**ABORTION – A RIGHT OF WOMEN**

**-Monisha Gade**

**Faculty Associate**

**ICFAI Law School**

**IFHE, Hyderabad**

**Introduction:**

**“No woman can call herself free who does not control her own body.”   
―**[**Margaret Sanger**](https://www.goodreads.com/author/show/264856.Margaret_Sanger)

Human beings are bestowed with certain natural rights, which are called as human rights. Human rights are inherent, inseparable and unequivocal for all irrespective of caste, creed, color, gender, sex, race, and religion etc. human rights aim at achieving freedom of human beings. Even though the human being are treated at par and given equal rights, there still exists a discrimination between men and women. Women rights have been a subject of debate over a period of time. Women are claiming their rights to equality, freedom and non-discrimination. But these rights include the right to privacy. Privacy of woman is always in question. Though she was given right to equal participation in all aspects of life, discrimination still exists.

Women are vested with a greatest power by nature. It is their capacity to reproduce or in simple words, right to give birth to a new life. Motherhood is a boon bestowed on feminine gender. Today we come across various instances, where motherhood is not treated as divine or boon rather women are forced to bear children. Motherhood is at crossroads. Many a time, women has to choose whether to bear the child or not. In this era of human rights, the rights of women are recognized and regarded as basic human rights. Every woman has right to life and personal liberty. The right to life and personal liberty have been recognized as a basic human right at both national and international level. International law and national laws have provided for various safeguards to protect women and help her to achieve her rights. One of the most debated right of a woman is right to life which includes her right to determine how she wants to use her body. This particular aspect is not only about right to life but also right to privacy.

Abortion means ending of pregnancy by removing the fetus or embryo before it can enter the real world. The term abortion is not defined under law. Right of abortion is being debated all over the world. The world countries are trying to recognize the right to abortion as an essential element of right to life and also as a human right. The debate of abortion is gaining momentum at a faster pace. The dimensions of debate are not only about medical implications or legal dimensions but also turned up as a political issue. Abortion-rights movements, also referred to as pro-choice movements, advocate for [legal](https://en.wikipedia.org/wiki/Abortion_law) access to induced abortion services. The issue of induced abortion remains divisive in public life, with [recurring arguments](https://en.wikipedia.org/wiki/Abortion_debate) to liberalize or to restrict access to legal abortion services. Abortion-rights supporters themselves are frequently divided as to the types of abortion services that should be available and to the circumstances, for example different periods in the pregnancy such as [late term abortions](https://en.wikipedia.org/wiki/Late_termination_of_pregnancy), in which access may be restricted.[[1]](#footnote-1) There are many countries which have strict laws prohibiting abortion. Texas and Ireland are some countries which have strict laws. Indian society is also progressing towards women empowerment. Women are being represented in every field of life. The recent rulings given by Indian Judiciary in different cases has intensified the debate on abortion.

**Abortion: Meaning & Kinds:**

The medical Dictionary defines abortion as terminatiom of pregnancy before the fetus is viable. In medical sense the term abortion and miscarriage both refer to termination of pregnancy. The word abortion is used when the termination of pregnancy is induced and deliberately interrupts pregnancy[[2]](#footnote-2).

In legal sense abortion means the artificial or spontaneous termination of a pregnancy before the embryo or fetus can survive on its own outside a woman’s uterus.[[3]](#footnote-3)

Various laws have been passed on the subject of abortion at national and international level. Some countries have passed strict legislations banning abortion practices and some took a liberal view towards abortion. Countries having strict laws treat abortion even as a crime. Human activists treat this as violation of human rights. Declaring abortion as a crime ha both positive and negative aspects. Sometimes abortion practices are supported to uphold the dignity, safety and health of the woman. Especially in case of rape victims, strict ban on abortion would affect her liberty and autonomy. It is an accepted fact that women have a right to use their body on their own will. From this point of view, supporting abortion practices seems to have a positive impact which would help enhance the human rights of a woman. On the other hand, supporting abortion practices will lead to denial of righto life of an unborn child who is also treated as a legal personality.

The medical sciences have identified various kinds of abortion practices which are enlisted as follows:

Complete abortion: Complete expulsion of all products of conception.

Criminal abortion: Termination of pregnancy by illegal interference.

Early abortion: Abortion caused before completion of 12 weeks of pregnancy.

Elective abortion: Abortion done on the request of mother due to therapeutic reasons.

Habitual abortion: Spontaneously done consecutively for three times.

Incomplete abortion: Abortion in which parts of conception are left in the uterus.

Induced abortion: Abortion which is brought out by medicines or instrumentalisation.

Inevitable abortion: Abortion caused when vaginal bleeding is profuse.

Infected abortion: Abortion caused by infection in genital tracts.

Missed abortion: Abortion where the dead components of conception are left even after 8 weeks of pregnancy.

