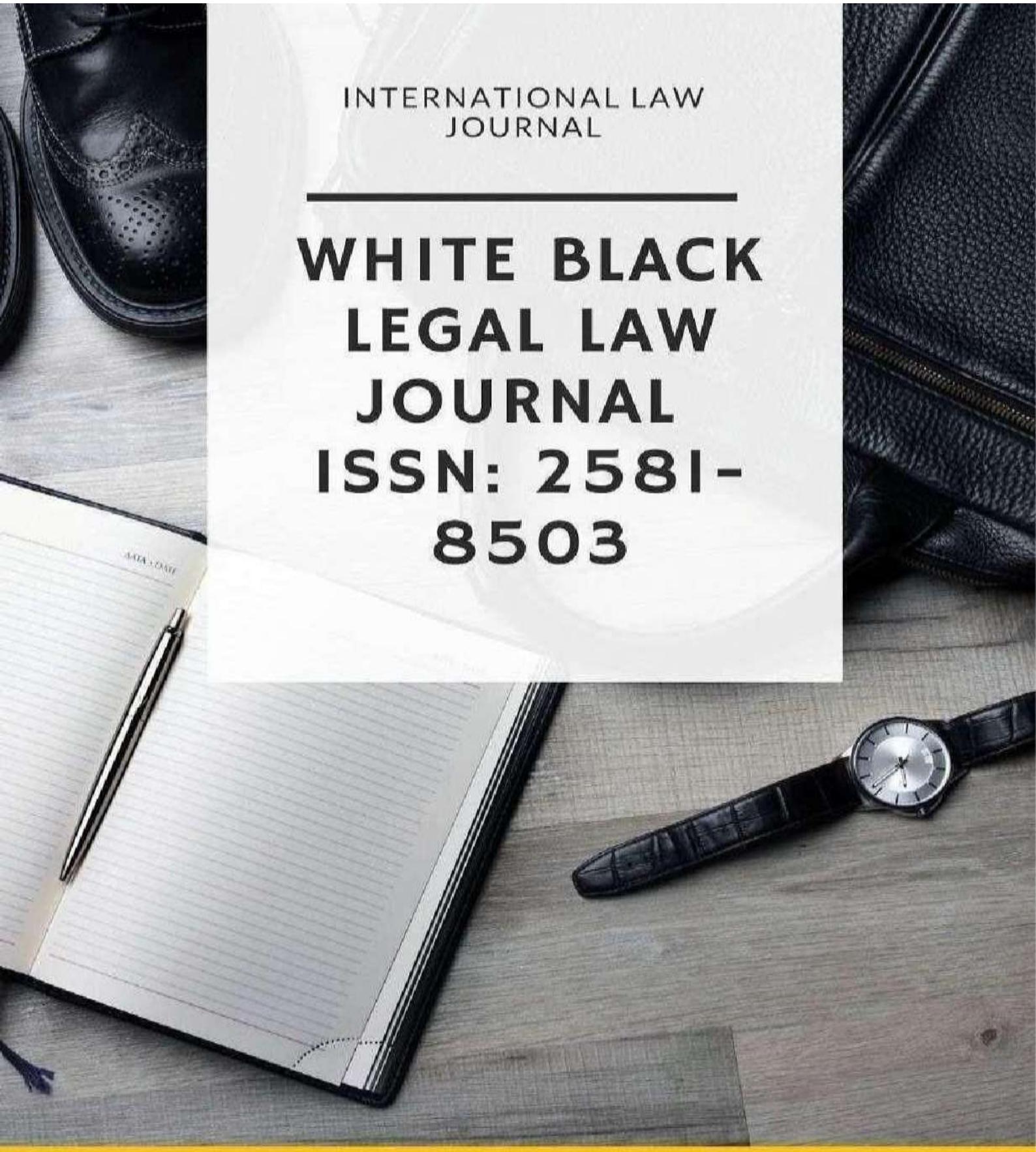

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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

FEASIBILITY OF FOETAL RIGHTS IN ABORTION ERA

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Abstract:

*The rights of the fetus are one of the most fascinating interfaces between medical science, morality and law. New issues and grey areas will always be there since till we are not able to define what really **'life'** means and when does it really start? We may come across the questions: Who is **'fetus'**? Is it same as the **'unborn'**? Who is 'unborn'? The term unborn can be perfectly defined using the legal maxim "en ventre sa mere" which means "in the mother womb". This article discusses the Rights of an unborn child and it has apportioned into three areas of discussion. The introductory part explains the conceptual understanding of the topic, the second segment deals with comparative analysis between UK and India. The third portion deals with the conclusion.*

Key words: Foetal Rights, Human Rights, Legal Rights, MTP Act.

