To Decriminalize Abortion Care

Bangladesh Perspective

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Ipas BANGLADESH Partners for Reproductive Justice

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Foreword

It is with great respect and appreciation that we present this compelling and insightful exploration of a critical and sensitive issue with far-reaching global implications—abortion. This comprehensive analysis focuses particularly on the legal landscape in Bangladesh, where the contradiction between the prevalence of abortion practices and their criminalization has created alarming consequences for women's health and rights.

In this timely and thought-provoking work, Dr. Syeda Nasrin, Advocate of the Supreme Court of Bangladesh, examines the legal framework outlined in Sections 312–316 of the Penal Code, 1860. Her analysis highlights the dissonance between these colonial-era provisions and the Constitution of the People's Republic of Bangladesh, which guarantees fundamental rights including privacy, freedom, life, and livelihood. The criminalization of abortion not only undermines these rights but has also led to unsafe, and often life-threatening, conditions for countless women.

Beyond legal critique, this work raises profound questions about women's rights within a patriarchal society. It underscores how the denial of bodily autonomy and reproductive choices continues to marginalize women, treating their essential rights as criminal offenses rather than human entitlements. The urgent need for legal reform is emphasized, advocating for a rights-based approach that respects and upholds women's dignity, health, and agency.

This resource is a valuable contribution for policymakers, legal professionals, development practitioners, and advocates committed to advancing gender equality and justice. It is our hope that this publication will serve as a catalyst for deeper understanding, dialogue, and much-needed reform in the field of reproductive rights.

We extend our sincere gratitude to Dr. Syeda Nasrin for her dedication, expertise, and significant contribution to this vital discourse

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Introduction

Abortion is a very sensitive and complex issue which has attracted diverse legal responses throughout the world from time to time. Sometimes it is legally acceptable, and sometimes totally deniable. Though abortion is practiced around the world, however, it is highly controversial and unsettled. In many countries, abortion is legal or partially legal, whereas, in some countries it is illegal or restrictive.[1] Undoubtedly abortion has elicited diverse reactions from different countries throughout various periods of human history.

While abortion primarily concerns the autonomy and liberation of women, unfortunately men often have a significant influence over it, particularly in terms of prohibiting or restricting women's abortion rights. The issue has persisted throughout human history, yet there remains no unanimous resolution on this matter among countries worldwide. It would not be inaccurate to describe the abortion issue as one of the longstanding problems that has continued to spark controversy between men and women ever since it can be remembered. Society, at times, raises objections to it, religions may prohibit it, economic factors come into play, ethical considerations are weighed, there may be moral reservations, even though "morality and criminality are not co-extensive"[2]. Furthermore, opposing viewpoints often emerge within mainstream discourse. Cultural norms may not support it, and unfortunately, the law is also biased against it.

In Bangladesh, abortion is considered a crime. The criminal law of Bangladesh does not recognize abortion as an essential part of healthcare for women, even though it is practiced. Abortion care is allowed to a certain extent as a part of family planning policy. However, the fact remains that the criminalization of abortion has not prevented its occurrence; instead, it has made the procedure unsafe and potentially deadly for over half a million women each year who try to terminate their pregnancies.[3] It is prohibited, except when it is necessary for saving the life of a woman, but in all other cases, it is a penal offense.

Sections 312-316 of the Penal Code, 1860 deals with abortion related crimes, which are apparently inconsistent with the right to privacy, freedom, life and livelihood of women as guaranteed under the Constitution of the People's Republic of Bangladesh.

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[1] See Annexure 1 (The World's Abortion Map).

[2]In S. Khusboo vs Kanniammal, MANU/SC/0310/2010, (2010) 5 SCC 600, AIR 2010 SC 3196 the Supreme Court of India has made a very interesting observation holding that "While there can be no doubt that in India, marriage is an important social institution, we must also keep our minds open to the fact that there are certain individuals or groups who do not hold the same view. To be sure, there are some indigenous groups within our country wherein sexual relations outside the marital setting are accepted as a normal occurrence. Even in the societal mainstream, there are a significant number of people who see nothing wrong in engaging in premarital sex. Notions of social morality are inherently subjective and the criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy. Morality and criminality are not co-extensive."

[3]Center For Reproductive Rights, Fact Sheet, Facts on Abortion in the Philippines: Criminalization and a General Ban on Abortion.
Retrieved from: https://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_fac_philippines_1%2010.pdf

In this backdrop, this write-up is for advocating in favor of legalizing or 'decriminalizing' abortion care[4] in Bangladesh. It will briefly discuss the historical journey of abortion with reference to recent developments in some countries where abortion is absolutely legal, partially legal or restrictively permitted. In addition, it will explore the necessity of legalizing abortion in Bangladesh from the social, legal and moral perspectives.

Background of the Study

The denial of women's rights has been at the center of patriarchal origin, growth and extension worldwide. The exact starting point and the true underlying causes are yet to receive any conclusive answers, although several findings on this issue by scholars will be discussed later. Nevertheless, the contemporary world is male- dominated, where entitlements of women need to pass the patriarchal thresholds to be recognized as rights. Some inherent rights are not inherent for women. Women's rights are dependent and require permission to gain validity in this male-dominated society. Be it in any form, social structure, religious frameworks, legal systems, financial structures, etc., the denial of women's rights is everywhere. They are not even awarded full freedom over their bodies and minds, and one example of this is the prohibition or restriction of abortion care.

The body and mind are the basics of a human, but a woman can hardly exercise full freedom over her body and mind. The restrictions on her body and mind are limitless. Men have more authority to make decisions regarding the bodies and minds of women. Unfortunately, legal provisions are also male dominating, and laws are not equal for women. Sometimes, laws are terribly unequal, biased and discriminatory. Laws are so discriminatory that legal provisions, instead of recognizing these rights as inherent to women treat them as offences. These offences are punishable, attracting different forms of punishment such as rigorous imprisonment, sentences of different terms, fine, penalty, etc. Bangladesh is not an exception to this. One basic example is the criminalization of abortion.

Bangladesh does not recognize 'abortion' as a "right", it recognizes it as an "offence" through the term "miscarriage". Abortion indicates the intentional termination of pregnancy. Miscarriage is the spontaneous or unexpected expulsion of the product of conception from the womb before it comes out and becomes able to survive independently. The law does not provide a definition of miscarriage or abortion. Whether there is any distinction between 'abortion' or 'miscarriage' – leaving that issue aside and considering these two terms as interchangeable, this article will discuss the legal perspective of abortion in Bangladesh. It will also make a comparative analysis of the legal positions in the USA, UK, India, Nepal, South Korea, Argentina and some other countries worldwide for advocates in favor of abortion rights in Bangladesh.

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[4] The decriminalization of abortion means removing specific criminal sanctions against abortion from the law, and changing the law and related policies and regulations to achieve the following:
- not punishing anyone for providing safe abortion,
- not punishing anyone for having an abortion,
- not involving the police in investigating or prosecuting safe abortion provision or practice,
- not involving the courts in deciding whether to allow an abortion, and
- treating abortion like every other form of health care—that is, using best practice in service delivery, the training of providers, and the development and application of evidence-based guidelines, and applying existing law to deal with any dangerous or negligent practices.

Marge Berer, Abortion Law and Policy Around the World, Health Hum Rights. 2017 Jun; 19(1): 13–27.
Retrieved from: https://pmc.ncbi.nlm.nih.gov/articles/PMC5473035/

What is Abortion?

Abortion is a procedure to end a pregnancy which is also known as termination of pregnancy. As per World Health Organization (WHO) "every individual has the right to decide freely and responsibly, without discrimination, coercion and violence – the number, spacing and timing of their children, and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health (ICPD 1994). Access to legal, safe and comprehensive abortion care, including post-abortion care is essential for the attainment of the highest possible level of sexual and reproductive health."[5]

Abortion is the termination of pregnancy. It covers all the scenarios in which a pregnancy is deliberately terminated. It may be performed through surgical or medical methods and may be performed within or outside a health care established by a qualified or non-qualified service provider. Its safety and efficacy depend on how it is performed and provided.[6]

Medical abortion refers to abortion through the use of pharmacological drugs which is also referred to as medication abortion. The medications recommended by WHO for induced abortion are the drugs *mifepristone* and *misoprostol*, in combination or *misoprostol* alone. Both drugs are included in the WHO Model List of Essential Medicines, which means that they should be "available within the context of functioning health systems at all times in adequate amounts, in the appropriate dosage forms, with assured quality, and adequate information, and at a price the individuals and the community can afford".[7]

Self-managed abortion refers to abortion performed through self-care interventions or one that is performed on the pregnant person without clinical supervision; its safety and efficacy depend on how it is performed.[8] It is based on an individual's knowledge, access to quality medicines and ability to seek follow-up care. In contexts where abortion including self-managed abortion is criminalized, an individual's safety depends on risk of enforcement of the laws penalizing abortion and the degree to which they may face harassment, intimidation, arrest or prosecution when self-managing their abortion.[9]

WHO recommends self-managed abortion with medicines as a method of abortion for individuals who are less than 12 weeks pregnant and have "a source of accurate information and access to a health-care provider should they need or want it at any stage of the process".[10] Pregnant people can have a range of self-involvement in their medical abortion process, from learning about drug regimens from non-medical

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[5]World Health Organization, Abortion,
Retrieved from: https://www.who.int/health-topics/abortion#tab=tab_1

[6] SARJAI – Center for Reproductive Rights, Safe abortion through medical abortion and self-management in select Asian countries, 2021,
Retrieved from: https://reproductiverights.org/wp-content/uploads/2021/10/Advancing-Public-Health-and-Human-Rights_Bangladesh_India_Nepal_Pakistan_Philippines_Sri-Lanka.pdf

[7] World Health Organization, New WHO Guide to help countries expand access to essential medicines, 30.03.2020,
Retrieved from: https://www.who.int/news/item/30-03-2020-new-who-guide-to-help-countries-expand-access-to-essential-medicines See also World Health Organization, Model List Of Essential Medicines (2020).

[8]Safe Abortion Advocacy Initiative: Global South Engagement, Self-Managed Abortion:
SAIGE Technical Guide Paper, p.1 (2020),
Retrieved from: https://arrow.org.my/wp-content/uploads/2020/06/SelfManagedAbortions_SAIGE.pdf

[9] Center for Reproductive Rights and IPAS, Medical Abortion and Self-Managed
Abortion: Frequently Asked Questions on Health and Human Rights 3 (2021)
Retrieved from: https://reproductiverights.org/wp-content/uploads/2020/12/SMA-IPAS-CRR-FINAL-for-Distributionrev-1.pdf

[10]World Health Organization, Who Consolidated Guidelines On Self- Care Interventions For Health: Sexual And Reproductive Health And Rights, 67 (2019) [hereinafter WHO, Guidelines On Self-Care].

sources to taking medication at home that was given to them by a doctor.[11] Pregnant persons or those who may need abortion care include women, transgender men and non-binary individuals who have the capacity to become pregnant.[12]

Intentional abortion is the termination of unintended pregnancy. An unwanted or unintended pregnancy is one of the most evident violations of women's sexual and reproductive rights in developing countries.[13] The lack of having scope of terminating unwanted pregnancy creates inequality and discrimination. Legalizing abortion is a step in mitigating this inequality and discrimination as legalizing abortion shall promote safe abortion while the contrary compels unsafe and risky abortion. When the specific term "abortion" is used it refers to intentional termination of unwanted pregnancy. There may be unintentional miscarriage. Sometimes termination of pregnancy may come out of compulsion, undue influence, force, fraudulent misrepresentation, etc, i.e. it may come out of any situation except for free consent. Termination of unwanted pregnancy must come out of free consent of the women bearing the same. Continuing the pregnancy or terminating it at the free will of a woman construes the core of fight for abortion right. Abortion right is not the termination of pregnancy when the woman wants to continue her pregnancy and is also ready to give birth at her free will. Abortion care becomes necessary when woman does not want her pregnancy and she is not ready to give birth. Coercion should have no place while a woman decides about continuation of her pregnancy. Thus, reproductive coercion is a flagrant violation of women's free will.

A woman's decision to terminate a pregnancy is not a silly or frivolous one. For a woman abortion is often the only way out of a very difficult situation. An abortion is a carefully considered decision taken by a woman who fears that the welfare of the child she already has, and of other members of the household that she is obliged to care for with limited financial and other resources, may be compromised by the birth of another child. These are decisions taken by responsible women who have few other options. There are women who would ideally have preferred to prevent an unwanted pregnancy, but were unable to do so. If a woman does not want to continue the pregnancy, then forcing her to do so represents a violation of the woman's bodily integrity and aggravates her mental trauma which would be deleterious to her mental health.[14]

History of Abortion

Abortion has been practiced since ancient times, but its legality and availability have been threatened continuously by forces that would denigrate women's fundamental rights.[15] There is no precise record of exactly when the deliberate termination of pregnancy, popularly known as abortion, started. It is believed that abortion has always been there since the beginning of human history. As long as the birth process of humans follows natural routes, abortion is an undeniable one. This undeniability comes from both avoidable and unavoidable circumstances. Sometimes abortion is bound to happen, and at times it is of choice. In both cases, it concerns right and liberty of women. Anti-abortion legislation was part of an anti-

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[11]Center for Reproductive Rights and IPAS, Medical Abortion and Self-Managed
Abortion: Frequently Asked Questions on Health and Human Rights 3 (2021),
Retrieved from: https://reproductiverights.org/wp-content/uploads/2020/12/SMA-IPAS-CRR-FINAL-for-Distributionrev-1.pdf

[12] SARJAI – Center for Reproductive Rights, Safe abortion through medical abortion and self-management in select Asian countries, 2021,
Retrieved from: https://reproductiverights.org/wp-content/uploads/2021/10/Advancing-Public-Health-and-Human-Rights_Bangladesh_India_Nepal_Pakistan_Philippines_Sri-Lanka.pdf

[13] BMC, Factors associated with unintended pregnancy among women attending antenatal care in Maichew Town, Northern Ethiopia,2017, 05 July 2019,
Retrieved from: https://bmcresnotes.biomedcentral.com/articles/10.1186/s13104-019-4419-5

[14]High Court on its own Motion vs The State of Maharashtra, SuoMotu Public Interest Litigation No. 1 of 2016, Decided on 19.09.2016, MANU/MH/1886/2016.

[15]G Hovey, Abortion : A History, Plan Parent Rev, 1985 Summer;5(2):18-21, <https://pubmed.ncbi.nlm.nih.gov/12340403/>

feminist backlash to the growing movements for suffrage, voluntary motherhood, and other women's rights in the 19th century.[16]

Written records of contraceptive remedies and abortion techniques were found from the Egyptian Ebers Papyrus in 1550 BCE.[17] Many of the methods employed in early cultures were non-surgical. Herbal remedies for inducing delayed menstruation are abundant in history and in contemporary folk culture. One ancient method of unusual interest was the use of an herb called *silphion* exported from the ancient Greek city of Cyrene in North Africa.[18] Physical activities such as strenuous labor, climbing, paddling, weightlifting, or diving were a common technique. Various methods have been used to perform or attempt abortion, including the administration of *abortifacient*[19] herbs, the use of sharpened implements, the application of abdominal pressure, and other techniques.[20]

Neither the time of first abortion nor when it became a hitch for the men can be exactly identified in history. However, the formal legislation criminalizing abortion is traceable. Over several centuries and in different cultures, there is a rich history of women helping each other to abort. The religions, social theories and State mechanisms originating from patriarchy or male dominance either prohibited or restricted abortion during ancient and medieval period, which is still the same. The States formally didn't prohibit abortion until the 19th century by enacting laws, nor did the Church lead in this new repression.[21] In 1803, Britain first passed anti-abortion laws, which then became stricter throughout the century. Subsequently, wherever Britain made or extended its colonies the same prohibition followed. Abortion was legally restricted in almost every country by the end of the 19th century. The most important source of such laws was the imperial countries of Europe-Britain, France, Portugal, Spain, and Italy-who imposed their own laws forbidding abortion in their colonies.[22]

The U.S. followed, as individual States began to outlaw abortion. By 1880, most abortions were illegal in the U.S., except those “necessary to save the life of the woman”.' But by then the tradition of women's right to abortion was rooted in U.S. society; abortionists continued to practice openly with public support, and juries refused to convict them.[23]

Looking into the history of abortion and religious responses, it is also upsetting. The sacred Hindu texts are very clear about abortion correlating it with the most grievous sins a Hindu could commit, and the doctrine regarding the karmic law and rebirth constitute the foundation of the intransigent attitude of Hinduism towards abortion. As for Buddhism, the traditional embryology and the principle of non-violence, seen by Buddhists as a way of life, determine a similar attitude concerning abortion. More than

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[16] Linda Gordon's Woman's Body, Woman's Right, rev. ed. (New York: Penguin Books, 1990)
Quoted from: https://www.feminist.com/resources/ourbodies/abortion.html
[17] Malcolm Potts and Martha Campbell, History of Contraception**,** Vol. 6, Chp. 8, Gynecology and Obstetrics, 2002
Retrieved from: http://big.berkeley.edu/ifplp.history.pdf
[18]Malcolm Potts and Martha Campbell, History of Contraception**,** Vol. 6, Chp. 8, Gynecology and Obstetrics, 2002
Retrieved from: http://big.berkeley.edu/ifplp.history.pdf
[19] Wikipedia, An abortifacient is a substance that induces abortion. This is a nonspecific term which may refer to any number of substances or medications, ranging from herbs to prescription medications. Retrieved from:
https://en.wikipedia.org/wiki/Abortifacient
[20]Wikipedia, Abortion, Retrieved from: https://en.wikipedia.org/wiki/History_of_abortion
[21] Marge Berer, Abortion Law and Policy Around the World, Health Hum Rights. 2017 Jun; 19(1): 13–27.
Retrieved from: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5473035/
[22] Marge Berer, Abortion Law and Policy Around the World, Health Hum Rights. 2017 Jun; 19(1): 13–27.
Retrieved from: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5473035/
[23]Feminist.com's Statement on Roe v. Wade Decision, and Facts, Resources and Calls to Action, Copyright © 1984, 1992, 1998 by the Boston Women's Health Book Collective. All rights reserved. Published by Touchstone, a division of Simon & Schuster Inc., Retrieved from: https://www.feminist.com/resources/ourbodies/abortion.html

that, if a Buddhist monk even incites abortion he is "defeated" and scourged with total exclusion from the monastic order, the severest punishment a monk can experience.[24]

There is no single Islamic position about abortion. The answer to the question depends on what kinds of Islamic sources, scriptural, legal or ethical, are applied to this contemporary issue by people of varying levels of authority, expertise or religious observance.[25] In Islam, and most religions, abortion is forbidden.[26] It is forbidden *(haram)* to abort the fetus and if this is done, it would result in the payment of *Diyah*[27].[28] Generally four rules are prescribed.[29] The Quranic verses and *hadith*, recorded sayings of the Prophet Muhammad – are not about abortion *per se*, nor the moment when life begins or whether abortion is akin to taking a life. Instead, there are descriptions for people to reflect on God's miracle of what happens in the womb, or *rahm* in Arabic, which is part of God's mercy and compassion.[30] Islam is considerably liberal concerning abortion, which is dependent on (i) the threat of harm to mothers, (ii) the status of the pregnancy before or after ensoulment (on the 120th day of gestation), and (iii) the presence of foetal anomalies that are incompatible with life.[31] Considerable variation in religious edicts exists, but

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[24]Constantin-Iulian Damian, Abortion from the perspective of Eastern Religions: Hinduism and Buddhism,Romanian Journal of Bioethics, Vol. 8, No. 1, January – March 2010. Retrieved from: http://eng.bioetica.ro/atdoc/RRBv8n1_2010_Damian_EN.pdf

[25]Zahra Ayubi, There is no one Islamic interpretation on ethics of abortion, but the belief in God's mercy and compassion is a crucial part of any consideration, The Conversation, 8 July 2022,
Retrieved from: https://theconversation.com/there-is-no-one-islamic-interpretation-on-ethics-of-abortion-but-the-belief-in-gods-mercy-and-compassion-is-a-crucial-part-of-any-consideration-184534

[26]Abdulrahman Al-Matary and Jaffar Ali, Controversies and considerations regarding the termination of pregnancy for Foetal Anomalies in Islam, BMC Medical Ethics,volume 15, Article number: 10 (2014), 5 February 2014,
Retrieved from: https://bmcmedethics.biomedcentral.com/articles/10.1186/1472-6939-15-10

[27]Blood money/ransom (Tr.).

[28] Dr. BharamDilawar, Abortions, Islamic Ethics on Family Planning. Retrieved from: https://www.al-islam.org/islamic-edicts-family-planning/abortions

[29]**Rule 1:** In Islam, it is forbidden *(haram)* to abort the fetus and if this is done, it would result in the *Diyah* having to be paid. The Diyah is the responsibility of the person who was in charge of carrying out the abortion.
If the doctor was to perform it through an operation or by injecting some medication into the woman and through this act of his, the child was aborted, then he is responsible.
If it was the mother herself who ate some pills or was to use something else that the doctor prescribed for her to take, then the mother would be responsible.
If the father did not know about this taking place, then the Diyah would have to be paid to him. However if the father knew about it and approved of it, then the Diyah is the responsibility of both the mother and father and the Diyah must be given to the indirect inheritor of that fetus.
Rule 2: If the child was to die while in the womb of the mother, then it is obligatory to remove it from the womb.
Rule 3: If the pregnancy is a danger to the life of the mother or would result in her become handicapped, then it is permissible for her to abort the child before the time when the soul has been infused into the body.
However it is not permissible to abort the child once the soul has come into the body and the fetus starts to move (inside the womb) and the mother must carefully watch over and give special attention to the child inside her and must make sure that it is brought into the world at the appropriate time.
Rule 4: If the child which has been aborted was four months old or more, then it must be given the *Ghusl-e-Mayyit* and must also be provided with a *Kafan* (burial shroud) and must be buried. In addition, anyone that touched the body of the child (such as the mother, grandmother, or others who were taking care of the mother) must perform a Ghusl of Mass-e-Mayyit.
If the child was less than four months old, then it must be wrapped in cloth, and without giving it a Ghusl, it must be buried. If anyone has touched the body of the child, then it is better that they too perform the Ghusl (of Mass-e-Mayyit).
[*Ghusl-e-Mayyitis a*ceremonial bath must be performed if a person touches the dead body of another person after the body has become cold and the corpse itself has not been given the ceremonial bath. (Tr.)]
By Dr. BharamDilawar, Abortions, Islamic Ethics on Family Planning,
Retrieved from: https://www.al-islam.org/islamic-edicts-family-planning/abortions

[30]Zahra Ayubi, There is no one Islamic interpretation on ethics of abortion, but the belief in God's mercy and compassion is a crucial part of any consideration, The Conversation**,** 8 July 2022,
Retrieved from: https://theconversation.com/there-is-no-one-islamic-interpretation-on-ethics-of-abortion-but-the-belief-in-gods-mercy-and-compassion-is-a-crucial-part-of-any-consideration-184534

[31]Abdulrahman Al-Matary and Jaffar Ali, Controversies and considerations regarding the termination of pregnancy for Foetal Anomalies in Islam, BMC Medical Ethics,volume 15, Article number: 10 (2014), 5 February 2014,

most Islamic scholars agree that the termination of a pregnancy for foetal anomalies is allowed before ensoulment, after which abortion becomes totally forbidden, even in the presence of foetal abnormalities; the exception being a risk to the mother's life or confirmed intrauterine death.[32]

On the other hand, historically abortion in Asia has received mixed responses from social and religious perspectives. During ancient period when most of the regions of Asia were practicing Hinduism and Buddhism, abortion was not religiously allowed but several minor ethnic communities allowed abortion, and the general practice was also not against it. China[33], Japan[34],[35] Taiwan[36],[37] Philippines[38],[39] and other countries allowed abortions though there were anti-abortion laws from time to time in earlier days at times with several modifications, exceptions and restrictions.

Likewise, abortion in South Asia has a long history from both social and religious perspectives before and after the British invasion. The criminal justice system either took a relatively lenient approach towards abortion at the level of legal doctrine (pre-1862) or failed to enforce anti-abortion law when the rules became stricter (post-1862).[40] Under the Indian Penal Code of 1860 (which came into force in 1862), abortion was a crime unless performed to save the life of the woman.[41] As one observer noted, abortion in India was 'very frequent', but cases only came to court when a woman had died. Even in those cases, convictions were 'quite rare'.[42] This was the case of forced abortion.

Women in Asia are vulnerable, weak and ignored. They have less control in the family. They have less decision-making power, both at home and outside. In many occasions, they are forced to abort. In anticipation of a male heir, women are forced to abort. Countless women have lost their lives and are still losing them in hope of giving birth to male offspring. For preventing that sex determination is not allowed in the country, however, in reality sex determination is going on, which brings tragic fate for the women. Sometimes it leads to forced abortion one after another impacting acutely on their physical and mental health. It causes irrecoverable weakness, sickness and also death.

Retrieved from: https://bmcmedethics.biomedcentral.com/articles/10.1186/1472-6939-15-10

[32]Ibid.

[33] China decriminalized it in 1950 being the first developing country to do it.

