and urged legislation to provide that (1) the

¹² Rabbi Dr. Immanuel Jakobovits, "Jewish View on Abortion," In David F. Walbert & J. Douglas Butler, *Abortion, Society and the Law* (Ohio, 1973), p.106.

¹³ Chandrashekhar, n.1, p.38.

termination of pregnancy before the 12th week be at the request of the individual(s) concerned and (2) after that period a pregnancy be terminated only in case of substantial risk to physical or mental health of the mother, risk that the child would be born with grave physical or mental defect, rape, incest as cause of pregnancy.¹⁴ In fact, the resolution urges the church to provide counselling on abortion. The Unitarian Universalist Association urged that "efforts be made to abolish existing abortion laws, except to prohibit performance of an abortion by a person who is not a duly licensed physician, leaving the decision as to an abortion to the doctor and his patient".¹⁵ Though the positions of individual denominations vary, generally abortion is tolerated under certain conditions and is not absolutely prohibited.

Judaism:

Judaism, while it does not share the rigid stand of the Roman Catholic Church, also does not endorse the far more permissive views of many Protestant denominations. the traditional Jewish position is between the two extremes, recognizing only a grave hazard to the mother as legitimate indication for therapeutic abortion. Jewish law assumes that the full title to life arises only at birth. According to the Talmud, " If a woman is in hard travail [and her life

¹⁴ ibid, p.39.

¹⁵ ibid, p.40.

cannot otherwise be saved] one cuts up the child within her womb and extracts it... because her life comes before that of [the child]. But if the greater part [or the head] was delivered, one may not touch it, for one may not set aside one person's life for the sake of another".¹⁶ The argument for sanctioning embryotomy to save the mother is that such a child is in 'pursuit' of the mother's life and may be destroyed as an "aggressor" following the general principle of self defence.¹⁷ So, the attitude towards abortion in Jewish law is that (1) the only indication for an abortion is a hazard to the mother's life and (2) otherwise, destruction of the unborn child is a grave offence (although technically not murder). Most authorities of Jewish law agree that physical or mental abnormalities of the foetus do not in themselves compromise the title to birth. Human life is infinite in value and its sanctity is unaffected by the absence of mental faculties or by defects. Any chance, however slim, that a life may be saved must always be given the benefit of doubt. But Jewish law would consider a grave psychological hazard to the mother as reason for abortion. The Jewish concern for the mother is highlighted by the fact that a pregnant woman sentenced to death must not be subjected to the ordeal of suspense to await the delivery of her child¹⁸ (Jewish sources brand any delay in the execution as

¹⁶ Jacobovits, n.12 p.106.

¹⁷ *ibid*, p.107.

¹⁸ *ibid*, p.117.

"perversion of justice", (since the criminal is sentenced to die, not to suffer). In fact, more lenient opinions have followed allowing abortion when there is a serious medical indication for it as well as in cases of conception by rape or incest or of a risk that the child may be born physically or mentally handicapped, as long as it is within the first 40 days of pregnancy. But the general Jewish view remains that Jewish law prohibits abortion unless a potentially lethal deterioration in the mother's health might ensue.¹⁹

Hinduism : There is no static, defined belief in Hinduism's attitude to abortion and it is a matter of dispute whether classical Hinduism contains clear, specific prohibitions against abortion. But certain classical principles and customs suggest a general bias against the practice. The principle of *ahimsa* would run counter to abortion. According to ancient *Samkhya* Philosophy, there are two principles which are central to this Universe : *Purusha* (soul) and *Prkrti*(body). The soul or *atman* descends into the zygote produced from the union of the sperm and the ovum. According to Dr. A. Ramaswamy Iyengar, "It is at the moment of the sperm-ovum union that the transmigrating *atman*, *purusha* (the individual) gets his material encrustation, as dictated by his

¹⁹ ibid, p.118.

previous *karma*".²⁰ There are 40 sacraments in traditional Hinduism- for every major event in the life of a Hindu. Three such sacraments that appear to run counter to the practice of abortion are *garbhadana*, the sacred rite to promote conception, *pumsavana* to enhance the chances of the birth of a male and *simatonnayana* to ensure the embryo's safety in the womb.²¹ *Bhruna-hatya* (foetus murder) or *garbha-hatya* (pregnancy destruction) has been condemned as a serious sin in the vedic scriptures. The first reference to abortion appears in the *Atharva Veda*: "Wipe off, O Pushan, the misdeeds on him that practiceth abortion".²² Thus, abortion is ranked along with the gravest of sins. That the *Atharva Veda* condemns abortion can also be found in its passage, "Within the womb Prajapati is moving".²³ Because Prajapati is the creator and Lord of the Universe, abortion is indicated as being inimical to the elemental principle of creation. According to *Yagnavalkya Smriti* (400 B.C.), abortion causes the degradation of women and *garphapatana* (inducing abortions) is a valid reason for abandoning one's wife.²⁴ The epic Mahabharata (300 B.C.) refers to embryo murder as a sin. It also contains the story of the legendary hero Arjun

²⁰ C.M. Francis, " Medical Ethics in India : Ancient and Modern (II)" in *Issues in Medical Ethics*, vol. 5, no.1, (1997), pp. 3-6.

²¹ Callahan, n 3 p.154.

²² Chandrashekhar, n.1 p.41.

²³ *ibid*, p.41-42.

²⁴ *ibid*, p.44

narrating the secret military manoeuvre to penetrate the unassailable battle formation, Chakravyuha, to his pregnant wife Subhadra. Flowering in her womb, the foetus Abhimanyu listens and later uses the manoeuvre in battle. Thus, the ancients projected the womb as penetrable and the foetus as sensitive and responsive. However, Hindu thought has been willing to distinguish between different phases of gestation. S.Radhakrishnan in "The Hindu view of Life" points out that according to the Hindu classical texts there are three school of thought - (1) that life beings at conception (2) that it begins with the first movement of the foetus and (3) that is begins with the first breath of the infant after delivery.²⁵ Radhakrishnan, who has reinterpreted classical Hinduism in the light of modern thought and needs could permit abortion under certain conditions. So, the Hindu view has not remained static, it has changed with time.

Muslim View: Muslims are required to find the answer to their ethical dilemmas firstly from the Holy Koran, the Hadith (traditions from the Prophet Mohammed) and from the interpretations and opinions of Islamic ecclesiastical heads such as the Muftis and Ulemas.²⁶ The traditional Islamic view has been opposition to birth control in general. The opposition is derived from the Koranic injunction, "Murder not your children for fear lest ye be reduced to poverty.

²⁵ ibid, p.32.

²⁶ ibid, p.46.

We will provide for you and them" (Koran VI : 151; XVII; 31). A *fatwa* issued by the Grand Mufti of the Egyptian realm in 1937 said about abortion, "...opinion on this subject has differed but the majority are inclined not to allow it... After the quickening of the embryo, abortion is absolutely prohibited".²⁷ Islam recognizes life, not as a right but as a duty. One of the most important human duties is the preservation of life. The Koran says, "Terminate not life for it is sanctified by God. But in December 1964, the Grand Mufti of Jordan stated, " It is permissible to take medicine to procure abortion, so long as the embryo is unformed in human shape".²⁸ The period of this unformed human state was given as 120 days. Thus, Islamic theological view has also undergone some change and Islamic injunctions are now interpreted to allow therapeutic abortions.

Other Religions: The central principle of *ahimsa* in Buddhism and Jainism would stand against abortion, though there are no specific references to it. *Videvdad* (a religious code of the Zoroastrians) treats abortion as a great crime tantamount to manslaughter and if a girl was made pregnant and had recourse to an abortion, the woman, the man and the abortionist were all considered

²⁷ ibid, p. 47-8.

²⁸ ibid, p. 47

equally responsible.²⁹ Shintoism apparently holds that a foetus is not a living person and personhood is acquired upon birth. Confucianism places no particular obstacle to the performance of abortion.³⁰

MORAL DEBATES

The legal issue of abortion cannot be resolved independently of the moral concerns that surround it. Without some fundamental points of moral agreement, laws cannot be framed, nor codes enacted. And without an awareness of the moral issues implicit in establishing good laws, it will be impossible to determine what a good law is or should be. If we hope to strive for a consensus on legal and public policy of abortion, we must necessarily agree on some fundamental human values. However, this is easier said than done. Moral debates have raged for decades over the issues relating to abortion and they show no signs of abating. What are some of these issues?

The Sanctity of life: That life is sacred and precious and to be treasured is an accepted principle. The "right to life" is enshrined in numerous national and international statutes on the belief that life is to be valued.³¹ But there are

²⁹ Henry E. Siegler, *A History of Medicine, Vol. II : Early Greek, Hindu and Persian Medicine* (New York, 1987), p.201.

³⁰ Callahan, n.3 p.258.

³¹ The Right to Life is enshrined in :
Article 3 of the Universal Declaration of Human Rights.

innumerable questions that crop up when this right is sought to be implemented. One central question is regarding the boundary lines of this right-when does life begin ? Who can avail of this right ? What is the status of the foetus? Is it a 'person', a 'potential person' or 'not a person at all' (till it is born)? The legal issue of abortion thus has at its core the 'status of the foetus' problem.

Personhood of the foetus:

Only a decision about the personhood of the embryo can bring to light any obligations owed to it. Is a foetus a 'human being' ? According to Daniel Callahan, it is necessary to first examine the concept "human" and then see how it can apply to prenatal life.³² But a 'human' is a mosaic of many characteristics. How can we select one characteristic arbitrarily and apply it for comparison?

For example one school of thought believes that because the zygote has the same genetic code as a human being, it qualifies to be a human. Another group claims that when the foetus outwardly resembles a human being, it is

Article 6 of the International Covenant of Civil and Political Rights.

Article 2 of the European Convention on Human Rights.

Article 4 of the American Convention on Human Rights.

Article 4 of the African Charter on Human and People's Rights.

³² Callahan, n.3 p.349.

human. Still others claim that sentience or rationality or consciousness is essential for qualifying the foetus as human. Callahan points out that human beings are to be looked at in all their diversity - we cannot single out one human attribute that can be counted as decisive.

Also, any attempt to define "human" life must take account of "potentialities".³³ At one particular moment, a human being may be displaying very few human characteristics (he may be asleep, unconscious or an infant)-a human does not realize all his potential at once. That does not mean he is not human; what is important is that he possesses those human potentialities.

These two facts - that the status of the foetus (a) cannot rest on one characteristic alone and (b) must take account of "potentiality", make it all the more difficult to arrive at a decision on the status of the foetus.

The law often has to deal with the status of the foetus. Does the law treat the foetus as a person?³⁴

1. For purposes of inheritance or succession, a posthumous child is deemed existing at the time of the parent's death. Property rights vest in the unborn child provided that it is subsequently born alive.
2. For purposes of citizenship, birth is a test of life.

³³ ibid, p.350.

³⁴ R. Slovenko, "When Does Life Really Begin?", *Medicine and Law*, vol.2 (1983), pp.81-84.

3. The unborn child is considered a "person or separate being" within the meaning of the wrongful death statute in many states. A pregnant woman, consequent to injury can recover damages in a lawsuit for the loss of the "foetal child".
4. If a father is wrongfully injured and killed. The child *in utero* at the time of the father's death has a right of action against the wrongdoer.
5. The unborn may also claim damages for injuries suffered before birth. The California Civil Code provides that " A child conceived, but not yet born is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth".
6. The California legislature included a foetus as a human being withing its homicide statute following a case where a man stomped a pregnant woman, causing her to have a miscarriage.
7. Medical examiners finding in an autopsy a foetus that could have survived outside the womb, double the death count.
8. Penal codes postpone until birth the execution of pregnant woman sentenced to death.

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The general emphasis has focused on live birth as rite of passage to personhood with viability as an increasingly accepted alternative. While in most cases, the protection of the law rests at the moment of birth, it can be questioned whether the unborn is less a person when terminated by abortion

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than when killed by car or execution? The courts too have been equivocal about this issue. The U.S. Supreme Court had this to say on the issue: " We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine , philosophy, and theology are unable to arrive at any consensus, the judiciary , at this point in the development of man's knowledge, is in no position to speculate as to the answer".³⁵

Further, it is claimed that laws are merely statutory recognition of the nature of individuals as persons. Such recognition may be absent because of a failure on the part of society to comprehend the moral structure of the world. This is illustrated by the failure of society to recognize women as persons or to comprehend the immorality of slavery. Noonan points out, "Humanity does not depend on social recognition."³⁶ So even if the laws do not at present recognize personhood of the foetus, it does not mean that the foetus is actually bereft of personhood.

While, courts have avoided committing themselves to a particular theory of life, personal theories as to the moral status of the foetus have been equally diverse and arbitrary. The foetus gains personhood when life beings. But when does life begin?

³⁵ ibid, p.83.

³⁶ Edward John Main, "The Relevance of a Biological Definition of Life to Fundamental Rights", *Medicine and Law*, vol.6. (1987), p. 190.

Beginning of Life Theories:

No consensus whatsoever seems to exist on the beginning of life. Though the biological process of *in utero* life is known right from fertilization to birth, scientific data alone is of no help as it has to be interpreted and this is where ethics and morals step in. Data provided by technical experts must be interpreted by moralists and ethicist.

There are various theories regarding the point at which life begins.³⁷

1. The Genetic School³⁸ considers life to start at conception because the zygote has the genetic potential of a human being. The Roman Catholic Church would fall in this school which claims life must be protected and respected from the time of conception. The potential argument is negated by many according to whom the potential may no more be equated with the actual than the clay on the wheel may be equated with the particular finished pot or the acorn with the oak which spring from it.
2. The Development School holds that while conception does establish the genetic basis for an individual human being, it must develop to some degree before it can be thought of as the life of an individual human

³⁷ Callahan, n3 p.383.

³⁸ Proponents of the Genetic School are John T. Noonan Jr., Paul Ramsey and Andre Hellegers among others.

being. Personhood (and thereby rights) follow biological or social achievements.

Within this school, there are differences of opinion on just how much development is required. For example,

- (i) it is put forth by some that only when the zygote is implanted in the uterus can life be said to have begun. According to Michael Coughlan, "conception should be identified with implantation in the womb and not with fertilization."³⁹ Similarly, Ian Kennedy opines that a miscarriage cannot be procured unless the woman is carrying- until the fertilized egg is implanted in the womb.⁴⁰
- (ii) It is argued that the capacity of the embryo for twinning or recombining shows it cannot be 'a person'. Rex Gardner queries "Does the soul also split?," if it was a person since conception.⁴¹ Thus, according to Norman Ford, "the human individual begins at the primitive streak (14 days)."⁴²

³⁹ Michael J. Coughlan, *The Vatican, the Law and the Human Embryo* (London, 1990).