I. INTRODUCTION:

In the era of reproductive rights, the debates and discussions often revolve around the autonomy and choice of pregnant women, with a significant focus on expanding the rights on access to abortion services in India. It is true that the recognition of women's reproductive rights including right of choice to abort or continue with the pregnancy, is crucial for ensuring bodily autonomy of a pregnant women, it has led to serious and complex moral and ethical dilemma regarding the status of foetal rights. Many countries around the world has got more liberal abortion policies. And India is one among them, making progressive legislation on abortion practice. However, there is a pressing need to address and preserve the rights of foetus while balancing the rights of women.

The term "unwanted pregnancy" has been widely used recently and abortion is justified under such ground. Though India was one among the first countries to introduce the family planning scheme during the 1950s which was later developed into family welfare scheme, taking measures to reduce mortality rate of mother and infant and bringing awareness about birth control and setting up of centres for women safe access to family planning, it still has issues relating to unwanted pregnancy. The scheme of family planning, introduced sixty years back has raised more awareness throughout the country, yet the issue on abortion is on raise. Our judiciary has upheld women's reproductive rights in many cases, which has to be exercised diligently by every woman. The women's right over bodily autonomy or the right to choose pregnancy or to terminate it, covers within its ambit the rights of unborn who are dependent on their mother.

This paper tries to explore the intersection of reproductive rights and foetal rights in the context of the progressive abortion regime and shed light on the importance of preserving rights of unborn child. The Medical Termination of Pregnancy Act, 1971 along with the 2021 Amendment to the Act has destigmatised abortion, removes barrier to access and promotes the reproductive rights of women. While such a progressive step is necessary to promote gender equality and bodily autonomy, it also raises critical questions about the moral and legal status of the unborn child.

The paper attempts to examine the implication of progressive abortion policies on the societal attitude towards the rights of unborn child. There is dire need to reconcile the competing interests of women and unborn child in a manner that upholds the right to life, dignity and justice to both.

II. INDIAN LAWS ON ABORTION:

First, let's delve into the legal framework on abortion in India and the laws relating to reproductive rights of women, to understand its role in protecting foetal rights. In India there are primarily two laws that deal with abortion. One is the Medical Termination of Pregnancy Act, 1971 and the other is the Pre Conception- and Pre Natal-Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994. Many believe that the former Act legalizes abortion in India, whereas the correct legal position would be that it declares abortion as illegal. Though on health grounds, it does state when and in what circumstances a foetus can be medically terminated. Hence, foetal homicide, in Indian laws exists not in the nature of generic abortions, but in the nature of 'termination of pregnancies.'

Apart from this, the general Criminal Code of the country that is the IPC, 1860, sections 312 and 315 of the Indian Penal Code, 1860 contain provisions wherein punishment is provided for miscarriage. It is very important to understand that IPC provides "good faith" as the only exception to escape prosecution where abortion is done to save the life of the mother. However, the recent amendments and judicial interpretation has recognised the women's right to choose to either continue or not to continue with the pregnancy. We have deviated from the original illegality of abortion to legalising abortion in certain conditions to now, upholding the reproductive autonomy of women which is understood as abortion to be part of women's right to choose.

i) IPC:

In India, abortion was considered to be illegal until the enactment of the Medical Termination of Pregnancy Act, 1971. Prior to the MTP Act, 1971, the only law that dealt with abortion was the Indian Penal Code, 1870. Any person who voluntarily cause miscarriage to a pregnant woman may be punished with imprisonment and/or a fine unless the procedure was performed in good faith to save the mother's life. It was a settled position that woman had no right to reproductive choices especially when it came to having an abortion. If a pregnant woman voluntarily gives consent to the miscarriage, sec 312 punishes the woman along with the person who caused miscarriage. The punishment is severe in case of miscarriage caused to a pregnant woman who was quick with child. If miscarriage is done without the consent of the pregnant woman it was considered a grave offence and the person may be punished with imprisonment which may extend to ten years along with fine or life imprisonment.

ii) SHANTILAL SHAH COMMITTEE:

There was high increase in the maternal mortality rate due to illegal and unsafe abortion practice during 1950s and 1960s. In order to decrease the high maternal morbidity and mortality associated with illegal abortion, the government appointed a Committee under the chairmanship of a medical professional, Dr.Shantilal Shah in the middle of 1960s to investigate whether India need a law to control abortions. A report was submitted by the Committee on December 30, 1966 which recommended to enact a law on abortion. In 1971, the Parliament passed the Medical Termination of Pregnancy Act, 1971.The enactment's name, the Medical Termination of Pregnancy (MTP) Act, 1971, was purposefully intended to allay ethical or religious concerns and provide a medical justification for allowing such operations. It is very important to understand the reason for making

such a recommendation. Due to high birth rates people were resorting to unregistered medical practitioner in order to escape the prosecution. Unfortunately, most women lost their lives and many were suffering from physical injury as a result of unprofessional surgeries and abortion practices. It was in this background abortion was recommended to be allowed for legitimate reasons like child conceived as a result of rape, pregnancy posing threat to life of mother, child capable of developing abnormalities, etc. Therefore, abortion has to be interpreted in a way that protects the life of both the mother and the unborn child.

iii) THE MEDICAL TERMINATION OF PREGNANCY ACT, 1971:

The MTP Act was enacted with the object to provide safe and legal access to abortion services under certain conditions in order to prevent unsafe abortions, thus protecting the health and well-being of women. The Preamble of the Act clearly states that the pregnancies can be terminated only by the registered medical practitioner. Sec 3 of the Act, provides the conditions under which termination can be allowed. The Act initially allowed for the termination of pregnancy up to 20 weeks of gestation. When the gestation period is between 12 weeks and not 20 weeks, it requires the opinion of two medical practitioners and only under the grounds under sec 3 abortion can be performed. It allowed termination only when the continuation of pregnancy posed serious or grave threat to the life of pregnant women or to her physical or mental health or to terminate in case of fetal abnormality or when the pregnancy is caused due to rape or due to contraceptive failure.

2021 Amendment:

Considering the advancement in the field of medical science, MTP Act was amended to improve the access to safe abortion services beyond 20 weeks. The 2021 had positive response as it made significant changes to the parent Act. It allowed termination of pregnancy up to 24 week under conditions specified in the Act. The Act recognises pregnancy outside marriage and reflects the same in the provision by replacing the word “pregnant married woman” with “pregnant woman” and “husband” with partner.” According to 2017 data, 59 countries allowed elective abortions, of which only seven permitted the procedure after 20 weeks like Canada, China, the Netherlands, North Korea, Singapore, the United States, and Vietnam. Through the 2021 Amendment, India has become one among the above-mentioned countries.

iv) PRE-CONCEPTION AND PRE-NATAL DIAGONOSTIC TECHNIQUES ACT, 1994:

The main objective of enacting this Act is to completely ban the use of sex selection techniques and to prevent the misuse of prenatal diagnostic technique for sex selective abortion. The Act was passed to curb the practice of female foeticide and pre-natal sex determination. It also provides a stringent provision in penalising any conduct of sex-determination of the foetus and informing the same to the pregnant women, or to her family. It allows the use of such technique only for legitimate purpose.

III. ANALYSING THE ROLE OF INDIAN LAWS IN PROTECTING THE INTEREST OF UNBORN CHILD:

Section 312 provides that if the woman is 'with child', which means pregnant simpliciter and not when the unborn has reached the stage of quickening, causes herself to miscarry, she faces the possibility of a lesser punishment-viz. maximum 3 years, *with or without* fine as compared to the stage where she is 'quick with the child'-where the punishment is maximum 7 years *with* fine. This demonstrates that the act of causing miscarriage at an advanced stage of pregnancy has been treated as a graver offence, though at no stage does it amount to homicide.[1] Thus, the section goes so far as to provide some acknowledgement to foetal personality but falls short of reading full personhood in favor of the same.

Section 299 (culpable homicide) of the Indian Penal Code, under Explanation 3 clearly states that: 'the causing of the death of child in the mother's womb is not homicide. Ratanlal and Dhirajlal, which is an authority on Criminal Law of the Land, mentions that the causing of death of an unborn child where it is totally inside the mother's womb is an offence under section 315(act done with intention of preventing the child from being born alive or to cause it to die after birth) but not 299 or 300. At the same time, section 299 states that 'it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.' Hence, one unequivocal circumstance that makes an unborn a subject matter of homicide is (as mentioned under section 299, Expl III), when during childbirth some part of the unborn is already out of the PW.

[1] Ratanlal and Dhirajlal, *The Indian Penal Code* (32nd enlarged edn, LexisNexis Butterworths Wadhwa, Nagpur 2012) 1794.

Section 315 of the IPC, 1860 is the Indian equivalent of section 1 of the Infant Life Preservation Act 1929 of the UK with some modifications. In order for the PW to be guilty of any offence under this section, the concerned act or omission must be committed by her while the child is inside the womb. If the child is allowed to be born alive and then the act or omission is intentionally committed by the pregnant women (hereinafter as PW), as a result of which it dies, it would then be homicide of an alive human being-an offence not under this section but under section 300 (murder).
Otherwise also, the IPC 1860 does not use the expression abortion anywhere; the word used is miscarriage, which may be understood synonymously to ease understanding of the concept. The provisions of the same have been mentioned above already.