Theaurupatic abortion: Abortion caused by medical practitioner to save health of mother.

Doctors and medical practitioners have observed that abortion will cause various side effects on the reproductive health of a mother. Medical science treats that incomplete, induced and habitual kinds of abortions are most dangerous. They also state that these kinds of abortions will affect the physical, psychological and mental health of a woman. Generally abortion is prescribed by the medical practitioners only when there is an imminent threat to life of the mother.

**Ethical issues surrounding abortion:**

Abortion has become a highly debated topic. There is a lot of heat and dust around the policy discussions on abortion. Ethics are various standards set by society with respect to the field ethical values aim at upholding the moral values of the society. We can understand the various ethical issues surrounding abortion from different points of view as discussed hereunder.

**Abortion and Medical Ethics:**

Ethical questions about health, illness and medical care were once considered to be best left to the judgment of physicians. Bioethics replaced the notion that ‘doctor knows best’ with theoretically grounded approaches to decision-making in medicine. In order to help resolve the dilemmas that arise in healthcare, academic bioethicists have called upon a number of ethical theories-deontology, teleology, virtue theory, care ethics, feminist ethics, to name a few but the day-to-day work of bioethicists in the clinic and on research review committees is, for the most part, guided by a method of ethical problem solving known as ‘principalism’. In this much used, much-cited text the authors set forth four principles.

**Autonomy:**

This principle acknowledges the fact that the patient has a perspective of her interest based on her values and beliefs. The patient has the right to choose or refuse treatment. This is perhaps not surprising given that “from the outset, the conceptual framework of bioethics has accorded paramount status to the value complex of individualism, underscoring the principles of individual rights, autonomy, self-determination and their legal expression in the jurisprudential notion of privacy”. The patient-doctor relationship only works when each can trust the other.

**Beneficence:**

A doctor should always have the best interest of the patient as the supreme consideration. Doctor should assess objectively and meticulously all the available diagnostic and therapeutic options and to implement those that protect and promote the interest of the patient by ensuring a balance of good over harm.

**No maleficence**

A doctor must make sure that in the first place, he does no harm.

**Justice:**

It is the fair distribution of health resources and the decision of who gets what treatment is fairness and equality. Central issue concerns the moral status of the human fetus. It concerns the nature and attributes that an entity requires to have ‘full moral standing’ or ‘moral inviolability’ including a ‘right to life’. But what of the human being, as it develops from newly fertilized ovum, to pre-embryo, embryo, fetus, new born baby, to unequivocally mature autonomous person with full moral standing including a moral and legal right not to be killed at least.

**Abortion and the International Law:**

The law relating to abortion is being discussed at both national and international levels. Various international covenants have been passed by world countries. Right to abortion is treated as a human right. The Universal Declaration of Human Rights 1948 (hereinafter referred as UDHR) reaffirms that every person has a right to life. It further enunciates that right to life includes various aspects like equality, dignity, respect etc. which are most essential to lead a worthy life. This document creates an awareness and understanding about the human rights but does not create a legal obligation.

International Covenant on Civil and Political Rights (ICCPR) echoes and enforces the right to life of the declaration. The Covenant proclaims, “Every human being has the inherent right to life. Law shall protect this right. No one shall be arbitrarily deprived of his life.[[4]](#footnote-4) Unlike the word “person” that, through judicial interpretation in the United States (US), has left the unborn outside a sphere of protection, “human being” is a scientific term for a living human organism. Thus, one view lies that the basic human-rights documents are against abortion; they certainly do not create a right for abortion.[[5]](#footnote-5)

Article 1of ICCPR, declares that, ‘every human being’ has the inherent right to life, while in respect to other rights the expressions used are ‘everyone’ and ‘every person’. This use of different terminology raises the question whether ‘every human being’ has a wider connotation than ‘everyone’ and could therefore be understood to include the unborn child. There is an absence of authoritative literature on the above contention however it is a well understood fact that the criminalization of abortion can have implications regarding the right to life. This can be backed by the instances of suicides, which young females commit as a result of failure to perform an abortion due to its criminalization by the state which is a direct violation of right to life. Failure to prevent unnecessary deaths due to anti-abortion laws would raise issues pertaining to the obligation to ensure that everyone enjoys the right to life. Another interpretation can be drawn from Article 12 of the CEDAW Convention that provides that, “States parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.”

**Abortion and Constitution of India:**

The framers of Constitution of India have been very vigilant and inculcated the spirit that the aim of Constitution is to protect people from all kinds of discrimination whether done by Government or private persons. The Indian Constitution contains Part III which deals with fundamental rights. These fundamental rights are framed taking spirit from basic human rights enunciated under UDHR. Of all the fundamental rights enshrined in Constitution of India, Article 21 is the heart and soul of the Indian Constitution. Article 21 deals with right to life and liberty. This particular Article have been interpreted by the judiciary with a view to promote and protect the rights of every individual. Right to life and personal liberty is the most sacrosanct, precious, inalienable and fundamental of all the fundamental rights of citizens. This guarantee imposes a restraint on the government and it is part of the cultural and social consciousness of the community in India. In this context, every woman owe an individual right, right to her life, to her liberty, and to the pursuit of her happiness, that sanctions her right to have an abortion.