⁴⁰ Ian Kennedy, *Treat me Right: Essays in Medical Law and Ethics* (Oxford, 1988).

⁴¹ Allister Wale, *Medicine and the Christian Mind*, (London, 1980), p.133.

⁴² Norman M. Ford, *When Did I Begin? Conception of the Human Individual in History, Philosophy and Science* (Cambridge, 1988).

Other proposed points for the acquisition by the embryo of the status of a person are :

- (iii) after 18 days (beginning of neural tube development). According to Blunt, personality is related to an ability to respond to fellow human beings. The crucial stage in the development of the foetus would therefore depend on a minimal development of the nervous system.⁴³
- (iv) after 22 days (onset of foetal brain-birth).
- (v) when recognizable human form emerges
- (vi) when the foetus is viable.
- (vii) brain-birth ((24-28 weeks) ⁴⁴
- (viii) quickening etc.⁴⁵

Further, many of these development points are themselves variable, depending on the foetus and the state of medical technology.

3. The Social Consequences School⁴⁶ claims that 'life' is continuous; one cannot draw a line confirming where life beings. But the decision to call the conceptus a "human life" is to be made on the basis of the social consequences of the decision. This school does not recognize the

⁴³ Wale, n41 p.132.

⁴⁴ D. Gareth Jones, "Brain Birth and Personal Identity", *Journal of Medical Ethics*, vol. 15, pp. 173-8.

⁴⁵ The point at which foetal movements become discernible to the mother.

⁴⁶ Glanville Williams and Garret Hardin.

significance of biological data. Their theory is aptly summed up by Hardin, "Whether the foetus is or is not a human being is a matter of definition, not fact,; and we can define any way we wish".⁴⁷

That legal policy is largely influenced by philosophical or moral leanings is evidenced by the fact that the Genetic school represents a fully protectionist policy, the Developmental School opts for a flexible, moderate model and the Social Consequences school leans in favour of the pregnant woman.⁴⁸

Both the status of the foetus and the issue of when life beings, are linked to each other. They represent the vexing problem of 'line drawing'. Where can one draw the line against abortion. An attempt to do so leads us to the "paradox of the heap" (*sorites* paradox) - how does one determine when the removal of a grain from a heap of sand renders the pile no longer a "heap".⁴⁹ Thus the problem of drawing distinctions along a continuum is what we are faced with.

Scientific evidence does no tell us when human life begins. The concept "human" requires a philosophical and ethical judgement. Further, even if it were shown that human life begins at a certain point, that finding would require the further moral judgement that life at that stage ethically merits full protection.

⁴⁷ Hardin, "Abortion-or Compulsory Pregnancy?", *Journal of Marriage and Family*, vol.30 (May 1968).

⁴⁸ Callahan, n.3 p.385

⁴⁹ Jeanne Salmon Freeman, "Arguing Along the Slippery Slope of Human Embryo Research", *The Journal of Medicine and Philosophy*, vol.61 (1996) pp.61-81.

When human life begins and when it merits full respect are sometimes treated as two different questions.⁵⁰

But, law cannot wait endlessly for answers which will fully satisfy the moralist or philosopher. So, most abortion laws of the world have drawn these lines for the purpose of law. Though such line are bound to be arbitrary and so questionable, all that can be said is that we have to draw them to fulfil a functional purpose.

Foetal Rights vs Maternal Rights:

Even if the point where life begins is 'discovered' and the foetus is granted human status, what happens when its rights come up against those of the mother? Who gets precedence? The issue of abortion involves the consideration of competing rights.

Foetal rights and maternal rights have been publicly debated in "pro-life" and "pro-choice" terminology Legislation all over the world has recognized that when the right to life of the foetus is pitted against the right to life of the mother, the hierarchy of rights is quite clear. Almost all countries permit

⁵⁰ Callahan, n3 p. 153.

abortion when the mother's life is at stake. But does the woman have a right over her body, or the right to make her reproductive choice, the right to privacy etc. ? The pro-choice lobby advocates that the woman must have complete control of her reproductive system and she should be free to make her choice. Beverly Harrison and Rosalind Petchesky⁵¹ point out that no one can be forced to donate an organ or submit to invasive physical procedures. No woman should be subjected to 'compulsory pregnancy'. Although pro-choice advocates agree that foetal life is human life, they claim that the ontological status of the embryo or foetus is subsumed by the paramountcy of the woman's choice. Their view of foetal life is that foetal life is dependent upon the woman's free consent and subjective acceptance; the foetus becomes human only when invested with maternal valuing. The meaning and value of foetal life must be construed by the woman. So, foetus rights can never out-weigh the woman's prior interest and rights. According to Tribe,⁵² the relationship between the foetus and the woman is without any parallel as the foetus is completely dependent upon the body of the woman. The sustenance it needs is not for society to grant; so it is wrong for society to claim an interest in the life of the foetus. Respect for the foetus cannot be bought by denying the value of the mother.

⁵¹ D.J. Leyshon, "Abortion: In Search of a Constitutional Doctrine (Part 1)", *Medicine and Law*, Vol.10 (1991) pp. 155-183.

⁵² *ibid.*, p.163.

"Pro-lifers" on the other hand argue that the rights of the foetus cannot be subordinated to those of the woman. Their basic premise is that human life starts at conception and when the foetus's right to life comes up against a lesser right of the mother, the right to life must prevail.⁵³

As if it were not already beset with enough moral dilemmas, any abortion law, must also take into account this issue of a conflict of rights. A conflict between maternal and foetal rights was brought out in the famous case of Baby Boy Roininen (Baby R) (1988) in Canada,⁵⁴ which saw the apprehension *in utero* of a child in the process of being born in order to provide it with appropriate medical attention so as to save its life. This involved delivery by caesarian section, where the mother initially refused (ultimately, she granted consent). In subsequent court proceedings, Judge B.K. Davis found that the apprehension of the Child while *in utero* was in keeping with the law. Both the initial apprehension as well as the subsequent court order were welcomed by those who saw this as an appropriate intervention of the state to safeguard the life of an unborn child and rejected by those who saw an imposed caesarian section as gross violation of female autonomy and inviolability. The rationale behind this decision was that in situations where the foetus has passed a certain

⁵³ *ibid*, p.164.

⁵⁴ Fike-Henner W. Kluge, "When Caesarian Section Operation Imposed by a Court are Justified", *Journal of Medical Ethics*, vol. 14, 1988, pp. 206-11.

state of development, its rights take precedence over those of the mother. The *Roe v. Wade* decision was an attempt to balance foetal rights with maternal rights. Many other judicial decisions and legislations have also drawn the same conclusions, by breaking up the gestation period and having different provisions to apply to different phases of foetal and maternal life.

PUBLIC POLICY CONSIDERATIONS ⁵⁵

Abortion has been and continues to be the most widely practised method of fertility control in virtually every country, no matter what its culture or religion. Abortion legislation may have striking demographic consequences. Ancient Greek society never frowned on abortion and Plato and Aristotle both recommended it as a means of controlling population growth.

Many countries (China, Vietnam) have liberal laws only to facilitate population control. On the other hand, many eastern European countries have had stringent laws to avoid a fall in the birth rate. However, studies show that the birth rate can hardly ever be manipulated by limiting the right to abortion. "Experience in all countries has demonstrated that no legislative provision can

⁵⁵ Malcolm, Potts, "Population Growth and Abortion" In Gerald I. Zatzuchni and Others, *Pregnancy Termination: Procedure, Safety and New Development* (Maryland, 1979), p. 416.

prevent a pregnant woman from trying to terminate an unwanted pregnancy, notwithstanding the risks that this entails".⁵⁶

The right to life of a foetus, which is dependent on the abortion law, may thus be determined by the demographic needs of the country.

SCIENTIFIC PROGRESS:

Abortion laws must also keep up with scientific progress. They have to continually adapt to medical progress which moves at a much faster pace than does law. The development of pre-natal diagnostic techniques for example, has resulted in the problem of sex-selective abortion, creating another important issue for law to sort out. The introduction of abortion pills (RU 486)⁵⁷ to facilitate medical abortion will have to be dealt with separately by the law. Similarly, laws based on the viability principle have to be altered now that technology is pushing back the viability line. Thus, abortion legislation has to be continuously updated.

⁵⁶ Statement of Purposes of a French Bill (1997-78) on prevention of clandestine abortion.

⁵⁷ Also known as the "Morning after" pill, RU486 or Mifepristone induces abortion if swallowed after an act of unprotected sex.

SUMMING UP:

Any law that openly disregards religious sentiments will not be tolerated by people. It is a different issue that religions are gradually being reinterpreted and are adjusting to modern needs. Understanding religion is essential for forming policy issues concerned with life, birth and procreation (the abortion issue happens to touch all three aspects).

As for the ethical debates, it is not possible to come up with clear-cut answers. It is a gray area in which subjectivity prevails. Questions concerning line drawing are necessarily arbitrary. These lines are of utmost relevance because they separate life from death. One's moral evaluation of abortion has a considerable impact on one's evaluation of abortion indications and abortion laws. It also decides one's stand in cases of conflict of rights. For purposes of the law, functional solutions must be worked out without getting caught in the mire of morality, though only after considering morality and the debates surrounding the issue.

Public policy issues like population control also come into play in the matter of foetal rights and here again conflicting interests emerge. For some countries, demographic considerations play a particularly important role in deciding abortion policy.

Lastly, abortion law cannot remain static when scientific progress is whizzing by.

All these factors must be understood before understanding, formulating or evaluating abortion law. After understanding these background issues, we can proceed to take a look at the global scenario regarding abortion legislation.

CHAPTER II

ABORTION LAWS AROUND THE WORLD

INTRODUCTION

The variety of differing moral and legal attitudes to abortion suggest that it is not an easy problem for mankind to come to grips with. Among the countries of the world, the legal status of abortion ranges from complete prohibition to elective abortion. But there is hardly any nation in the world which believes or claims to have discovered the perfect solution to the ethical, social, medical and legal problems relating to abortion. The changes in abortion laws of different nations over the past few decades and the heated debates surrounding the issue are evidence of the worldwide uncertainty and flux. A systematic international comparison is essential to form an idea of the global legal scenario regarding abortion. This will help us discern whether the countries of the world are moving in different directions or whether there is possibility that they are taking the first step towards some kind of a global consensus on this issue. It is true that the value systems and consequently legal systems of different communities are bound to differ. However, there are always areas of agreement and it is these overlapping areas that can form a common ground for cross-cultural discussion.

It should be noted at the outset that abortion statutes of many countries are not strictly enforced and some abortions on medical grounds (to save the life of the woman) are tolerated in almost all countries. It is an established fact that in many countries with restrictive laws, abortions can be obtained from physicians without interference from the authorities. Conversely, legal authorization of elective abortion does not guarantee that abortion on request is actually available to all women. Lack of medical personnel and facilities or conservative attitudes among physicians or the authority responsible for deciding the permissibility of each case can determine the availability of legal abortion. Thus, legal provisions are not always reflective of actual practice regarding abortion.

ABORTION LAWS:

Before the nineteenth century, early abortions were not condemned or regulated legally. But during the nineteenth century, women faced legal restrictions on abortion at any stage of pregnancy. Law traditionally took its cue from ecclesiastical law with its moralistic overtones and imposed heavy penalties on anyone involved in abortion. In the evolution of legislative provisions, abortion is generally first dealt with in penal legislation. By 1954, the penal codes of almost every country in the world made abortion a grave crime and imposed strict penalties for inducing abortion. These legislations have over time

been changed to include certain "indications" which make abortion permissible or new abortion legislation has been formulated enumerating such indications. The language of "indications" is used to classify the reasons for abortion.¹ The commonly recognized indications are as follows:²

- (1) **Medical Indications:** (also known as therapeutic indications) the most stringent legislations authorize abortion only when the operation is necessary to save the life of the woman. This involves a direct clash between the right to life of both the mother and the foetus. In this case, it is almost universally recognized that the interest in the life of the mother must prevail. The medical indication is often extended to include the preservation of the health of the mother. Further, in some cases 'potential' injury to health of the woman or consideration of her 'reasonably foreseeable' environment in determining threat to her health, make this a broad indication which can be used to cover many situations.
- (2) **Eugenic Indications:** the purpose of such a provision is to prevent the transmission of hereditary diseases and to avoid the birth of children liable to be affected by physical or mental disorders as a result of

¹ According to Daniel Callahan, the language of "indications" is used in order to avoid begging the question of whether such indications should be written into the law.

² D.D. Seth and S.K. Maitra, *Abortion and Termination of Pregnancies in India* (Allahabad, 1973) p.27-31.

chromosomal abnormality or intra-uterine damage. This ground for abortion has thrown up a host of moral questions. Who is to decide whether a foetus will be "fit" enough to be allowed to live? How is one to determine that level of disability where not being born at all is preferable to a life of suffering ? Here again we are faced with the problem of where to draw the line. Needless to say, any such line drawn is bound to be arbitrary and subject to constant change . It is feared that eugenic indications are designed for the convenience for the parents and if legalized, they may result in arbitrary abortions in the quest for the "perfect" baby.

- (3) **Ethical Indications:** These include cases where pregnancy is a result of a criminal act such as rape, incest or sexual intercourse with a minor or a person suffering from a mental disorder. In some cases (Middle East) ethical indications include cases where the 'honour' of the pregnant woman or her family are at stake.
- (4) **Medico-Social Indications:** are provided for in fairly liberal abortion legislations. They include factors like previous deliveries in close succession, domestic difficulties because of infants, a difficult financial situation etc.
- (5) **Social Indications:** One social indication is the number of children. Many legislations allow abortions after a certain number of children.

Age of the woman can also be cited as an indication for abortion (for example, if she's less than 16 or more than 40 years of age) other social indications include cases where the husband is dead or on military duty.

(6) **Abortion on Demand:** A statute allowing abortion on request usually sets time limits for such requests.

(7) **Contra-indications:** legislative enactments often establish a list of contra-indications, i.e. a list of restrictions on legal abortion. The most common contra-indication is the progress of the pregnancy beyond a certain stage. Another is the requirement that a certain authority be responsible for the decision regarding abortion. Or it may be required that the abortion be performed in approved establishments only. Consent of interested parties may be required. Some countries with liberal laws impose restrictions on non-residents.

It is based on the above-mentioned indications and contra-indications that all abortion laws in the world are formulated.

ABORTION LAWS IN THE WORLD

NORTH AMERICA

U.S.A.: Before 1973, each state of USA responded to the abortion dilemma in its own way. Catholic influenced states banned abortion under all circumstances. Fundamental Protestant states (like Texas) permitted it only in order to save the

woman's life.³ Other states had enacted relatively permissive abortion laws based on the Model Penal Code put forward by the American Law Institute, which allowed abortion on medical, eugenic and ethical indications. This lack of uniformity was rendered untenable by the realization that the abortion issue raised fundamental human rights issues.