Coming back to the MTPA, 1971 and the PCPNDTA, 1994 both statutes were primarily formulated to curb the menace of sex selective abortions, which is an obsession in the country. While in the early 70's the thrust was just to project India as a pro-life (as against a pro-choice) nation and that foetal life could be terminated only per law and that too in certain given situations, in the mid 90's the purpose was different. Advent of superior medical technology had made sex detection a possibility and when such technologies began to be misused, a need was felt to regulate the same, which resulted in the PNDT Act, 1994. The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (PNDT), was amended in 2003 and termed as 'The Pre-Conception and Pre- Natal Diagnostic Techniques (Prohibition Of Sex Selection) Act (PCPNDT Act)' to improve the regulation of the technology used in sex selection. It bans sex selection for the purposes of foeticide. Both laws are a part of the criminal law of the country.

Insofar as the culpability of the pregnant women for harm suffered by the foetus is concerned, if personality is conferred on the foetus, thereby granting it the rights and interests of a legal person, then it is the demand of logic and common sense that it must be protected from all harm, including that inflicted by the mother. Presently, there is no legal or societal sentiment or inclination regarding the same in India.

Contradiction: It is often argued that there is a contradiction in maintaining that while the mother can intentionally terminate the pregnancy in the form of legal abortions (she can do it in India through the MTPA only), without regard to the rights of the foetus, the same mother becomes liable to the foetus

for unknowingly and unintentionally, but negligently, causing the pregnancy to end at the same stage.[2]

It is true that sometimes cases may assume a strange implication just because abortion is legal. For instance, in cases of foetal homicide by women hosts, their offence is reduced to nothing but maternally-induced criminal foetal homicide by a non-state approved method and not abortion—the state approved method of terminating pregnancies.[3]If one looks at it this way, there does seem a contradiction in maintaining that pre-viability abortion is a woman's protected choice (till the 24th week in most pro-choice countries and upto 20th week under the MTPA321) and at the same time prosecuting pregnant females for substance abuse (or negligent behaviour in general) if it results in death of the unborn even in the pre-viable stage.

Hence the author argues that the standard of viability itself should be done away with in order to decide whether foetus is aged enough to be granted legal personality. It is 'life' the moment it is conceived and merits to be treated like any other natural person from that instance.

The idea is never to shift focus from the well being of the PW; abortion, if it is permissible, in the restricted form suggested, should be allowed so long as the health of the PW permits the same. Contrary to the present position, where the shenanigan adopted reflects as if the state is interested in the life of both the mother and the foetus. On one hand, it conveniently refuses to grant any legal personality to the unborn and on the other hand displays concern for the 'life' of the foetus by denying the right of legal abortion by choosing the arbitrary standard/limit of viability because apparently at viability the foetus gains the capacity to exist independent of the host mother.

In short, barring the exception of legal abortion if this life is deliberately taken away or negligently extinguished, it would merit criminal prosecution. If such a prosecution becomes a reality in India and/or elsewhere there are several possibilities that may arise. Abortions would become extremely regulated and not an open- on-demand choice. The contradiction that resulted from the existence of viability as a standard would disappear and theoretically speaking, there would be no problem in prosecuting the PW for deaths of foetuses that result from negligent behaviour including substance

[2] Just as in cases of pre-viable abortions being non-criminal and WD during the same stage being an offence.
[3] Assuming that their foetuses were non viable at the time of the concerned homicide.

abuse. Amongst the adverse effects that may result, there are basically two--one, the very thought or prospect of a criminal prosecution for drug-damaging the unborn foetus may be seen as a burden, a dis-incentive to bear a child in the first place. Habitual women addicts or those who stubbornly refuse to change their lifestyle for pregnancy may opt this over getting their liberties curbed.[4]

Secondly, if at all the woman gets pregnant, the pressures of choosing abortion over retaining the pregnancy may increase to avoid prosecution.[5] The author however maintains that this may not happen in the Indian scenario, because abortion in the form of medical termination of pregnancy is already too circumscribed. It is suggested that if the US and the UK also adopt this model with some tweaking here and there,[6] the issue may be resolved to a Prosecution of women for such acts may also cause many women to avoid seeking help for addictive behaviour. Moreover, there might arise a tendency to hold women accountable for any behaviour during pregnancy, including smoking, jogging, or not taking pre-natal medicines regularly. It is submitted however that if the judiciary follows a balanced approach or in case of a legislation, if it is plugged of loopholes, such fears may easily be rubbished as exaggerated or unfounded.