[34] The Criminal Code of 1880 (effective 1882) criminalized abortion.

[35]Hidemi Kanazu and Marjan Boogert, The Criminalization of Abortion in Meiji Japan,
U.S.-Japan Women's Journal, No. 24 (2003), pp. 35-58 (24 pages), University of Hawai'i Press,
Retrieved from: https://www.jstor.org/stab3le/42771893

[36] Induced abortion is widely practiced in Taiwan; however, it had been illegal until 1985.

37. P D Wang and R S Lin, Induced abortion in Taiwan, 37J R SocHealth .1995 Apr;115(2):100, 105-8.
Retrieved from: https://pubmed.ncbi.nlm.nih.gov/7738988/

[38]Abortion was not criminalized before 1870.

[39] Abortion was criminalized through the Penal Code of 1870 under Spanish colonial rule, and the criminal provisions were incorporated into the Revised Penal Code passed in 1930 under U.S. occupation of the Philippines.
[Facts on Abortion in the Philippines: Criminalization and a General Ban on Abortion, Fact Sheet, Center For Reproductive Rights,
Retrieved from: https://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_fac_philippines_1%2010.pdf]

[40]Mitra Sharafi, Abortion in South Asia, 1860–1947: A medico-legal history, Modern Asian Studies, Cambridge University Press, 04 **May 2020,**
Retrieved from: https://www.cambridge.org/core/journals/modern-asian-studies/article/abortion-in-south-asia-18601947-a-medicolegal-history/54A4A3ACCEA05FC87F993449E2FBAC0D

[41]Mitra Sharafi, Abortion in South Asia, 1860–1947: A medico-legal history, Modern Asian Studies, Cambridge University Press, 04 **May 2020,**
Retrieved from: https://www.cambridge.org/core/journals/modern-asian-studies/article/abortion-in-south-asia-18601947-a-medicolegal-history/54A4A3ACCEA05FC87F993449E2FBAC0D

[42]Parry, L. A., Criminal Abortion (London: John Bale, Sons and Danielsson, 1932), p. 18, Google Scholar,
Cited by MitraSharafi in Abortion in South Asia, 1860–1947: A medico-legal history, Modern Asian Studies, Cambridge University Press, **04 May 2020,**
Retrieved from: https://www.cambridge.org/core/journals/modern-asian-studies/article/abortion-in-south-asia-18601947-a-medicolegal-history/54A4A3ACCEA05FC87F993449E2FBAC0D

There are other compelling reasons, such as superstitions, prostitution, multiple children in a family, excessive fertility, adultery, illicit relationship, poverty, etc. which lead women towards abortion. This is a negative perspective on abortion which goes against the will and freedom of women. If anything against abortion should be an offence, then those who compel women towards abortion against their will should be punished.

Therefore, summing up the discussion above, it can be inferred that, the laws, policies, ideologies and acceptances regarding abortion has never been in uniformity throughout human history. The social, ethical, religious, political and legal responses around the world keep changing from time to time, even within the same State. Within a State, sometimes no restriction is imposed upon abortion practice, sometimes criminal sanction is added, sometimes it is decriminalized, and sometimes in future it can meet with another fate. It is very uncertain and volatile.

The rule relating to abortion is ever changing. Sometimes it changes for good, and sometimes for bad. When it changes for securing the rights of women, it is a positive movement. When it changes for restricting the rights and autonomy of women, its impact becomes huge, and it acutely affects women to a terrible extent. Negative changes regarding abortion always take more time to change to the positive one again. However, be it induced, compulsory or necessity, abortion is an undeniable phenomenon of women's health. It is inalienable and inherent to women's health but people, society and law keep insisting on making it controversial and complex. Having a long and highly multifaceted and contentious history on plate, it is also necessary to examine the contemporary practices across the world.

Countries Where Abortion is Legal, Partially Legal or Illegal

Abortion is a contentious issue in many countries around the world, with some countries outright banning the practice while others permit it under certain circumstances. In some countries abortion is legal.[43] In countries where abortion is illegal,[44] women are forced to seek out unsafe, often life-threatening methods to end their pregnancies, leading to higher rates of maternal mortality and morbidity.

Additionally, women in these countries are often stigmatized and criminalized for seeking abortions, leading to a lack of access to reproductive healthcare services and increased vulnerability to violence and discrimination.[45] In some countries where abortion is partially legal give very limited access to safe abortion, such as, for saving the life of a woman,[46] abortion valid up-to limited period[47] or under certain conditions[48]. Countries where abortion is legal and accessible are better for securing safe abortion for women though the numbers of such countries are limited.

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[43] Such as, Albania, Argentina, Armenia, Australia, Austria, Azerbaijan, Belarus, Belgium, Benin, Bosnia and Herzegovina, Bulgaria, Cambodia, Canada, Colombia, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Estonia, France, Georgia, Germany, Greece, Guinea-Bissau, Guyana, Hungary, Iceland, Ireland, Italy, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Luxembourg, Maldives, Moldova, Mongolia, Montenegro, Mozambique, Nepal, Netherlands, New Caledonia, New Zealand, North Korea, Norway, People's Republic of China, Portugal, Puerto Rico, Republic of Macedonia, Romania, Russia, Serbia, Singapore, Slovakia, Slovenia, South Africa, South Korea, Spain, Sweden, Switzerland, São Tomé and Príncipe, Tajikistan, Thailand, Tunisia, Turkey, Turkmenistan, Ukraine, United States of America, Uruguay, Uzbekistan, and Vietnam.
Retrieved from: https://wisevoter.com/country-rankings/countries-where-abortion-is-illegal/

[44] Countries include Andorra, Dominican Republic, Egypt, El Salvador, Haiti, Honduras, Iraq, Jamaica, Laos, Madagascar, Malta, Mauritania, Nicaragua, Palau, Philippines, Republic of the Congo, San Marino, Senegal, Sierra Leone, and Suriname, Countries Where Abortion Is Illegal,
Retrieved from: https://wisevoter.com/country-rankings/countries-where-abortion-is-illegal/

[45] Countries Where Abortion Is Illegal,
Retrieved from: https://wisevoter.com/country-rankings/countries-where-abortion-is-illegal/

[46] Such as, Bangladesh, Brazil, etc.

[47] Such as, France, India, Tunisia, Israel, etc.

[48] Such as, Brazil, South Africa, Zimbabwe, etc.

Russia 

Russia is the first country in modern history which allowed abortion in 1920 in all circumstances though the laws and policies changed from time to time depending on the rulers and administrative regimes. However, abortion culture has been in practice throughout modern history of Russia.[49] Recently Russia's government has approved measures aimed at halving the number of abortions carried out in the country before 2025. The plan is part of the government's latest long-term blueprint for improving the demographic situation in the country through 2025, amid a recently resumed decline in population growth after a decade of sluggish but stable increases. The blueprint also sets forward plans for a significant reduction in infant and maternal mortality, and a rise in general reproductive health.[50]

Canada 

No laws restrict abortion in Canada. Abortion care is covered by provincial and territorial public health care systems as an essential medical procedure within 20 weeks of conception and, under some circumstances, after that point, such as when pregnancy threatens the mother's life. Access and exceptions vary by province, and sometimes by hospital.[51]

However, till 1988, Section 251 of the Criminal Code of Canada allowed abortion only if it was approved by committees of physicians, it was later changed when the Supreme Court of Canada declared the said provision of law to be unconstitutional in R. vs Morgentaler[52].[53] On how Section 251 contradicts with women's right to liberty and security, Justice Bertha Wilson[54] held that –

"Section 251 of the Criminal Code, which limits the pregnant woman's access to abortion, violates her right to life, liberty and security of the person within the meaning of s. 7 of the *Charter* in a way which does not accord with the principles of fundamental justice. The right to "liberty" contained in s. 7 guarantees to every individual a degree of personal autonomy over important decisions intimately affecting his or her private life. Liberty in a free and democratic society does not require the state to approve such decisions but it does require the state to respect them.

A woman's decision to terminate her pregnancy falls within this class of protected decisions. It is one that will have profound psychological, economic and social consequences for her. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well.

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[49]Karpov, Vyacheslav; Kääriäinen, Kimmo (September 2005). ""Abortion Culture" in Russia: Its Origins, Scope, and Challenge to Social Development". Journal of Applied Sociology.os-22 (2): 13–33,
Retrieved from: https://journals.sagepub.com/doi/10.1177/19367244052200202

[50] Matthew Luxmoore, Russia Announces Plan To Halve Abortion Rates To Spur Population Growth ,Redio Free Europe Radio Liberty, *22 September 2021,*
Retrieved from: https://www.rferl.org/a/russia-plan-reduce-abortions/31473124.html

[51] The New York Times, Abortion Laws Around the World,
Retrieved from: https://www.nytimes.com/2022/07/03/world/abortion-laws-international.html

[52] The New York Times, Abortion Laws Around the World,
Retrieved from; https://www.nytimes.com/2022/07/03/world/abortion-laws-international.html

[53] Dr. Henry Morgentaler, Dr. Leslie Frank Smoling and Dr. Robert Scott *v.*Her Majesty The Queen, [1988] 1 SCR 30
Retrieved from; https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/288/index.do

[54] She was the first female justice of the Supreme Court of Canada and she made glorious contribution to decriminalize abortion laws and other issues including the development of battered-wife syndrome (BWS) in respect of a defence of self-defence to a murder charge.
Retrieved from: https://www.lawsociety.sk.ca/throwback/one-woman-makes-a-difference-justice-bertha-wilson-throwback-thursday/

Section 251 of the *Criminal Code* takes a personal and private decision away from the woman and gives it to a committee which bases its decision on "criteria entirely unrelated to [the pregnant woman's] own priorities and aspirations".

Section 251 also deprives a pregnant woman of her right to security of the person under S. 7 of the *Charter*. This right protects both the physical and psychological integrity of the individual. Section 251 is more deeply flawed than just subjecting women to considerable emotional stress and unnecessary physical risk. It asserts that the woman's capacity to reproduce is the subject, not to her own control, but to that of the state. This is a direct interference with the woman's physical "person".”[55]

As she found that the aforesaid “violation of S. 7 does not accord with either procedural fairness or with the fundamental rights and freedoms laid down elsewhere in the *Charter*. A deprivation of the right of S. 7 which has the effect of infringing a right guaranteed elsewhere in the Charter cannot be in accordance with the principles of fundamental justice.”[56]

She also held that “the deprivation of the. 7 right in this case offends freedom of conscience guaranteed in s. 2(*a*) of the *Charter*. The decision whether or not to terminate a pregnancy is essentially a moral decision and in a free and democratic society the conscience of the individual must be paramount to that of the state. Indeed, s. 2(*a*) makes it clear that this freedom belongs to each of us individually. "Freedom of conscience and religion" should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality and the terms "conscience" and "religion" should not be treated as tautologous if capable of independent, although related, meaning. The state here is endorsing one conscientiously-held view at the expense of another. It is denying freedom of conscience to some, treating them as means to an end, depriving them of their "essential humanity".”[57]

It is also undeniable that the primary objective of said Section 251 was to protect the foetus, but protecting the same was clearly affecting the physical and mental health of a woman who should get the right to decide whether she wants to develop the foetus in her body with full conscience and willingness. On this context, an important question came into consideration before the Court that whether the foetus would have independent right to life when the person carrying it would not want to carry. To answer this question, Justice Wilson very elegantly observed that –

“The primary objective of the impugned legislation is the protection of the foetus. This is a perfectly valid legislative objective. It has other ancillary objectives, such as the protection of the life and health of the pregnant woman and the maintenance of proper medical standards. The situation respecting a woman's right to control her own person becomes more complex when she becomes pregnant, and some statutory control may be appropriate. Section 1 of the *Charter* authorizes reasonable limits to be put upon the woman's right having regard to the fact of the developing foetus within her body.

The value to be placed on the foetus as potential life is directly related to the stage of its development during gestation. The undeveloped foetus starts out as a newly fertilized ovum; the fully developed foetus emerges ultimately as an infant. A developmental progression takes place between these two extremes and it has a direct bearing on the value of the foetus as potential life. Accordingly, the foetus should be viewed in differential and developmental terms. This view of the foetus supports a permissive approach to abortion in the early stages where the woman's autonomy would be absolute and a restrictive approach in the later stages where the state’s interest in protecting the foetus would justify its prescribing conditions.

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[55] R.*v.*Morgentaler, [1988] 1 SCR 30
Retrieved from: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/288/index.do
[56] Ibid.
[57] Ibid.

The precise point in the development of the foetus at which the state's interest in its protection becomes "compelling" should be left to the informed judgment of the legislature which is in a position to receive submissions on the subject from all the relevant disciplines.

Section 251 of the *Criminal Code* cannot be saved under s. 1 of the *Charter*. It takes the decision away from the woman at all stages of her pregnancy and completely denies, as opposed to limits, her right under s. 7. Section 251 cannot meet the proportionality test; it is not sufficiently tailored to the objective; it does not impair the woman's right "as little as possible". Accordingly, even if s. 251 were to be amended to remedy the procedural defects in the legislative scheme, it would still not be constitutionally valid.

The question whether a fetus is covered by the word "everyone" in s. 7 so as to have an independent right to life under that section was not dealt with."[58]

The aforesaid finding of the Canadian Supreme Court in R. vs Morgentaler can be a good source of motivation for many other countries around the world that tend to allow abortion in practice though it is legally prohibited. It is not impossible to decriminalize abortion. One good step is required. The good step can be taken by the legislature. If not by the legislature, then Judiciary can play a proactive role. Executive organ of the State can also take positive steps towards decriminalizing abortion.

China

The Chinese abortion law underwent profound changes in the previous century alongside political transitions and social revolutions and underlying these changes were the country's age-long effort to achieve modernization. It went through different developmental stages, namely non-intervention, prohibition, and regulation, mirroring China's socioeconomic evolution and the policy rationales of different regimes.[59] In contemporary times, abortion has been widely practiced in China for decades. Under the one-child policy, introduced in 1979, millions of women were forced to terminate "illegal" pregnancies every year. The traditional preference for sons also led to a rise in sex-selective abortions, with families often choosing to abort girls. This has contributed to a significantly skewed gender ratio, with the 2021 census revealing there were almost 35 million more men than women in the country of 1.4 billion.[60]

It is pertinent to mention that, China was one of the first developing countries to legalize abortion and make it easily accessible in the 1950s.[61] For more than 30 years, the Chinese government restricted most people to have only one child. Women had to seek permission to give birth and prove that they didn't have any other children. This led to a massive drop in the country's birth rate. Illegal and forced abortions were common. However, in 2015, that policy was changed and two children were allowed. Then last year, the government loosened the policy even further, which now allows couples to have up to three children.[62]According to the right's groups, China's pledge to limit abortions puts women's bodies under

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[58] See Annexure 2.

[59]Mary Ziegler, Research Handbook on International Abortion Law, 21 March 2023,
Retrieved from: https://www.elgaronline.com/edcollchap/book/9781839108150/book-part-9781839108150-18.xml

[60] Jessie Yeung and Nectar Gan, China says it's restricting abortions to promote gender equality. Experts are skeptical, CNN, 1 October 2021,
Retrieved from: https://edition.cnn.com/2021/10/01/china/non-medical-abortions-mic-intl-hnk/index.html

[61]Retrieved from: https://en.wikipedia.org/wiki/Abortion_in_China#cite_note-:2-4
[Mimi Lau, *China's controversial history of abortion needs different cultural lens, South China Morning Post., 19 June 2022, Retrieved from:* https://www.scmp.com/news/china/politics/article/3182106/abortion-legal-china-how-common-it-and-why-it-controversial *]*

[62]Rebecca Kanthor, Abortion access in China has changed drastically amid declining birth rate, The World, 22 June 2022,

the state's control just as the one-child policy did and could jeopardize the lives of women seeking abortions[63]

Therefore, whether to have a baby or to have more than one baby in China is mostly determined by the Government which is absolutely a violation of women's freedom over her body and mental health. Chinese Government tends to compel the women to abort when the Government requires. Likewise, the Government tends to prohibit the women to abort when more children are required by the State. Therefore, it is ultimately the Government who is to decide on this issue. This is really frightening. Hence, there is no absolute guarantee for the continuation of its legality and availability, even in a place where abortion has been made easily accessible for several decades.[64] Recently, this situation has changed. Now, women are allowed to give birth to more than one baby. Therefore, it is mostly the State policy to determine the number of children for a family, and the abortion practice follows the State policy, which is, of course, a denial of women's rights.

"The female body has become a tool," said one top comment on Weibo, China's Twitter-like platform. "When (the state) wants you to bear a child, you must do it at all cost. When (the state) doesn't want it, you're not allowed to give birth even at the risk of death." But the fact it was mentioned at all in the sweeping 10-year plan is concerning – and could be part of the government's campaign to increase the birth rate as it faces a growing demographic crisis, said Leta Hong Fincher, author of "Betraying Big Brother: The Feminist Awakening in China." "This, of course, is not a red alert nationwide ban on abortion, which would create an enormous uproar," she said. "But, in fact, it's more obvious than I had anticipated because it's coming in the form of this document issued by the State Council, a nationwide policy document." [65] Thus, considering the perspective of China, it cannot be said that abortion is being allowed absolutely based on women's freedom of choice; rather it is the state-decision which curtails the fundamental right of women to have free control over her life and body.

USA 

Abortion was made legal in USA and also in most of the countries of North America. Before Roe vs Wade[66] abortion was illegal in most of the States of USA since Common law had prevailed there wherein the provisions were similar to those of Penal Code, 1860 of Bangladesh. The reason was obvious; both USA and Bangladesh were British Colonies once upon a time.

However, Jane Roe, a single woman residing in Dallas County, Texas, instituted a federal action in March, 1970 against the District Attorney of the county. She sought a declaratory judgment that the Texas criminal abortion statutes were unconstitutional on their face and an injunction restraining the defendant from enforcing the statutes. Roe alleged that she was unmarried and pregnant; and she wished to terminate her pregnancy by an abortion 'performed by a competent, licensed physician, under safe, clinical conditions', - she was unable to get a 'legal' abortion in Texas because her life did not appear to be threatened by the continuation of her pregnancy; and that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions. She claimed that Texas statutes were

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Retrieved from: https://theworld.org/stories/2022-06-22/abortion-access-china-has-changed-drastically-amid-declining-birth-rate

[63]Kaamil Ahmed, China to clamp down on abortions for 'non-medical purposes', The Guardian, 27 September 2021,
Retrieved from: https://www.theguardian.com/world/2021/sep/27/china-to-limit-abortions-for-non-medical-purposes

[64]Mary Ziegler, Research Handbook on International Abortion Law, 21 March 2023,
Retrieved from: https://www.elgaronline.com/edcollchap/book/9781839108150/book-part-9781839108150-18.xml

[65]Jessie Yeung and Nectar Gan, China says it's restricting abortions to promote gender equality. Experts are skeptical, CNN, 1 October 2021,
Retrieved from: https://edition.cnn.com/2021/10/01/china/non-medical-abortions-mic-intl-hnk/index.html

[66]Jane ROE, et al. vs Henry WADE, 410 U.S. 113 (1972).

unconstitutionally vague and they abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth and Fourteenth Amendments. Through an amendment to her complaint Roe purported to sue 'on behalf of her and all other women' similarly situated.

The Supreme Court of USA by a majority decision declared the said Texas statutes unconstitutional on a few grounds, primarily on the ground that –

"This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation. On the basis of elements such as these, appellant and some amici argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way and for whatever reason she alone chooses."[67]

Though Roe vs Wade showed light around the world for almost five decades and instilled confidence in many women, suddenly the situation got changed. A lot could change in a day, and it did recently. On the morning of June 24th, 2022 women waking up in the conservative states of Kentucky and Arkansas of USA had a formal Constitutional right to an abortion— even if the reality of getting one had become increasingly fraught and laborious. A few hours later, a Supreme Court refashioned by Donald Trump's appointees finalised a sweeping opinion that had been leaked in May. It declared that the Constitution contained no fundamental right to abortion that the landmark *Roe v Wade* decision from 1973 had been "egregiously wrong from the start", and that states could start to regulate abortions as they saw fit. Some 13 states had "trigger laws" designed to ban abortion soon after this moment came; some went into immediate effect.[68]

Writing for the court majority, Justice Samuel Alito said that the 1973 Roe ruling and repeated subsequent High Court decisions re-affirming Roe "must be overruled" because they were "egregiously wrong," the arguments "exceptionally weak" and so "damaging" that they amounted to "an abuse of judicial authority."[69] It was observed that, "We hold that Roe and Casey must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of Roe and Casey now chiefly rely— the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty"[70],[71].

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[67] See Annexure 5.
[68] The fallout from overturning Roe, The Economist (online), 26.06.2026,
Retrieved from: The fallout from overturning Roe-The Economist
[69]Nina Totenberg and Sarah McCammon, Reproductive rights in America, Special Series (Online), National Public Radio (NPR),24.06.2022,
Retrieved from: https://www.npr.org/2022/06/24/1102305878/supreme-court-abortion-roe-v-wade-decision-overturn
[70]Washington v. Glucksberg, 521 U. S. 702, 721 (1997).

The aforesaid finding is not correct, because the issue is not about the "guarantee of right", thus recognizing "abortion as of right". The issue is about the "denial of a right which is already inherent". US Constitution guarantees the right to liberty and privacy, which is enough to recognize the full autonomy of a woman over her body and mental health, because law cannot compel motherhood. A right that is inherently and naturally given cannot be curtailed by an Act of Parliament though it is the scenario in most of the cases. Nature enables a woman to conceive a foetus, leading to the birth of a human. Likewise, nature gives a woman the freedom of choice whether she wants to carry it or not. That is why, the desire and willingness for abortion or termination of pregnancy has arisen; otherwise, there would be no such desire at all. However, the aforesaid judgment of the Supreme Court of USA is disappointing. It has already taken USA back before Roe vs Wade, and in some States even worse.

After the said judgment, President Joe Biden rightly commented that "Friday's ruling was "a tragic error by the Supreme Court" that had put women's health and lives "at risk"." The President vowed to do what he could to keep abortion accessible, but he said the "only way we can secure a woman's right to choose is for Congress to restore the protections of Roe v. Wade as federal law." That can't be accomplished without more Democrats in the House and Senate, Biden said, meaning, "This fall, Roe is on the ballot."[72] It is observed in the USA Presidential Election of November, 2024 the abortion issue had played a very critical role. The Democratic Party advocated in favor of legalizing abortion while the Republican Republican Party did the opposite though the First Lady Melania Trump, wife of President Donald Trump differed her opinion from her husband on this issue. The Republican Party had clear mandate that they would leave this issue on each State, and after the election result some of the States have already sanctioned ban on abortion. In the Presidential Debate between Donald Trump and Kamala Harris this issue took much attention too. Though the Republican Party won the election having one of their agendas against legalizing abortion care, however a large number of US people still support abortion care and they want it to be legalized without any restriction. The fact is, the abortion care and its validity shifts from time to time depending on the public opinion through election, and sometimes depending on the mindset of the ruler, which is unfortunate but undeniably true.

As it appears, the right to abortion has become an important political issue in the USA, as it has in some other countries around the world, including Bangladesh. One of the reasons of prevailing anti-abortion law is political too, because most of the people are religious here. Some are conservative. Decriminalizing abortion care will have serious impact on votes, because religious patronization has become one of the determining factors of casting votes in Bangladesh. Therefore, the abortion issue in Bangladesh is a mixed and complex question of political, religious, social, patriarchal and other issues.

India

Abortion in India is legal in certain circumstances as per Medical Termination of Pregnancy Act. It can be performed on various grounds until 20 weeks of pregnancy. In exceptional cases, the Court may allow a termination after 24 weeks. Before 1971,[73] it was governed under similar provisions like Bangladesh. In 1971, the Medical Termination of Pregnancy Act came into force in India. It allows termination of

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[71] Thomas E. Dobbs, State Health Officer of the Mississippi Department of Health vs Jackson Women's Health Organization, 2022. Published by Josh Gerstein and Alexander Ward, POLITICO (online) 05.02.2022,
Retrieved from: https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473

[72] Pete Williams and Dareh Gregorian, Supreme Court overturns Roe v. Wade, doing away with half-century of precedent, NEWS (online), 24.06.2022,
Retrieved from: https://www.nbcnews.com/politics/supreme-court/supreme-court-wipes-away-constitutional-guarantee-abortion-rights-over-rcna18718

[73] See Annexure 7.

pregnancy on certain grounds, amongst others, when continuation of pregnancy is a risk to the life of a pregnant woman or could cause grave injury to her physical or mental health, when there is substantial risk that the child (if born or dead) would be seriously handicapped due to physical or mental abnormalities, when pregnancy is caused due to rape (presumed to cause grave injury to the mental health of the woman) or when pregnancy is caused due to failure of contraceptives used by a married woman or her husband (presumed to constitute grave injury to mental health of the woman, or with the declaration of court.[74]

In the case of Suchita Srivastava and another vs. Chandigarh Administration,[75] the Supreme Court of India observed that "there is no doubt that a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India. It is important to recognize that reproductive choice can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected."