The landmark *Roe v. Wade*⁴ decision of the Supreme Court in 1973 'decriminalized' abortion in nearly all American states. This classic decision in the field of abortion tried to balance foetal rights with maternal rights. The Supreme Court established a constitutional right to privacy through creative interpretation of the constitution. It established that the state might have an interest in the opinion which the woman chooses to exercise but only a compelling interest can justify any state regulation which impinges on the woman's choice. The *Roe* decision divided the nine month gestation period into three distinct trimesters. In the first trimester (0-3 months), an abortion can proceed without state interference as long as the woman can find a physician who is satisfied that the pregnancy should be terminated. So, in the first three months, virtual abortion on demand is available. During the second trimester (4-6 months), a compelling interest in safeguarding the woman's health justifies a degree of state regulation. So it is permissible for the state to determine the

³ Patricia Gober, "The Role of Access in Explaining State Abortion Rights" *Social Science and Medicine*, vol.44(7) (March 1997), pp. 1003-16.

⁴ *Roe v. Wade* 420 U.S. 113 (1973).

qualifications needed for those persons who are to perform the abortion. The decision whether to opt for an abortion or not, however, was to remain within the realm of personal choice. So, at no point during the first six months of pregnancy does the state have any compelling interest in safeguarding the life of the foetus. The legal significance of the life of the foetus is only recognized from the seventh month of pregnancy. Thus, the compelling point was fixed at "viability" or "capability of meaningful life outside the mother's womb". But even in this phase, state controls to prevent abortions are unconstitutional if abortion is considered necessary to preserve the life or health of the woman. In sum, the decision of abortion rested with the woman till the twenty-fourth week, after which the foetus is deemed to be potentially independent of its mother's body, so the state has a constitutional right to ensure the foetus's survival.

The *Roe* decision instead of settling the issue fanned the flames of the abortion debate further. Though it ruled that unduly restrictive state regulation of abortion was unconstitutional, the Supreme Court failed to write specific guidelines for acceptable legislation; A counter-movement for the restoration of strict control over abortion soon sprang up and the issue became entangled in social and political conflict. States which are opposed to abortion but which have been prevented by *Roe* from criminalizing it have resorted to alternative strategies such as restricting public funding or requiring parental consent or waiting periods etc. In the 1977 case of *Maier v. Roe*, the Supreme Court ruled

that the state of Connecticut was not obliged to fund abortions for poor women.⁵ The scope of this ruling widened in 1980 when the Court refused to overturn the Hyde Amendment.⁶ States are now free to decide whether or not to fund abortions. In the 1992 case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court upheld the state's request for report and record keeping and parental consent.⁷ An increasingly conservative Supreme Court has been granting states greater discretion in regulating access to abortion. States have been using requirements of notification, waiting periods, parental consent and non-funding as measures to restrict abortions.

The US. is a classic case of religious affiliation and degree of religiosity contributing to abortion attitudes. Larger proportions of the population that are Roman Catholic, Norman and Southern Baptist are associated with lower abortion rates.⁸ All three religions have explicitly negative positions on abortion. The Roman Catholic Church has very high visibility in American public life, and it has time and again and fiercely defended the right to life of the foetus from the time of conception.

⁵ Maher v. Roe, 432 U.S. 464, 473 (1977).

⁶ An amendment to annual appropriations bills prohibiting the use of federal funds for reimbursing the cost of abortions for Medical recipients, except for a few permitted exceptions.

⁷ Planned Parenthood v. Casey 112 S. Ct. 2791 (1992), U.S.

⁸ Gober, n3 p.1007.

Also of relevance is the issue of abortion related harassment, intimidation, violence and even murder. Frustrated by the Supreme Court's refusal to overturn *Roe* in 1992 and eliminate the right to abortion, militant anti-abortion groups moved the battle to the street. Anti-abortion violence culminated in the killing of three abortion clinic workers and a doctor in 1994.⁹ Quite a strange way to voice the demand for a "right to life" by "pro-lifers"! The Congress had to pass the Freedom of Access to Clinic Entrances Act¹⁰ in May 1994, making it a federal offence to obstruct the entrance of an abortion clinic. The result of this Act was a drop in violence and harassment directed at abortion clinics.¹¹

The U.S. has been the major platform for the staging of the abortion debate. The "pro-life" and "pro-choice" advocates have been most visible and vocal here. The *Roe v. Wade* decision was an attempt to incorporate the interests of both sides. Though it decriminalized abortion in *Roe*, the Supreme Court in *Webster v. Reproductive Health Services* 1989, upheld a Missouri statute that 'the life of each human being begins at conception' and 'unborn children have protectable interest in life, health and well-being'.¹² State

⁹ ibid, p.1010.

¹⁰ ibid, p.1011.

¹¹ Business and Political Observers (New Delhi), 5 April, 1996.

¹² G.V. Ramaiah, "Right to Conceive *vis-a-vis* Right to Birth", *A.I.R. Journal* (1996) pp.136-140.

statutes are responsible for regulating access to abortion and today the likelihood of being able to procure an abortion in U.S.A. is strongly dependent upon where a woman lives.

Canada: The Criminal Code of Canada of 1953-54, as amended in 1969 made therapeutic abortion by a qualified medical practitioners legal. No other abortion was lawful. In 1988 in the case of *R.V. Morgentaler* (1988),¹³ the Canadian Supreme Court struck down as unconstitutional the existing legal restriction on abortion, in view of Canada's new Charter of Rights and Freedoms. It held that existing therapeutic abortion committees provided for in the Criminal Code were biased against the woman and it thought it appropriate to suggest the adoption of a new law which would not infringe on women's right to life, liberty and security of the person. So, Canada has no Criminal Code provision prohibiting or regulating abortion. The absence of legal guidance on the subject was highlighted in a series of cases in which injunctions were sought to prevent pregnant women from obtaining abortions.

The Special Group on the Status of the Foetus was to devise " a comprehensive policy regarding the foetus... fairly balancing the rights and interest of all these implicated".¹⁴ The commission which was to produce

¹³ R. V. Morgentaler (1988) 1SCR 30.

¹⁴ Report of the Special Group on the Status of the Foetus, p.3.

policy to guide Parliament, concluded that the foetus certainly deserves "some protection", for example from wrongdoing not sanctioned by the mother. It failed, however, to provide a unanimous policy for legislation. The vague formulation was that the grounds for obtaining an abortion after twenty two weeks gestation would be limited to saving the mother's life. Before that point, it would be considerably flexible. The abortion debate is very much alive in Canada today. The Commission concluded that " a foetus is not necessarily seen as having the same value... as someone already born".¹⁵ In the absence of law, abortions are virtually available on request.

LATIN AMERICA: Abortion is generally legally restricted, clandestine and unsafe in this region. Most of the Latin American countries authorize therapeutic abortion and some recognize ethical indications. Very few countries recognize eugenic or medico-social indications.

Chile:¹⁶ Chile is an extreme example for the world to see. Abortion is not permitted under any circumstances in Chile, even if the woman's life is in danger. Legislation permitting therapeutic abortion was struck down in

¹⁵ ibid, p.35.

¹⁶ Lidia Casas-Becerra " Women Prosecuted and Imprisoned for Abortion in Chile", *Reproductive Health Matters*, (London), vol. 9., May 1997.

September 1989. In 1974, when a new Constitution was written, a Right to Life clause was included in the Constitution that is still there today: "Every person has a right to life, and the state will protect the life of the unborn". Although it was left to Parliament to formulate a law on abortion, the intention of this clause was to stop any law allowing abortion on demand from being passed. The stipulated penalty for abortion in the Chilean criminal legislation is 3-5 years imprisonment.

Peru¹⁷: While Chile is one extreme example, Peru is not far behind. Sec.21 of its Health Code allows therapeutic abortion only, that too when three physicians decide that there is no other means of saving her life or preventing serious harm to her.

Barbados: The Medical Termination of Pregnancy Act of 11th February, 1983 allows termination on therapeutic, eugenic, ethical and social indications below twelve weeks, after which point only therapeutic and eugenic indications are recognized. Barbados's law is thus fairly liberal.

¹⁷ International Digest of Health Legislation (IDHL), 1983, vol.34(1), p.73-74.

Guyana¹⁸: But, it is Guyana which after 2 years of public campaign passed the Medical Termination of Pregnancy Bill and became the country with the most liberal abortion law in South America. It makes abortion legal on the following conditions:

- below 8 weeks - abortion on request
- 8-12 weeks - therapeutic, eugenic, ethical indications or if the mother is HIV positive or in case of failure of a recognized contraceptive method (like Indian law)
- 12-16 weeks - on the above mentioned indications if 2 medical practitioners allow it.
- after 16 weeks - if three medical practitioners allow it
- these provisions do not apply in case termination of pregnancy is immediately necessary to save the life of the woman.

In the Latin American region Guyana's legislation is the most liberal.

Apart from the extreme legislations of Guyana (liberal) and Chile (restrictive), most of South America provides narrow grounds for legal abortions. But even where legal abortion is made available by legislation, it is practically difficult to procure a legal abortion and the number of illegal abortions and maternal deaths is high.

¹⁸ IDHL, vol.34(3), 1983.

EUROPE:

U.K.: Before 1803, the rule of the Common Law was that abortion was a crime only if it took place after quickening. In that year, abortion became a crime before quickening as well. The Offences Against the Person Act of 1861 established a maximum penalty of life imprisonment for any abortion.¹⁹ This law admitted of no "indications". The famous ruling of *Rex v. Bourne*²⁰ indicated that an abortion carried out in good faith to preserve the mother's life and mental well-being was lawful. This ruling constituted a fundamental judicial precedent. The Abortion Act of 1967²¹ allowed abortion in case of therapeutic or eugenic grounds and also in case of risk to life or physical or mental health of any existing children of her family. Also, note was allowed to be taken of the woman's "actual or reasonably foreseeable environment". The broad socio-medical grounds for legal abortion provided for the Abortion Act 1967 inspired the legislations of various other countries. The Abortion Act failed to specify time limits but it kept intact the provisions of the Infant Life (Preservation) Act, according to which the crime of 'child destruction' includes a child 'capable of being born alive'. The point of viability was fixed at 28 weeks. Thus, 'viable'

¹⁹ Seth, n2 p.76.

²⁰ See p.25.

²¹ IDHL, vol. 42(1) 1991, p.37-39.

foetus is protected under English Law. The Human Embryology and Fertilization Act (1990) has shifted the point of viability to 24 weeks - an incidence of law trying to keep up with scientific progress in the field.

Ireland²²: The Regulation of Information (Services Outside the State for Termination of Pregnancy) Act of 12th May, 1995 allows that certain information relating to services legally available outside the state for the termination of pregnancies and to persons who provide such services may be given to women and to the general public on certain conditions.

Hungary²³: Hungary's law is an example of a liberal law with a broad range of social and socio-medical indications for legal abortion. Ordinance No. 76 of 3rd November, 1988 on the termination of pregnancy allows termination on therapeutic, eugenic and ethical grounds. Other indications are if the woman is unmarried or separated, if she has no accommodation, if her husband is doing his military service, if she has 2 or more surviving children and other social indications.

²² IDHL, vol. 46(4), 1995, p.481.

²³ IDHL, vol.40(3), 1989, p.595.

Poland:²⁴ Abortion law has been on a roller-coaster since the fall of communism. The Law of 30 August 1996 allows termination of pregnancy on therapeutic, eugenic, ethical and socio-economic indications.

Soviet Union(erstwhile)²⁵: From 1917 to 1920, abortions were totally illegal (even on therapeutic grounds). In 1920, Russia became the first country to legalize abortion. From 1920-1936 abortions were made legal on certain indications. From 1936-1955, abortions were again illegal except on strictly medical grounds. Since 1955, abortion on request has been provided for.

In general, abortion law in Europe is liberal with a wide range of indications. The erstwhile East European countries have either virtually allowed abortion on demand or had very repressive laws. Their abortion laws are in a state of flux. Since the dissolution of the Soviet Union , Eastern European countries have come under pressure from the Catholic Church to approve of restrictive laws. The trend towards reverting to restrictive laws has been mainly due to the role played by the church and demographic concerns. However, most European countries would fall in the liberal category.

²⁴ IDHL, vol.48(2), 1997, p.176-8.

²⁵ Daniel Callahan, *Abortion : Law, Choice and Morality* (New York, 1970).

SCANDINAVIA²⁶: A relatively uniform policy has been adopted by the Scandinavian countries, the overall trend being toward a progressive liberalization of grounds for legal abortion. A feature of this region was the acceptance of medico-social indications.

Iceland:²⁷ Iceland was the first country to have passed a law dealing specifically with abortion and the first Scandinavian country to have passed a law introducing the concept of medico-social indications. Under Law No. 38 of 28th January 1935, an abortion can be performed before the twenty eighth week if it constitutes a risk to the health of the mother. Factors that constitute a risk to health include social circumstances.

Sweden:²⁸ Swedish law recognizes "anticipated weakness" or living conditions of the woman along with therapeutic, eugenic and ethical grounds.

²⁶ Seth, n2 p.26.

²⁷ *ibid*, p.62.

²⁸ *ibid*, p.27.

Finland:²⁹ Finland allows abortion to women less than 17 years of age or more than 40 years of age along with recognizing the other usual indications.

Denmark:³⁰ Danish law allows legal abortion if the woman is incapable of care because of youth or immaturity or if child care represents a serious burden for the woman.

Norway:³¹ Norwegian law also includes medico-social indications along with the other indications.

ASIA: In most Asian countries, legislation has been restrictive. Many of the Asian countries facing the problem of overpopulation, have tended to use abortion laws to further their demographic interests.

Japan:³² In Japan, the provisions concerning abortion are contained in the Eugenic Protection Law of 13th July 1948. It allows legal termination of

²⁹ ibid, p.60.

³⁰ ibid, p.57.

³¹ ibid, p.63.

³² ibid, p.75.

pregnancy on a wide range of medical and socio-economic indications. It is considered one of the most liberal laws in the world.

Countries like China and Vietnam promote the use of abortion as population control measures.

Singapore:³³ has a fairly liberal abortion law which provides for therapeutic, eugenic, ethical as well as economic indications.

Middle East³⁴: Most of the countries of the Middle East have repressive legislation on abortion. The laws in question are however rarely enforced in a strict manner in practice and many illegal abortions are performed by physicians in hospitals and private clinics. In most of the countries, abortion is legal only if done to save the life of the mother. In some countries (Jordan, Lebanon), it is available to save the "reputation" of the mother and the "honour" of the family. Abortion is less frequent among the Arab population. The oil-rich states, valuing fertility, provide incentives to increase family size.