A COMPARATIVE ANALYSIS WITH UK:

The accepted view of foetal status under Criminal law of Homicide, since mid 90's in the UK is that, 'Violence towards a foetus which results in harm suffered after the baby that has been born alive can give rise to criminal responsibility. [7]So, the fixation is on the requirement of being born alive. Normally, the aspect of viability is also added to the fixation of liability. Meaning, any pre-natal injury to the foetus would be a criminal offence only after it has attained viability and provided it is born alive. Once this happens, even if it dies after one miniscule second, the requirement of Criminal Law to inculpate the offender would be satisfied. Conversely, there would be no crime committed under Criminal Law if the injury happens before viability or if the injury happens after viability but

[4] Refer to ch 6. 'Confinement of Pregnant Women for Protection of Unborn' for details.
[5] Nova D Janssen, 'Foetal Rights and the Prosecution of Women for using Drugs during Pregnancy' (2002) 48 Drake Law Review 741.
[6] Refer to ch 6 for suggestions for improvement in MTPA, 1971.
[7] *Attorney General's Reference* (No 3 of 1994) (1998) AC 245, 254. Here, the accused had stabbed a PW in the abdomen, causing her to go into premature labour. She gave birth to a live child who survived for 121 days. In this particular case, the foetus did achieve live birth and thus the rights attached to all human beings crystallised at that point. The logic of Attorney General makes live birth mandatory if any criminal liability for harm or homicide to the foetus has to be fixed.

the pregnancy does not result in live birth (it is stillborn).

For the Legislations, in the UK, they have the Abortion Act 1967, and the Infant Life Preservation Act, 1929. The former gives grounds for legal abortion whereas the latter makes child destruction an offence.[8] However, the mother is never inculpated for crimes against the foetus.

In 1991, through section 37(4) of the Human Fertilisation and Embryology Act, 1990, some changes were made to the Abortion Act, 1967. Section 1(1) of the Abortion Act, 1967, which gave the grounds for medical termination of pregnancy, the gestational age till which abortion was a legal possibility was made till 24th week.[9]

If it exceeded 24th week, abortion could not be carried out legally at all. It also amended section 5 of the Abortion Act, 1967 (for the smooth operation of the Infant Life Preservation Act, 1929) and stated that it would NOT be an offence under the Infant Life Preservation Act, 1929 if pregnancy was terminated by a medical practitioner and in consonance with the provisions of the Abortion Act, 1967. This ensured that if a medical practitioner under the Abortion act terminated the pregnancy, it would not amount to the offence of child destruction under the Infant Life Preservation Act, 1929.

Child Destruction is the name of a statutory offence in England and Wales primarily. It refers to the crime of killing an unborn but viable foetus, that is, a child capable of being born alive, which has been fixed at 24 weeks gestation. Meaning, if the unborn is killed beyond the 24th week and it is not done in consonance with the Abortion Act, 1967, it would be an offence of child destruction under the Infant Life Preservation Act, 1929. The purpose of the offence is to criminalise the killing of the child *during* birth because it is neither legal abortion[10] nor homicide[11] as per the UK Laws.

CONCLUSION:

I conclude that as society faces with the challenges posed by the progressive abortion legal regime, it is the duty of the State to ensure the rights and dignity of the foetus are not overlooked.

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[9] Because advancement in medical technology made it possible to save a foetus of 24 weeks gestation in case of pre-mature birth.

[10] The offence of child destruction is not abortion, legal or illegal (which is referred to as unlawful procurement of miscarriage in section 58 of the Offences Against the Person Act 1861).

[11] Child Destruction is also not murder, manslaughter or infanticide either.

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his/her right to life. Most of the human rights are transformed as recognized national and international laws but nowhere these rights are formed for a foetus, making a meaning as if foetus is not a human being. One can easily find laws protecting foetus because it is one of the most concerned issue of society.

All religious texts recognize the life in foetus and our legal field also do so but the legal field is denying life in fetus from the very beginning, that is not true as well as unscientific to claim but true from the religious perspective, and legal field is not ready to resolve this issue of when fetus comes to life. Leaving this question as unsolved one, law has created a dilemma of time, when it is right to abort an unborn child. Judiciary has faced many questions on the stage of viability or abortion before 20 weeks.

It is very important to balance the right of unborn child and the right of pregnant women. Abortion was allowed with the intention to prevent high female mortality rate due to abortion. However, the law has evolved and new developments has forgotten the rights of unborn children. This is high time for the States to protect the interest of the inborn child and frame laws upholding the rights of unborn children.