Recently, in a Special Leave Petition[76] the Supreme Court of India made very positive remarks on recognizing abortion as an important right, holding the following –

"1. A woman's right to reproductive choice is an inseparable part of her personal liberty under Article 21 of Constitution. She has a sacrosanct right to bodily integrity.

2. Denying an unmarried woman the right to a safe abortion violates her personal autonomy and freedom.

3. Allowing the Petitioner to suffer an unwanted pregnancy would be contrary to the intent of the law enacted by Parliament. Moreover, allowing the Petitioner to terminate her pregnancy, on a proper interpretation of the statute, prima facie, falls within the ambit of the statute and the Petitioner should not be denied the benefit on the ground that she is an unmarried woman. The distinction between a married and unmarried woman does not bear a nexus to the basic purpose and object which is sought to be achieved by Parliament which is conveyed specifically by the provisions of Explanation 1 to Section 3 of the Act. The Petitioner had moved the High Court before she had completed 24 weeks of pregnancy. The delay in the judicial process cannot work to her prejudice.

4. Present Court request the Director of the All India Institute of Medical Sciences, Delhi to constitute a Medical Board in terms of the provisions of Section 3(2D) of the Act. In the event that the Medical Board concludes that the fetus can be aborted without danger to the life of the Petitioner, a team of doctors at the All India Institute of Medical Sciences shall carry out the abortion in terms of the request which has been made before the High Court and which has been reiterated both in the Special Leave Petition. Before doing so the wishes of the Petitioner shall be ascertained again and her written consent obtained after due verification of identity."[77],[78].

Nepal

Abortion was legalized in Nepal in 2002. It is available up to 12 weeks' gestation, on request, up to 18 weeks' gestation in cases of rape or incest, and at any time if the pregnancy poses a danger to the

[74] Ibid.
[75]MANU/SC/1580/2009MANU/SC/1580/2009, (2009) 9 SCC 1, AIR 2010 SC 235.
[76] Special Leave Petition (Civil) No. 12612 of 2022, Decided on 21.07.2022.
[77]X vs The Principal Secretary, Health and Family Welfare Department and others, MANU/SC/0914/2022.
[78] See Annexure 3.

woman's life or physical or mental health or if there is a fetal abnormality.[79] Nepal, though it has not fully legalized abortion without any restrictions, is more supportive of this issue than other South Asian countries. The Right to Safe Motherhood and Reproductive Health Act, 2018 provide some landmark provisions protecting the rights of women to safe abortion.[80]

Japan

In Japan, where abortion is relatively accessible, it is rarely a political issue like in other countries. Nonetheless, there are various issues women face if they decide to have an abortion.[81] Abortion is legal in Japan up to 22 weeks for endangerment to the health of the pregnant woman, economic hardship, or rape,[82] but consent is usually required from a spouse or partner when the woman is married or with a partner. Till April 2023, a surgical procedure had been the only option, but recently Japan has approved abortion pill.[83] In April 2023, medical abortion was approved in Japan for pregnancies up to 9 weeks of gestation.[84]

The Maternal Health Act stipulates that, when carrying out an abortion, doctors must obtain the consent of the pregnant woman and her spouse. However, this Act allows women whose marriages have effectively collapsed due to domestic violence and other reasons to undergo abortions without their spouse's consent. Even if the woman is not married, many medical institutions seek consent from the man believed to have impregnated the woman, out of fear of lawsuits and other problems they may face with the man involved. There have been many cases in which women wanting abortions have been given the run around by multiple medical institutions or have been forced to give birth because they have been unable to provide their spouse's consent for an abortion.[85]

Japan is one of 11 countries and the only one of the Group of Seven largest economies that mandate that women get their spouse's consent to obtain an abortion, with very few exceptions, according to the Center for Reproductive Rights, an international organization.[86]

South Korea

Abortion was decriminalized in South Korea by a Court order on April 11, 2019, and millions of women breathed sighs of relief. Before this decision abortion was illegal since 1953. Pregnant people undergoing an abortion risked a prison sentence of up to a year, or a fine of up to 2 million won (US$1,850).

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[79] Nepal Ministry of Health, *National Safe Abortion Policy*, Kathmandu, Nepal: Ministry of Health, 2002, Retreived from: http://www.mohp.gov.np/images/pdf/policy/National%20abortion%20Policy.pdf.

[80] See Annexure 6

[81] *Magdalena Osumi, "Abortion legal and apolitical in Japan, but cost and consent present barriers", The Japan Times (online), 28 June 28, 2022*
Retrieved from: https://www.japantimes.co.jp/news/2022/06/28/national/social-issues/abortion-japan-rights-explainer/

[82] "母体保護法の施行について" [On Enforcement of the Maternal Health Act].Act No. 122 of 25 September 1996(in Japanese), Ministry of Health, Labour and Welfare, Japan,
Retrieved from: https://www.mhlw.go.jp/web/t_doc?dataId=00ta9675&dataType=1&pageNo=1

[83] Japan approves abortion pill for the first time, Agence France-Presse in Tokyo, The Guardian, 29 April 2023,
Retrieved from; https://www.theguardian.com/world/2023/apr/29/japan-approves-abortion-pill-for-the-first-time

[84] Japan approves abortion pill for the first time, Agence France-Presse in Tokyo, The Guardian, 29 April 2023,
Retrieved from: https://www.theguardian.com/world/2023/apr/29/japan-approves-abortion-pill-for-the-first-time

[85] *Satoko Nakagawa,* No consent from spouse needed for abortion in broken marriages in Japan: ministry, Mainichi Japan (online) 15 March 2021,
Retrieved from; https://mainichi.jp/english/articles/20210315/p2a/00m/0na/016000c

[86] Michelle Ye Hee Lee and Julia Mio Inuma, In Japan, abortion is legal — but most women need their husband's consent, The Washington Post, 14 June 2022,
Retrieved from: https://www.washingtonpost.com/world/2022/06/14/japan-abortion-pill-women-reproductive-rights/

Healthcare workers providing abortions faced up to two years in prison. The only exceptions to the ban were for cases of rape or incest, pregnancies likely to jeopardize the woman's health, or situations in which the woman or her spouse had certain hereditary or communicable diseases. Married women needed their spouse's permission to undergo the procedure. However, the laws were rarely enforced, and in practice, abortions were widely available. But the laws created a feeling of fear and stigma around abortion. They prevented healthcare providers and their patients from talking openly about their experiences, sharing information, and supporting each other.[87]

The Constitutional Court's ruling may prevent doctors and women from being punished, but all of those laws restricting abortions are still present in the Criminal and Mother and Child Health Acts, 1973 because the authorities concerned have yet to create a specific law in compliance with the Constitutional Court's ruling.[88] Therefore, it appears that despite the 2019 landmark ruling of the Constitutional Court decriminalizing abortion, legal abortion in Korea remains a controversial issue with no simple answers.[89] Technically speaking, abortions are legal in Korea today because the one law that made them illegal was ruled unconstitutional. Although this is a legally sound interpretation, in practice, without a law that specifically says abortion is legal, most doctors and lawyers are unwilling to consider the situation resolved.[90]

The leading opinion of four judges found the abortion ban non-conforming for two reasons. First, it 'restricts a pregnant woman's right to self-determination beyond the minimum extent necessary to achieve its legislative purpose'. Thus, it failed the principle of 'least restrictive means'. The judges explained that, in fact the legislative purpose of protecting foetal life was not being effectively protected by the ban, due to the paucity of prosecution and the fact that the threat of criminal punishment had little effect on a woman's decision to terminate her pregnancy. Second, the Court found that the current law 'tilts the balance of interests heavily in favour of the public interest in protecting foetal life by awarding absolute and unilateral superiority to it', thereby violating the principle of proportionality. In particular, the Court stressed that the current ban on abortions did not sufficiently account for economic and social justifications for abortion, including concerns about continuing employment, studies and social activities, lack of child care resources, and desire to continue a relationship with the partner and unwanted pregnancy of an unmarried minor woman. Three other Justices concurred with the leading opinion, while additionally arguing that the ban is unconstitutional, and should immediately be struck down for abortions prior to the 14th week of pregnancy. The dissent, meanwhile, argued that a fetus has a constitutional right to life, and the abortion ban is a proportionate measure to protect this right.[91]

UK

Under Common Law abortion was illegal. So, the British applied the same rule in the India sub-continent. But now abortion is legal throughout the UK like many other countries of Europe. After severe moral and

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[87]Lina Yoon, Senior Researcher, Asia Division, Human Rights Watch, South Korea's Constitutional Right to Abortion, 9 June 2022,
Retrieved from: https://www.hrw.org/news/2022/06/09/south-koreas-constitutional-right-abortion
[88] Kim Arin, Not illegal but not legal: The murky landscape of abortion in Korea, The Korea Herald, 7 July 2022,
Retrieved from: https://www.koreaherald.com/view.php?ud=20220707000805
[89]Lee Hyo-jin, Abortion remains stuck in legal gray area in Korea, The Korea Times, 26 November 2022,
Retrieved from: https://www.koreatimes.co.kr/www/nation/2023/07/113_340565.html
[90] Yoon So-Yeon, [WHY] Korea decriminalized abortion, but has anything actually changed?, Korea JoongAng Daily, 2 July 2022,
Retrieved from: https://koreajoongangdaily.joins.com/2022/07/02/why/Korea-abortion-pregnancy/20220702070028589.html
[91]Dahee Chung and Andrew Wolman, The Korean Constitutional Court Judgment on the Constitutionality of an Abortion Ban, Oxford Human Rights hub, 4 August 2019,
Retrieved from: https://ohrh.law.ox.ac.uk/the-korean-constitutional-court-judgment-on-the-constitutionality-of-an-abortion-ban/

political debate over this issue, the Abortion Act was passed on 27 October, 1967, coming into effect on 27 April, 1968 under a free vote, making abortion legal all over the UK. Unfortunately, we still follow the earlier laws imposed by the British who changed their law but we could not.

The Abortion Act, 1967 renders lawful activities that would otherwise constitute a crime under the Offences Against the Person Act (OAPA) 1861. The OAPA makes it a crime for a woman to 'procure a miscarriage', or for another person to help her do so.[92] The Act is a product of the moral climate and clinical realities of the 1960s, when widespread backstreet abortions resulted in significant maternal mortality and morbidity. Abortion was then a far riskier, more technically demanding, surgical procedure which required the skilled hand of a doctor and, on average, a stay of over one week in hospital.[93]

The Abortion Act, 1967[94] states that an abortion is legal if it is performed by a registered medical practitioner (a doctor), and that it is authorised by two doctors, acting in good faith, on one (or more) of the following grounds (with each needing to agree that at least one and the same ground is met) –
(a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or
(b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or
(c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or
(d) that 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.[95]

Before the said Act although abortion was illegal, the UK Courts were relaxing the penal provisions depending on different circumstances. In a landmark judgment,[96] Justice Mac Naughten clarified the law in the case of a surgeon found not guilty of procuring an abortion after carrying out the procedure on a 14-year-old rape victim. The Judge directed the jury that it must be proven beyond reasonable doubt that the abortion was not performed to save the life of the girl. The Court established that doctors do not have to wait until the patient is in peril of immediate death but rather it is the duty of doctors to perform the operation if, on reasonable grounds and with adequate knowledge, the probable consequence of the continuance of the pregnancy would negatively affect the physical and mental health of the woman. Consequently, abortions can legally be carried out where the life or health of a pregnant woman is reasonably thought to be in danger.[97]

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[92]Britain's abortion law, Britich Pregnancy Advisory Service,
Retrieved from: https://www.bpas.org/get-involved/campaigns/briefings/abortion-law/
[93]Decriminalising Abortion in the UK, Sally Sheldon and Kaye Wellings, Policy Press Shorts Policy & Practice, 2020,
Retrieved from:
https://opus.lib.uts.edu.au/bitstream/10453/148983/2/Decriminalising%20Abortion%20in%20the%20UK%20What%20Would%20it%20Mean.pdf
[94] As amended by the Human Fertilisation and Embryology Act 1990.
[95] Britain's abortion law, Britich Pregnancy Advisory Service,
Retrieved from; https://www.bpas.org/get-involved/campaigns/briefings/abortion-law/
[96]R v Bourne [1938] 3 All ER 615
[97]Retrieved from; https://www.studocu.com/en-au/document/the-university-of-notre-dame-australia/legal-process-and-statutory-interpretation/r-v-bourne-case-note-case-note-for-exam/6351647

Italy

Abortion has been legal here since 1978; women seeking terminations in the first 90 days of pregnancy are protected under Italy's Law, 194. The law also allows for "therapeutic" abortions – beyond the 90-day mark – but only if there are serious fetal abnormalities or if the mother's life or health is at risk.[98] Law 194 stipulates that, all hospitals should provide abortions at their facilities, but it also gives doctors – as well as nurses, anesthesiologists and other medical support staff – the option to "conscientiously object" to performing them, for example, if doing so would go against their religious or personal beliefs.[99] At first glance, Law 194 might appear liberal and permissive. However, in practice, it has failed to guarantee access to abortion for women in Italy, and the fulfillment of their right to health.[100]

France and some other European Countries

Abortion in France was decriminalized under a key 1975 law, but there is nothing in the Constitution that would guarantee abortion rights.[101] Recently, the lawmakers in France's lower House of Parliament adopted a Bill to protect abortion rights in the country's constitution, the first step in a lengthy and uncertain legislative battle prompted by the rollback of abortion rights in the United States.[102] However, France's 12-week time limit for abortion on request had forced thousands of women annually to travel outside of France to procure legal abortions. Its new 14-week limit mirrors that of Spain, while other European Union countries go further: abortion for any reason is legal in Sweden up to 18 weeks and in the Netherlands up to 24 weeks.[103]

Reasons behind Anti-abortion Laws

Reasons behind the anti-abortion laws around the world over the thousand years of human history are multifarious but the aim and result is the same. The aim is to either abolish abortion totally or restrict it to different extents, thus to corner the women's autonomy and freedom of choice. Sometimes good reasons were shown behind anti-abortion laws, policies and practices, and sometimes no reasons. Many try to justify anti-abortion laws through religious, social, economic, ethical, moral and various other perspectives while some do not bother with any justifications. In some cases there are positive reasons; saving the life of women from dangerous abortionists or saving them from unfair abortion in the hope of male offspring while in most of the cases the reasons are negative. Needless to say, the opinions of these women have never been prioritized in any of it.

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[98]Kara Foxand Valentina Di Donato, Abortion is a right in Italy. For many women, getting one is nearly impossible, Special Report, CNN, (online)
Retrieved from: https://edition.cnn.com/interactive/2019/05/europe/italy-abortion-intl/
[99] Ibid.
[100] Elena Caruso, Abortion in Italy: Forty Years On, 28 January 2020 (online), Feminist Legal Studies, volume 28, pages 87–96 (2020),
Retrieved from: https://link.springer.com/article/10.1007/s10691-019-09419-w
[101]VOA News (online), France Takes First Step to Add Abortion Right to Constitution, 24 November 2022,
Retrieved from: https://www.voanews.com/a/france-takes-first-step-to-add-abortion-right-to-constitution/6849572.html
[102] Ibid.
The Guardian (online), French lawmakers propose bill to inscribe abortion rights in constitution, 25 June 2022
Retrieved from: https://www.theguardian.com/world/2022/jun/25/french-lawmakers-propose-bill-abortion-rights-constitution
[103]. Hillary Margolis, Senior Researcher, Women's Rights Division, Human Rights Watch, France Expands Abortion Access in Two Key Moves, 1 March 2022,
Retrieved from: https://www.hrw.org/news/2022/03/01/france-expands-abortion-access-two-key-moves

To identify the reasons in view of Marge Berer[104], historically, restrictions on abortion were introduced for three main reasons –

1. Abortion was dangerous, and abortionists were killing a lot of women. Hence, the laws had a public health intention to protect women—who nevertheless sought abortions and risked their lives in doing so, as they still do today if they have no other choice.

2. Abortion was considered a sin or a form of transgression of morality, and the laws were intended to punish and act as a deterrent.

3. Abortion was restricted to protect fetal life in some or all circumstances.[105]

Agreeing to the aforesaid findings to some extent, there are some other important reasons which have been ignored in the aforesaid findings. One of the main reasons is patriarchy. Almost all the powerful countries, societies, religions, sects, tribes, etc. are dominated by men who want their hereditary lineage to extend indefinitely and / or to survive for a long time. They want to grow up as the majority. To attain the majority numbers, men want to continue their kinship without any restrictions. Almost all the popular and influential religions, creeds, social structures, etc. have been originated and dominated by men who have always much to say in defining, ruling out, limiting down and customizing the women and their periphery. On the other hand, only women can reproduce naturally; therefore, it has become their prime job to produce. After conceiving the foetus, the production process only involves a woman. It grows inside her body. Only she has to bear till the natural birth of the child. As a result, men often feel reluctant to allow the women to interfere with or hinder the natural process of child production, as it upholds patriarchy.

Through the advancement of time, though there are now safe abortion methods available but still the attempt to decriminalize or legalize abortion care is slow around the world. The movement of legalizing abortion has not been advanced to the rate as it should have been by now; because, the best way to control women's lives is through (the risk of) pregnancy. The traditional belief is that women should accept "all the children God gives," the recent glorification of the fetus as having more value than the woman it is dependent on, and male-dominated culture used this extremely effectively to justify criminal restrictions. Nevertheless, the need for abortion is one of the defining experiences of having a uterus.[106]

On the other hand, no society or religion wants to get dissolved or vanished from the universe. Society or religion wants to survive till eternity. To have their gene continue they shift this liability upon the women, completely denying their freedom and liberty to have full control over their bodies and use thereof. Hence, it can be argued that special care for the human unborn is grounded by the need of social and religious male offspring. Socially speaking, they ensure family's continuity, once mature they will take over and continue their father's occupation and will economically support the entire family. As for their religious role, once boys reach maturity, they will accomplish domestic rites but especially the compulsory libations for the spirits of the ancestors.[107]

In some countries, abortion is illegal due to religious or cultural beliefs. Anti-abortion views are considered as morally and ethically wrong. Some religions consider abortion to be a sin. For example, in

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[104]Marge Berer is an international coordinator of the International Campaign for Women's Right to Safe Abortion, London, UK, and was the editor of *Reproductive Health Matters*, which she founded, from 1993 to 2015.
[105] Ibid.
[106] Ibid.
[107]Constantin-Iulian Damian, Abortion from the perspective of Eastern Religions: Hinduism and Buddhism, Romanian Journal of Bioethics, Vol. 8, No. 1, January – March 2010
Retrieved from: http://eng.bioetica.ro/atdoc/RRBv8n1_2010_Damian_EN.pdf

predominantly Catholic countries such as El Salvador and the Philippines, abortion is completely banned due to the Catholic Church's strong opposition to the practice. In other countries, abortion is banned due to conservative political ideologies that prioritize foetal rights over women's rights. This is often the case in countries with conservative governments or where there is a strong anti-abortion movement, such as the United States.[108]

The Rigveda[109] indirectly references the unborn human when it depicts Bhagwan Vishnu as "the guardian of the future infant"[110]. As part of the Trimurti, the Hindu trinity, Bhagwan Vishnu is considered the world's protector. Thus, the world's protector cannot be killed. Harming world's protector is a sin. Hindus believe that the "fetus is not developing into a person but, rather, is already a person in the moment of conception"[111]. The Atharvaveda makes a specific reference to abortion. It suggests (VII, 113.3; VII 112.3) that a greater sinner does not exist than the one who practices abortion. The Satapatha Brahmana (III, 1.2.21) compares those who facilitate abortion – one who has "expelled the embryo from a woman" – to those who 'eat the flesh of a cow'[112],[113].

In Buddhism there is no qualitative difference between an unborn foetus and a born individual, and human being is treated as human since a woman conceives. The argument against abortion is that since the embryo assumes shape around an entity that already passed through different previous lives, it is just a continuation of life and not a new one. Although this entity cannot be exactly considered a "soul", Buddhist texts speak about intermediate stages, which make the karmic transition from one life to another.[114]

Both Hinduism and Buddhism allow abortion only for the purpose of saving the life of a woman. The same is also the scenario in Christian and Muslim religions who allow abortion care to a very limited extent. However, all of these religions accept abortion as a means to save the mother's life.[115] Unfortunately, most of the religions have immense concerns for saving the foetus that is not born and human yet, but no care for the right, opinion, autonomy and freedom of a woman who is already a human.

Since the ancient times, women are being used for the most effective way of reproduction. Sometimes, this capacity of women to generate human life is rewarded with praise, designation and many more things. Sometimes they are treated like deity, and sometimes they are considered as devils. But in both circumstances, they are not set with full liberty whether they want to give birth or not.

The physical intimacy comes from the mutual attraction between the parties involved, but in most of the cases the natural consequence is that a woman becomes pregnant if she conceives. Men do not become pregnant by having sex with a woman but a woman does. But the privileges lie with men. They can

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[108] Countries Where Abortion Is Illegal,
Retrieved from: https://wisevoter.com/country-rankings/countries-where-abortion-is-illegal/
[109] A Hindu text composed over 5,000 years ago, is one of the earliest texts in human history.
[110]Rigveda VII, 36.9.
[111]Harold Coward and TejinderSidhu, Hindu and Sikh bioethics, Cambridge University Press: 30 October 2009, The Cambridge Textbook of Bioethics , pp. 403 – 407, https://doi.org/10.1017/CBO9780511545566.059
[112] Eating the flesh of cow (i.e. cow meat / beef) is prohibited in Hindu religion.
[113]Avatans Kumar, A Hindu View On Abortion (A Hindu perspective on abortion in the wake of the Roe v Wade reversal), 3 July 2022, Retrieved from: https://indiacurrents.com/a-hindu-view-on-abortion/
[114]Constantin-Iulian Damian, Abortion from the perspective of Eastern Religions: Hinduism and Buddhism, Romanian Journal of Bioethics, Vol. 8, No. 1, January – March 2010,
Retrieved from: http://eng.bioetica.ro/atdoc/RRBv8n1_2010_Damian_EN.pdf
[115] Fatimah Karim, Abortion in Religious Perspectives: Islam, Hinduism, and Buddhism, AL-RISALAH, e-ISSN: 2600-8394 VOL. 6. No. 2 Dec (1444-2022), Al-Risalah Journal, Academic Biannual Refereed Journal Kulliyyah Of Islamic Revealed Knowledge and Human Sciences International Islamic University Malaysia,

accept it or deny. So far accepting is concerned, most of the societies give them authority to claim over the child and establish his fatherhood, which is unfortunate, but true.

The reasons behind anti-abortion laws throughout the human history have changed from time to time as discussed above. The social protagonists, religious preachers, social rulers, administrators, male dominants have always adopted different strategies and policies for justifying anti-abortion laws, even sometimes in the name of saving the life of women and sometimes for protecting the life of unborn child. Amidst all these, the inherent right of the women to have basic control, authority and freedom over their body and the right to make free choice whether to give birth or not has been ignored blatantly and brutally.

Abortion Care in Bangladesh – A Part of Family Planning Policy

While the Penal Code provides severe punishment for miscarriage, the Government regulations allow for MR (Menstrual Regulation)[116] procedures (for miscarriage) up to 10–12 weeks after a woman's last menstrual period (depending on the type of provider), and MRM (MR using Medication) is allowed up to "ten weeks"[117] after a woman's last menstrual period as per the Guttmacher Institute Report. Menstrual Regulation (MR) has been a part of Bangladesh's national family planning program since 1979. MR is a procedure that uses manual vacuum aspiration or a combination of *mifepristone* and *misoprostol* to regulate the menstrual cycle when menstruation is absent for a short duration.[118] These medicines are available in the market with the approval of the Directorate General of *Drug Administration* (DGDA), Bangladesh.

An estimated 121 million unintended pregnancies occurred annually and 61% of all unintended pregnancies ended in abortion (totaling 73·3 million abortions annually) in 2015–19.[119],[120],[121] In Southeast Asia, the abortion rate increased by 21%, and in Bangladesh, the increase was 26% between 1990–1994 and 2015–2019.[122] Maternal mortality in the Southeast Asian region as well as in Bangladesh has reduced significantly in recent decades but deaths due to complications of unsafe abortion remain high. As per BMMS 2016, the estimated Maternal Mortality Ratio (MMR) in Bangladesh is 196 per 100,000 live births and 7% of all maternal deaths are contributed by complications of unsafe abortion.[123] In Bangladesh during 2015–2019, out of an estimated annual 5.33 million pregnancies, a total of 2.63 million were unintended, and 1.58 million ended with termination of pregnancy before childbirth.[124]

According to BDHS 2017-2018, 71% of ever-married women and 72% of currently married women know about menstrual regulation. Among those who have heard of menstrual regulation, 7% of ever married and 8% of currently married women have used it.[125]

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[116] Menstrual Regulation (MR) is an "interim method of establishing non-pregnancy for a woman at risk of pregnancy, whether or not she actually is pregnant" (Bangladesh Institute of law and International Affairs, 1979). WHO defined Menstrual Regulation as Uterine evacuation without laboratory or ultrasound confirmation of pregnancy for women who report recent delayed menses. [Safe abortion: technical and policy guidance for health systems, 2*nd edition, WHO 2012*]

[117] Meeting Minutes of 72 National Technical Committee of Directorate General of Family Planning, Ministry of Health and Family Welfare, dated 23 June 2021, Memo: DGFP/MCH-S/NTC-4/138/95 (Part 06)/653), and
Meeting Minutes of 62 National Technical Committee of Directorate General of Family Planning, Ministry of Health and Family Welfare, dated 30 June 2014, Memo: DGFP/MCH-S/NTC-4/138/95 (Part 05)/831.