South Asia: Abortions are illegal in all countries of South Asia except India.

³³ IDHL, vol.32(3), 1981, p.451-3.

³⁴ Seth, n2 p. 108.

Sri Lanka³⁵: In Sri Lanka there was an unsuccessful attempt to amend and abortion law in 1995. Under the penal Code of 1883, abortion in Sri Lanka is a criminal offence except when performed to save the life of the woman.

Nepal³⁶: Nepal has a harsh abortion law which equates abortion with homicide. There are no mitigating circumstances under the law - even in cases where the health or life of the mother is threatened. Nepal is one of the very few countries with extreme restrictions. There has been little debate, let alone resistance to the law so far. But, a Bill calling for change has been introduced in parliament.

India: India has fairly liberal abortion law and though all the indications are dressed up to look like medical indications, they actually constitute a wide range of indications. But, over-medicalization of the law has led to an unsuccessful implementation of the law. India's abortion laws are discussed in detail in Chapter III.

³⁵ Marge Berer, "Abortion: Unfinished Business", *Reproductive Health Matters*, vol. 9 (May 1997), p.6.

³⁶ Madhya Pradesh Chronicle (Bhopal), 7 May 1997.

Africa: Most African States retained abortion legislation introduced by the colonial country. So, most African States have stringent abortion laws, prohibiting abortion unless to save the life of the mother.

Ivory Coast³⁷: The law in Ivory Coast is a typical example of stringent abortion law. Sec. 366 of the Penal Code makes it an offence to perform an abortion on a woman (whether or not her consent is available) unless it is necessary to avert a serious threat to her life. Three physicians must certify that there is no other way to save her life. Sec. 368 lays down penalties for incitement to abortion and Sec. 369 indicates penalties for sale or distribution of abortifacients.

Botswana³⁸: Botswana liberalized her abortion law in 1991 to allow abortion within the first sixteen weeks of pregnancy on therapeutic, ethical and eugenic grounds.

South Africa³⁹: The new abortion law of South Africa which was passed in 1996 makes it the most liberal law in Africa. It acknowledges that women have

³⁷ IDHL, vol.34(1), 1983, p.75.

³⁸ IDHL, vol.43(4), 1992, p.737.

³⁹ IDHL, vol.48(2), 1997, p. 178-80.

reproductive rights, including the right to have an abortion. The Choice on Termination of Pregnancy Act makes termination of a pregnancy legal upon a woman's request upto 12 weeks; on therapeutic, ethical, socio-economic and eugenic grounds upto 20 weeks; and after 20 weeks if the woman's life is endangered. The Bill makes it an offence to obstruct access to an abortion facility. Abortion may only be carried out by a medical practitioner or a registered midwife. The Act provides for counselling. The aim of the Act is stated to be inter alia "...the advancement of human rights and freedoms".

AUSTRALIA⁴⁰: There is a considerable amount of ambivalence on the question of abortion in Australia. As the law stands, all abortions in the common law jurisdictions are classified as offence and are potentially unlawful (criminal statutes are modelled on the Offence Against the Person Act 1861, England). But although Australian abortion laws have not been amended by legislation as in England (except in South Australia and the Northern Territory), the broadening of the common law (through cases) has produced fairly similar results. Two rulings which broadened the Common Law were *R. v. Davidson*,⁴¹ 1969 (where it was said that an abortion was lawful if a medical

⁴⁰ Kerry Petersen "Procreative Freedom : A Legal and Moral Challenge", Proceedings, 11th World Congress on Medical Law, South, Africa, 1996, vol.1, pp.213-23.

⁴¹ *R. v. Davidson* (1969) V.R.667.

practitioner believed a danger to life or health (physical and mental) existed and *R. v. Wald*,⁴² 1971 (where it was said that it would be for the jury to decide whether there existed in each case any economic, social or medical reason which could constitute grounds for a danger to her health). In *CES v. Superclinics*⁴³ 1984 the mental health indication was broadened to include any effect which such conditions may have after the birth of the child. In 1986, *R. v. Bayliss and Cullen*⁴⁴, Judge Mc. Guire stressed that abortion would not be lawful if permitted for less than serious reasons-there is no legal mandate for abortion "on demand" under the common law. The responsibility of the abortion decision making is placed in the province of the medical provision. Although non-medical grounds are accepted, they are locked in a medical framework. By and large, however, abortion has been available virtually on request and is publicly funded.

⁴² *R. v. Wald* (1971) NSWDCR 25

⁴³ *CES v. Superclinics*, Nos. CA 40266/94 CL 14479/88.

⁴⁴ *R. v. Bayliss and Cullen* (1986)9 QLD Lawyer Reps 8.

CLASSIFICATION OF ABORTION LAW MODELS

Abortion legislation has been variously classified by different writers. Daniel Callahan named them 'restrictive', 'moderate' and 'permissive', legal codes.⁴⁵ K.A. Peterson⁴⁶ classified them as:

- (1) The Abortion Reform Model: legal systems that generally prohibit abortion while granting physicians discretionary power. (e.g U.K.)
- (2) The Judicial Model: legal systems that adhere to old abortion statutes, most of them dating back to the 19th century. The judiciary alone established the circumstances under which abortion may be permitted on the basis of necessity. (e.g. Australia)
- (3) The Elective Model: women have the right to abortion under specified circumstances. (e.g. U.S.A.)

However, as mentioned earlier, classifying the legal provisions into a category often does not reveal the true picture. Abortion is legal in Zambia, but rarely performed. A survey in Calcutta showed that the majority of the residents still thought abortion was illegal. Abortion is illegal in the Philippines but most people think it's legal because of readily available services and no interference by authorities. Further a lot of the legal codes can only be classified after taking

⁴⁵ Daniel Callahan, *Abortion: Law, Choice and Morality* (New York, 1970).

⁴⁶ K.A. Peterson, *Abortion Regimes* (Aldershot, 1993).

into consideration the way in which they are interpreted. A broad provision may be interpreted narrowly or a stringent code may have convenient loopholes.

SOME COMMON FEATURES IN ABORTION LAWS

After a quick look at the abortion laws across the world. The following points emerge:

- Almost all countries permit abortion when the mother's life is at stake. A stringent code is considered one which permits abortion only to save the life of the mother. That the mother's right to life is to get precedence over the foetus's right to life is more or less accepted across the world (notable exceptions being Chile and Nepal).
- Most countries permit abortion in case of risk to health of the mother. This provision however can be variously interpreted. Some laws allow the consideration of "reasonably foreseeable environment" or "actual or potential" threat to health. Thus social, economic or other indications can be made to fit this category. Some laws (like Indian law) include ethical considerations in this category. Thus a pregnancy resulting from rape is considered a serious risk to the health of the mother. Also, failure of a contraceptive is also included under this category (India and Guyana). Thus, this indication can be very widely interpreted.

- Some laws provide ethical consideration separately, for pregnancies resulting from a criminal act. In the Middle East, this extends to cases to protect the "honour" of the family.
- Many countries are reluctant to provide for eugenic indications considering the moral dilemma of the issue of prenatal screening and selective abortion. (Most South American countries do not provide for eugenic considerations). Countries that allow eugenic indications sometimes have to deal separately with the related issue of sex-selective abortion. (India has a separate law to deal with the issue)
- Those countries that provide for social indications provide for a varying range of indications which in some cases is so broad that it is tantamount to abortion on request.
- Countries which do permit abortion on request impose a time limit on it (Turkey allows abortion on request in the first 10 weeks, Mongolia allows it in the first 3 months)
- Almost all countries have divided the gestation period and provide for different regulations in different time periods. Some legal codes vary the level of punishment along the gestation period. So, all countries have done their share of "line-drawing". These lines can undoubtedly be questioned as being arbitrary. But they are a functional necessity. Fast-moving changes in medical technology however are causing the need for

re-drawing previously established lines. (e.g. British abortion law, based on "viability" has had to redefine the point of viability). Thus the contradiction of time-limits is incorporated in almost all abortion law

- Some laws impose the restriction of guardian-consent especially in case of minors and mentally incapable women (as does Indian law). In many states of the U.S.A., the issue of parental consent is a problem for teenage pregnancies. The new South African law by defining a woman as 'a female person of any age' addresses this problem.
- Countries with liberal laws impose restrictions for outsiders in order to avoid becoming "abortion-mills". (Singapore law imposes residence conditions for procuring abortion; Sweden, on the other hand has no such restrictions. Within the U.S.A., the 'migration of the abortion problem' is a common practice. So many states with liberal laws have some conditions for making abortion available).
- Many of the liberal codes, while providing a broad range of indications, keep the decision making in the hands of the medical profession or a Board or Commission (Indian law requires the consent of registered practitioner while most Scandinavian and European countries have established Boards to screen each application for abortion). Thus, in many cases, the discretion to interpret the law rests with an authorised agency and the woman is not the one to take the final decision.

- The common approach of all countries has been to make legal abortion a medically supervised, safe process. Most countries that allow for legal abortion require that it be carried out at a registered centre on an in-patient basis and under the supervision of a medical person who fulfils certain basic requirements stipulated by law. In many cases (India is a glaring example), the requirements of the law do not match with the available infrastructure. In India, for example, the MTP facilities are so wanting that the law is considered restrictive in practice.
- In many laws, due consideration is taken of the person performing the abortion. Anyone who has ethical objection to the abortion cannot be forced to perform it (unless it must be done to save the life of the mother):
- A lot of the abortion laws include provisions for counselling services. German law makes counselling compulsory stating :
 "the purpose of the counselling is to protect the life of the unborn child. It shall be inspired by a concern to encourage the woman to continue with her pregnancy and enable her to envisage the idea of living with her child; it shall assist her in making a responsible and conscientious decision. The woman concerned must be made aware of the fact that whatever the stage of her pregnancy, the unborn child has his own right to life and that accordingly under the legislation in force, pregnancy

termination may be contemplated only in exceptional situations, where the woman concerned, if she continues her pregnancy to term, will have to bear a burden that is so heavy and exceptional that it goes beyond the bounds of reasonable sacrifice."⁴⁷

The South African law also provides for counselling services, which is all the more essential in cases involving minors. The provision for counselling is wanting in Indian law where a large population of women seeking abortion are uninformed and take decisions under social and family pressures.

- To sum up, no country leaves abortion totally in the private sphere. Some codes are restrictive making legal abortion unavailable, in which case there is no personal choice of abortion. There can be moderate laws with a wide range of indications but the decision being in the hands of an authorised body. These can be highly permissive laws with a wide host of indications allowing practically anyone to avail of legal abortion. There can also be laws dealing only with the process, requiring it to be medically supervised, leaving the decision wholly to the woman. But there can not be no law, leaving the decision and procedure wholly to personal choice. Thus, working out a satisfactory abortion legislation is imperative for any society.

⁴⁷ The Assistance to Pregnant Women and Families Amendment Law of 21 August, 1995, Sec. 219(1), IDHL, 1996, 47(1), p.34-35.

JUDICIAL DECISIONS⁴⁸

What have the courts of the world had to say about the controversial issue of abortion?

1938 - *U.S. v. Caroline Products Co.* (U.S.A.): Justice Stone's famous footnote suggested that the Court should be alert for "prejudice against discrete and insular minorities ..." since "no fetus sits in our legislatures".

1938 - *R. v. Bourne* (U.K.): A doctor who had performed an abortion on a 15 year old victim of gang rape was acquitted - it was held that a woman's life depended on her physical and mental health. This was a landmark decision recognizing for the first time that there could be cases of lawful abortion.

1973 - *Roe v. Wade* (U.S.A.): US Supreme Court established a constitutional right to abortion - but a limited one. In an attempt to balance foetal and maternal interests, it created the trimester approach with a freedom to elect abortion till the 24th week after which point the state's interest in the life of the foetus was asserted.

1977-*Maher v. Roe* (U.S.A.): US Supreme Court ruled that the State of Connecticut was not obligated to fund abortions for poor women.

1978 - *Paton v. Trustees of the British Pregnancy Advisory Services* (U.K.) : The court, denying an injunction sought by a man to restrain his wife from having an abortion

⁴⁸ For detailed citations of cases, see bibliography.

ruled, "The foetus cannot, in English Law... have any right of its own at least until it is born and has a separate existence from its mother".

1980 - *Dehler v. Ottawa Civil Hospital* (Canada): Judge Robins said "What then is the legal position of the unborn child ? Is it regarded in the eyes of Law as a person in the full legal sense ? While there can be no doubt that the Law has long recognized foetal life and has accorded the foetus various rights, those rights have always been contingent upon a legal personality being acquired by the foetus upon its subsequent birth alive... It is only persons recognised by law who are the subject of legal rights and duties."

1983 - *Akron v. Centre for Reproductive Health, Inc* (U.S.A.) : The Supreme Court reaffirmed *Roe v. Wade*.

1986-*R. v. Bayliss and Cullen* (Australia) : Judge Mc. Guire said there was no legal mandate for "abortion on demand" and stressed that abortion would be illegal if permitted for less than serious reasons.

1988 - *Re F (in utero)*(Canada): It was held that a foetus has no status as a legal person or rights under the law until it is born and separated from its mother.

1988 - *R. v. Morgentaler*(Canada): The Canadian Supreme Court struck down the country's federal abortion law as unfair and violative of women's constitutionally recognised right to life, liberty and security of the person.

1989 - (Argentina): The Court of First Instance in Argentina prevented a mentally retarded minor, who had been the victim of rape and who was four months pregnant, from having an abortion. The decision rested on the claimed right to life of the foetus.

1989 - *Webster v. Reproductive Health Services* (U.S.A.): The US Supreme Court upheld a Missouri Statute which declares that "unborn children have protectable interest in life, health and well-being".

1989 - *Davis v. Davis* (Australia): An Australian Court held that human life begins at conception

1991 - *Rust v. Sullivan* (U.S.A.): The Supreme Court banned medical personnel in federally funded clinics from engaging in abortion counselling, referral or activities informing women of their right to an abortion.

1992 - *Planned Parenthood v. Casey* (U.S.A.): The Court upheld the right announced in *Roe* but upheld the State's request for report and record keeping and parental consent.

SUMMING UP

There exist today a variety of abortion legislation regimes, ranging from restrictive to permissive. But legal developments throughout the world over recent years have moved away from concentrating on abortion as a crime towards legislation enabling abortion on health and social grounds. The general

trend that is discernible around the world is towards more permissive laws. There seems to be global consensus on the danger of illegal abortions and a recognition of the fact that a woman intent on procuring abortion will opt for it no matter how strict a legal regime she faces. Abortion laws today are concentrated more on what to do once the decision to abort is taken and less on the decision of abortion itself. Does this imply that laws are not giving due recognition to the right to life of the foetus? This is not necessarily so because abortion is legalized only on certain 'indications' and within time restrictions. It is only indicative of the helplessness of law in stopping a woman intent on abortion from doing so by any means, legal or illegal. Illegal abortions are a grave menace. They are a threat to the life and health of the woman. It is this problem that most abortion laws today address.