The women have reproductive features and have right to decide about her sexual health and shape her reproductive choices. To ensure availability of human rights to women and to advance the development, the international community acknowledged reproductive rights of the woman. In order to follow the international mandate, governments from all over the world have recognized and accredited reproductive rights to women to an unprecedented heights. To fulfill its commitment government enacted formal laws and policies that are prime indicators in promoting reproductive rights. Thus it can be reiterated that all over the World each and every woman has an unconditional right to have control over her own body.

**Abortion Law in India:**

India is a country with diverse cultures and religions co-existing within it. The religious beliefs of people are also given due weightage at the time of framing any law. At the same time, the interests of people are also addressed. To protect the fundamental rights and to secure dignity of women, various laws have been passed. One such law is Medical Termination of Pregnancy Act 1971.

The law relating to abortion was enacted in different countries after the landmark decision in the case of Roe vs Wade[[6]](#footnote-6). During the last thirty years, since 1970s many countries have liberalized their abortion laws. Roe case has been subsequently modified by the US Supreme Court in Planned Parenthood v. Casey[[7]](#footnote-7) where the legality of the abortion law is now linked to the viability of the foetus rather than the rigid third trimester test laid down in Roe case.

In India, the Central Family Planning Board on August 25, 1964 recommended the Ministry of Health to constitute a committee to study the need of legislation on abortion. The recommendation was adopted in the later half of 1964 constituting a committee which consisted of members from various Indian public and private agencies. The committee – called Shantilal Shah Committee. After analyzing a vast expanse of statistical data available at that time, this committee issued its report on December 30, 1966.12 On the basis of this report, the government passed the Medical Termination of Pregnancy Act, 1971 (MTP Act of 1971) and liberalized abortion laws in India.

The committee acknowledged that there did not exist and would not exist in the predictable future either the doctors or the medical facilities to support an extensive abortion programme. It also specifically denied that its intention was to force down for the legislation of abortion only for the population control in India.

It is noteworthy that the MTP Act was implemented in the month of April, 1972 and again revised in the year of 1975 to eliminate time consuming procedures for the approval of the place and to make services more readily available. This Act was amended in the year 2002 and again in 2005. The Preamble of the Act states, “An Act to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto”. The Act, consisting of just 8 sections, deals with the various aspects like the time, place and circumstances in which a pregnancy may be terminated by a registered medical practitioner. It legalizes abortion in case where there is a failure of contraceptives or where the pregnancy will adversely affect the physical or mental termination of pregnancy, consent of the pregnant woman is a must unless she is a minor or lunatic when her guardian’s consent is required.15

The Act permits abortion only in certain circumstances. It Act allows medical termination of pregnancy up to Twenty weeks’ gestation. Though the Act talks about the written consent of the pregnant mother before the technique is administered to her, the law fails to recognize the social reality that a woman cannot make a free choice. Thus, it is evident that the Act fails to achieve a equilibrium between the right of the unborn to be born and the right of the woman, who bears, gives birth and rears the child, to decide whether she wants the child or wants to abort the foetus.

In Nikhil D. Dattar v. Union of India[[8]](#footnote-8), sections 3 and 5 of MTP Act was challenged on the ground of non-inclusion of eventualities vires of the Act. In this case the fetus was diagnosed for complete heart block thus the Petitioner, in her twenty sixth week of pregnancy, had sought termination of pregnancy. The petitioner contended that section 5(1) of the MTP Act should be read down to include the eventualities in section 3 and consequently, a direction should be issued to the respondents to allow the petitioner to terminate the pregnancy. The court held that the courts are not empowered to legislate upon a statute. Sections 3 and 5 provide for right to terminate pregnancy only under the specified circumstances. And the remedy under section 5 can only be available when the non-termination of pregnancy would be dangerous to the life of pregnant woman. While dismissing the petition the court further held that since twenty six weeks of pregnancy has already passed the court could not pass any direction for exercise of right under section 3. This case further reiterated that the physical and mental trauma which may be experienced by women in such circumstances. It also highlighted the ethical issue faced by the doctors in similar situations.[[9]](#footnote-9)

In a recent case the Supreme Court of India refused to terminate the pregnancy of 26 week old foetus. In this case it was diagnosed that the foetus would be born with Down Syndrome, as a result of which the intellectual features of the child would not develop on pace with growth in the age. In another case the Apex Court refused to grant permission to terminate pregnancy of a 26 week old foetus to a 35 year old woman who was sexually assaulted. This raises a bigger ethical question whether abortion is violating the human right of a woman with respect to her privacy or dignity or the human right of an unborn child. Law encompasses legal personality on an unborn child also. The current status of law is that it permits abortion of a child but not only on a woman’s request. However, the underlying condition remains as an abortion is permitted only if continuing the pregnancy poses a ‘substantial risk’ to the woman’s life or to her ‘physical or mental health’. Alternatively, if the child that is yet to be born faces similar substantial risk – in that it would suffer from ‘physical or mental abnormalities’ or may be ‘seriously handicapped’ – an abortion may be allowed.