[118]GUTTMACHER INSTITUTE, Menstrual Regulation and Unsafe Abortion in Bangladesh March 2017,
Retrieved from: https://www.guttmacher.org/fact-sheet/menstrual-regulation-unsafe-abortion-bangladesh#

[119] Bearak, J., Popinchalk, A., Ganatra, B., Moller, A.-B., Tunçalp, Ö., Beavin, C., Kwok, L., & Alkema, L. (2020). Unintended pregnancy and abortion by income, region, and the legal status of abortion: estimates from a comprehensive model for 1990–2019. The Lancet Global Health, 8(9). https://doi.org/10.1016/S2214-109X(20)30315-6.

[120] Unintended Pregnancy and Abortion Worldwide, Global and Regional Estimates of Unintended Pregnancy and Abortion, Guttmacher, March 2022. Retrieved from: https://www.guttmacher.org/fact-sheet/induced-abortion-worldwide

[121] Jonathan Bearak, Anna Popinchalk, Bela Ganatra, Ann-Beth Moller, Ozge Turncalp and Cynthia Beavin, Unintended pregnancy and abortion by income, region, and the legal status of abortion: estimates from a comprehensive model for 1990-2019, The Lancet Global Health, July 22, 2020 DOI: https://doi.org/10.1016/S2214-109X(20)30315-6 ,
Retrieved from: https://www.thelancet.com/journals/langlo/article/PIIS2214-109X(20)30315-6/fulltext

[122] Ibid.

[123] National Institute of Population Research and Training (NIPORT), International Centre for Diarrhoeal Disease Research, Bangladesh (icddr,b), & MEASURE Evaluation. (2017). Bangladesh maternal mortality and health care survey 2016: Preliminary report. Dhaka, Bangladesh, and Chapel Hill, NC, USA: Author

[124]Unintended Pregnancy and Abortion in Asia. (2022, February 16). Guttmacher Institute. Retrieved from: https://www.guttmacher.org/fact-sheet/unintended-pregnancy-and-abortion-asia

[125] NIPORT (National Institute of Population Research and Training), and ICF. Bangladesh Demographic and Health Survey 2017-18: Key Indicators. Dhaka, Bangladesh, and Rockville, Maryland, USA: NIPORT, and ICF; 2019.

As per Johnston`s Archive in 2015, 2016, 2017, 2018, 2019, 2020 and 2021 reported abortion in Bangladesh were about 222,606, 187,532, 158,253, 149,379, 149,000, 149,000 and 149,000, respectively.[126] The unreported abortions may have higher rates than this.

Lack of standardization among providers of MR gestational age cut-offs may affect patient care and MR access, causing some patients to be inappropriately turned away. Providers in urban tertiary care facilities in Bangladesh see primarily the complicated MR/PAC cases, which may impact their negative attitude, and the safety of out-of-clinic/self-managed abortion is unknown.[127]

In Bangladesh, 48% of pregnancies are unintended despite the impressive growth in CPR (Contraceptive Prevalence Rate) is 62%[128], and sometimes up-to 64%[129] as per the latest report. Some reports have estimated the unintended pregnancy up-to 49%.[130] Be it 48% or 49%, the number of unintended pregnancies is high and the same is increasing day by day. It indicates the high necessity of legalizing abortion, but the law makers are totally silent on this issue. Bangladesh recognizes MR as a part of family planning policy, but "abortion" is not a mere part of family plan. It is a right of a woman. It bestows a very important and inalienable right that is inextricably connected with right to life, liberty, privacy and freedom. It is essentially connected with the freedom of a woman to have unrestricted control over her body and mind. It does not only form a part of health and psychological care of a woman but also builds her core existence with choice.

Reasons for Unintended Pregnancy in Bangladesh

Unintended pregnancies are pregnancies that are unintentional or unwanted which occurs with no desire to have a child, mistimed which occurs before the desired time or unplanned at a time of conception.[131] Worldwide, an estimated 33 million unintended pregnancies are a result of contraceptive failure or incorrect use.[132] In developing countries, the majority of unintended pregnancy occurs due to using traditional family planning methods or not using any type of modern contraceptives,[133] and it is the main reason for induced abortion.[134] Early, unwanted pregnancies are associated with increased levels of

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[126]Historical abortion statics, Bangladesh, Abortion statistics and other data--Johnston`s Archive, compiled by Wm. Robert Johnston, last updated 3 July 2022,
Retrieved from: https://www.johnstonsarchive.net/policy/abortion/ab-bangladesh.html

[127] BMC, Return to pregnancy after contraceptive discontinuation to become pregnant: a pooled analysis of West and East African populations, 02 July, 2021,
Retrieved from: https://reproductive-health-journal.biomedcentral.com/articles/10.1186/s12978-021-01123-w

[128]Marie Stopes Bangladesh, Safe Abortion for Every Woman (SAFE),
Retrieved from: https://www.mariestopes.org.bd/about/safe-abortion-for-every-woman-safe/

[129] Bangladesh Demographic and Health Survey 2022, National Institute of Population Research and Training, Medical Education and Family Welfare Division, Ministry of Health and Family Welfare, Dhaka, Bangladesh, The DHS Program, ICF, Rockville, Maryland, USA, arch, 2023
Retrieved from: https://dhsprogram.com/pubs/pdf/PR148/PR148.pdf

[130] Jonathan Marc Bearak, Anna Popinchalk , Cynthia Beavin , Bela Ganatra , Ann-Beth Moller, Özge Tunçalp , and Leontine Alkema, BMJ Glob Health, Country-specific estimates of unintended pregnancy and abortion incidence: a global comparative analysis of levels in 2015-2019, , National Library of Medicine, National Center for Biotechnology Information, USA, 2022 Mar; 7(3):e007151., doi: 10.1136/bmjgh-2021-007151. Retrieved from: https://pubmed.ncbi.nlm.nih.gov/35332057/

[131]Askew I. Causes and consequences of unintended pregnancy in developing countries. New York: Population Council; 2011.

[132]World Health Organization (WHO), Unsafe abortion—global and regional estimates of the incidence of unsafe abortion and associated mortality in 2008. 6th ed. Geneva: World Health Organization; 2011.

[133]Mulatu T. Prevalence of unwanted pregnancy and associated factors among women in reproductive age groups at selected health facilities in Addis Ababa city, Ethiopia; 2014.

[134]Brown SS, Eisenberg L. The best intention: unintended pregnancy and the well-being of children and families. Washington, D.C: National Academies Press; 1999.

induced abortion, which when carried out in unsafe conditions carries severe health risks, including death.[135]

Globally, each day about 100 million sexual intercourse takes place, of these 1 million conceptions occur as per the report in 2014.[136] Among 208.2 million pregnancies of the world, 41% are unintended.[137] In addition, 213 million pregnancies occur each year, 89% of this occurs in developing countries, and 40% of these are unintended pregnancies.[138]

In 2015–19, there were 121·0 million unintended pregnancies annually (80% uncertainty interval [UI] 112·8–131·5), corresponding to a global rate of 64 unintended pregnancies (UI 60–70) per 1000 women aged 15–49 years. 61% (58–63) of unintended pregnancies ended in abortion (totaling 73·3 million abortions annually [66·7–82·0]), corresponding to a global abortion rate of 39 abortions (36–44) per 1000 women aged 15–49 years. Using World Bank income groups, an inverse relationship has been found between unintended pregnancy and income, whereas abortion rates varied non-monotonically across groups. In countries where abortion was restricted, the proportion of unintended pregnancies ending in abortion had increased compared with the proportion for 1990–94, and the unintended pregnancy rates were higher than in countries where abortion was broadly legal. Between 1990–94 and 2015–19, the global unintended pregnancy rate has declined, whereas the pro portion of unintended pregnancies ending in abortion has increased. As a result, the global average abortion rate in 2015–19 was roughly equal to the estimates for 1990–94.[139]

Bangladesh is not an exception to that. Unwanted pregnancy has become a serious issue in Bangladesh which is also reflected in the provision of law. Physical intercourse with the promise of marriage but not marrying is an offence of "rape"[140] in Bangladesh.[141]However, abortion before marriage and after

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[135] Early marriages, adolescent and young pregnancies, Report by the Secretariat, World Health Organisation, 1 December 2011, Retrieved from: https://apps.who.int/gb/ebwha/pdf_files/EB130/B130_12-en.pdf

[136]World Health Organization (WHO). Engaging men in changing gender-based inequality in health: evidence from programme intervention. Geneva: World Health Organization; 2007.

[137] Singh S, Sedgh G, Hussain R. Unintended pregnancy: worldwide levels, trends, and outcomes. Stud Fam Plan. 2010;41(4):241–50.

[138] Singh S, Sedgh G, Hussain R, Eilers M. Incidence of unintended pregnancies worldwide in 2012 and trends since 1995; 2012.

[139] The Lancet Global Health, July 22, 2020
Retrieved from: https://www.thelancet.com/journals/langlo/article/PIIS2214-109X(20)30315-6/fulltext

[140] Section 375 of Penal Code 1860 provides that "A man is said to commit "rape" who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:
Firstly - Against her will.
Secondly - Without her consent.
Thirdly - With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.
Fourthly - With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
Fifthly - With or without her consent, when she is under fourteen years of age.
Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.
Exception. Sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape."

[141] Section 9 of the Nari O Shishu Nirjatan Daman Ain 2000 states that "1. Whoever commits rape with a woman, or a child shall be punished with death or rigorous imprisonment for life and with fine.
Explanation: Whoever has sexual intercourse without lawful marriage with a woman not being under sixteen years of age, against her will or with her consent obtained, by putting her in fear or by fraud, or with a woman not being above sixteen years of age with or without her consent, he shall be said to commit rape.
(2). If in consequence of rape or any act by him after rape, the woman or the child so raped, died later, the man shall be punished with death or with transportation for life and also with fine not exceeding one lac taka.
(3). If more than one man rapes a woman or a child and that woman or child dies or is injured in consequences of that rape, each of the gang shall be punished with death or rigorous imprisonment for life and also with fine not exceeding one lac taka.
(4). Whoever attempts on a woman or a child
(a) To cause death or hurt after rape, he shall be punished with rigorous imprisonment for life and also with fine.
(b) To commit rape, he shall be punished with imprisonment for either description, which may extend to ten years but not less than five years rigorous imprisonment and also with fine.

marriage is not an uncommon practice in Bangladesh. Poor education, lack of access to health services and health education, poor economic status, single in marital status, peer pressure, sexual violence, and due to failure of family planning lead to unintended pregnancy amongst others. Some of the causes are discussed below –

Lack of Contraceptive Information before Intimacy

The lack of information on how to prevent pregnancies before having sexual intercourse for the first time is one of the main reasons of unwanted pregnancy. Both the persons involved in the process may lack proper information about the required contraceptives for preventing pregnancy. Due to conservative attitude in society, they feel shy seeking proper information and knowledge of the contraceptives and their uses. By the time they know about contraceptives and other preventive measures, it is late. Poor people and youngsters suffer the most. They do not get adequate information about proper use of contraceptives in order to prevent pregnancy, which often causes unwanted pregnancy.

Lack of Awareness

Lack of comprehensive sexuality education or lessons about reproductive health care is one prime reason for lack of awareness. There is no such lesson in our schools, colleges, or universities though it is an essential subject of learning for all irrespective of gender. If there were such a type of education, our people, especially the young people, would be more self-conscious and could avoid unwanted pregnancies by their own. This education is also necessary to create a favorable field and gain public support for decriminalizing abortion and letting people understand about the importance of abortion care from medical and legal perspectives. Many youngsters before their first experience do not even know about contraceptives. Sometimes they cannot understand the consequence of physical particularly sexual intimacy Sometimes they learn from unauthorized books, friends, internet, or other secret ways, but that information may not always be correct, or that information may be partially correct and partially incorrect, or that information may not be adequate for preventing pregnancy.

The youngsters do not find any safe or friendly elder or any other information and consultation /interactive platform who can explain these things to them and make them aware about the consequences. Lack of understanding about the severe consequences may be due to their emotional activity which is an attributor of unwanted pregnancy. In this situation, pregnancy comes as a burden, not as a blessing. Abortion can channelize this burden and save the lives of the persons involved in this process and their respective family members.

Conservative Attitude

The conservative attitude of the whole society including parents, guardians, teachers, elders is also a cause for unwanted pregnancy. Comprehensive sexuality education (CSE) is not formally available nor is it discussed informally. This is considered as a topic not to be discussed amongst family members. Elders are not welcoming sharing knowledge about this. Rather they scold if any teenager wants to know about it from his / her parents, teachers or elders.

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(5). If a woman is raped in the police custody, each and every person, under whose custody the rape was committed and they all were directly responsible for safety of that woman, shall be punished for failure to provide safety, unless otherwise proved, with imprisonment for either description which may extend to ten years but not less than five years of rigorous imprisonment and also with fine."

An undefined but obvious nervousness and fear prevents them to ask anything relating to this topic. A social fear causing stigma triggers her down and enhances confusion and apprehension. If anyone is talking about this issue people, see it negatively. The elders handle it secretly though not secretly enough. The hide-and-seek-play lures more interest amongst the young minds. Sometimes they consider it a part of adventure. They take it to be part of a game and enjoy it without knowing about the terrible consequences attached to it. Reports on this issue are recently drawing public attention.[142] Guardians and teachers keep their mouth totally shut on this issue. They don't behave friendly enough so the youngsters can feel safe to share. This conservative attitude is ultimately bringing more negative results in the society.

Lack of Comprehensive Sexual Education (CSE)

Comprehensive sexuality education - or the many other ways this may be referred to - is a curriculum-based process of teaching and learning about the cognitive, emotional, physical, and social aspects of sexuality. It aims to equip children and young people with knowledge, skills, attitudes, and values that empower them to realize their health, well-being, and dignity; develop respectful social and sexual relationships; consider how their choices affect their own well-being and that of others; and understand and ensure the protection of their rights throughout their lives. CSE presents sexuality with a positive approach, emphasizing values such as respect, inclusion, non-discrimination, equality, empathy, responsibility, and reciprocity. It reinforces healthy and positive values about bodies, puberty, relationships, sex, and family life.[143]

Though CSE is an essential education, and it is getting acceptance day by day worldwide, the same is not the case in Bangladesh. She does not recognize "the right to receive sexual education is an important human right"[144]. With the conservative attitude about sexuality, CSE has not been officially accepted yet in Bangladesh. Be it a married couple or unmarried, be it mature or adolescent – most of them are not open for CSE. Sex has been the usual daily course of our life and "Sexuality is an integral part of human life"[145], but unfortunately there is no formal education for it. There is always hide and seek, and no

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[142]Bdnews24.com, Dhaka schoolgirl died of excessive bleeding after 'rape': forensic doctor,
Retrieved from: https://bdnews24.com/bangladesh/2021/01/09/dhaka-schoolgirl-died-of-excessive-bleeding-after-rape-forensic-doctor

[143] Retrieved from: https://www.unesco.org/en/health-education/cse

[144] International human rights bodies have established that children and young people have the right to receive comprehensive, accurate, scientifically sound and culturally sensitive sexuality education, based on existing international standards. These include the UN Convention on the Rights of the Child, the UN Convention on the Elimination of all Forms of Discrimination against Women, the International Covenant on Economic, Social and Cultural Rights and, at European level, the European Social Charter and the above-mentioned Lanzarote and Istanbul Conventions.

The right to receive comprehensive sexuality education derives from a range of protected rights, such as the right to live free from violence and discrimination, the right to the highest attainable standard of mental and physical health, but also the right to receive and impart information and the right to quality and inclusive education, including human rights education. In a 2010 report on sexuality education, the UN Special Rapporteur on the Right to Education stressed that "sexual education should be considered a right in itself and should be clearly linked with other rights in accordance with the principle of the interdependence and indivisibility of human rights." The need for sexuality education is also acknowledged in the 2030 Agenda for Sustainable Development of the United Nations and is necessary to achieve several of the goals included in the agenda.

"Comprehensive sexuality education protects children and helps build a safer, inclusive society", Council of Europe, 21 January 2020,
Retrieved from: https://www.coe.int/ca/web/commissioner/-/comprehensive-sexuality-education-protects-children-and-helps-build-a-safer-inclusive-society

[145] "Comprehensive sexuality education protects children and helps build a safer, inclusive society", Council of Europe, 21 January 2020,

qualitative lessons are available for it within the family periphery or education institution. Consequently, most people are not conscious enough to avoid pregnancy while entering into physical intimacy which leads to unintended pregnancy.

Lack of Trusted Mentors

There is a lack of trusted people to counsel young girls confidentially on sexual issues in general and pregnancy prevention; in particular, this was also reported as one of the leading causes of early unintended pregnancies. The fear that their private information will be exposed, and they will be ridiculed for engaging in sex prevented these girls from seeking counsel from older girls in the community. They do not consult anyone because of a lack of trust and the high possibility of breach of confidentiality.[146]

Adolescents' Intimacy

Adolescent pregnancy coming out of adolescents' intimacy is often the cause and consequence of love marriage or circumstantial forced marriage. It also acts as a driver of child marriage in contexts where pre-marital sexuality is taboo.[147] Unintended pregnancies of sexually active adolescent girls cause various serious problems. In some scenarios, the persons involved in sexual intercourse do neither want to get married nor do they have any intention to get married. Since they are doing it secretly, they cannot share these things with elders. Nor the persons are educated or cautious enough to gather proper information before intercourse. At one stage if the girl becomes pregnant, she or her family compels the boy to marry her. In cases of refusal or failure to marry, the girl or her family files rape cases against the boy without any intention of compelling the boy to marry the girl.

It is the stereotype coming from the common belief that marriage can solve this problem. After filing cases either they negotiate for marriage or for compensation. Both are unjust and unfair. Because marriage under compulsion can hardly bear good results, and settling this issue with compensation exposing the identities of the persons involved in it brings social stigma, defamation, psychological trauma, and other challenges in life. It becomes tougher for them to live a normal life. It gives them a tough time to return back to normal life. They may have to quit their education and public appearance. Sometimes it compels them to change their place of residence. In such a situation, termination of pregnancy can save their lives. They may get over this problem and start afresh. They may not need to quit their education and regular way of life.

Unsafe Precaution

Sometimes, the protections people use are not safe enough. And when the girl becomes pregnant before marriage, it leaves her nowhere to go. Premarital pregnancy is taken as a social offence in Bangladesh. The pregnant girl can hardly find any safe shelter for herself. Even the parents deny taking the responsibility. Instead of supporting her to get rid of this problem, they make this situation worse, and tragedy starts from there. Many commit suicides and quit their education. Neither our guardians nor our society take these things easily, which is scary.

Retrieved from: https://www.coe.int/ca/web/commissioner/-/comprehensive-sexuality-education-protects-children-and-helps-build-a-safer-inclusive-society

[146]BMC, "I was tricked": understanding reasons for unintended pregnancy among sexually active adolescent girls, 22 January 2021,
Retrieved from: https://reproductive-health-journal.biomedcentral.com/articles/10.1186/s12978-021-01078-y

[147] "Child Marriage and Sexual and Reproductive Health and Rights", Girls Not Brides, the Global Partnership to End Child Marriage, November 2018, Retrieved from: https://www.girlsnotbrides.org/documents/873/PO47765-Girls-Not-Brides-5.-Child-Marriage-and-SRHR-lr.pdf

Innocent Pregnancy

On many occasions, pregnancy may occur from mistake. Especially the sexually inactive teenagers who have no previous knowledge or awareness may get involved into sexual intercourse somehow, and become pregnant. Due to this accident, they become nervous, but they don't know how to get rid of it. They can neither share nor bear it.

Being Tricked

The tenuous nature of the relationship between a boy and a girl at their young age is one of the reasons for unintended pregnancy. Some blame the allure and charm of the boys as captivating and difficult to resist and vice versa. They indicated that boys do challenge them to prove their love by engaging in sex with them, and they comply in a bid to impress the boys and maintain their relationships. The challenge that boys usually throw at girls is also a form of trickery in which boys play on the girls' emotion. Boys appeal to girls' emotions by playing the trick of insisting that without the proof of love, demonstrated through sexual intercourse, there is no love, and the girls, in proving their love, engage in sex. While engaging in sex leads to pregnancy, the main challenge is the lack of protected sex that reduces the risk of pregnancy through contraceptives.[148]

Mistaken or Accidental Pregnancy

Mistaken pregnancy between married couples can also bring disaster. As the saying goes, the only form of birth control that's 100% effective is abstinence. "Most of the time, birth control does work, but 'accidents' can happen".[149] Even after menopause or when the couple or female partner has no plan for pregnancy, it can happen in some cases which leads to unwanted pregnancy and abortion care becomes necessary.

Misconception about Modern Contraceptive Methods

Besides the lack of contraceptive information, there appears to be misinformation and outright misconceptions regarding side effects of contraceptives among the teenagers, newlywed couples, illiterate and semi-literate people. There are different kinds of superstitions amongst the conservative and uneducated people, such as, use of contraceptives challenges fertility, one-time abortion destroys the chance of future pregnancy, using contraceptives is a sin, using contraceptives give less satisfaction or male partner may abandon the female partner, etc.

These misconceptions cause barriers to contraceptive use among young girls as there seems to be genuine fear and concern about the potential link between contraceptive use and future infertility. While significant others have not invested enough time to inform teenagers about ways of preventing pregnancy, they appear to have encouraged them not to use modern contraception. Often, they warn them against using contraceptives to avoid future infertility. The instruction is explicit in teenagers' minds: "do not use modern contraception until you have a child. Failure to comply means they will not be fertile in the future".[150] Somehow, this sort of misleading information, superstitions and misconception is prevailing

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[148]BMC, "I was tricked": understanding reasons for unintended pregnancy among sexually active adolescent girls, 22 January 2021,
Retrieved from: https://reproductive-health-journal.biomedcentral.com/articles/10.1186/s12978-021-01078-y
[149]Camille NoePagán , Surprise Pregnancy: Could It Happen to You?
Retrieved from: https://www.webmd.com/sex/birth-control/features/surprise-unplanned-pregnancy
[150]BMC, "I was tricked": understanding reasons for unintended pregnancy among sexually active adolescent girls, 22 January 2021,

amongst the people. Lack of education is the source of this misconception, especially lack of health education and sex education is mostly responsible.

Contraceptive Methods Failure

Despite scientific development of birth control methods through contraceptive, its failure is common too. Failure rate of contraceptive methods increased between the surveys, from 22.8% in 2011 to 27.3% in 2017/18. Also, male condom use increased by 2.8%, while withdrawal/periodic abstinence and/or other methods decreased by 2.9%. The failure rates in these two categories of contraceptive methods increased substantially by 4.0% and 9.0%, respectively. Compared to the 2011 survey, the prevalence ratio (PR) of contraceptive methods failure was 20% (PR 1.2, 95% CI 1.1–1.3) high in the 2017/18 survey. This PR declined 13% (PR 1.1, 95% CI 1.04–1.2) once the model was adjusted for women's and their partner's characteristics along with the last contraceptives used.[151]

Lack of Access to Contraceptives

In Bangladesh, contraception is considered culturally sensitive and warrants privacy for providers to discuss, albeit rarely facilities have such private corners.[152] Women have less access to contraceptives. Women feel shy and uneasy to go to the nearby pharmacy or medical shop. Youngsters find it uneasy to have contraceptives with them. Parents, guardians, and elders look down on them. Most of the time, they are secretive. Newlywed couples find it uneasy before their parents and elders. Unmarried couples or lovers find it very difficult to buy or keep contraceptives with them because premarital sex is not socially acceptable. Any disclosure about premarital sex brings social disdain not only for the persons involved in it but also for their family members. If any contraceptives are found with them, they will be insulted socially. On the other hand, poor people have less access to contraceptives. Information to them about contraceptives is also not available in the way as it should be. Lack of information about contraceptives is a barrier to access of contraceptives. Poor and illiterate women suffer most due to lack of access to quality contraceptives. For this reason, abortion keeps increasing at the cost of the women's health.

Lack of education

Lack of healthcare education and sex education are also the reasons for unintended pregnancy. Sex education is a part of health care education but the same is hardly recognized in our country as discussed earlier. People are not cautious and liberal enough to learn something regarding this issue. This education is equally important for both male and female. Unintended pregnancy though primarily touches the woman, but it is a man's concern too. Both parties, who have a good relationship and understanding, want to have engage in physical intimacy with each other but may not be willing to become pregnant. They both may want to prevent pregnancy and abort the unwanted fetus. To avoid this kind of situation, sex education is highly essential. Upon reaching the age of menstruation, girls should be taught about health care. Likewise, the boys should also be given education regarding caution, self-care and sex management. Natural desire can be marginalized through education. It is also required for newlywed couples. Having access to adequate information about safe contraceptives may help them avoid unwanted pregnancy.