Different countries may have differing legal provisions to tackle the problem, but certain global consensus is essential on some basic principles and ethics. In no country should there be an extreme law that either totally denies respect to the foetus or totally curbs women's rights. Thus the problem has to be attacked from the extremes, cutting out the edges where there is flagrant violation of either a foetal right or a woman's right.

After getting an idea of global legislative approaches and perspectives on abortion, it would be worthwhile to have a look closer home and see what the abortion law in India is all about. How protected is the Indian foetus and how safe is the Indian mother?

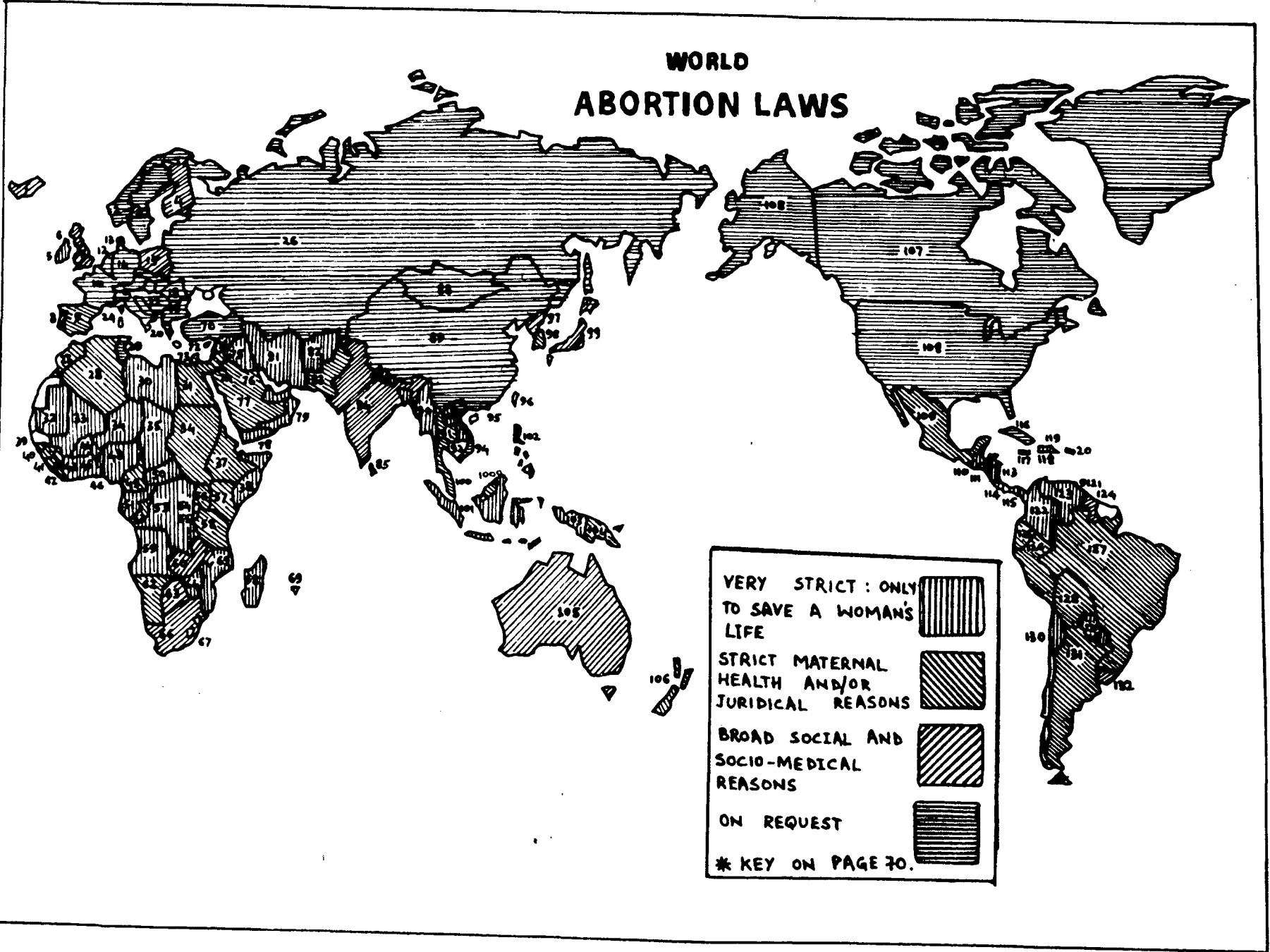
TABLE 1
RESTRICTIVENESS OF ABORTION LAW IN DIFFERENT COUNTRIES

Law	Africa	Asia & Oceania	Europe	North America	South America
Under No Circumstances		Nepal			Chile
To Save a woman's life	Angola Benin Burkina Faso Central Africa Rep. Chad Cote d'voire Gabon Libya Madagascar Malawi Mali Mauritania Mauritius Mozambique Niger Nigeria Senegal, Somalia Sudan Zaire	Afghanistan Bangladesh Burma Indonesia Iran Iraq Laos Lebanon Oman Pakistan Philippines Sri Lanka Syria United Arab Emirates Yemen Arab Rep. Yemen, Peoples Democratica Rep.	Belgium Ireland #	Dominican Rep. El Salvador*! Guatemala Haiti Honduras Mexico* Nicaragua Panama	Brazil * Chile Colombia Ecuador* Paraguay Venezuela Peru
Other maternal health reasons	Algeria Cameroon*! Congo Egypt! Ethiopia Ghana*! Guinea Kenya Lesotho Liberia*! Morocco Botswana Namibia*! Rwanda Sierra Leone Tanzania Uganda Zimbabwe*!	Hong Kong*! Israel*! Jordan* Korea, Rep. of*! Kuwait! Mongolia New Zealand*! Papua New Guinea Saudi Arabia Thailand*	Albania Northern Ireland Portugal*! Spain*! Switzerland	Costa Rica Jamaica Trinidad & Tobago	Argentina* Bolivia* Guyana Cuba
Social and social medical reasons	Burundi Zambia! South Africa	Australia ! India **,! Japan*,\$\$ Korea, Dem. Rep.*! Taiwan*!,!	Bulgaria*!,& Finland*!,&&& German Fed Rep.*!,&&*, Great Britain ! Hungary*!,&& Poland*,\$\$,&& Iceland	Uruguay*,\$	
On request	Togo Tunisia&&	China Singapore Turkey \$\$ Vietnam	Austria!!,*! Czechoslovakia&& Denmark && France \$\$ German Dem. Rep. && Greece && Italy && Netherlands Norway&& Romania && Soviet Union (erstwhile)&& Sweden* Yugoslavia!!	Canada Cuba&& Puerto Rico United States	

- # Allows information on abortion services legally available outside the state
- * Includes juridical grounds, such as rape and incest.
- ! Includes abortion for genetic defects.
- & Approval is automatic for women who meet certain age, marital and/or parity requirements.
- \$ Not permitted for health reasons but may be permitted for serious economic difficulty.
- ** During the first twenty weeks
- !! During the first ten weeks.
- && During the first three months
- *+ During the first 18 weeks

Notes: Table does not include countries with fewer than one million inhabitants or those for which information on the legal status of abortion could not be located
 Source: Henshaw, Stanley K. (1990) "Induced Abortion: A World Review, 1990", Family Planning Perspectives, 22(2). Updated (personally) till 1996 to the best of knowledge.

WORLD ABORTION LAWS



VERY STRICT : ONLY TO SAVE A WOMAN'S LIFE

STRICT MATERNAL HEALTH AND/OR JURIDICAL REASONS

BROAD SOCIAL AND SOCIO-MEDICAL REASONS

ON REQUEST

* KEY ON PAGE 70.

KEY FOR MAP ON PAGE 69

EUROPE		AFRICA		THE AMERICAS	
Albania	22	Algeria	28	Argentina	131
Austria	23	Angola	59	Bolivia	128
Belgium	11	Benin	47	Brazil	127
Bulgaria	19	Botswana	63	Canada	107
Czech Rep.	16	Burkina Faso	44	Chile	130
Finland	4	Burundi	55	Columbia	122
France	10	Cameroon	49	Costa Rica	114
Germany	14	Cent. Afr. Rep.	50	Cuba	116
Gr. Britam	7	Chad	35	Doninican Rep.	119
Greece	20	Congo	52	Ecuador	125
Hungary	17	Ivory Coast	43	El Salvador	111
Iceland	1	Egypt	31	Guatemala	110
Ireland	5	Ehiopia	37	Guyana	124
Italy	25	Gabon	51	Haiti	118
Netherlands	12	Ghana	45	Honduras	112
Norway	2	Guinea	40	Jamaica	117
N. Ireland	6	Kenya	57	Mexico	109
Poland	15	Lesotho	67	Micaragua	113
Portugal	8	Liberaia	42	Panama	115
Romania	18	Libya	30	Paraguay	129
(errstwhile) USSR	26	Madagascar	68	Peru	126
Spain	9	Malawi	61	Peurto Rico	120
Sweden	3	Mali	33	Trinidad & Teb	121
Switzerland	24	Mauritania	32	USA	108
Yugoslavia	22	Mauritius	69	Uruguay	132
		Morocco	27	Venezuela	123
		Mozambique	65		
		Namibia	62		
		Niger	34		
		Nigeria	48		
		Rewanda	54		
		Senegal	39		
		Sierra Leons	41		
		Somalia	38		
		S.Africa	66		
		Sudan	36		
		Tanzania	58		
		Togo	46		
		Tumisia	29		
		Ugana	56		
		Zaire	53		
		Zambia	60		
		Zimbabwe	64		
<hr/>					
ASIA					
Afghanistan	82	Malayisa	1000		
Australia	105	Mongolia	88		
Bangladesh	87	Myanmar	90		
Combodia	92	Nepal	86		
China	89	New Zealand	106		
Hong Kong	95	Oman	79		
India	84	Pakistan	83		
Indonesia	103	Papua N. Guinea	104		
Iran	81	Phillipines	102		
Iraq	75	Saudi Arabia	77		
Israel	73	Singapore	101		
Japan	99	Sri Lanka	85		
Jordan	74	Syria	71		
Korea (Dem. Rep)	97	Taiwan	96		
Korea (Rep. of)	98	Thailand	91		
Kuwait	76	Turkey	70		
Laos	93	UAE	80		
Lebanon	72	Vietnam	94		
		Yemen	78		

CHAPTER III

ABORTION LAW IN INDIA

INTRODUCTION

Any attempt to evaluate abortion law must take into account the backdrop against which the law operates. Law must after all be in constant interaction with culture, ethics, philosophy, public policy and scientific progress.

India is a country with an ancient tradition and a rich and vast history which it can refer to when seeking to formulate solutions to ethical dilemmas. It is a meeting ground of a great variety of ethical and cultural traditions. Hinduism, Islam, Christianity, Sikhism, Buddhism and Jainism are all part of the religious mosaic. Eastern and Western values find here a point of confluence. Though traditional religious attitude is of importance in India, religion has not stood in the way of progressive legislations. There are practical issues also that come into play regarding the issue of abortion. India has been termed a "demographer's nightmare",¹ adding to itself each year a population equal to that of Canada. Thus, the population problem is one of the biggest that the country faces. It must also be noted that the issue of abortion has remained

¹ Daniel Callahan, *Abortion : Law, Choice and Morality* (New York, 1970), p. 152.

within the wraps of a "social purdah".² The traditional society has not favoured an open debate on the issue. So, abortion law in India has been a government initiative. All of the above mentioned elements obviously play a role in any discussion of abortion in India.

ABORTION IN ANCIENT INDIA

The problem of abortion has prevailed in India since ancient times. The *Brihadayogatarangini* (1st Century B.C.) is said to contain a method for the termination of an unwanted pregnancy.³ Almost all ancient Indian writers and law-givers refer to induced abortion as a serious sin. Manu (200 B.C.) referred to abortion as a cause of impurity and decreed that libations shall not be offered to women who have abortions.⁴ The Code of Manu, Section XI, Verse 88 reads, "One should also practice these observances (penances) on having slain an embryo not distinctly known (whole sex is not known)...or (on having slain) a woman while in her course (pregnancy)".⁵ The *Vishnu Smriti* (100 B.C.-A.D. 100) equates the destruction of an embryo to the killing of a holy or

² Ranu Chhabra and Sheel C. Nuna, *Abortion in India : An Overview (New Delhi)*, p. 3.

³ S. Chandrashekhar, *Abortion in a Crowded World: The Problem of abortion with Special Reference to India* (Chatham, 1974), p. 2.

⁴ *ibid*, p. 42.

⁵ Edward Hopkins, *Ordinances of Manu* (London, 1891) p. 336.

learned person (*brahmin*).⁶ Sangam literature also contains references to the killing of a foetus being equivalent to the killing of a cow or a *brahmin*. Thus, ancient Indian lawgivers treated abortion as a grievous crime ranking with murder and incest.

However, while abortion was condemned, there was provision for difficult and exceptional cases. Susruta (5th century B.C.) opined that early pregnancy could be terminated if the pregnant woman's health was seriously affected. He says, "...when the health of the pregnant woman is threatened and her condition becomes serious, the pregnancy may be terminated to save her life because it is improper to let the pregnant mother die. So, the proper step is to induce abortion."⁷ Susruta considered abortion upto four months spontaneous (*garbhasrava*) and after that point induced (*garbhapata*). Abortion on a fairly large scale is said to have existed during the Gupta period (Third Century A.D.).⁸ During this time, periods of gestation were prescribed beyond which abortion was forbidden. The foetus could be aborted before it gained firm shape. Acharya Lolimbaraja, who belonged to the Ayurvedic tradition (Seventeenth Century A.D.) provided for a method to terminate unwanted

⁶ Chandrashekhar, n3 p.44.

⁷ *ibid*, p.44.

⁸ Chhabra, n2 p.4.

pregnancies for "women in poor health, widows and women of liberal morals."⁹ Even in ancient times, differences between different gestation periods were recognized. So, while '*bhruna-hatya*' (foetus murder) was condemned and prohibited in ancient India, some recognition was granted to the importance of the life of the mother.

PRE-1971 ABORTION LAW

Para 3. of the 'Code of Ethics' of the Medical Council of India reads :
"I will maintain the utmost respect for human life *from the time of conception*".¹⁰ A little more than a century ago, abortion in India was made a crime for which the mother as well as the abortionist could be punished. There was no comprehensive law with regard to abortion and it was covered under Section 312 to 316 of the Indian Penal Code (IPC). These provisions of the IPC were framed in 1860 in accordance with 19th century British law. Sec. 312 of the IPC prescribed "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..."¹¹ The penalties were more

⁹ Chandrashekhar, n3 p.45.