In case of pregnancies caused by rape, or a failure of birth control (for married women), the risk to their mental health is admissible grounds for abortion. The premise of keeping the window for abortion open only until 20 weeks is that, generally, abnormalities can be detected by that time. However, some rare congenital diseases can be detected only after 20 weeks; this can potentially put both the lives of the mother and the child at risk.

**The MTP (Amendment) Bill, 2014**

The [MTP (Amendment) Bill](http://www.mohfw.nic.in/showfile.php?lid=2986) of 2014 proposes to replace ‘registered medical practitioners’ with ‘registered healthcare providers’. More importantly, it aims to extend the permissible period for abortion from 20 weeks to 24 weeks if the healthcare provider believes the pregnancy involves a substantial risk to the mother or the child. If substantial foetal abnormalities are detected, the amendment also allows an exception on the time limit for pregnancies to be terminated.

However, these amendments are being passed back and forth without any effective action, forcing pregnant women seeking abortion to run to courts. The amendment still also needs cabinet approval, after which the Bill will be tabled in parliament.

The judiciary has at times been progressive, pronouncing judgments that support reproductive rights. But at times, the courts have succumbed to the old 1971 law as well. The Supreme Court has held that a crucial consideration is that a woman’s right to privacy, dignity and bodily integrity should be respected. In a [suo motu case](http://indianexpress.com/article/cities/mumbai/undertrial-over-15-weeks-pregnant-allowed-to-abort-state-to-bombay-high-court-3021155/), the Bombay high court – while dealing with the medical termination of pregnancy of two under-trial prisoners in Thane jail – clearly stated that it is applicable to all women irrespective of their marital status or whether she was a working woman, a homemaker or a prisoner.

Even the term ‘mental injury’ has been given wider interpretation by the courts. On the right to abortion, the US Supreme Court [has held](http://www.casebriefs.com/blog/law/family-law/family-law-keyed-to-weisberg/private-family-choices-constitutional-protection-for-the-family-and-its-members/roe-v-wade/) that it is the woman who suffers and thus she has the right to make the decisions. Its Indian counterpart [allowed](http://www.thehindu.com/news/national/SC-allows-rape-victim-to-abort-24-week-old-foetus/article14508050.ece) an alleged rape victim to abort a 24-week old foetus with severe abnormalities in January 2017, as the medical board thought that the pregnancy could put her life in danger. Decisions made by courts therefore have not always been on an even footing, thereby necessitating changes to the existing law.

**Conclusion:**

**Right to abortion is a gender oriented right, it is available only to women by virtue of nature. Today abortion practices are recognized as rights in the eyes of law, but still there are certain hindrances which a woman needs to face while exercising this right. She has to undergo an emotional and ethical trauma. It is understood from the above analysis, that though laws are being made to protect the health and dignity of women, there is no proper implementation of the laws. A woman cannot make a choice whether to bear a child or not. It is the time to move towards pro-choice laws. Thereafter it is also the need of the hour to spread knowledge and literature about conception and safe abortion practices. This would become possible only when we pass laws which are women friendly and the people observe these laws in aq proper manner.**

1. https://en.wikipedia.org/wiki/Abortion-rights\_movements [↑](#footnote-ref-1)
2. http: // medical dictionary.thefreedictionary.com/abortion [↑](#footnote-ref-2)
3. Black’s Law Dictionary/abortion [↑](#footnote-ref-3)
4. International Covenant on Civil and Political Rights, art. 6. [↑](#footnote-ref-4)
5. Ibid. [↑](#footnote-ref-5)
6. 410 U.S. 113 (1973). [↑](#footnote-ref-6)
7. 1 505 U.S. 833 (1992) [↑](#footnote-ref-7)
8. S.L.P. (Civ.) No. XXXX of 2008 (Supreme Court of India), available at: http://www.hrln.org/hrln/images/stories/pdf/xandy-petition-8-3-14.pdf (last visited on Feb. 10, 2017). [↑](#footnote-ref-8)
9. Centre for Reproductive Rights, Human Rights Law Network, available at: https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Datar\_v\_India.pdf (last visited on Feb. 10, 2017). [↑](#footnote-ref-9)