Retrieved from: https://reproductive-health-journal.biomedcentral.com/articles/10.1186/s12978-021-01078-y

[151]Md Nuruzzaman Khan and M Mofizul Islam, Exploring rise of pregnancy in Bangladesh resulting from contraceptive failure, *Scientific Reports*, volume 12, Article number: 2353 (2022), Retrieved from: https://www.nature.com/articles/s41598-022-06332-2

[152] Khan, M. N., Harris, M. &Loxton, D. Modern contraceptive use following an unplanned birth in bangladesh: an analysis of national survey data. Int. Perspect. Sex.Reprod. Health, **46**, 77–87 (2020).

Misconception about Fetus as Life

Fetus has no separate life. It comes along with the body of a woman. A fetus is neither a natural person nor juristic. Jurisprudence does not recognize it as a separate person, nor does science recognize it as a separate living being. The Constitution of the People's Republic of Bangladesh guarantees the rights of citizens and persons. The words 'citizen' and 'person' do not recognize fetus as an independent living issue. International and regional human rights standards, as well as the laws and jurisprudence of countries around the world, have consistently indicated that the right to life of persons born does not extend to fetuses.[153] International and regional human rights standards do not support the finding that the right to life of persons born extends to fetuses. In particular, the International Covenant on Civil and Political Rights provides no indication that the right to life, protected under Article 6(1) of the Covenant,[154] applies to a fetus.[155] However, under the prevailing religions in Bangladesh, fetus is considered to have life after certain weeks. Thus, abortion or using contraceptives is considered as killing a life. This misconception often leads to unwanted pregnancy.

Child Marriage

Child marriage is one of the major phenomena of coercive reproduction. It changes the fate from girlhood to motherhood. It is both a cause and consequence of adolescent pregnancy. It may lead to unintended and unwanted pregnancy. Sometimes adolescent or young girls become pregnant even before their understanding about pregnancy or motherhood. Sometimes they become mothers even before their understanding about family life or social formalities. They become mothers of children when they are still child themselves. When girls first marry, they often face intense social pressure to prove their fertility. It can be extremely difficult for them to assert their will, particularly when deciding whether to get pregnant, or negotiating safe sexual practices and the use of contraception.156 Girl's face barriers to accessing contraception and safe abortion. This reduces their options for limiting or spacing their pregnancies.[157]

Child marriage has many causes but is primarily driven by inequitable gender norms which deprive girls and young women of their sexual and reproductive rights and limit their life choices. A key driver of adolescent pregnancy, child marriage has a hugely detrimental impact on the health and well-being of girls and young women, as well as on that of their children. Adolescent pregnancy also acts as a driver of child marriage in contexts where pre-marital sexuality is taboo.[158] Both these contexts lead to unintended pregnancy and to a devastating future. A study which found that still birth, miscarriage and pregnancy termination are significantly associated with child marriage. Early marriage often followed by adolescent pregnancies has enormous harmful effect on women's health as they are not ready physically and psychologically, hence increases the risk for different sexually transmitted diseases, obstetric fistulas, pre-term deliveries, miscarriage accompanied by mental depression, physical abuse, lack of social coherence and isolation and so on.[159] Adolescent fertility rates are generally higher in settings where early marriage is prevalent, in rural rather than urban areas, and among girls with less educational attainment and lower socio-economic status. An unintended pregnancy can have negative consequences for the girl, including

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[153]Retrieved from: https://reproductiverights.org/wp-content/uploads/2020/12/Memo-to-SC-Nepal-CRR_0.pdf

[154]International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., art. 6(1), Supp. No. 16, U.N. Doc A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

[155]Retrieved from: https://reproductiverights.org/wp-content/uploads/2020/12/Memo-to-SC-Nepal-CRR_0.pdf

[156] Retrieved from: https://www.girlsnotbrides.org/learning-resources/child-marriage-and-health/adolescent-pregnancy-and-child-marriage/

[157] Retrieved from: https://www.girlsnotbrides.org/learning-resources/child-marriage-and-health/adolescent-pregnancy-and-child-marriage/

[158] "Child Marriage and Sexual and Reproductive Health and Rights", Girls Not Brides, the Global Partnership to End Child Marriage, November 2018, Retrieved from: https://www.girlsnotbrides.org/documents/873/PO47765-Girls-Not-Brides-5.-Child-Marriage-and-SRHR-lr.pdf

[159] "Causes of Early Marriage and Its Effect on Reproductive Health of Young Mothers in Bangladesh", Md. Ruhul Kabir, Susmita Ghosh and Asma Shawly, American Journal of Applied Sciences, Volume 16 No. 9, 2019, 289-297
Retrieved from: https://thescipub.com/abstract/ajassp.2019.289.297

stigma, social isolation, school expulsion, forced marriage, and in some cases violence and suicide. Abortions, which are highly restricted or prohibited in many countries in the region, can be unsafe and result in illness and death. Complications of adolescent pregnancy and childbirth are a leading cause of death among girls and young women aged 15–19 in developing countries.[160]

Legal Position of Abortion in Bangladesh

Sections 312 – 318 of the Penal Code, 1860 provide penal provisions for causing miscarriage, injuries to unborn children, exposure of infants and concealment of births. Amongst those provisions, Sections 312 – 316 are particularly relevant prohibiting abortion in Bangladesh. Section 312 provides that whoever voluntarily causes a pregnant woman to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both. If the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and also with fine. The consent of the woman or of her guardian to the causing of such miscarriage does not justify the act.[161]

Section 313 provides that whoever causing miscarriage without women's consent shall be punished with imprisonment for life, or for a term which may extend to ten years, and also with fine.[162] Section 314 provides that whoever, with intent to cause the miscarriage of a pregnant woman, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and also with fine. It further provides that if the act is done without the consent of the woman, shall be punished either with imprisonment for life, or with the punishment above-mentioned. This Section goes to a far extent stating that it is not essential to this offence that the offender should know that the act is likely to cause death.[163]

Section 315 provides punishment with imprisonment of either description for a term which may extend to ten years, or with fine, or with both for an act done with intent to prevent child being born alive or to cause it to die after birth.[164] Section 316 states that whoever does any act under such circumstances, that if

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[160] "Key issues in East Asia and the Pacific", Child Marriage and Teenage Pregnancy,
Retrieved from: https://www.unicef.org/eap/media/3926/file

[161] Section 312 provides that –
Penalty for causing miscarriage :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 with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. Explanation.-A woman who causes herself to miscarry, is within the meaning of this section.

[162] Section 313 provides that –
Causing miscarriage without women's consent : Whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[163] Section 314 provides that –
Death caused by act done with intent to cause miscarriage: Whoever, with intent to cause the miscarriage of a woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine,
If act done without women's consent: and if the act is done without the consent of the woman, shall be punished either with imprisonment for life, or with the punishment above-mentioned.
Explanation: It is not essential to this offence that the offender should know that the act is likely to cause death.

[164] Section 315 provides that –
Act done with intent to prevent child being born alive or to cause it to die after birth : Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

he thereby caused death he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and also with fine.[165]

Under the aforesaid penal provisions, miscarriage/abortion at any stage is a punishable offence, but in reality, abortion is available as discussed earlier. It is not easy to avoid or prevent abortion in a country where rape cases are alarming, desire to have male offspring is still pressing, birth rate is too high, illiteracy rate is significant, many people don't take birth control protection, people suffer from misconceptions and superstitions regarding the use of contraceptives, the need for protection during sexual activities, uncontrolled adolescent sexual behavior, the availability of adult sexual activity.

The State does not bear responsibility for any child born within its territory, regardless of their parents. Amidst this situation, the illegal route to abortion causes several kinds of complex problems, such as, unsafe and dangerous abortion by the unrecognized hands, aborting the child after birth, endangering the life of the woman and child, forced abortion, increasing rate of orphans and street children, suicide, social stigma and other forms of physical and mental tortures.

As stated earlier, abortion has been illegal since 1860 which started during British regime and continued till birth of independent Bangladesh, the position is still the same. Though after liberation war abortion was allowed without any restriction for the rape victims of war which "was clearly featured in the government's First Five Year Plan (1973-1978). Under the "Population Planning Program" section, the Planning Commission noted, "in all successful family planning programs abortion played a central role. While keeping in mind the question of social acceptability all efforts must be made to allow this method to play its proper role in controlling the growth of population in Bangladesh" (planning Commission, 1973:539). Moreover, "legalization of abortion," they stated, "has been known as probably the best and most effective method for control of population growth. It should be seriously considered how this method can be adopted to control population growth in Bangladesh" (Planning Commission, 1973: 545). Moreover, "legalization of abortion," they stated "has been known as probably the best and most effective method for control of population growth. It should be seriously considered how this method can be adopted to control population growth in Bangladesh" (Planning Commission, 1973: 545)."[166] Therefore, it is clear that the founding figures of Bangladesh, especially immediately after liberation which also extended till 1978 had the intention to legalize abortion but subsequently it stopped midway. The exact reason for stopping the process of legalizing abortion is not recorded officially, nevertheless it stopped and has never came into light officially till date. Resultantly, the original provisions i.e. Sections 312-316 of Penal Code 1860 have remained as it is without amendment or change of any kind.

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[165] Section 316 provides that –
Causing death of quick unborn child by act amounting to culpable homicide :Whoever does any act under such circumstances, that if he thereby caused death he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
Illustration: A, knowing that he is likely to cause the death of a pregnant woman, does an act which, if it caused the death of the woman, would amount to culpable homicide. The woman is injured but does not die; but the death of an unborn quick child with which she is pregnant thereby caused. A is guilty of the offence defined in this section.

[166] Gabrielle Catherine Ross, "Sustaining Menstrual Regulation Policy: A Case Study of the Policy Process in Bangladesh", University of London, London School of Hygiene and Tropical, Medicine Department of Public Health and Policy Health Policy Unit, June 2002.
Retrieved from:
https://www.academia.edu/89254197/Sustaining_menstrual_regulation_policy_a_case_study_of_the_policy_process_in_Bangladesh

Abortion as An Offence – Denial of Certain Rights

Criminalizing abortion is a deliberate denial of certain rights of women which are, indeed, guaranteed under the Constitution of the People's Republic of Bangladesh along with other rights which men can access regularly. To have a life, freedom of movement, dignity, privacy, freedom of expression, freedom of choice and freedom of speech are some of the fundamental rights preserved under Part III of the Constitution. On the other hand, the right to medical care is one of the fundamental state policies as mandated by the Constitution. But all these rights have been denied to women when it comes to giving them abortion care in a legal way by decriminalizing abortion under the law.

Decriminalizing abortion will entail legalizing it, which was the main reason for criminalization, and thus denying certain rights to women. Getting abortion care through legally warranted ways by registered medical practitioners shall ensure more safety and security to the pregnant women who wish to abort. This is an integral part of her basic necessity for health care; being able to access good doctors, hospitals, medical instruments, quality medicine and other appliances. No legal bar upon them along with their access to such care adheres to their right to life. Therefore, abortion care combines both the fundamental principles of state policy and fundamental rights as enshrined under Part II and III of the Constitution. Denying several important rights of women through denying them abortion care should be an offence, whereas the situation is totally the opposite here. Nevertheless, denial of some rights are discussed below:

Denial of Women's Control Over their Physical and Mental Health

It is a dismissal of their right to have primary control over any decision relating to their physical and mental health. Giving birth to a child through natural process touches both the physical and mental health of a woman. In fact, it goes beyond that. It extends to her financial condition, social status, family life, career, morality and many more things. It is a life changing decision which is going to stay with her lifelong. It is a very important thing in the life of a woman.

The Bombay High Court in a *suo moto* Public Interest Litigation[167] correctly held that "a woman irrespective of her marital status can be pregnant either by choice or it can be an unwanted pregnancy. To be pregnant is a natural phenomenon for which woman and man, both are responsible. Wanted pregnancy is shared equally, however, when it is an accident or unwanted, then the man may not be there to share the burden, but it may only be the woman on whom the burden falls. Under such circumstances, a question arises why only a woman should suffer. There are social, financial, and other aspects immediately attached to the pregnancy of the woman and if pregnancy is unwanted, it can have serious repercussions. It undoubtedly affects her mental health. The law makers have taken care of helpless plight of a woman and have enacted Section 3(2)(b)(i) by incorporating the words "grave injury to her mental health". It is mandatory on the registered medical practitioner while forming opinion of necessity of termination of pregnancy to take into account whether it is injurious to her physical or mental health. While doing so, the woman's actual or reasonably foreseeable environment may be taken into account."[168]

A woman's decision to terminate her pregnancy falls within this class of protected decisions. It is one that will have profound psychological, economic and social consequences for her. It is a decision that deeply reflects the way a woman thinks about herself and her relationship with others and with the society at large. It is not just a medical decision; it is a profound social and ethical one as well.[169]

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[167] See Annexure 4.

[168] High Court on its own Motion vs The State of Maharashtra, SuoMotu Public Interest Litigation No. 1 of 2016, Decided on 19.09.2016, MANU/MH/1886/2016 MANU/MH/1886/2016.

[169] Dr. Henry Morgentaler, Dr. Leslie Frank Smoling and Dr. Robert Scott *v.* Her Majesty The Queen, [1988] 1 SCR 30. Retrieved from: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/288/index.do

Violation of Right to Health Care

Abortion care is a human right, and these rights are now being realized in countries with some of the strictest abortion laws.[170]Access to safe abortion protects women's' health and human rights. Abortions are safe when they are carried out with a method that is recommended by WHO and is appropriate with the duration of the pregnancy, and when the person carrying out the abortion has the necessary skills. Such abortions can be done using tablets (medical abortion) or a simple outpatient procedure. When women with unwanted pregnancies do not have access to safe abortion, they often resort to an unsafe abortion. An abortion is unsafe when it is carried out either by a person lacking the necessary skills or in an environment that does not conform to minimal medical standards, or both. The characteristics of an unsafe abortion encompass inappropriate circumstances before, during or after the procedure.[171]

Unsafe abortion can lead to immediate health risks including death as well as long-term complications, affecting women's physical and mental health and well-being throughout her life. It also has financial implications for women and communities. Unsafe abortion procedures may involve the insertion of an object or substance (root, twig, catheter or traditional concoction) into the uterus; dilatation and curettage performed incorrectly by an unskilled provider; ingestion of harmful substances; and application of external force.[172] Unsafe abortion can lead to cysts, ultimately cancer and other several gynecological complications.

Renunciation of Choice to be A Mother with Wanted Child

To become pregnant should be a deliberate choice. The decision of becoming pregnant should be a freedom of choice for the woman bearing it. When pregnancy is wanted, it becomes a blessing for a woman. The baby coming out becomes a blessing because becoming mother is considered to be one of the most beautiful and natural gifts in a woman's life. But the situation is totally opposite when the pregnancy is unwanted. Becoming pregnant and failure to abort the fetus due to lack of free consent is a violation of human rights. Likewise, facing abortion without free consent is a violation of human rights too. Whether to become pregnant and give birth to a child or terminate the pregnancy – should be out of free consent of women; otherwise in both ways these are violation of human rights.

Violation of Fundamental Right

The Constitution of the People's Republic of Bangladesh protects the rights to life, body, privacy, liberty, and freedom of choice. Giving birth to a child and accepting motherhood (thus parenthood for both) is a vital part of life, body, privacy, and liberty. But the provisions of the Penal Code which came long before our Constitution are expressly violative of our fundamental rights. Whether law can impose motherhood is a different issue, but in civic sense, the law should not impose it, respecting individuals' rights to life, liberty, freedom of choice and privacy. Because carrying a fetus in the womb should be the deliberate decision of a woman. A fetus may develop in the womb through intentional, unintentional, or forceful means. It occurs intentionally when sex was consented with the clear plan of giving birth to a child. It happens unintentionally when sex was consented, but the fetus was conceived accidentally without any plan to have off-springs. The forceful is barbaric - it occurs without consent. In each case, conceiving the fetus and giving birth to a child substantially changes a women's life which is not only limited to her

[170] Said by IPPF's Director-General, Dr Alvaro Bermejo, Quoted at "A win for women's rights: South Korea decriminalizes abortion care", International Planned Parenthood Federation (IPPF), 5 January 2021. Retrieved from: https://www.ippf.org/news/win-womens-rights-south-korea-decriminalizes-abortion-care
[171]World Health Organization, Abortion, Retrieved from: https://www.who.int/health-topics/abortion#tab=tab_1
[172]Ibid.

body but also with every aspect of her life including mental, social, financial, etc. It is a lifelong issue. When a baby is planned, it feels as a blessing but when the motherhood is either forced or out of rape, it becomes a curse. Motherhood should be a matter of, not compulsion, and certainly not through the compulsion of law. But the present position of law in Bangladesh sadly shows the opposite. It denies and defies women's liberation. Let the women decide over their own bodies – one of the best ways of liberation of women. Liberation of women requires equality in all stages of public and private life. Equality is the common bond which runs through our world's idea of justice. It represents everything that is noble in a nation, and it brings out the best in its people, respect, tolerance, fair play and a willingness to accommodate differences.[173]

Abortion is one of the important elements of women's liberty. Enjoying the liberty is an inherent right and it should not require any sanction from anyone, not to mention from men or State. Humans are born free, and they should have the right and privilege to feel free during their lifetime. Liberty comes along with freedom. Liberty in a free and democratic society does not require the State to approve it, though on many occasions the State needs to take some important steps for protecting and safeguarding the liberty of others, especially the vulnerable and backward sections. State needs to respect the liberty of its citizens. According to the law of international human rights, a person is vested with human rights only at birth; an unborn fetus is not an entity with human rights. The pregnancy takes place within the body of a woman and has profound effects on her health, mental well-being and life. Thus, how she wants to deal with this pregnancy must be a decision she and she alone can make. The right to control their own body, fertility and motherhood should be left to the women alone. Let us not lose sight of the basic rights of women: the right to autonomy and to decide what to do with their own bodies, including whether or not to become pregnant and stay pregnant.[174]

Curse for Rape Victims

In many countries where abortion is illegal, exceptions are made for cases where the woman's life is at risk. However, this exception is often narrowly defined and difficult to prove, leaving many women without access to safe and legal abortion services. Additionally, in countries where abortion is illegal, access to contraception and comprehensive sex education is often limited, leading to unintended pregnancies and unsafe abortions.[175] If pregnancy is due to rape, then there is bound to be a complete mental break-down of a victim.[176] In 2008, the Supreme Court of California upheld that pregnancy resulting from rape constitutes great bodily injury.[177]

The pain of a rape victim cannot be described in words. Rape is such a heinous crime which deserves disgrace and rigorous punishment. The punishment for rape in Bangladesh is one of the highest ones under the existing laws as discussed earlier. Still the number of rape victims in Bangladesh is huge.

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[173]Catherine Fraser, "Judicial independence, impartiality and equality: A Canadian perspective" (Address delivered in Harare, Zimbabwe, 27 April 1998), [unpublishedi, cited in The Honourable Madame Justice Claire L'Heurcux-Dubb, "Beyond the Myths: Equality, Impartiality, and justice" (2001) 10:1 Journal of Social Distress and the Homeless 87 at 100.

[174]High Court on its own Motion vs The State of Maharashtra, SuoMotu Public Interest Litigation No. 1 of 2016, Decided on 19.09.2016, MANU/MH/1886/2016 MANU/MH/1886/2016.

[175]Countries Where Abortion Is Illegal, Retrieved from: https://wisevoter.com/country-rankings/countries-where-abortion-is-illegal/

[176]High Court on its own Motion vs The State of Maharashtra, SuoMotu Public Interest Litigation No. 1 of 2016, Decided on 19.09.2016, MANU/MH/1886/2016 MANU/MH/1886/2016.

[177] People v. Cross, 45 Cal. 4th 58 (2008),
Quoted in Where We Stand, Rape Exemptions and Abortions, National Alliance to End Sexual Violence,
Retrieved from: https://endsexualviolence.org/where_we_stand/rape-exemptions-and-abortions/

According to a new report by Ain o Salish Kendra (ASK), at least 476 women have been raped in the country in the first six months of 2022. Among them, 24 were killed after rape and six died by suicide.[178]

Over the past five years, in Bangladesh, more than 27,000 cases of rape and almost 60,000 cases of violence against women have been reported at police stations, according to the Police Headquarters. In 2022 alone, there were 4,762 reported rape cases and 9,768 cases of violence against women. These alarming statistics reveal a pervasive problem in the country. Statistics from the Police Headquarters show that the number of reported rape cases has increased annually from 2018 to 2021, with 3,949 cases in 2018, 5,872 cases in 2019, 6,555 cases in 2020, and 6,341 cases in 2021. Meanwhile, in the past five years, 3,042 rape cases have been filed in the capital city of Dhaka, including 2,470 cases involving women and 572 cases involving children.[179]

A number of countries adopt abortion laws recognizing rape as a legal ground for access to safe abortion service,[180] but unfortunately Bangladesh does not. Most of the countries where rape is a crime do legalize abortion care for the rape victims upon their consent. As rape is a crime, these abortion laws carry with them criminal and health care elements that in turn result in the involvement of legal and medical expertise.[181] The most common objective of the laws should be providing safe abortion services to women, the survivors of rape.[182] As mentioned earlier, Bangladeshi laws do not support this objective. Bangladesh allows abortion in one situation only – which is for saving the life of a woman, which is very skeptical and conservative, because not all the rape suffered pregnant victims are in danger or risk of life. Some extensive interpretation would say that the word 'life' includes both physical and mental health, but that is very subjective according to the situation of each case, which ultimately denies the right of the rape victim to abort even though it does not risk her life. A rape victim may become pregnant without her knowledge. It is most likely the teenagers who have no knowledge about pregnancy, contraceptives or any preventive measures after the rape incident. Not all the rape victims can be open about sharing the incident of rape with anyone. There are some rape victims who are raped by their own family members, relatives, close friends or nearby neighbors. Not many of them are brave enough to disclose the incident after occasion. Tears of many rape victims go unspoken and unheard in such cases. They feel so terrified, vulnerable, miserable and lonely that they cannot share about this scariest experience with anyone. They do lack reliable parents and elders to share and lean on at their most critical point of life when they need the most. That is why they become pregnant beyond their knowledge and live a frightening life alone. They become scared of facing people including the family members and relatives. Being vulnerable, they are extremely prone to social stigma. This stigma causes lifelong hallucination and tragedy. They continue to suffer this trauma for the rest of their life.

The pain and misery of such victims cannot be expressed in black and white. Their lives become like a living hell. In such situation, when pregnancy is revealed they find suicide to be the only option, sometimes they take other illegal and disgraceful routes, which are unhealthy and unsafe for them. Some risk their future going astray. Some drop their studies. They feel uneasy to face their teachers, friends and school mates. Some elope with their unreliable partners. Some become the victims of human trafficking. Some adopt the route of prostitution. In this way they become victims of many undesirable and unwanted situations which lead towards problematic paths one after another with uncertain and pessimistic future.

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[178] 476 women raped in the last six months, The Daily Star, 8.07. 2022
Retrieved from: https://www.thedailystar.net/opinion/editorial/news/476-women-raped-the-last-six-months-3067041
[179] Fatima Tuj Johara,27,479 rape cases filed in 5 years, KalerKantho, 16 February, 2023 09:26
Retrieved from; https://www.kalerkantho.com/english/online/national/2023/02/16/49559
[180]K I Teklehaimanot and C Hord Smith, Rape as a legal indication for abortion: implications and consequences of the medical examination requirement, National Library of Medicine, Med Law, 2004;23(1):91-102
[181] National Library of Medicine, Retrieved from: https://pubmed.ncbi.nlm.nih.gov/15163078/
[182] Ibid.

The reality is more acute and tough than the words, and the denial of abortion care to the rape victims thus actually create a lot of problems and obstacles for the women. But still, it is the reality in Bangladesh, and the situation cannot be changed unless the law gets changed.

Impairing Mental Health

Unintended pregnancy is one of the most serious public health issues around the world, and it is the major sexual and reproductive health problem which carries a higher risk of morbidity and mortality for women, often due to unsafe abortion.[183] Unintended pregnancy imposes substantial health, economical and psychosocial costs on individuals and society as well as significant emotional distress to women, families, and society.[184] Furthermore, unintended pregnancy contributes to late antenatal care (ANC) visits, increased substance exposure, reduced child care, and the experience of physical and psychological violence.[185] The impact of unintended pregnancy is higher during the adolescent period which can lead to dropping out of school, unstable and lack of proper management of family relationships.[186] In addition, children born to teenage mothers are more likely to experience a range of negative outcomes in later life, such as developmental disabilities, behavioral issues and poor academic performance.[187]

About half of unintended pregnancies in developing countries result in unsafe abortion which accounts for 13% of maternal deaths.[188] Poor educational status, lack of access to health services and health education, low economic status, single marital status, peer pressure, sexual violence, and failure in family planning lead individuals towards unintended pregnancies.[189] Addressing unintended pregnancy is critical given its adverse consequences, among which are intimate partner violence, depression, suicidal ideation, anxiety, stress, lesser relationship satisfaction and social support, and even death.[190] Also, women with unintended pregnancies have lower odds of receiving prenatal care and higher odds of late initiation of antenatal care, which can adversely affect both mothers' and infants' health and wellbeing.[191] Unintended pregnancy also

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[183]Retrieved from: https://bmcresnotes.biomedcentral.com/articles/10.1186/s13104-019-4419-5

[184]Mamboleo N. Unwanted pregnancy and induced abortion among female youths: a case study of Temeke district. Muhimbili University of Health and Allied Sciences; 2012.
Hernandez ND. Exploration of the meaning and consequences of unintended pregnancy among latina cultural subgroups; 2013.
Mulatu T. Prevalence of unwanted pregnancy and associated factors among women in reproductive age groups at selected health facilities in Addis Ababa city, Ethiopia; 2014.