¹⁰ C.M. Francis, "Medical Ethics in India: Ancient and Modern (II)" in *Issues in Medical Ethics*, vol.5, 1997, p.3.

¹¹ D.D.Seth and Others, *Abortion and Termination of Pregnancies in India* (Allahabad, 1973), p.103.

severe for abortion after "quickening". A woman causing herself to miscarry was considered culpable for the crime. Miscarriage without the pregnant woman's consent was punishable by life imprisonment and a case of injury to the foetus was dealt with severely. No allowance was provided even for the earliest stages of pregnancy. The sole exception existed only in a situation of medically indicated danger to life of the mother. In sum, the pre-1971 law in India gave unequivocal precedence to the right of the foetus to life over that of the woman to her person.

This stringent law was observed more in its breach and a racket in backstreet abortions flourished. Concerned about the alarming rise in maternal deaths due to illegal abortions, the Government of India established a committee in 1964 to study the question of legalization of abortion.¹² The Committee found the existing law (allowing abortion only to save the life of the mother) to be too restrictive. The Medical Termination of Pregnancy (MTP) Bill was introduced in 1969 to liberalize abortion law in India.

It must be noted here that India did not witness a public debate over the issue on the national stage as did many other countries. There was neither a well-formed feminist movement urging a recognition of women's rights over their bodies nor an orthodox religious demand for the right to life for the

¹² The eleven member committee was chaired by Shantilal Shah, then Minister of Public Health, Law and Judiciary of the State of Maharashtra.

"unborn child". Issues relating to procreation were not openly discussed and even today they are rarely and reluctantly brought out in the open. Nor did the classical principles of religion generate an opposition to a more permissive abortion law. The MTP Bill was passed without a murmur and there was no public reaction to the Act - one way or the other. The MTP Bill was thus a government initiative and not a reaction to public outcry.

THE MEDICAL TERMINATION OF PREGNANCY ACT, 1971¹³

(a) Provisions: The MTP Act came into force in 1972, liberalizing the abortion law in India. The twin objectives of the Act were (1) liberalization of the grounds on which termination of pregnancy could be procured and (2) greater stringency of the law to ensure the performance of a proper medical procedure.

The MTP Act permits the termination of pregnancy on the following grounds:¹⁴ (1) Where the continuance of the pregnancy involves a risk to the life of the pregnant woman or of grave injury to her physical or mental health and (2) where substantial risk exists of the child being born with a serious physical or mental abnormality. It is clarified that pregnancy following rape

¹³ The Medical Termination of Pregnancy Act, 1971.

¹⁴ MTPA, Sec.3(2).

shall be presumed to constitute grave injury to the mental health of the mother.¹⁵ A pathbreaking concept in the field of abortion law was the recognition that failure of a contraceptive method could be presumed to constitute grave injury to the mental health.¹⁶ Also, in determining what would constitute risk of injury to the health of the woman, account may be taken of the pregnant woman's "actual or reasonable foreseeable environment".¹⁷ Termination of pregnancy of a girl below eighteen or of a lunatic woman requires written consent of her guardian.¹⁸

The time till which these provisions can be availed of is upto twenty weeks.¹⁹ The restriction to accessing these provisions is that the decision to terminate a pregnancy lies with a registered medical practitioner (or two practitioners, if the pregnancy is over twelve weeks). The termination may be performed only by a medical practitioner meeting stipulated training requirements and at a place which has been sanctioned by an appropriate authority.²⁰

¹⁵ MTPA, Sec.3, Explanation 1.

¹⁶ MTPA, Sec. 3, Explanation 2.

¹⁷ MTPA, Sec. 3, Explanation 3.

¹⁸ MTPA, Sec. 3, Explanation 4(a).

¹⁹ MTPA, Sec 2(a) and Sec 2(b).

²⁰ MTPA, Sec. 3 and Sec. 4.

(b) Assessment: When, in 1972, the MTP Act came into force, it was hailed as a liberal and progressive measure, whereby India joined a then select band of twenty five countries to have liberal legislation, permitting pregnancy termination on medical grounds. Though the indications are disguised in medical terms, they are worded so that almost anyone can avail of the provisions. In the words of S. Chandrashekhar (writing in 1974), " The religious beliefs of a bygone age have been compromised in the face of pressing modern needs...in the conflict between modern scientific outlook and traditional religious attitude, the former...has won".²¹

However, the Act has had to face its share of brickbats. True, it liberalized the grounds on which termination could be possible. However, the final decision to allow termination rests with the medical practitioner. The woman is not the ultimate arbiter of what constitutes endangerment of her well-being. It has been felt that though the Act decriminalizes the process of pregnancy termination, it also over-medicalizes the process.

Chhabra and Nuna, in their study (1994),²² point out that the implementation of the MTP Act has been dismal and the number of illegal abortions continues to rise. This is mainly because while the law insists on strict medicalization of the abortion process, adequate infrastructure to meet the

²¹ Chandrashekhar, n3 p.45.

²² Chhabra, n2.

consequent requirements are missing. MTP centres and services are grossly inadequate, especially in the rural areas. They question "the essential wisdom of a legal framework that has remained as much breached as the breach it was created to fill".²³ Though the Act was once pioneering and radical, it has been overtaken by more liberal legislation in over twenty two countries. Twenty five years after the implementation of the MTP Act, it is said that restrictions in the law and the way it is implemented through service delivery have resulted in failure to meet the abortion needs of women.

CURRENT TRENDS

S. Chandrashekhar (writing in 1992)²⁴ advocates further liberalization of the abortion law. He is in favour of abortion on demand as women should retain control of their own bodies and reproductive choices. According to him, the impact of liberalizing abortion is largely a shift from dangerous and costly illegal procedures to safe, medically supervised ones, rather than a generation of abortions which would otherwise not have occurred. There is, however, need for counselling by professional trained social workers so that women can exercise their freedom carefully. He asserts that a liberal abortion law will not lead to an increased disrespect for the life of the foetus.

²³ ibid, p.10.

²⁴ S. Chandrashekhar, *India's Abortion Experience: 1972-92* (Texas, 1994).

Another point of view, presented by G.V. Ramaiah²⁵ is that the existing law stands good in that it allows abortion, but under exceptional circumstances only. The unborn child under present law may lose its life only when it poses a threat to its mother's life or health or its own life or health is endangered. The right to abortion must be regulated because "the state is under obligation under Article 21...to protect the life of the unborn child from arbitrary and unjust destruction".²⁶

In general, the issue of abortion still does not occupy a place in public view in India. No "pro-life vs. pro-choice" debates have raged here. In fact, the existing abortion law is not known to a large portion of the public and many women (especially in the rural areas) continue to resort to illegal abortions for sheer ignorance of the fact that legal abortions have been available for almost three decades now.

On the part of the Government, there has been action to further the availing of the provisions of the MTP Act. In response to the lack of services, the centre has proposed to amend certain provisions of the MTP Act. The proposal by the Union Government²⁷ seeks to make medical termination of pregnancy more accessible. To this end, it proposes to reduce the medical

²⁵ G.V. Ramaiah, "Right to conceive *vis-a-vis* Right to Birth" *A.I.R. Journal*, pp. 136-40.

²⁶ *ibid*, p.140.

²⁷ The Telegraph, 21 January 1996.

qualifications required for a practitioner to induce an abortion. It also plans to simplify the procedures for setting up MTP clinics and to decentralize the procedure for granting recognition to such clinics. Also, The Maternity Benefit (Amendment) Act, 1995²⁸ entitles a woman to leave with wages at the rate of maternity benefit, if she undergoes a medical termination of pregnancy. Earlier, this benefit was available only in case of delivery or miscarriage. The Government of India and the Indian Council for Medical Research have also cleared the use of RU486 in India. So, the trend is toward liberalizing the existing abortion law.

THE PROBLEM OF FEMALE FOETICIDE

A problem specific to a few countries and of major concern for India is that of sex-selection based abortions. Statistics for the year 1994 showed that 50,000 female foetuses are aborted each year after sex determination tests.²⁹ In northern India, sex-selection based abortions have assumed the proportions of an epidemic. Patriarchal values allow for the selective killing of female foetuses (and even infants) in Indian society. So, in India, the central issue of debate has been sex-selective abortion, rather than abortion itself.

²⁸ IDHL, 1997, 48(1) p. 34.

²⁹ The Pioneer, 30 July 1994.

The debate over the selective abortion of female foetuses has given rise to "a profound philosophic incoherence within the feminist position". If the state, through law prevents a woman from having information required to make a specific choice, can this be considered a violation of her right to control over her body?³⁰ Here, the right of future women to be born comes up against the right of present women to have control over their bodies and lives. It has been recognized that agitating against female foeticide could jeopardise women's right to abortion *per se*.

In addition to the ethical issues introduced, there is to be considered the demographic and social impact of sex-selective abortion. The practice will lead to a skewed sex-ratio and far-reaching social implications. According to Ren-Zong Qui³¹, this problem is particular to Asia and requires an Asian paradigm of seeking a balance between the individualist and communitarian approaches. From the viewpoint of many Asian cultures, the individual and society are interdependent. So, regulation or even prohibition of pre-natal sex selection is necessary in Asia where a patriarchal mindset prevails.

³⁰ Chhabra, n2 p.50.

³¹ Ren-Zong Qui, "Bioethics in an Asian Context", *World Health* no.5, Sept.-Oct., 1996.

GOVERNMENT RESPONSE TO THE PROBLEM

Between 1977-85, three circulars by Government Departments at the Centre and the States made the use of prenatal sex determination a penal offence. But by 1980, the facilities of sex-determination tests were widely used in private clinics. Maharashtra, in 1988 enacted legislation to regulate prenatal diagnostic tests. Under Sec. 4(4) of the Maharashtra Regulation of Use of Prenatal Diagnostic Techniques Act, 1988,³² it is made obligatory to obtain an undertaking from a woman who uses such a test to the effect that she will not terminate the pregnancy if the diagnosis shows the possibility of a normal child of either sex. Four other states soon followed suit in enacting similar legislation. Central legislation was introduced in Parliament in 1991 and the Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Bill was passed in 1994.

³² Ramaiah, n25 p.139.

THE PRE-NATAL DIAGNOSTIC TECHNIQUES (REGULATION AND PREVENTION OF MISUSE) ACT, 1994³³

(a) Provisions: The Act prohibits any unregistered clinic to conduct activities relating to pre-natal diagnosis.³⁴ Further, pre-natal diagnosis can only be conducted for the purpose of detection of specific abnormalities and only under certain qualified conditions.³⁵ Persons conducting the diagnosis are prohibited from communicating the sex of the foetus to the woman or the relatives.³⁶ Diagnosis only for determining the sex of the foetus is prohibited.³⁷ The law bans advertising and imposes fines, imprisonment and suspension of license.

(b) Assessment: The Act is an important step toward curbing the wave of female foeticide. However, there is no agency to ensure the implementation of the ban and none has been created by the Act. Who is to initiate legal action against violators? It is claimed that technology that matches the ethos of a

³³ The Pre Natal Diagnostic Techniques (Prevention and Regulation) Act, 1994, A.I.R. 1995.

³⁴ The PNDT Act, Sec.3(1).

³⁵ The PNDT Act Says that pre-natal diagnosis can only be conducted if either the woman is over thirty five years of age or has had two or more spontaneous abortions or has been exposed to harmful drugs, radiation or infection or has a family history or mental retardation.

³⁶ ThePNDT Act, Sec.5(2).

³⁷ PNDT Act, Sec. 6.

society (in this case a son-preferring patriarchal society) is likely to diffuse into the population regardless of legal obstacles.³⁸

SUMMING UP

Indian abortion law has evolved from a restrictive law to a fairly permissive law providing a wide range of indications for abortion. However, it is a classic case of non-implementation. The lack of MTP facilities and services along with the strict regulation of the procedure make it difficult to avail of legal abortion. Counselling services are glaringly absent. In India, where most are unaware of even the existence of the law, and where women are forced to take decisions under family and societal pressure, counselling services are a must. Religion does not seem to have too much effect on abortion practice in India, but ignorance and poverty do influence it.

Today, it is essential to address the problem of lack of infrastructure to deal with abortion in India. Another problem to be dealt with immediately must be that of sex-selective abortion as it is bound to have long-lasting impact. Laws must be implementable. It will not help to have a progressive law that stays on paper. Greater policy clarity is required on a number of emerging potential

³⁸ Sunil K. Khanna, "Traditions and Reproductive Technology in an Urbanizing North Indian Village", *Social Science and Medicine* vol.44(2), (December 1997) pp. 171-180.

conflict issues between different aspect of women's rights, and their rights vs. the societal good. It is also essential to generate public debate on the issue so that it can be seen whether the law is what people want, or at least so that they know of its existence!

CONCLUSION

A Continuing Problem: The problem of abortion has been with us over the centuries and is likely to remain for a long time to come. No common consensus is possible on the solution, considering the complexity of the issue. However, this does not mean that at least the basic principles and morals of life are also left unrecognized. It is a recognized fact today that abortion cannot be stopped from happening, no matter how stringent and restrictive the law is. In practice, nobody can force upon a woman an unwanted child and she is bound to find means to eliminate it, whether legal or illegal. It has been suggested that in areas where it has no means of ensuring its enforcement, the law should not bring disrepute upon itself by being unduly repressive. Keeping also in mind that some cases of abortion (to save the life of the mother) are almost universally justified, it must be conceded that abortion should be legal at least in some cases. On the other hand, totally deregulating the issues and making all desired abortions legal may have a 'slippery slope' effect and have far-reaching consequences in other spheres of life. The problem is definitely a perplexing one, but merely wishing it away will not do.

Looking for Solutions: Abortion is an issue over which sensible, rational people can disagree. Abortion cannot always be right. Nor can it always be wrong. Any extreme position on abortion is necessarily wrong and only a 'middle-of-the-path' stand is correct on the issue of abortion. It is worthwhile to consider that human beings are formed along a continuum during the gestation period and their rights develop as they develop. The right to life of the foetus is to be respected but because it may clash with the woman's rights, it cannot be an absolute right prevailing throughout the period of gestation. As many legislations in the world have done, lines must be drawn for the gestation period and each phase separately considered. Though these lines will undoubtedly be arbitrary, they have a functional value. They can be kept flexible, open to change determined by scientific progress, public objection etc. Life is a continuous process and at no point of time can it be said, "Here begins life". Irrespective of where this point of so called 'beginning of life' is, the law must designate lines of recognition of rights so as to address both maternal and foetal rights and avoid falling into either extreme.