[185]Logan C, Holcombe E, Manlove J, Ryan S. The consequences of unintended childbearing: a white paper. Washington, D.C: Child Trends and The National Campaign to Prevent Teen and Unplanned Pregnancy; 2007.

[186]World Health Organization (WHO). Adolescent pregnancy. Geneva: World Health Organization; 2013.

[187]Hofferth SL. Early childbearing and children's achievement and behavior over time, Prospect Sex Report Health. 2002;34(1):41–9.

[188]World Health organization (WHO). Why do many women's still die in pregnancy or childbirth. Geneva: World Health organization; 2013.

[189]Bahk J, Yun SC, Kim YM, KhangYH, 'Impact of unintended pregnancy on maternal mental health a casual analysis using follow up date of the panel study on Korean children, BMC Pregnancy Child Bear' (2015);15:85.
Contraception ST. The global epidemic of unintended pregnancies.1990–2015.

[190] Faisal-Cury A, Menezes PR, Quayle J, Matijasevich A. Unplanned pregnancy and risk of maternal depression: secondary data analysis from a prospective pregnancy cohort. Psychol Health Med. 2017;22(1):65–74.
Yanikkerem E, Ay S, Piro N. Planned and unplanned pregnancy: effects on health practice and depression during pregnancy. J ObstetGynaecol Res. 2013;39(1):180–7.

[191]Exavery A, KantéAM, Hingora A, Mbaruku G, Pemba S, Phillips JF. How mistimed and unwanted pregnancies affect timing of antenatal care initiation in three districts in Tanzania. BMC Pregn Childbirth. 2013;13(1):35.
WoldeHF, Tsegaye AT, Sisay MM. Late initiation of antenatal care and associated factors among pregnant women in Addis Zemen primary hospital, South Gondar, Ethiopia. Reprod Health. 2019;16(1):73.
Okedo-Alex IN, Akamike IC, Ezeanosike OB, Uneke CJ. Determinants of antenatal care utilisation in sub-Saharan Africa: a systematic review. BMJ Open. 2019;9(10):e031890.
Dibaba Y, Fantahun M, HindinMJ. The effects of pregnancy intention on the use of antenatal care services: systematic review and meta-analysis. Reprod Health. 2013;10(1):50.

increases the likelihood of abortion and unsafe abortion related deaths,[192] especially in the sub-Saharan African settings (somehow sharing similar kinds of legal provisions as in Bangladesh), where most countries have restrictive abortion laws.[193] Furthermore, the consequences of unintended pregnancy on the physical, psychological, health, and socioeconomic wellbeing of adolescent girls are far more deleterious.[194] Teenage girls who experienced unintended pregnancy are stigmatized, more likely to drop out of school and get married or die from unsafe abortions.[195] In other words, the consequences of unintended pregnancy force adolescents' girls to seek abortion from underground providers who lack the minimum required medical standards and operate under dangerous conditions which may lead to avoidable deaths.[196]

Premarital sex cannot be completely restrained. It is a natural desire. The biological necessity of men should not always take precedence; women's needs and choices should also be considered and taken care of. The freedom to make decisions regarding women's biological choice is fundamental to enhance her natural confidence. As humans, it is their inalienable right. Having consensual sex and getting pregnant or becoming a mother are two different things. The physical or mental need for sex does not necessarily imply or impose motherhood or pregnancy against a women's will. This natural desire should be equal for all genders. It is absolutely their personal need and choice irrespective of the consequences that may follow. If the aftermath results into pregnancy and there is no one to share the burden with, it eventually leaves women with no legal options but to seek abortion care, which can have a long-lasting negative impact on their mental health. It can be challenging for their souls and mind as well.

Bring Children with Blessings

One emotional issue, but rather a practical one, is that when children are planned, they are the most accepted ones by the parents and society at large. Parents keep waiting for their baby. Family, friends, relatives and neighbors shower their blessings and appreciations to the parents and their upcoming baby. They take several happy preparations for welcoming their baby. They get full access to medical care and other support. They celebrate the pregnancy and eagerly accept the birth of the baby as one of their most precious moments of life. Children get happy receptions upon their arrival in this world. They get social, moral and legal recognition. They get a family and a family name.

On the other hand, when the child is unwanted and the mother wants to abort but she could not due to a legal barrier, then the situation is totally opposite. The girl becomes the most favorite subject of

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[192] Kant S, Srivastava R, Rai SK, Misra P, Charlette L, Pandav CS. Induced abortion in villages of BallabgarhHDSS: rates, trends, causes and determinants. Reprod Health. 2015;12(1):51

[193] Johnson BR Jr, Mishra V, Lavelanet AF, Khosla R, Ganatra B. A global database of abortion laws, policies, health standards and guidelines. Bull World Health Organ. 2017;95(7):542.

[194] Faisal-Cury A, Tabb KM, Niciunovas G, Cunningham C, Menezes PR, Huang H. Lower education among low-income Brazilian adolescent females is associated with planned pregnancies. Int J Women's Health. 2017;9:43.
Hanna B. Negotiating motherhood: the struggles of teenage mothers. J AdvNurs. 2001;34(4):456–64.
Lee D. The early socioeconomic effects of teenage childbearing: a propensity score matching approach. Demogr Res. 2010;23:697–736.

[195] Sharpe G. Precarious identities:'Young'motherhood, desistance and stigma. CriminolCrim Justice. 2015;15(4):407–22.
Bermea AM, Toews ML, Wood LG. "Students getting pregnant are not gonna go nowhere": manifestations of stigma in adolescent mothers' educational environment. Youth Soc. 2018;50(3):423–36.
KehilyMJ, 'Pramface girls? Early motherhood, marginalisation and the management of stigma',Youth Marginal Britain (2017) ;105:86.
Shahidul S, Karim Z, 'Factors contributing to school dropout among the girls: a review of literature', Eur J Res Reflect EducSci (2015), 3(2):1–8.
Shah I, Åhman E, 'Age patterns of unsafe abortion in developing country regions', Reprod Health Matters. (2004);12(24): 9–17.

[196]Ajayi AI, Akpan W, Goon DT, Nwokocha EE, AdeniyiOV. Tough love: socio-cultural explanations for deadly abortion choices among Nigerian undergraduate students: health. Afr J PhysActiv Health Sci (AJPHES). 2016;22(31):711–24.

badmouthing, humiliation, disparage and social disdain. Nobody welcomes the baby. Perhaps, in some situation the girl wants to give birth but due to social stigma, scandal and legal barriers she is frightened to welcome the baby. Nobody celebrates an illegitimate child. No happy occasions are given to them for celebrating their arrival. Nobody welcomes their existence. It is hard for them to live hidden or in the corner of a shore let alone have a family name. They are considered to be a burden on the community. They cannot be a part of the majority. These stigmas haunt them throughout their life. The birth certificates, national identity card, passport and other official documents require the name of the father as per the prevailing laws of Bangladesh. In a country like Bangladesh, where motherhood without marriage is still not socially and legally accepted, it is tough for any girl to become a mother without marriage. The child without a father is considered as illegitimate, coming out of an illicit relationship. Social, moral and legal prejudices against the illegitimate children are still unbreakable. Therefore, the child coming out of a socially despised relationship faces the worst in this country. For that reason, the rate of abandoning newborn babies is alarming in our country. The news of dumping newborn babies in dustbin, jungle or hospital is quite common in our country.[197]

It also has an effect on the increasing street children who grow up begging and leading a miserable life. Since the Government cannot fully support all the homeless or poor children with residential facilities, food, education, healthcare and other basic necessities, therefore, often the poor parents or single mothers finding no way to support their children abandons them. Most of these children grow poor and get involved in different kinds of crimes and forced labor. It causes multifarious problems and violation of legal rights.

Enhances Maternal Mortality

Countries where abortion is illegal are often characterized by high rates of maternal mortality and morbidity. According to the World Health Organization, unsafe abortions account for 13% of maternal deaths globally, with the majority of these deaths occurring in countries where abortion is illegal or heavily restricted. In addition to the health risks associated with unsafe abortions, women in these countries face a range of other harms, including stigma, discrimination, and legal punishment for seeking out reproductive healthcare services.[198] A study from Nepal reveals that abortion legalization has contributed to a sharp decline in maternal mortality, falling from 580 maternal deaths per 100,000 live births in 1995 to 190 per 100,000 in 2013.[199] A complication of abortion is one of the five major causes of maternal mortality in the developing world.[200] Fourteen per cent of all maternal deaths in South Asia can be attributed to unsafe abortions. Two out of every five abortion procedures are unsafe, and one out of every 400 women who undergo an unsafe abortion dies.'[201]

Historically, one of the primary reasons for anti-abortion laws was to prevent unsafe abortions and protect women, but that was at a time when safe abortion methods were not available as discussed earlier. This is not the case in the contemporary world, where there are several safe methods available. There should not

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[197]Star Digital Report, Newborn left abandoned on Lalmonirhat street rescued by police after 999 call, (14 Feb 2022),
Retrieved from: https://www.thedailystar.net/news/bangladesh/news/newborn-left-abandoned-lalmonirhat-street-rescued-police-after-999-call-2961736

[198]Wisevoter, Countries Where Abortion Is Illegal,
Retrieved from: https://wisevoter.com/country-rankings/countries-where-abortion-is-illegal/

[199] World Health Organization (WHO) and World Bank, *Trends in Maternal Mortality: 1990 to 2013*, Geneva: WHO, 2014.

[200]Shameem Ahmed, Ariful Islam, Parveen A. Khanum & Barkat-e-Khuda, 'An international journal on sexual and reproductive health and rights' (1999), Volume 7, Induced abortion: What's happening in rural Bangladesh Induced abortion: What's happening in rural Bangladesh,
Retrieved from: https://www.tandfonline.com/doi/pdf/10.1016/S0968-8080%2899%2990003-4

[201]Henshaw SK, 1990. Induced abortion: a world review. International Family Planning Perspectives. 22:76-89.

be any laws criminalizing abortions. Instead, we need effective laws to prevent unsafe abortions, thereby reducing women's mortality rates and ensuring proper medical care for those who require and consent to abortion. Effective laws are required to penalize those who cause forced abortion against the free consent of woman. Laws are also required against those who compel women to carry out a fetus against their will and give birth to it. Laws are required to prevent all kinds of discrimination, disparities and fears that hinder women's ability to have safe abortions. These kinds of positive laws are required to reduce maternal mortality, ensure sound medical care and establish healthy environment for women in a society.

Increases Gender Inequality

The anti-abortion law systematically denies women their right to gender equality, healthcare, economic balance, fundamental freedom of thought, choice and expression. Failing to allow women the free will to access abortion care, as barred by law, results in serious discrimination and gender inequality. It legally handicaps the women from having autonomy and liberty over their own body. It also deprives her of freedom of choice. It denounces her decision-making power regarding pregnancy before or after marriage. It is a discrimination that originates from law. When law is unfair and discriminatory, it opens the horizon of many more discriminations against women. It denies their right to participate in the decision-making process of accepting motherhood. It increases gender inequality and imbalance. It highlights the economic gap between male and female partners. On the other hand, women's right to abortion does not only ensure her fundamental right to freedom but also guarantees gender equality. In the decision-making process of forming family, women can get equal rights to participate and men shall respect the choice of women regarding motherhood. It makes women feel strong and equally confident. It removes their vulnerability to a notable extent. It ensures a proper safeguard for women against the arbitrary and unitary will of their male partners regarding pregnancy. It reduces social disparity and gender discrimination.

Unintended pregnancy and abortion are experiences shared by people around the world. These reproductive health outcomes occur irrespective of the country's income level, region or the legal status of abortion. Roughly 121 million unintended pregnancies occurred each year between 2015 to 2019. Of these unintended pregnancies, 61% ended in abortion. This translates to 73 million abortions per year. The disparities in unintended pregnancy and abortion among low, middle- and high-income countries indicate a need for greater action to achieve global equity in sexual and reproductive health. Continued investment is needed to ensure access to the full spectrum of high quality sexual and reproductive health care. The Guttmacher-*Lancet* Commission recommends that a comprehensive package of essential sexual and reproductive health services, including contraception and safe abortion care be included in national health systems.[202]

Impairs Healthy Relationship

An unwanted pregnancy can strain a healthy relationship. Sometimes, couples may not be ready to have a child under their current circumstances. Sometimes, the love-birds are not ready to get married. Sometimes, the time is not right for them. In such circumstances, an unwanted pregnancy can strain their relationship when they want to abort mutually but due to legal barrier, they cannot have secured access to abortion care. Criminalizing abortion creates a fear for both of them and it ultimately impairs a healthy relationship. One mistake can lead them into a complicated situation that could otherwise be easily avoided and not result in an unhealthy or painful outcome if they were able to abort in a legally approved way.

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[202]Guttmacher Institute, Unintended Pregnancy And Abortion Worldwide, March 22, Retrieved from: https://www.guttmacher.org/fact-sheet/induced-abortion-worldwide

As discussed above, criminalizing abortion is causing serious negative effects on the private, community and social lives. It denies the women's right to control her body and her own choices about pregnancy. It refutes the freedom of rape victims to abort the cause of the most tragic incident of her life. It makes women vulnerable against patriarchy, compelling them to feel inferior within their families having failed to make a decision regarding her motherhood. It forces many women with unwanted and unhappy motherhood. It increases social disparity and discrimination amongst children. It widens the scope of other crimes and leaves women with no choice but to resort to a negative path in some situations. It leads young girls towards a doubtful, pessimistic and difficult future. It prejudices many relationships. It violates human rights in many aspects as discussed earlier.

Where criminalizing abortion adheres to numerous social and legal disapprovals, difficulties and problems, still abortion is a crime in Bangladesh. Though abortion is practiced legally to a very limited extent and illegally to a wider extent, the law makers are not paying any heed to the necessity of decriminalizing abortion. This is a legal discrimination and denial of a right, by way of recognizing it as a crime through the scheme of law. This is unfair, unholy and unjustified. An essential medical care and an inalienable human right have become a crime in Bangladesh due to the arrangement of the law, which systematically denies women their right to life, privacy and freedom.

A Journey of Hope

To decriminalize abortion, Writ Petition No. 4182 of 2020[203] was filed, wherein *Rule Nisi* was issued by the High Court Division of the Supreme Court of Bangladesh vide Order dated 18.08.2020 with the following terms –

"Let a Rule Nisi issue calling upon the Respondents to show cause why the impugned provision of Sections 312-316 of Penal Code 1860 are discriminatory, *ultra vires* and contrary to the fundamental rights as guaranteed under Articles 27, 29, 31, 32, 38 and 42 of the Constitution of the People's Republic of Bangladesh and/or pass such other or further orders or orders as to this Court may seem fit and proper."

The Rule is now pending for hearing. It is a positive step towards decriminalizing abortion though some researchers opine that it is more like awakening the sleeping horse who knows that abortion is a common practice in Bangladesh, but they don't want to legally recognize it. Therefore, the legal battle may ultimately lead to the loss of the softened attitude of the sleeping horse towards abortion; rather they may become more active and resolute in their stance against it in a legal battle. This worry is not undeniable. But this is not the only challenge. There are countless other challenges in every step towards decriminalizing abortion.

The journey of decriminalizing abortion cannot be easier. It has never been easy for the women so far in any country around the world to establish any of their rights, especially when it comes to their independence, education and establishment. The road is full of hard rocks and deep holes, which has been the case for most of the positive developments and establishments of human rights. This has been the case in many countries where women have fought to decriminalize abortion and lost countless lives, suffered unthinkable challenges, stigma and pain and also engaged in blood-shedding battles. Once, slavery seemed impossible and unlikely to abolish, but people stood against it. Once freedom was denied to mass people, but it changed too. We are advancing. The situation never remains static. Time has its own value and recourse. It is a call of time in Bangladesh too that people talk about it, either against or in favor of it; at least it should be discussed. Abortion is something that people in Bangladesh are not open to discussing. The mainstream conservative attitude almost creates a curfew-like atmosphere, which is not conductive to discussing abortion care.

Teenagers, students, newly married couples, elders and parents - none of them seem ready to discuss it, even though education about abortion care is highly necessary in our daily lives. Its education is necessary for people's awareness. The more aware people are of both the positive and negative consequences, the fewer occurrences there will be. But the attitude and mindset towards learning about reproductive health issues, especially abortion care, is very negative. Social, moral and religious prejudices are a few of the reasons behind this.

At this juncture, the filing of the aforesaid writ petition and the issuance of the Rule, thereof, if not contributing significantly, at least open the door for discussion. The responses following the writ petition have been mixed so far. Students from various universities are conducting research, and their graduation / post-graduation thesis / research/ assignment are focused on this topic. This year, the Law Faculty of Dhaka University organized its internal moot court competition based on a case relating to abortion. I was invited to serve on the panel of adjudicators in the semi-final round. It was overwhelming to see university students arguing in favor of or against the decriminalization of abortion. At the very least, the topic is now being discussed in educational institutions, which is a positive development. Furthermore,

[203] Dr Syeda Nasrin and another vs The Government of People's Republic of Bangladesh and others.

several organizations and newspapers have published this news positively, and there have been some television talk shows on the subject as well.

There have been some repercussions as well. Several groups have formed, and they are ready to fight against the writ petition. They are openly discussing how to preserve the penal provisions and maintain anti-abortion laws. They have gained some newspaper publications and support from advocacy groups. The group is strong and vigorous. Nevertheless, it is important that this issue is now being discussed.

It is a misleading attitude to equate abortion with killing a human life. The perspective not correct at all, especially considering that, there are no legal restrictions in Bangladesh on the number of children a couple can have. . They are free to have as many children as they desire. . As long as a woman is ready to give birth, she can do so without any restrictions. The problem arises when the woman does not want to become a mother. She shouldn't be compelled to give birth to a child against her free will. Restricting her will, curtailing her freedom and compelling her to give birth are the issues that should be considered an offense, but the situation is totally opposite as per the prevailing laws of Bangladesh. Decriminalizing abortion is about empowering women to have access to safe abortion care with all the modern healthcare facilities when necessary and according to their own choices, without being influenced, coerced, defrauded and misguided by anyone. Hope, Bangladesh will recognize this right of women without delaying further.

Conclusion

To conclude, it can be said that abortion is not just an issue of termination of pregnancy at the will of a woman; it has various contexts in terms of gender equality, religion, morality, ethics, social, economic, etc. It is also one of the triggering points between male dominance and patriarchy versus women's autonomy and liberty over their bodies and souls. Hence the conflict sustains and goes on. The scariest part is that this conflict has been controlled by legal sanctions, which is understandable because most of the laws come into force through male sanction. For this reason, male sanctioned laws are more anti-women. Criminalization of abortion is one such kind as discussed earlier. It compels a woman to give birth to a child which she may not want to carry on. The blessings of motherhood become the opposite for her.

Law should not compel someone to be a mother when she is not ready for it. Likewise, the law should not create any bar upon anyone who wants to continue with her pregnancy. Taking birth as a woman is not under her control, but whether to give birth or not, should be under her full control. It is closely tied to her body and mind, and it is a life changing decision for any women. The law should not impose parenthood or motherhood. Even if the physical relationship is consensual, it does not mean that the individuals involved must accept parenthood if the woman becomes pregnant. The biological need of having sex is totally different from parenthood. The former is connected to the bodies of those involved, while the latter involves the life of another human being and becomes a lifelong responsibility. Motherhood should be a matter of choice, free will, love and dignity. However, the existing provisions of the Penal Code flagrantly violate our fundamental rights to life, freedom, liberty and privacy as guaranteed by the Constitution.

Though it's true that the Constitution came after the Penal Code, already more than 52 years have passed. It's time to rethink. The legislature can't devoid their duties to review laws and take effective steps for repealing or omitting the provisions of laws which are inconsistent with the Constitution. The Menstruation Manual for family planning shows the practical necessity and positive intention of the policy makers in favour of abortion. Making the process legal will not only prevent unsafe abortions but

also save us from moral degradation, social stigma and unwanted pregnancies. It will ensure a healthy life for both the women and children along with their families. It is time to change the existing provisions of law on this issue, recognizing it as a 'right' rather than as an 'offence'. It is time to save women from unintended pregnancies.

Unwanted pregnancy is often unavoidable due to lack of contraceptive information before intimacy, lack of awareness, lack of trusted mentors, adolescent intimacy, unsafe precautions, innocent pregnancies, tricked or defrauded physical intimacy, mistaken or accidental pregnancy, misconception about modern contraceptive methods, contraceptive failure, lack of access to contraceptives, lack of education, misconception about fetus as a life, child marriage, etc.

Decriminalization of abortion is necessary to save women from unwanted and unintended pregnancies, mortality, medical complications, diseases, etc. It is necessary for women's empowerment and securing their fundamental rights. To expedite the legal movement for decriminalizing abortion care, it is necessary to enhance public awareness, build knowledge sharing platform , extend effective comprehensive sexual education (CSE), recognize sexual education as an important right and include it in formal education, spread reproductive healthcare studies amongst all classes of people, students, teenagers, arrange public seminars, symposiums and other programs and create friendly platforms to express opinions engaging all classes of people including the legislature, executives and judiciary. Time has come to move forward rather than walking backward. It is time to recognize and guarantee women's liberation.

Annexure-01

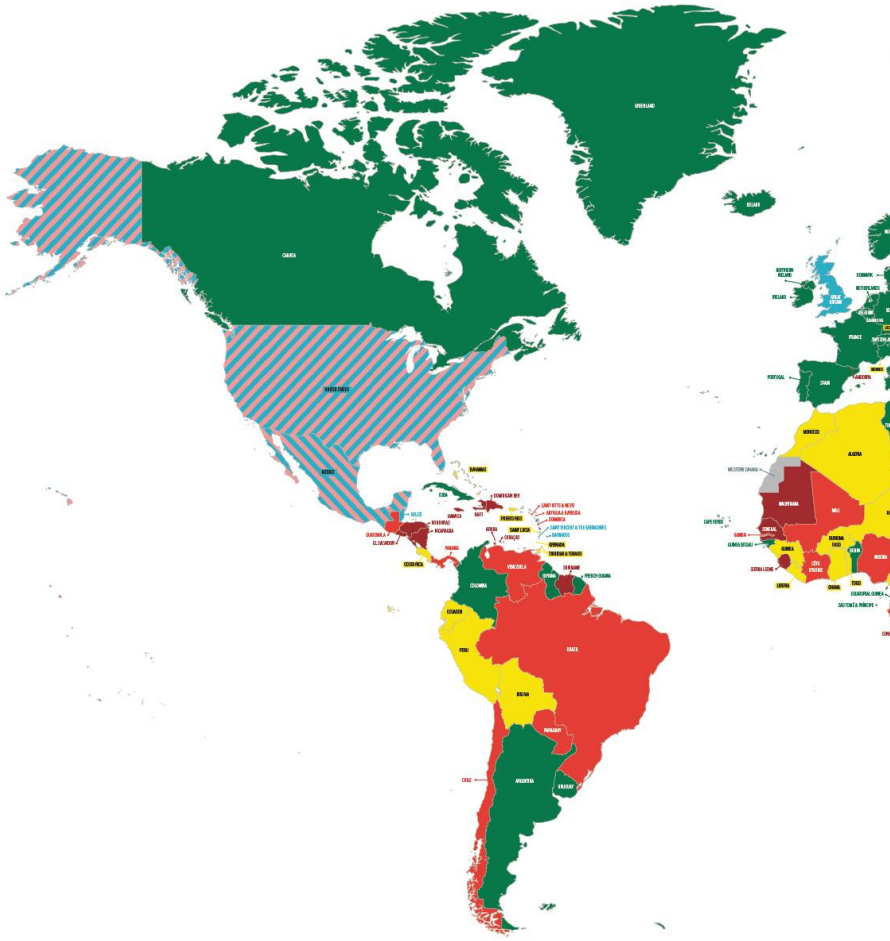
CENTER *for* REPRODUCTIVE RIGHTS

The World's Abortion Laws

The definitive record of the legal status of abortion in countries and territories across the globe.

Print map current as of June 9, 2023

Map updated in real time at **worldabortionlaws.org**



Categories of Abortion Laws from Least to Most Restrictive

Category I. On Request (Gestational Limits Vary)

77 COUNTRIES

All countries in Category I have gestational limits of 12 weeks unless otherwise indicated.