Role of International Law: It has been recognised that international law must be an instrument of ensuring basic human rights universally. It must see that states respect human life and the rights accorded to it. It cannot be denied that human rights come into direct play in abortion decisions. The differences arise

only at the level of discerning relative rights and the ordering of rights. It is absolutely true that the abortion issue is inextricably linked to the cultural-religious and socio-economic background of particular countries, and no universal paradigm can be imposed on all cultures. However, what can be ensured is the elimination of extreme positions and legislations. According to Rebecca Cook, International Law should evolve not only to prevent governments from actively abusing their citizens but also from passively doing so, particularly by allowing high rate of maternal mortality. International law can explicitly recognize the right of the mother to an abortion to save her life. (To bring in line legislation like Chile's and Nepal's). On the other hand, it can also recognize the states interest in the life of the foetus after a particular point of time. Thus, it can ensure that extreme positions which are based on one-sided views of the issue are done away with. Expecting anything beyond that is unreasonable, because complete universalization of the issue is not possible.

What is important at this point of time is the initiation of international debate in the search for basic, universal values that might be applicable across cultures. Though national paradigms are bound to differ, there always exist areas of overlap and these areas are bound to grow with the general trend of globalization of issues and problems. These areas of overlap can be used as platforms for discussing universal approaches to a problem that manifests itself in every corner of the globe. Any such debate must however respect all cultural

view points. It must also be interdisciplinary as the abortion problem is a moral, medical and social problem besides being a legal one. Approaching International Law as a process rather than a set of rules makes it possible for the abortion issue to be discussed at the level of international human rights law.

Impact of Scientific Progress : Whereas legal questions about embryonic life were in previous years closely linked to discussions on abortion policy, new issues have now arisen. New thinking on the beginning of life has developed with the development of new technologies like embryo research, foetal tissue and organ transplantation, artificial reproductive technologies etc. Development in the legal field in these areas is bound to effect views on abortion as all of them are reflective of the status of the foetus.

It cannot be denied that today the foetus attracts much attention and interest. The characteristic which makes it unique is its total dependence for life on a human being. Any rights accorded to it are bound to have an impact of other human rights- especially the life of the mother. The issue therefore requires urgent attention, though it is a problem the solution for which seems to be distant. One must look for solutions to this human problem; The solution will definitely not be 'easy' and 'simple' to find but we must work towards assuring that it is not 'wrong'.

Appendix

Appendix I

The Medical Termination of Pregnancy Act, 1971 (ACT No. 34 OF 1971)

[10th August, 1971]

An Act to provide for the termination of certain pregnancies by registered Medical practitioners and for matters connected therewith or incidental thereto.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:

1. Short title, extent and commencement (1) This Act may be called the Medical Termination of Pregnancy Act, 1971.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Definitions In this Act, unless the context otherwise requires,--

(a) "guardian" means a person having the care of the person of a minor or a lunatic;

(b) "lunatic" has the meaning assigned to it in section 3 of the Indian Lunacy Act, 1912 (4 of 1912);

(c) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875), is to be deemed not to have attained his majority;

(d) "registered medical practitioner" means a practitioner who possesses any recognised medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956, (102 of 1956), whose name has been entered in a State Medical Register and who has such experience or training in gynaecology and obstetrics as may be prescribed by rules made under this Act.

3. When pregnancies may be terminated by registered medical practitioners (1) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.

(2) 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 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.

Explanation 1 Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation 2 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 grave injury to the mental health of the pregnant woman.

(3) In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or reasonable foreseeable environment.

(4)(a) 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 lunatic, shall be terminated except with the consent in writing of her guardian.

(b) Save as otherwise provided in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman.

4. Place where pregnancy may be terminated No termination of pregnancy shall be made in accordance with this Act at any place other than--

(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

5. Section 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 faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.

(2) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), the termination of a pregnancy by a person who is not a registered medical practitioner shall be an offence punishable under that Code, and that Code shall, to this extent, stand modified.

Explanation For the purposes of this section, so much of the provisions of clause (d) of section 2 as relate to the possession, by a registered medical practitioner, of experience or training in gynaecology obstetrics shall not apply.

6. Power to make rules (1) The Central Government may, by notification in the Official Gazette, make rules to carry out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely--

(a) the experience or training, or both, which a registered medical practitioner shall have if he intends to terminate any pregnancy under this Act; and

(b) such other matters as are required to be or may be, provided by rules made under this Act.

(3) Every rule made by the Central Government under this Act shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty

days which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

7. Power to make regulations (1) The State Government may, by regulations,--

(a) require any such opinion as is referred to in sub-section (2) of section 3 to be certified by a registered medical practitioner or practitioners concerned, in such form and at such time as may be specified in such regulations, and the preservation or disposal of such certificates;

(b) require any registered medical practitioner, who terminates a pregnancy, to give intimation of such termination and such other information relating to the termination as may be specified in such regulations;

(c) prohibit the disclosure, except to such persons and for such purposes as may be specified in such regulations, of intimations given or information furnished in pursuance of such regulations.

(2) The intimation given and the information furnished in pursuance of regulations made by virtue of clause (b) of sub-section (1) shall be given or furnished, as the case may be, to the Chief Medical Officer of the State.

(3) Any person who wilfully contravenes or wilfully fails to comply with the requirements of any regulation made under sub-section (1) shall be liable to be punished with fine which may extend to one thousand rupees.

8. Protection of action taken in good faith No suit or other legal proceedings shall lie against any registered medical practitioner for any damage caused or likely to be caused by anything which is in good faith done or intended to be done under this Act.

Appendix II

THE PRE-NATAL DIAGNOSTIC TECHNIQUES (REGULATION AND PREVENTION OF MISUSE) ACT, 1994

[ACT NO. 57 OF 1994]*

[20th September, 1994]

An Act to provide for the regulation of the use of 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 the prevention of the misuse of such techniques for the purpose of pre-natal sex determination leading to female foeticide, and for matters connected therewith or incidental thereto.

BE it enacted by Parliament in the Forty-fifth Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

1. Short title, extent and commencement.—

(1) This Act may be called the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994.

(2) It shall extend to the whole of India except the State of Jammu and Kashmir.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Definitions.— In this Act, unless the context otherwise requires,—

(a) "Appropriate Authority" means the Appropriate Authority appointed under Section 17;

(b) "Board" means the Central Supervisory Board constituted under Section 7;

(c) "Genetic Counselling Centre" means an institute, hospital, nursing home or any place, by whatever name called, which provides for genetic counselling to patients;

(d) "Genetic Clinic" means a clinic, institute, hospital, nursing home or any place, by whatever name called, which is used for conducting pre-natal diagnostic procedures;

(e) "Genetic Laboratory" means a laboratory and includes a place where facilities are provided for conducting analysis or tests of samples received from Genetic Clinic for pre-natal diagnostic test.

(f) "gynaecologist" means a person who possesses a post-graduate qualification in gynaecology and obstetrics.

(g) "medical geneticist" means a person who possesses a degree or diploma or certificate in medi-

cal genetics in the field of pre-natal diagnostic techniques or has experience of not less than two years in such field after obtaining—

(i) any one of the medical qualifications recognised under the Indian Medical Council Act, 1956; or

(ii) a post-graduate degree in biological sciences;

(h) "paediatrician" means a person who possesses a post-graduate qualification in paediatrics;

(i) "pre-natal diagnostic procedures" means all gynaecological or obstetrical or medical procedures such as ultrasonography foetoscopy, taking or removing samples of amniotic fluid, chorionic villi, blood or any tissue of a pregnant woman for being sent to a Genetic Laboratory or Genetic Clinic for conducting pre-natal diagnostic test;

(j) "pre-natal diagnostic techniques" includes all pre-natal diagnostic procedures and pre-natal diagnostic tests;

(k) "pre-natal diagnostic test" means ultrasonography or any test or analysis of amniotic fluid, chorionic villi, blood or any tissue of a pregnant woman conducted to detect genetic or metabolic disorders or chromosomal abnormalities or congenital anomalies or haemoglobinopathies or sex-linked diseases;

(l) "prescribed" means prescribed by rules made under this Act;

(m) "registered medical practitioner" means a medical practitioner who possesses any recognised medical qualification as defined in clause (b) of section 2 of the Indian Medical Council Act, 1956, and whose name has been entered in a State Medical Register;

(n) "regulations" means regulations framed by the Board under this Act.

CHAPTER II

REGULATION OF GENETIC COUNSELLING CENTRES, GENETIC LABORATORIES AND GENETIC CLINICS

3. Regulation of Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics.— On and from the commencement of this Act,—

(1) no Genetic Counselling 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 techniques;

(2) no Genetic Counselling Centre, Genetic

Laboratory or Genetic Clinic shall employ or cause to be employed any person who does not possess the prescribed qualifications;

(3) no medical geneticist, gynaecologist, paediatrician, 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 Act.

CHAPTER III

REGULATION OF PRE-NATAL DIAGNOSTIC TECHNIQUES

4. Regulation of pre-natal diagnostic techniques.— On and from the commencement of this Act,—

(1) no place including a registered Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic shall be used or caused to be used by any person for conducting pre-natal diagnostic techniques except for the purposes specified in clause (2) and after satisfying any of the conditions specified in clause (3);

(2) no pre-natal diagnostic techniques shall be conducted except for the purposes of detection of any of the following abnormalities, namely:—

(i) chromosomal abnormalities;

(ii) genetic metabolic diseases;

(iii) haemoglobinopathies;

(iv) sex-linked genetic diseases;

(v) congenital anomalies;

(vi) any other abnormalities or diseases as may be specified by the Central Supervisory Board;

(3) no pre-natal diagnostic techniques shall be used or conducted unless the person qualified to do so is satisfied that any of the following conditions are fulfilled, namely:—

(i) age of the pregnant woman is above thirty-five years;

(ii) the pregnant woman has undergone (if two or more) spontaneous abortions or foetal loss;

(iii) the pregnant woman had been exposed to potentially teratogenic agents such as drugs, radiation, infection or chemicals;

(iv) the pregnant woman has a family history of mental retardation or physical deformities such as spasticity or any other genetic disease;

(v) any other condition as may be specified by the Central Supervisory Board;

(vi) no person, being a relative or the husband of

the pregnant woman shall seek or encourage the conduct of any pre-natal diagnostic techniques on her except for the purpose specified in clause (2).

5. Written consent of pregnant woman and prohibition of communicating the sex of foetus.—

(1) No person referred to in clause (2) of Section 3 shall conduct the pre-natal diagnostic procedures unless—

(a) he has explained all known side and after effects of such procedures to the pregnant woman concerned;

(b) he has obtained in the prescribed form her written consent to undergo such procedures in the language which she understands; and

(c) a copy of her written consent obtained under clause (b) is given to the pregnant woman.

(2) 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.

6. Determination of sex prohibited.— On and from the commencement of this Act,—

(a) no Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic shall conduct or cause to be conducted in its Centre, Laboratory or Clinic, pre-natal diagnostic techniques including ultrasonography, for the purpose of determining the sex of a foetus;

(b) no person shall conduct or cause to be conducted any pre-natal diagnostic techniques including ultrasonography for the purpose of determining the sex of a foetus.

CHAPTER IV

CENTRAL SUPERVISORY BOARD

7. Constitution of Central Supervisory Board.— (1) The Central Government shall constitute a Board to be known as the Central Supervisory Board to exercise the powers and perform the functions conferred on the Board under this Act.

(2) The Board shall consist of—

(a) the Minister in charge of the Ministry or Department of Family Welfare, who shall be the Chairman, *ex officio*;

(b) the Secretary to the Government of India in charge of the Department of Family Welfare, who shall be the Vice-Chairman, *ex-officio*;

(c) two members to be appointed by the Central Government to represent the Ministries of Central Government in charge of Woman and Child Development and of Law and Justice, *ex-officio*;

(d) the Director General of Health Services of the Central Government, *ex officio*;

(e) ten members to be appointed by the Central Government, two each from amongst—

(i) eminent medical geneticists;

(ii) eminent gynaecologists and obstetricians;

(iii) eminent paediatricians;

(iv) eminent social scientists; and

(v) representatives of women welfare organisations;

(f) three women Members of Parliament, of whom two shall be elected by the House of the People and one by the Council of States;

(g) four members to be appointed by the Central Government by rotation to represent the States and the Union territories, two in the alphabetical order and two in the reverse alphabetical order.

Provided that no appointment under this clause shall be made except on the recommendation of the State Government or, as the case may be, the Union territory;

(h) an officer, not below the rank of a Joint Secretary or equivalent of the Central Government, in charge of Family Welfare who shall be the Member-Secretary, *ex officio*.

8. Term of Office of members.— (1) The term of Office of a member, other than an *ex officio* member, shall be,—

(a) in case of appointment under clause (e) or clause (f) of sub-section (2) of Section 7 three years; and

(b) in case of appointment under clause (g) of the said sub-section, one year.

(2) If a casual vacancy occurs in the Office of any other members, whether by reason of his death, resignation or inability to discharge his functions owing to illness or other incapacity, such vacancy shall be filled by the Central Government by making a fresh appointment and the member so appointed shall hold office for the remainder of the term of Office of the person in whose place he is so appointed.

(3) The Vice-Chairman shall perform such functions as may be assigned to him by the Chairman from time to time.

(4) The procedure to be followed by the members in the discharge of their functions shall be such as may be prescribed.

9. Meetings of the Board.— (1) The Board shall meet at such time and place, and shall observe

such rules of procedure in regard to the transaction of business at its meetings (including the quorum at such meetings) as may be provided by regulations:

Provided that the Board shall meet at least once in six months.

(2) The Chairman and in his absence the Vice-Chairman shall preside at the meetings of the Board.

(3) If for any reason the Chairman or the Vice-Chairman is unable to attend any meeting of the Board, any other member chosen by the members present at the meeting shall preside at the meeting.

(4) All questions which come up before any meeting of the Board shall be decided by a majority of the votes of the members present and voting, and in the event of an equality of votes, the Chairman, or in his absence, the person presiding, shall have and exercise a second or casting vote.

(5) Members other than *ex officio* members shall receive such allowances, if any, from the Board as may be prescribed.

10. Vacancies, etc. not to invalidate proceedings of the Board.— No act or proceeding of the Board shall be invalid merely by reason of—

(a) any vacancy in, or any defect in the constitution of, the Board; or

(b) any defect in the appointment of a person acting as a member of the Board; or

(c) any irregularity in the procedure of the Board not affecting the merits of the case.

11. Temporary association of persons with the Board for particular purposes.— (1) The Board may associate with itself, in such manner and for such purposes as may be determined by regulations, any person whose assistance or advice it may desire in carrying out any of the provisions of this Act.