W5 Gestational limit of 5 weeks
W9 Gestational limit of 9 weeks
W10 Gestational limit of 10 weeks
W12 Gestational limit of 12 weeks
W14 Gestational limit of 14 weeks
W16 Gestational limit of 16 weeks
W18 Gestational limit of 18 weeks
W22 Gestational limit of 22 weeks
W24 Gestational limit of 24 weeks
D90 Gestational limit of 90 days or 3 months
D120 Gestational limit of 120 days
∞ Law does not limit pre-viability abortion
0 Law does not indicate gestational limit; regulatory mechanisms vary
1 Finland adopted a new law permitting abortion on request until 12 weeks gestation. The law is set to enter into force on September 1, 2023.

Albania PA
Argentina[W14]
Armenia PA
Australia ◆
Austria[D90]
Azerbaijan
Belarus
Belgium[W14]
Benin
Bosnia & Herzegovina PA
Bulgaria
Cambodia[W9] PA
Canada◆
Cape Verde
China* SX
Colombia[W24]
Croatia[W10] PA
Cuba PA
Cyprus
Czech Rep. PA
Dem. People's Rep. of Korea* ?
Denmark PA
Equatorial Guinea[W12] PA
Estonia
Finland[1]
France[W14]
French Guiana
Georgia PA
Germany[W14]
Greece PA
Guinea Bissau*
Guyana[W8]
Hungary
Iceland[W22]
Ireland
Italy[D90]
Kazakhstan
Kosovo[W10] PA SX
Kyrgyzstan
Latvia PA
Lithuania PA
Luxembourg[W14]
Maldives[W10]
Moldova PA
Mongolia[D90]
Montenegro PA SX
Mozambique
Nepal SX
Netherlands**
New Caledonia
New Zealand[W20]
Northern Ireland
North Macedonia PA
Norway PA
Portugal[W10] PA
Republic of Korea
Romania[W9]
Russian Fed.
San Marino PA
São Tomé & Príncipe
Serbia PA
Singapore[W24]
Slovak Rep. PA
Slovenia PA
South Africa
Spain[W14] PA
Sweden[W18]
Switzerland
Tajikistan
Thailand
Tunisia[D90]
Türkiye[W10] SA PA
Turkmenistan[W6] ?
Ukraine
Uruguay PA
Uzbekistan
Vietnam*

Category II. Socioeconomic Grounds

12 COUNTRIES/TERRITORIES

These laws are generally interpreted liberally to permit abortion under a broad range of circumstances. These countries/territories often take into account a pregnant person's actual or reasonably foreseeable environment and their social or economic circumstances when considering the potential impact of pregnancy and childbearing. All countries/territories in this category also permit abortion in cases where the pregnant person's health or life is at risk.

Barbados F R I PA
Belize F
Ethiopia F R I +
Fiji F R I PA
Great Britain F
Hong Kong F R I
India F R PA
Japan R SA
Rwanda F R I +
Saint Vincent & the Grenadines F R I
Taiwan F R I SA PA
Zambia F

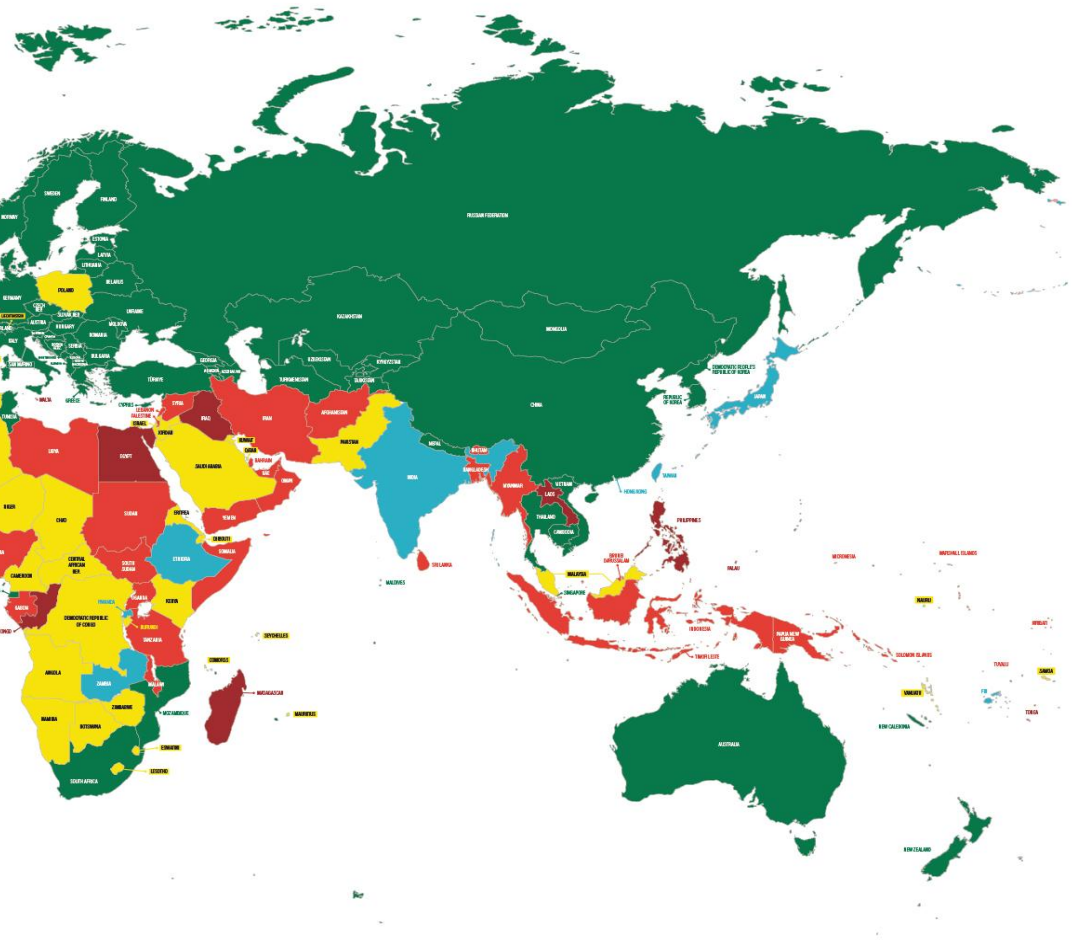
Category III. To Preserve Health

47 COUNTRIES

The laws of countries in this category permit abortion on the basis of health or therapeutic grounds. **Countries in bold** explicitly permit abortion to preserve the woman's mental health. Countries with a ✱ permit abortion only when the woman's physical health is at risk. Countries with a † are based on Rex v. Bourne. All countries in this category also permit abortion in cases where the pregnant person's life is at risk.

Algeria
Angola F R I PA
Bahamas
Bolivia R I
Botswana F R I
Burkina Faso F R I
Burundi
Cameroon R
Central African Rep. F R I + ?
Chad F R I
Comoros ?
Costa Rica
Dem. Rep. of Congo F R I
Djibouti
Ecuador R +
Eritrea R I +
Eswatini (formerly Swaziland) F R I
Ghana F R I +
Grenada
Guinea F R I ?
Israel F R I +
Jordan
Kenya
Kuwait F SA PA
Lesotho F R I
Liberia F R I
Liechtenstein R PA +
Malaysia
Mauritius F R I PA
Monaco F R I ✱
Morocco SA
Namibia F R I
Nauru F R I +
Niger F
Pakistan
Peru
Poland R I PA
Puerto Rico
Saint Lucia R I
Samoa
Saudi Arabia SA PA
Seychelles F R I +
Togo F R I
Trinidad & Tobago†
Vanuatu
Zimbabwe F R I ✱

F Abortion permitted in cases of fetal diagnosis
R Abortion permitted in cases of rape
I Abortion permitted in cases of incest
SA Spousal authorization required
PA
SX Sex-selective abortion prohibited
+ Abortion permitted on additional enumerated grounds relating to such factors as the pregnant person's age of capacity to care for a child.
✱ Legislation explicitly permits abortion only to protect the physical health of the woman
◆ Federal system in which abortion law is determined at state level; classification reflects legal status of abortion for largest group of people
?



Category IV. To Save the Pregnant Person's Life

43 COUNTRIES

Afghanistan
Antigua & Barbuda
Bahrain
Bangladesh
Bhutan R I +
Brazil R +
Brunei Darussalam
Chile F R
Côte d'Ivoire R
Dominica
Gabon F R I +
Gambia F
Guatemala
Indonesia F R SA
Iran F
Kiribati
Lebanon
Libya
Malawi
Mali R I
Marshall Islands ?
Micronesia ◆ ?
Myanmar
Nigeria
Oman
Palestine
Panama F R PA
Papua New Guinea
Paraguay
Saint Kitts & Nevis
Solomon Islands
Somalia
South Sudan
Sri Lanka
Sudan R
Syria SA PA
Tanzania
Timor-Leste PA
Tuvalu
Uganda
United Arab Emirates F SA PA
Venezuela
Yemen SA

Category V. Prohibited Altogether

22 COUNTRIES

Andorra
Aruba
Congo
Curaçao
Dominican Republic
Egypt
El Salvador
Haiti
Honduras
Iraq
Jamaica
Laos
Madagascar
Malta
Mauritania
Nicaragua
Palau ?
Philippines
Senegal
Sierra Leone
Suriname
Tonga

Varies at the State Level

2 COUNTRIES

Currently, the legal status of abortion varies widely at the subnational level in Mexico and the United States, spanning from Category I (on request) to Category IV (to save the pregnant person's life).

Mexico ◆
United States of America ◆

F Parental authorization/notification required

? Law unclear

The Center for Reproductive Rights uses the power of law to advance reproductive rights as fundamental human rights around the world.

Annexure: 02

SUPREME COURT OF CANADA

Case No. 19556
Decided On: 28.01.1988
Appellants: **R.**
Vs.
Respondent: **Morgentaler**

Hon'ble Judges:
Dickson C.J., Beetz, Estey, McIntyre, Lamer, Wilson, La Forest JJ.

JUDGMENT

R. **V.** MORGENTALER *The Chief Justice*

R. *C.* MORGENTALER *Le Juge en chef*

THE CHIEF JUSTICE--The principal issue raised by this appeal is whether the abortion provisions of the *Criminal Code*, R.S.C. 1970, c. C-34, infringe the "right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" as formulated in s. 7 of the *Canadian Charter of Rights and Freedoms*. The appellants, Dr. Henry Morgentaler, Dr. Leslie Frank Smoling and Dr. Robert Scott, have raised thirteen distinct grounds of appeal. During oral submissions, however, it became apparent that the primary focus of the case was upon the s. 7 argument. It is submitted by the appellants that s. 251 of the *Criminal Code* contravenes s. 7 of the *Canadian Charter of Rights and Freedoms* and that s. 251 should be struck down. Counsel for the Crown admitted during the course of her submissions that s. 7 of the *Charter* was indeed "the key" to the entire appeal. As for the remaining grounds of appeal, only a few brief comments are necessary. First of all, I agree with the disposition made by the Court of Appeal of the non-*Charter* issues, many of which have already been adequately dealt with in earlier cases by this Court. I am also of the view that the arguments concerning the alleged invalidity of s. 605 under ss. 7 and 11 of the *Charter* are unfounded. In view of my resolution of the s. 7 issue, it will not be necessary for me to address the appellants' other *Charter* arguments and I expressly refrain from commenting upon their merits.

During argument before this Court, counsel for the Crown emphasized repeatedly that it is not the role of the judiciary in Canada to evaluate the wisdom of legislation enacted by our democratically elected representatives, or to second-guess difficult policy choices that confront all governments. In *Morgentaler v. The Queen*, 1975 CanLII 8 (SCC), [1976] 1 S.C.R. 616, at p. 671, [hereinafter "*Morgentaler (1975)*"] I stressed that the Court had "not been called upon to decide, or even to enter, the loud and continuous public debate on abortion." Eleven years later, the controversy persists, and it remains true that this Court cannot presume to resolve all of the competing claims advanced in vigorous and healthy public debate. Courts and legislators in other democratic societies have reached completely contradictory decisions when asked to weigh the competing values relevant to the abortion question. See, e.g., *Roe v. Wade*,

MANU/USSC/0177/1972 : 410 U.S. 113 (1973);*Paton v. United Kingdom* (1980), 3 E.H.R.R. (European Court of Human Rights);*The Abortion Decision of the Federal Constitutional Court -- First Senate -- of the Federal Republic of Germany*, February 25, 1975, translated and reprinted in (1976), 9 John Marshall J. Prac. and Proc. 605; and the *Abortion Act, 1967*, 1967, c. 87 (U.K.)

But since 1975, and the first *Morgentaler* decision, the Court has been given added responsibilities. I stated in *Morgentaler (1975)*, at p. 671, that:

The values we must accept for the purposes of this appeal are those expressed by Parliament which holds the view that the desire of a woman to be relieved of her pregnancy is not, of itself, justification for performing an abortion.

Although no doubt it is still fair to say that courts are not the appropriate forum for articulating complex and controversial programmes of public policy, Canadian courts are now charged with the crucial obligation of ensuring that the legislative initiatives pursued by our Parliament and legislatures conform to the democratic values expressed in the *Canadian Charter of Rights and Freedoms*. As Justice McIntyre states in his reasons for judgment, at p. 138, "the task of the Court in this case is not to solve nor seek to solve what might be called the abortion issue, but simply to measure the content of s. 251 against the *Charter*." It is in this latter sense that the current *Morgentaler* appeal differs from the one we heard a decade ago.

I

The Court stated the following constitutional questions:

1 . Does section 251 of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 2(*a*), 7, 12, 15, 27 and 28 of the *Canadian Charter of Rights and Freedoms*?

2 . If section 251 of the *Criminal Code* of Canada infringes or denies the rights and freedoms guaranteed by ss. 2(*a*), 7, 12, 15, 27 and 28 of the *Canadian Charter of Rights and Freedoms*, is s. 251 justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

Is section 251 of the *Criminal Code* of Canada *ultra vires* the Parliament of Canada?

4. Does section 251 of the *Criminal Code* of Canada violate s. 96 of the *Constitution Act, 1867* ?

5. Does section 251 of the *Criminal Code* of Canada unlawfully delegate federal criminal power to provincial Ministers of Health or Therapeutic Abortion Committees, and in doing so, has the Federal Government abdicated its authority in this area?

6 . Do sections 605 and 610(3) of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 7, 11(*d*), 11(*f*), 11(*h*) and 24(1) of the *Canadian Charter of Rights and Freedoms*?
7. If sections 605 and 610(3) of the *Criminal Code* of Canada infringe or deny the rights and freedoms

guaranteed by ss. 7, 11(*d*) 11(*f*), 11(*h*) and 24(1) of the *Canadian Charter of Rights and Freedoms*, are ss. 605 and 610(3) justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

The Attorney General of Canada intervened to support the respondent Crown

II
Relevant Statutory and Constitutional Provisions

Criminal Code

251. (1) Every one who, with intent to procure the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose of carrying out his intention is guilty of an indictable offence and is liable to imprisonment for life.

(2) Every female person who, being pregnant, with intent to procure her own miscarriage, uses any means or permits any means to be used for the purpose of carrying out her intention is guilty of an indictable offence and is liable to imprisonment for two years.

(3) In this section, "means" includes (*a*) the administration of a drug or other noxious thing,

(*b*) the use of an instrument, and

(*c*) manipulation of any kind.

(4) Subsections (1) and (2) do not apply to

(*a*) a qualified medical practitioner, other than a member of a therapeutic abortion committee for any hospital, who in good faith uses in an accredited or approved hospital any means for the purpose of carrying out his intention to procure the miscarriage of a female person, or

(*b*) a female person who, being pregnant, permits a qualified medical practitioner to use in an accredited or approved hospital any means described in paragraph (*a*) for the purpose of carrying out her intention to procure her own miscarriage, if, before the use of those means, the therapeutic abortion committee for that accredited or approved hospital, by a majority of the members of the committee and at a meeting of the committee at which the case of such female person has been reviewed,

(*c*) has by certificate in writing stated that in its opinion the continuation of the pregnancy of such female person would or would be likely to endanger her life or health, and

(*d*) has caused a copy of such certificate to be given to the qualified medical practitioner.

(5) The Minister of Health of a province may by order
(a)require a therapeutic abortion committee for any hospital in that province, or any member thereof, to

furnish to him a copy of any certificate described in paragraph (4) (*c*) issued, by that committee, together with such other information relating to the circumstances surrounding the issue of that certificate as he may require, or

(b) require a medical practitioner who, in that province, has procured the miscarriage of any female person named in a certificate described in paragraph (4)(*c*), to furnish to him a copy of that certificate, together with such other information relating to the procuring of the miscarriage as he may require.

(6) For the purposes of subsections (4) and (5) and this subsection
"accredited hospital" means a hospital accredited by the Canadian Council on Hospital Accreditation in which diagnostic services and medical, surgical and obstetrical treatment are provided;

"approved hospital" means a hospital in a province approved for the purposes of this section by the Minister of Health of that province;

"board" means the board of governors, management or directors, or the trustees, commission or other person or group of persons having the control and management of an accredited or approved hospital;"Minister of Health" means

(*a*) in the Provinces of Ontario, Quebec, New Brunswick, Manitoba, Newfoundland and Prince Edward Island, the Minister of Health,

(*a*.1) in the Province of Alberta, the Minister of Hospitals and Medical Care, (*b*) in the Province of British Columbia, the Minister of Health Services and Hospital Insurance,

(*c*) in the Provinces of Nova Scotia and Saskatchewan, the Minister of Public Health, and
(*d*) in the Yukon Territory and the Northwest Territories, the Minister of National Health
and Welfare;

"qualified medical practitioner" means a person entitled to engage in the practice of medicine under the laws of the province in which the hospital referred to in subsection (4) is situated;

"therapeutic abortion committee" for any hospital means a committee, comprised of not less than three members each of whom is a qualified medical practitioner, appointed by the board of that hospital for the purpose of considering and determining questions relating to terminations of pregnancy within that hospital.

Nothing in subsection (4) shall be construed as making unnecessary the obtaining of any authorization or consent that is or may be required, otherwise than under this Act, before any means are used for the purpose of carrying out an intention to procure the miscarriage of a female person.

The Canadian Charter of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

III

Procedural History

The three appellants are all duly qualified medical practitioners who together set up a clinic in Toronto to perform abortions upon women who had not obtained a certificate from a therapeutic abortion committee of an accredited or approved hospital as required by s. 251(4). The doctors had made public statements questioning the wisdom of the abortion laws in Canada and asserting that a woman has an unfettered right to choose whether or not an abortion is appropriate in her individual circumstances.

Indictments were preferred against the appellants charging that they conspired with each other between November 1982 and July 1983 with intent to procure the miscarriage of female persons, using an induced suction technique to carry out that intent, contrary to s. 423(1)(*d*) and s. 251(1) of the *Criminal Code*.

Counsel for the appellants moved to quash the indictment or to stay the proceedings before pleas were entered on the grounds that s. 251 of the *Criminal Code* was *ultra vires* the Parliament of Canada, infringed ss. 2(*a*), 7 and 12 of the *Charter*, and was inconsistent with s. 1(*b*) of the *Canadian Bill of Rights*. The trial judge, Parker A.C.J.H.C., dismissed the motion, and an appeal to the Ontario Court of Appeal was dismissed. The trial proceeded before Parker A.C.J.H.C. and a jury, and the three accused were acquitted. The Crown appealed the acquittal to the Court of Appeal and the appellants filed a cross-appeal. The Court of Appeal allowed the appeal, set aside
the verdict of acquittal and ordered a new trial. The Court held that the cross-appeal related to issues already raised in the appeal, and the issues were therefore examined as part of the appeal.

IV

Section 7 of the *Charter*

In his submissions, counsel for the appellants argued that the Court should recognize a very wide ambit for the rights protected under s. 7 of the *Charter*. Basing his argument largely on American constitutional theories and authorities, Mr. Manning submitted that the right to "life, liberty and security of the person" is a wide-ranging right to control one's own life and to promote one's individual autonomy. The right would therefore include a right to privacy and a right to make unfettered decisions about one's own life.

In my opinion, it is neither necessary nor wise in this appeal to explore the broadest implications of s. 7 as

counsel would wish us to do. I prefer to rest my conclusions on a narrower analysis than that put forward on behalf of the appellants. I do not think it would be appropriate to attempt an all-encompassing explication of so important a provision as s. 7 so early in the history of *Charter* interpretation. The Court should be presented with a wide variety of claims and factual situations before articulating the full range of s. 7 rights. I will therefore limit my comments to some interpretive principles already set down by the Court and to an analysis of only two aspects of s. 7, the right to "security of the person" and "the principles of fundamental justice".

A. *Interpreting s. 7*

The goal of *Charter* interpretation is to secure for all people "the full benefit of the *Charter*'s protection": *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, at p. 344. To attain that goal, this Court has held consistently that the proper technique for the interpretation of *Charter* provisions is to pursue a "purposive" analysis of the right guaranteed. A right recognized in the *Charter* is "to be understood, in other words, in the light of the interests it was meant to protect": *R. v. Big M Drug Mart Ltd.,* at p. 344. (See also *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145; and *R. v. Therens*, 1985 CanLII 29 (SCC), [1985] 1 S.C.R. 613.)

In *Singh v. Minister of Employment and Immigration*, 1985 CanLII 65 (SCC), [1985] 1 S.C.R. 177, at p. 204, Justice Wilson emphasized that there are three distinct elements to the s. 7 right, that "life, liberty, and security of the person" are independent interests, each of which must be given independent significance by the Court (p. 205). This interpretation was adopted by a majority of the Court, *per* Justice Lamer, in *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486, at p. 500. It is therefore possible to treat only one aspect of the first part of s. 7 before determining whether any infringement of that interest accords with the principles of fundamental justice. (See *Singh, Re B.C. Motor Vehicle Act*, and *R. v. Jones*, 1986 CanLII 32 (SCC), [1986] 2 S.C.R. 284.)

With respect to the second part of s. 7, in early academic commentary one of the principal concerns was whether the reference to "principles of fundamental justice" enables the courts to review the substance of legislation. (See, e.g., Whyte, "Fundamental Justice: The Scope and Application of Section 7 of the Charter" (1983), 1 3 *Man. L.J.* 455, and Garant, "Fundamental Freedoms and Natural Justice" in W. S. Tarnopolsky and G.-A. Beaudoin, *The Canadian Charter of Rights and Freedoms: Commentary* (1982).) In *Re B.C. Motor Vehicle Act*, Lamer J. noted at p. 497 that any attempt to draw a sharp line between procedure and substance would be ill-conceived. He suggested further that it would not be beneficial in Canada to allow a debate which is rooted in United States constitutional dilemmas to shape our interpretation of s. 7 (p.
498):

We would, in my view, do our own Constitution a disservice to simply allow the American debate to define the issue for us, all the while ignoring the truly fundamental structural differences between the two constitutions.

Lamer J. went on to hold that the principles of fundamental justice referred to in s. 7 can relate both to procedure and to substance, depending upon the circumstances presented before the Court.

I have no doubt that s. 7 does impose upon courts the duty to review the substance of legislation once it has been determined that the legislation infringes an individual's right to "life, liberty and security of the person". The section states clearly that those interests may only be impaired if the principles of fundamental justice are respected. Lamer J. emphasized, however, that the courts should avoid "adjudication of the merits of public policy" (p. 499). In the present case, I do not believe that it is necessary for the Court to tread the fine line between substantive review and the adjudication of public policy. As in the *Singh* case, it will be sufficient to investigate whether or not the impugned legislative provisions meet the procedural standards of fundamental justice.First it is necessary to determine whether s. 251 of the *Criminal Code* impairs the security of the person.

Security of the Person

The law has long recognized that the human body ought to be protected from interference by others. At common law, for example, any medical procedure carried out on a person without that person's consent is an assault. Only in emergency circumstances does the law allow others to make decisions of this nature. Similarly, art. 19 of the *Civil Code of Lower Canada* provides that "The human person is inviolable" and that "No person may cause harm to the person of another without his consent or without being authorized by law to do so". "Security of the person", in other words, is not a value alien to our legal landscape. With the advent of the *Charter*, security of the person has been elevated to the status of a constitutional norm. This is not to say that the various forms of protection accorded to the human body by the common and civil law occupy a similar status. "Security of the person" must be given content in a manner sensitive to its constitutional position. The above examples are simply illustrative of our respect for individual physical integrity. (See R. Macdonald, "Procedural Due Process in Canadian Constitutional Law", 39 *U. Fla. L. Rev.* 217 (1987), at p. 248.) Nor is it to say that the state can never impair personal security interests. There may well be valid reasons for interfering with security of the person. It is to say, however, that if the state does interfere with security of the person, the *Charter* requires such interference to conform with the principles of fundamental justice.

The appellants submitted that the "security of the person" protected by the *Charter* is an explicit right to control one's body and to make fundamental decisions about one's life. The Crown contended that "security of the person" is a more circumscribed interest and that, like all of the elements of s. 7, it at most relates to the concept of physical control, simply protecting the individual's interest in his or her bodily integrity.