(2) A person associated with it by the Board under sub-section (1) for any purpose shall have a right to take part in the discussions relevant to that purpose, but shall not have a right to vote at a meeting of the Board and shall not be a member for any other purpose.

12. Appointment of officers and other employees of the Board.— (1) For the purpose of enabling it efficiently to discharge its functions under this Act, the Board may, subject to such regulations as may be made in this behalf, appoint (whether on deputation or otherwise) such number of officers and other employees as it may consider necessary:

Provided that the appointment of such category

of Officers, as may be specified in such regulations, shall be subject to the approval of the Central Government.

(2) Every Officer or other employee appointed by the Board shall be subject to such conditions of service and shall be entitled to such remuneration as may be specified in the regulations.

13. Authentication of orders and other instruments of the Board.— All orders and decisions of the Board shall be authenticated by the signature of the Chairman or any other member authorised by the Board in this behalf, and all other instruments, issued by the Board shall be authenticated by the signature of the Member-Secretary or any other Officer of the Board authorised in like manner in this behalf.

14. Disqualifications for appointment as member.— A person shall be disqualified for being appointed as a member if, he --

(a) has been convicted and sentenced to imprisonment for an offence which, in the opinion of the Central Government, involves moral turpitude; or

(b) is an undischarged insolvent; or

(c) is of unsound mind and stands so declared by a competent Court; or

(d) has been removed or dismissed from the service of the Government or a Corporation owned or controlled by the Government; or

(e) has, in the opinion of the Central Government, such financial or other interest in the Board as is likely to affect prejudicially the discharge by him of his functions as a member; or

(f) has, in the opinion of the Central Government, been associated with the use or promotion of pre-natal diagnostic technique for determination of sex.

15. Eligibility of member for re-appointment.— Subject to the other terms and conditions of service as may be prescribed, any person ceasing to be a member shall be eligible for re-appointment as such member.

16. Functions of the Board.— The Board shall have the following functions, namely:—

(i) to advise the Government on policy matters relating to use of pre-natal diagnostic techniques;

(ii) to review implementation of the Act and the rules made thereunder, and recommend changes in the said Act and rules to the Central Government;

(iii) to create public awareness against the practice of pre-natal determination of sex and female foeticide;

(iv) to lay down code of conduct to be observed

by persons working at Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics.

(v) any other functions as may be specified under the Act.

CHAPTER V

APPROPRIATE AUTHORITY AND ADVISORY COMMITTEE

17. **Appropriate Authority and Advisory Committee.**— (1) The Central Government shall appoint, by notification in the Official Gazette, one or more Appropriate Authorities for each of the Union territories for the purposes of this Act.

(2) The State Government shall appoint, by notification in the Official Gazette, one or more Appropriate Authorities for the whole or part of the State for the purposes of this Act having regard to the intensity of the problem of pre-natal sex determination leading to female foeticide.

(3) The Officers appointed as Appropriate Authorities under sub-section (1) or sub-section (2) shall be—

(a) when appointed for the whole of the State or the Union territory, of or above the rank of the Joint Director of Health and Family Welfare; and

(b) when appointed for any part of the State or the Union territory, of such other rank as the State Government or the Central Government, as the case may be, may deem fit.

(4) The Appropriate Authority shall have the following functions, namely:—

(a) to grant, suspend or cancel registration of a Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic;

(b) to enforce standards prescribed for the Genetic Counselling Centre, Genetic Laboratory and Genetic Clinic;

(c) to investigate complaints of breach of the provisions of this Act or the rules made thereunder and take immediate action; and

(d) to seek and consider the advice of the Advisory Committee, constituted under sub-section (5) in application for registration and on complaints for suspension or cancellation of registration.

(5) The Central Government or the State Government, as the case may be, shall constitute an Advisory Committee for each Appropriate Authority to aid and advise the Appropriate Authority in the discharge of its functions, and shall appoint one of the members of the Advisory Committee to be its Chairman.

(6) The Advisory Committee shall consist of—

(a) three medical experts from amongst gynaecologists, obstetricians, paediatricians and medical geneticists;

(b) one legal expert;

(c) one officer to represent the department dealing with information and publicity of the State Government or the Union territory, as the case may be;

(d) three eminent social workers of whom not less than one shall be from amongst representatives of women's organisations.

(7) No person who, in the opinion of the Central Government or the State Government, as the case may be, has been associated with the use or promotion of pre-natal diagnostic technique for determination of sex shall be appointed as a member of the Advisory Committee.

(8) The Advisory Committee may meet as and when it thinks fit or on the request of the Appropriate Authority for consideration of any application for registration or any complaint for suspension or cancellation of registration and to give advice thereon:

Provided that the period intervening between any two meetings shall not exceed the prescribed period.

(9) The terms and conditions subject to which a person may be appointed to the Advisory Committee and the procedure to be followed by such Committee in the discharge of its functions shall be such as may be prescribed.

CHAPTER VI

REGISTRATION OF GENETIC COUNSELLING CENTRES, GENETIC LABORATORIES AND GENETIC CLINICS

18. **Registration of Genetic Counselling Centres, Genetic Laboratories or Genetic Clinics.**—

(1) No person shall open any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic after the commencement of this Act unless such Centre, Laboratory or Clinic is duly registered separately or jointly under this Act.

(2) Every application for registration under sub-section (1) shall be made to the Appropriate Authority in such form and in such manner and shall be accompanied by such fees as may be prescribed.

(3) Every Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic engaged, either partly or exclusively, in counselling or conducting pre-natal diagnostic techniques for any of the purposes mentioned in Section 4 immediately before the commencement of this Act, shall apply for registra-

tion within sixty days from the date of such commencement.

(4) Subject to the provisions of Section 6 every Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic engaged in counselling or conducting pre-natal diagnostic techniques shall cease to conduct any such counselling or techniques on the expiry of six months from the date of commencement of this Act unless such Centre, Laboratory or Clinic has applied for registration and is so registered separately or jointly or till such application is disposed of, whichever is earlier.

(5) No Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic shall be registered under this Act unless the Appropriate Authority is satisfied that such Centre, Laboratory or Clinic is in a position to provide such facilities, maintain such equipment and standards as may be prescribed.

19. Certificate of registration.— (1) The Appropriate Authority shall, after holding an inquiry and after satisfying itself that the applicant has complied with all the requirements of this Act and the rules made thereunder and having regard to the advice of the Advisory Committee in this behalf, grant a certificate of registration in the prescribed form jointly or separately to the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, as the case may be.

(2) If, after the inquiry and after giving an opportunity of being heard to the applicant and having regard to the advice of the Advisory Committee, the Appropriate Authority is satisfied that the applicant has not complied with the requirements of this Act or the rules, it shall, for reasons to be recorded in writing, reject the application for registration.

(3) Every certificate of registration shall be renewed in such manner and after such period and on payment of such fees as may be prescribed.

(4) The certificate of registration shall be displayed by the registered Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic in a conspicuous place at its place of business.

20. Cancellation or suspension of registration.— (1) The Appropriate Authority may *suo motu*, or on complaint, issue a notice to the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic to show cause why its registration should not be suspended or cancelled for the reasons mentioned in the notice.

(2) If, after giving a reasonable opportunity of being heard to the Genetic Counselling Centre,

Genetic Laboratory or Genetic Clinic and having regard to the advice of the Advisory Committee, and Appropriate Authority is satisfied that there has been a breach of the provisions of this Act or the rules, it may, without prejudice to any criminal action that it may take against such Centre, Laboratory or Clinic, suspend its registration for such period as it may think fit or cancel its registration, as the case may be.

(3) Notwithstanding anything contained in sub-sections (1) and (2), if the Appropriate Authority is, of the opinion that it is necessary or expedient so to do in the public interest, it may, for reasons to be recorded in writing, suspend the registration of any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic without issuing any such notice referred to in sub-section (1).

21. Appeal.— The Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic may, within thirty days from the date of receipt of the order of suspension or cancellation of registration passed by the Appropriate Authority under Section 20, prefer an appeal against such order to—

(i) the Central Government, where the appeal is against the order of the Central Appropriate Authority; and

(ii) the State Government, where the appeal is against the order of the State Appropriate Authority in the prescribed manner.

CHAPTER VII

OFFENCES AND PENALTIES

22. Prohibition of advertisement relating to pre-natal determination of sex and punishment for contravention.— (1) No person, organisation, Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic shall issue or cause to be issued any advertisement in any manner regarding facilities of pre-natal determination of sex available at such Centre, Laboratory, Clinic or any other place.

(2) No person or organisation shall publish, distribute or cause to be published or distributed any advertisement in any manner regarding facilities of pre-natal determination of sex available at any Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or any other place.

(3) Any person who contravenes the provisions of sub-section (1) or sub-section (2) shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees.

Explanation.— For the purposes of this section

"advertisement" includes any notice, circular, label wrapper or other document and also includes any visible representation made by means of any light, sound, smoke or gas.

23. Offences and penalties.— (1) Any medical geneticist, gynaecologist, registered medical practitioner or any person who owns a Genetic Counselling 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 a Centre, Laboratory or Clinic, whether on an honorary basis or otherwise, and who contravenes any of the provisions of this Act or rules made thereunder 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.

(2) The name of the registered medical practitioner who has been convicted by the Court under sub-section (1), shall 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.

(3) Any person who seeks the aid of a Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic or of a medical geneticist, gynaecologist or registered medical practitioner 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 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.

24. Presumption in the case of conduct of pre-natal diagnostic techniques.— Notwithstanding anything in the Indian Evidence Act, 1872, the Court shall presume unless the contrary is proved that the pregnant woman has been 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 be punishable for the offence specified under that section.

25. Penalty for contravention of the provi-

sions of the Act or rule for which no specific punishment is provided.— Whoever contravenes any of the provisions of this Act or any rules made thereunder, for which no penalty has been 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 the 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.

26. Offences by companies.—(1) Where any offence, punishable under this Act has been committed by a company, every person who, at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this subsection shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in subsection (1) where any offence punishable under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other Officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.— For the purposes of this section,—

(a) "company" means any body corporate and includes a firm or other association of individuals, and

(b) "director," in relation to a firm means a partner in the firm.

27. Offence to be cognizable, non-bailable and non-compoundable.— Every offence under this Act shall be cognizable, non-bailable and non-compoundable.

28. Cognizance of offences.— (1) No Court shall take cognizance of an offence under this Act except on a complaint made by—

(a) the Appropriate Authority concerned, or any

Officer authorised in this behalf by the Central Government or State Government, as the case may be, or the Appropriate Authority; or

(b) a person who has given notice of not less than thirty days in the manner prescribed to the Appropriate Authority, of the alleged offence and of his intention to make a complaint to the Court.

Explanation.— For the purpose of this clause, "person" includes a social organisation.

(2) No Court other than that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.

(3) Where a complaint has been made under clause (b) of sub-section (1) the Court may, on demand by such person, direct the Appropriate Authority to make available copies of the relevant records in its possession to such person.

CHAPTER VIII MISCELLANEOUS

29. Maintenance of records.— (1) All records, charts, forms, reports, consent letters, and all other documents required to be maintained under this Act and the rules shall be preserved for a period of two years or for such period as may be prescribed:

Provided that, if any criminal or other proceedings are instituted against any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, the records and all other documents of such Centre, Laboratory or Clinic shall be preserved till the final disposal of such proceedings.

(2) All such records shall, at all reasonable times, be made available for inspection to the Appropriate Authority or to any other person authorised by the Appropriate Authority in this behalf.

30. Power to search and seize records, etc.—

(1) If the Appropriate Authority has reason to believe that an offence under this Act has been or is being committed at any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, such Authority or any Officer authorised thereof in this behalf may, subject to such rules as may be prescribed, enter and search at all reasonable times with such assistance, if any, as such authority or Officer considers necessary, such Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic and examine any record, register, document book, pamphlet, advertisement or any other material object found therein and seize the same if such Authority or Officer has reason to believe that it may furnish evidence of the commission of an offence punishable under this Act.

(2) The provisions of the Code of Criminal Procedure, 1973 relating to searches and seizures shall, so far as may be, apply to every search or seizure made under this Act.

31. Protection of action taken in good faith.— No suit, prosecution or other legal proceeding shall lie against the Central or the State Government or the Appropriate Authority or any Officer authorised by the Central or State Government or by the Authority for anything which is in good faith done or intended to be done in pursuance of the provisions of this Act.

32. Power to make rules.— (1) The Central Government may make rules for carrying out the provisions of this Act.

(2) In particular and without prejudice, to the generality of the foregoing power, such rules may provide for—

(i) the minimum qualifications for persons employed at a registered Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic under clause (1) of Section 3;

(ii) the form in which consent of a pregnant woman has to be obtained under Section 5;

(iii) the procedure to be followed by the members of the Central Supervisory Board in the discharge of their functions under sub-section (4) of Section 8;

(iv) allowances for members other than *ex officio* members admissible under sub-section (5) of Section 9;

(v) the period intervening between any two meetings of the Advisory Committee under the proviso to sub-section (8) of Section 17.

(vi) the terms and conditions subject to which a person may be appointed to the Advisory Committee and the procedure to be followed by such Committee under sub-section (9) of Section 17;

(vii) the form and manner in which an application shall be made for registration and the fee payable thereof under sub-section (2) of Section 18;

(viii) the facilities to be provided, equipment and other standards to be maintained by the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic under sub-section (5) of Section 18;

(ix) the form in which a certificate of registration shall be issued under sub-section (1) of Section 19;

(x) the manner in which and the period after which a certificate of registration shall be renewed and the fee payable for such renewal under sub-section (3) of Section 19;

(xi) the manner in which an appeal may be preferred under section 21;

(xii) the period up to which records, charts, etc., shall be preserved under sub-section (1) of Section 29;

(xiii) the manner in which the seizure of documents, records, objects, etc., shall be made and the manner in which seizure list shall be prepared and delivered to the person from whose custody such documents, records or objects were seized under sub-section (1) of Section 30;

(xiv) any other matter that is required to be, or may be prescribed.

33. Power to make regulations.— The Board may, with the previous sanction of the Central Government, by notification in the Official Gazette, make regulations not inconsistent with the provisions of this Act and the rules made thereunder to provide for—

(a) the time and place of the meetings of the Board and the procedure to be followed for the transaction of business at such meetings and the number of members which shall form the quorum under sub-section (1) of Section 9;

(b) the manner in which a person may be temporarily associated with the Board under sub-section

(1) of Section 11;

(c) the method of appointment, the conditions of service and the scales of pay and allowances of the Officer and other employees of the Board appointed under Section 12;

(d) generally for the efficient conduct of the affairs of the Board.

34. Rules and regulations to be laid before Parliament.— Every rule and every regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation or both Houses agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation.

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