Canadian courts have already had occasion to address the scope of the interest protected under the rubric of "security of the person". In *R. v. Caddedu* (1982), 40 O.R. (2d) 128, at p. 139, the Ontario High Court emphasized that the right to security of the person, like each aspect of s. 7, is a basic right, the deprivation of which has severe consequences for an individual. This characterization was approved by this Court in *Re B.C. Motor Vehicle Act*, at p. 501. The Ontario Court of Appeal has held that the right to life, liberty and security of the person "would appear to relate to one's physical or mental integrity and one's control over these..." (*R. v. Videoflicks Ltd.* 1984 CanLII 44 (ON CA), (1984), 48 O.R. (2d) 395, at p. 433.)

That conclusion is consonant with the holding of Lamer J. in *Mills v. The Queen*, 1986 CanLII 17 (SCC), [1986] 1 S.C.R. 863. In*Mills*, Lamer J. was the only judge of this Court to treat the right to security of the person in any detail. Although the right arose in the context of s. 11(*b*) of the *Charter*, Lamer J. stressed the close connection between the specific rights in ss. 8 to 14 and the more generally applicable rights expressed in s. 7. Lamer J. held, at pp. 919-20, that even in the specific context of s. 11(*b*):

. . . security of the person is not restricted to physical integrity; rather, it encompasses protection against "overlong subjection to the vexations and vicissitudes of a pending criminal accusation" . . . These include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction.

If state-imposed psychological trauma infringes security of the person in the rather circumscribed case of s. 11(*b*), it should be relevant to the general case of s. 7 where the right is expressed in broader terms. (See Whyte, *supra*, p. 39).

I note also that the Court has held in other contexts that the psychological effect of state action is relevant in assessing whether or not a *Charter* right has been infringed. I n *R. v. Therens*, at p. 644, Justice Le Dain held that "The element of psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice, is enough to make the restraint of liberty involuntary" for the purposes of defining "detention" in s. 10 of the *Charter*. A majority of the Court accepted the conclusions of Le Dain J. on this issue.

It may well be that constitutional protection of the above interests is specific to, and is only triggered by, the invocation of our system of criminal justice. It must not be forgotten, however, that s. 251 of the *Code*, subject to subs. (4), makes it an indictable offence for a person to procure the miscarriage and provides a maximum sentence of two years in the case of the woman herself, and a maximum sentence of life imprisonment in the case of another person. Like Beetz J., I do not find it necessary to decide how s. 7 would apply in other cases.

The case law leads me to the conclusion that state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitute a breach of security of the person. It is not necessary in this case to determine whether the right extends further, to protect either interests central to personal autonomy, such as a right to privacy, or interests unrelated to criminal justice. I wish to reiterate that finding a violation of security of the person does not end the s. 7 inquiry. Parliament could choose to infringe security of the person if it did so in a manner consistent with the principles of fundamental justice.

The present discussion should therefore be seen as a threshold inquiry and the conclusions do not dispose definitively of all the issues relevant to s. 7. With that caution, I have no difficulty in concluding that the encyclopedic factual submissions addressed to us by counsel in the present appeal establish beyond any doubt that s. 251 of the *Criminal Code* is *prima facie* a violation of the security of the person of thousands of Canadian women who have made the difficult decision that they do not wish to continue with a pregnancy.

At the most basic, physical and emotional level, every pregnant woman is told by the section that she cannot submit to a generally safe medical procedure that might be of clear benefit to her unless she meets criteria entirely unrelated to her own priorities and aspirations. Not only does the removal of decision-making power threaten women in a physical sense; the indecision of knowing whether an abortion will be granted inflicts emotional stress. Section 251 clearly interferes with a woman's bodily integrity in both a physical and emotional sense. Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person. Section 251, therefore, is required by the *Charter* to comport with the principles of fundamental justice.

Although this interference with physical and emotional integrity is sufficient in itself to trigger a review of s. 251 against the principles of fundamental justice, the operation of the decision-making mechanism set out in s. 251 creates additional glaring breaches of security of the person. The evidence indicates that s. 251 causes a certain amount of delay for women who are successful in meeting its criteria. In the context of abortion, any unnecessary delay can have profound consequences on the woman's physical and emotional well-being.

More specifically, in 1977, the *Report of the Committee on the Operation of the Abortion Law* (the Badgley Report) revealed that the average delay between a pregnant woman's first contact with a physician and a subsequent therapeutic abortion was eight weeks (p. 146). Although the situation appears to have improved since 1977, the extent of the improvement is not clear. The intervener, the Attorney General of Canada, submitted that the average delay in Ontario between the first visit to a physician and a therapeutic abortion was now between one and three weeks. Yet the respondent Crown admitted in a supplementary factum filed on November 27, 1986 with the permission of the Court that (p. 3):

. . . the evidence discloses that some women may find it very difficult to obtain an abortion: by necessity, abortion services are limited, since hospitals have budgetary, time, space and staff constraints as well as many medical responsibilities. As a result of these problems a woman may have to apply to several hospitals.

If forced to apply to several different therapeutic abortion committees, there can be no doubt that a woman will experience serious delay in obtaining a therapeutic abortion. In her *Report on Therapeu- tic Abortion Services in Ontario* (the Powell Report), Dr. Marion Powell emphasized that (p. 7):

The entire process [of obtaining an abortion] was found to be protracted with women requiring three to seven contacts with health professionals . . . .

Revealing the full extent of this problem, Dr. Augustin Roy, the President of the Corporation professionnelle des médecins du Québec, testified that studies showed that in Quebec the waiting time for a therapeutic abortion in hospital varied between one and six weeks.

These periods of delay may not seem unduly long, but in the case of abortion, the implications of any delay, according to the evidence, are potentially devastating. The first factor to consider is that different medical techniques are employed to perform abortions at different stages of pregnancy. The testimony of expert doctors at trial indicated that in the first twelve weeks of pregnancy, the relatively safe and simple

suction dilation and curettage method of abortion is typically used in North America. From the thirteenth to the sixteenth week, the more dangerous dilation and evacuation procedure is performed, although much less often in Canada than in the United States. From the sixteenth week of pregnancy, the instillation method is commonly employed in Canada. This method requires the intra-amniotic introduction of prostaglandin, urea, or a saline solution, which causes a woman to go into labour, giving birth to a foetus which is usually dead, but not invariably so. The uncontroverted evidence showed that each method of abortion progressively increases risks to the woman. (See, e.g., Tyler, et al., "Second Trimester Induced Abortion in the United States", in Garry S. Berger, William Brenner and Louis Keith, eds., *Second-Trimester Abortion: Perspectives After a Decade of Experience*.)

The second consideration is that even within the periods appropriate to each method of abortion, the evidence indicated that the earlier the abortion was performed, the fewer the complications and the lower the risk of mortality. For example, a study emanating from the Centre for Disease Control in Atlanta confirmed that "D & E [dilation and evacuation] procedures performed at 13 to 15 weeks' gestation were nearly 3 times safer than those performed at 16 weeks or later". (Cates and Grimes, "Deaths from Second Trimester Abortion by Dilation and Evacuation: Causes, Prevention, Facilities" (1981), 58 *Obstetrics and Gynecology* 401, at p. 401. See also the Powell Report, at p. 36.) The Court was advised that because of their perceptions of risk, Canadian doctors often refuse to use the dilation and evacuation procedure from the thirteenth to sixteenth weeks and instead wait until they consider it appropriate to use the instillation technique. Even more revealing were the overall mortality statistics evaluated by Drs. Cates and Grimes. They concluded from their study of the relevant data that: Anything that contributes to delay in performing abortions increases the complication rates by 15 to 30%, and the chance of dying by 50% for each week of delay.

These statistics indicate clearly that even if the average delay caused by s. 251 *per arguendo* is of only a couple of weeks' duration, the effects upon any particular woman can be serious and, occasionally, fatal.

It is no doubt true that the overall complication and mortality rates for women who undergo abortions are very low, but the increasing risks caused by delay are so clearly established that I have no difficulty in concluding that the delay in obtaining therapeutic abortions caused by the mandatory procedures of s. 251 is an infringement of the purely physical aspect of the individual's right to security of the person. I should stress that the marked contrast between the relative speed with which abortions can be obtained at the government-sponsored community clinics in Quebec and in hospitals under the s. 251 procedure was established at trial. The evidence indicated that at the government-sponsored clinics in Quebec, the maximum delay was less than a week. One must conclude, and perhaps underline, that the delay experienced by many women seeking a therapeutic abortion, be it of one, two, four, or six weeks' duration, is caused in large measure by the requirements of s. 251 itself.

The above physical interference caused by the delays created by s. 251, involving a clear risk of damage to the physical well-being of a woman, is sufficient, in my view, to warrant inquiring whether s. 251 comports with the principles of fundamental justice. However, there is yet another infringement of security of the person. It is clear from the evidence that s. 251 harms the psychological integrity of

women seeking abortions. A 1985 report of the Canadian Medical Association, discussed in the Powell Report, at p. 15, emphasized that the procedure involved in s. 251, with the concomitant delays, greatly increases the stress levels of patients and that this can lead to more physical complications associated with abortion. A specialist in fertility control, Dr. Henry David, was qualified as an expert witness at trial on the psychological impact upon women of delay in the process of obtaining an abortion. He testified that his own studies had demonstrated that there is increased psychological stress imposed upon women who are forced to wait for abortions, and that this stress is compounded by the uncertainty whether or not a therapeutic abortion committee will actually grant approval.

Perhaps the most powerful testimony regarding the psychological impact upon women caused by the delay inherent in s. 251 procedures was offered at trial by Dr. Jane Hodgson, the Medical Director of the Women's Health Center in Duluth, Minnesota. She was called to testify as to her experiences with Canadian women who had come to the Women's Health Center for abortions. Her testimony was extensive, but the flavour may be gleaned from the following short excerpts:

May I add one other thing that I think is very vital, and that is that many of these [Canadian] women come down because they know they will be delayed in getting, first, permission, then delayed in getting a hospital bed, or getting into the hospital, and so they know they will have to have saline [instillation] procedures. And some of them have been through this, and others know what it is about, and they will do almost anything to avoid having a saline procedure.

And of course, that is -- I consider that a very cruel type of medical care and will do anything to help them to avoid this type of treatment.

...

The cost, the time consumed, the medical risks, the mental anguish -- all of this is cruelty, in this day and age, because it's [the instillation procedure] an obsolete procedure that is essentially disappearing in the United States.

I have already noted that the instillation procedure requires a woman actually to experience labour and to suffer through the birth of a foetus that is usually but not always dead. Statistics from 1982 indicated that 33.4 per cent of second trimester abortions in Ontario were done by instillation, and the Powell Report revealed, at p. 36, that even in 1986 there persisted a high incidence of second trimester abortions in Ontario. The psychological injury caused by delay in obtaining abortions, much of which must be attributed to the procedures set out in s. 251, constitutes an additional infringement of the right to security of the person.

In its supplementary factum and in oral submissions, the Crown argued that evidence of what could be termed "administrative inefficiency" is not relevant to the evaluation of legislation for the purposes of s. 7 of the *Charter*. The Crown argued that only evidence regarding the purpose of legislation is relevant. The assumption, of course, is that any impairment to the physical or psychological interests of individuals caused by s. 251 of the *Criminal Code* does not amount to an infringement of security of the person because the injury is caused by practical difficulties and is not intended by the legislator.

The submission is faulty on two counts. First, as a practical matter it is not possible in the case of s. 251 to erect a rigid barrier between the purposes of the section and the administrative procedures established to carry those purposes into effect. For example, although it may be true that Parliament did not enact s. 251 intending to create delays in obtaining therapeutic abortions, the evidence demonstrates that the system established by the section for obtaining a therapeutic abortion certificate inevitably does create significant delays. It is not possible to say that delay results only from administrative constraints, such as limited budgets or a lack of qualified persons to sit on therapeutic abortion committees. Delay results from the cumbersome operating requirements of s. 251 itself. (See, by way of analogy, *R. v. Therens*, *per* Le Dain J., at p. 645.) Although the mandate given to the courts under the *Charter* does not, generally speaking, enable the judiciary to provide remedies for administrative inefficiencies, when denial of a right as basic as security of the person is infringed by the procedure and administrative structures created by the law itself, the courts are empowered to act.

Secondly, were it nevertheless possible in this case to dissociate purpose and administration, this Court has already held as a matter of law that purpose is not the only appropriate criterion in evaluating the constitutionality of legislation under the *Charter*. In *R. v. Big M Drug Mart Ltd.*, at p. 331, the Court stated that:

. . . both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation.

Even if the purpose of legislation is unobjectionable, the administrative procedures created by law to bring that purpose into operation may produce unconstitutional effects, and the legislation should then be struck down. It is important to note that, in speaking of the effects of legislation, the Court in *R. v. Big M Drug Mart Ltd*. was still referring to effects that can invalidate legislation under s. 52 of the *Constitution Act, 1982* and not to individual effects that might lead a court to provide a personal remedy under s. 24(1) of the *Charter*. In the present case, the appellants are complaining of the general effects of s. 251. If section 251 of the *Criminal Code* does indeed breach s. 7 of the *Charter* through its general effects, that can be sufficient to invalidate the legislation under s. 52. As an aside, I should note that the appellants have standing to challenge an unconstitutional law if they are liable to conviction for an offence under that law even though the unconstitutional effects are not directed at the appellants *per se*: *R. v. Big M Drug Mart Ltd.*, at p. 313. The standing of the appellants was not challenged by the Crown.

In summary, s. 251 is a law which forces women to carry a foetus to term contrary to their own priorities and aspirations and which imposes serious delay causing increased physical and psychological trauma to those women who meet its criteria. It must, therefore, be determined whether that infringement is accomplished in accordance with the principles of fundamental justice, thereby saving s. 251 under the second part of s. 7.

C. The Principles of Fundamental Justice

Although the "principles of fundamental justice" referred to in s. 7 have both a substantive and a procedural component (*Re B.C. Motor Vehicle Act*, at p. 499), I have already indicated that it is not

necessary in this appeal to evaluate the substantive content of s. 251 of the *Criminal Code*. My discussion will therefore be limited to various aspects of the administrative structure and procedure set down in s. 251 for access to therapeutic abortions.

In outline, s. 251 operates in the following manner. Subsection (1) creates an indictable offence for any person to use any means with the intent "to procure the miscarriage of a female person". Subsection (2) establishes a parallel indictable offence for any pregnant woman to use or to permit any means to be used with the intent "to procure her own miscarriage". The "means" referred to in subss. (1) and (2) are defined in subs. (3) as the administration of a drug or "other noxious thing", the use of an instrument, and "manipulation of any kind". The crucial provision for the purposes of the present appeal is subs. (4) which states that the offences created in subss. (1) and (2) "do not apply" in certain circumstances. The Ontario Court of Appeal in the proceedings below characterized s. 251(4) as an "exculpatory provision" (1985 CanLII 116 (ON CA), (1985), 52 O.R. (2d) 353, at p. 365). In *Morgentaler (1975)*, at p. 673, a majority of this Court held that the effect of s. 251(4) was to afford "a complete answer and defence to those who respect its terms".

The procedure surrounding the defence is rather complex. A pregnant woman who desires to have an abortion must apply to the "therapeutic abortion committee" of an "accredited or approved hospital". Such a committee is empowered to issue a certificate in writing stating that in the opinion of a majority of the committee, the continuation of the pregnancy would be likely to endanger the pregnant woman's life or health. Once a copy of the certificate is given to a qualified medical practitioner who is not a member of the therapeutic abortion committee, he or she is permitted to perform an abortion on the pregnant woman and both the doctor and the woman are freed from any criminal liability.

A number of definitions are provided in subs. (6) which have a bearing on the disposition of this appeal. An "accredited hospital" is described as a hospital accredited by the Canadian Council on Hospital Accreditation "in which diagnostic services and medical, surgical and obstetrical treatment" are provided. An "approved hospital" is a hospital "approved for the purposes of this section by the Minister of Health" of a province. A "therapeutic abortion committee" must be "comprised of not less than three members each of whom is a qualified medical practitioner" who is appointed by a hospital's administrative board. Interestingly, the term "health" is not defined for the purposes of s. 251, so it would appear that the therapeutic abortion committees are free to develop their own theories as to when a potential impairment of a woman's "health" would justify the granting of a therapeutic abortion certificate.

As is so often the case in matters of interpretation, however, the straightforward reading of this statutory scheme is not fully revealing. In order to understand the true nature and scope of s. 251, it is necessary to investigate the practical operation of the provisions. The Court has been provided with a myriad of factual submissions in this area. One of the most useful sources of information is the Badgley Report. The Committee on the Operation of the Abortion Law was established by Orders-in-Council P.C. 1975-2305, -2306, and -2307 of September 29, 1975 and its terms of reference instructed it to "conduct a study to determine whether the procedure provided in the Criminal Code for obtaining therapeutic abortions is operating equitably across Canada". Statistics were provided to the Committee by Statistics Canada and the Committee conducted its own research, meeting with officials of the departments of the provincial

attorneys general and of health, and visiting 140 hospitals throughout Canada. The Committee also commissioned national hospital, hospital staff, physician, and patient surveys. The overall conclusion of the Committee was that "The procedures set out for the operation of the Abortion Law are not working equitably across Canada" (p. 17). Of course, that conclusion does not lead to the necessary inference that s. 251 procedures violate the principles of fundamental justice. Unfair functioning of the law could be caused by external forces which do not relate to the law itself.

The Badgley Report contains a wealth of detailed information which demonstrates, however, that many of the most serious problems with the functioning of s. 251 are created by procedural and administrative requirements established in the law. For example, the Badgley Committee noted, at p. 84, that:

. . . the Abortion Law implicitly establishes a minimum requirement of three qualified physicians to serve on a therapeutic abortion committee, plus a qualified medical practitioner who is not a member of the therapeutic abortion committee, to perform the procedure.

The Committee went on to make the following observation at p. 102:

Of the 1,348 civilian hospitals in operation in 1976, at least 331 hospitals had less than four physicians on their medical staff. In terms of the distribution of physicians, 24.6 percent of hospitals in Canada did not have a medical staff which was large enough to establish a therapeutic abortion committee and to perform the abortion procedure.

In other words, the seemingly neutral requirement of s. 251(4) that at least four physicians be available to authorize and to perform an abortion meant in practice that abortions would be absolutely unavailable in almost one quarter of all hospitals in Canada.

Other administrative and procedural requirements of s. 251(4) reduce the availability of therapeutic abortions even further. For the purposes of s. 251, therapeutic abortions can only be performed in "accredited" or "approved" hospitals. As noted above, an "approved" hospital is one which a provincial minister of health has designated as such for the purpose of performing therapeutic abortions. The minister is under no obligation to grant any such approval. Furthermore, an "accredited" hospital must not only be accredited by the Canadian Council on Hospital Accreditation, it must also provide specified services. Many Canadian hospitals do not provide all of the required services, thereby being automatically disqualified from undertaking therapeutic abortions. The Badgley Report stressed the remarkable limitations created by these requirements, Especially when linked with the four-physician rule discussed above (p. 105):

Of the total of 1,348 non-military hospitals in Canada in 1976, 789 hospitals, or 58.5 percent, were ineligible in terms of their major treatment functions, the size of their medical staff, or their type of facility to establish therapeutic abortion committees.
Moreover, even if a hospital is eligible to create a therapeutic abortion committee, there is no requirement in s. 251 that the hospital need do so. The Badgley Committee discovered that in 1976, of the 559 general hospitals which met the procedural requirements of s. 251, only 271 hospitals in Canada, or only 20.1 per cent of the total, had actually established a therapeutic abortion committee (p. 105).

Even though the Badgley Report was issued ten years ago, the relevant statistics do not appear to be out of date. Indeed, Statistics Canada reported that in 1982 the number of hospitals with therapeutic abortion

committees had actually fallen to 261. (*Basic Facts on Therapeutic Abortions, Canada: 1982* (1983).) Even more recent data exists for Ontario. In the Powell Report, it was noted that in 1986 only 54 per cent of accredited acute care hospitals in the province had therapeutic abortion committees. In five counties there were no committees at all (p. 24). Of the 95 hospitals with committees, 12 did not do any abortions in 1986 (p. 24).

The Powell Report reveals another serious difficulty with s. 251 procedures. The requirement that therapeutic abortions be performed only in "accredited" or "approved" hospitals effectively means that the practical availability of the exculpatory provisions of subs. (4) may be heavily restricted, even denied, through provincial regulation. In Ontario, for example, the provincial government promulgated O. Reg. 248/70 under *The Public Hospitals Act*, R.S.O. 1960, c. 322, now R.R.O. 1980, Reg. 865. This regulation provides that therapeutic abortion committees can only be established where there are ten or more members on the active medical staff (Powell Report, at p. 13). A minister of health is not prevented from imposing harsher restrictions. During argument, it was noted that it would even be possible for a provincial government, exercising its legislative authority over public hospitals, to distribute funding for treatment facilities in such a way that no hospital would meet the procedural requirements of s. 251(4). Because of the administrative structure established in s. 251(4) and the related definitions, the "defence" created in the section could be completely wiped out.

A further flaw with the administrative system established in s. 251(4) is the failure to provide an adequate standard for therapeutic abortion committees which must determine when a therapeutic abortion should, as a matter of law, be granted. Subsection (4) states simply that a therapeutic abortion committee may grant a certificate when it determines that a continuation of a pregnancy would be likely to endanger the "life or health" of the pregnant woman. It was noted above that "health" is not defined for the purposes of the section. The Crown admitted in its supplementary factum that the medical witnesses at trial testified uniformly that the "health" standard was ambiguous, but the Crown derives comfort from the fact that "the medical witnesses were unanimous in their approval of the broad World Health Organization definition of health". The World Health Organization defines "health" not merely as the absence of disease or infirmity, but as a state of physical, mental and social well-being.

I do not understand how the mere existence of a workable definition of "health" can make the use of the word in s. 251(4) any less ambiguous when that definition is nowhere referred to in the section. There is no evidence that therapeutic abortion committees are commonly applying the World Health Organization definition. Indeed, the Badgley Report indicates that the situation is quite the contrary (p. 20):

There has been no sustained or firm effort in Canada to develop an explicit and operational definition of health, or to apply such a concept directly to the operation of induced abortion. In the absence of such a definition, each physician and each hospital reaches an individual decision on this matter. How the concept of health is variably defined leads to considerable inequity in the distribution and the accessibility of the abortion procedure.

Various expert doctors testified at trial that therapeutic abortion committees apply widely differing definitions of health. For some committees, psychological health is a justification for therapeutic abortion;

for others it is not. Some committees routinely refuse abortions to married women unless they are in physical danger, while for other committees it is possible for a married woman to show that she would suffer psychological harm if she continued with a pregnancy, thereby justifying an abortion. It is not typically possible for women to know in advance what standard of health will be applied by any given committee. Parker A.C.J.H.C., at p. 377, found clear evidence that s. 251(4) provided no adequate guidelines for therapeutic abortion committees charged with determining when an abortion should legally be available:

The [Badgley] report, and other evidence adduced in support of this motion, indicates that each therapeutic abortion committee is free to establish its own guidelines and many committees apply arbitrary requirements. Some committees refuse to approve applications for second abortions unless the patient consents to sterilization, others require psychiatric assessment, and others do not grant approval to married women.

It is no answer to say that "health" is a medical term and that doctors who sit on therapeutic abortion committees must simply exercise their professional judgment. A therapeutic abortion committee is a strange hybrid, part medical committee and part legal committee. Again, in the words of Parker A.C.J.H.C., at p. 381:

Given the consequences of the issuing or refusing to issue a certificate, I have some difficulty in reducing the committee's powers to merely that of stating its opinion as to the likelihood of the continuation of the pregnancy endangering the applicant's life or health. The decision of the committee has a very real effect on access to abortion for the pregnant female applicant, and the potential criminal liability of both the applicant and the physician who performs the operation.

When the decision of the therapeutic abortion committee is so directly laden with legal consequences, the absence of any clear legal standard to be applied by the committee in reaching its decision is a serious procedural flaw.

The combined effect of all of these problems with the procedure stipulated in s. 251 for access to therapeutic abortions is a failure to comply with the principles of fundamental justice. In *Re B.C. Motor Vehicle Act*, Lamer J. held, at p. 503, that "the principles of fundamental justice are to be found in the basic tenets of our legal system". One of the basic tenets of our system of criminal justice is that when Parliament creates a defence to a criminal charge, the defence should not be illusory or so difficult to attain as to be practically illusory. The criminal law is a very special form of governmental regulation, for it seeks to express our society's collective disapprobation of certain acts and omissions. When a defence is provided, especially a specifically-tailored defence to a particular charge, it is because the legislator has determined that the disapprobation of society is not warranted when the conditions of the defence are met.

Consider then the case of a pregnant married woman who wishes to apply for a therapeutic abortion certificate because she fears that her psychological health would be impaired seriously if she carried the foetus to term. The uncontroverted evidence reveals that there are many areas in Canada where such a

woman would simply not have access to a therapeutic abortion. She may live in an area where no hospital has four doctors; no therapeutic abortion committee can be created. Equally, she may live in a place where the treatment functions of the nearby hospitals do not satisfy the definition of "accredited hospital" in s. 251(6). Or she may live in a province where the provincial government has imposed such stringent requirements on hospitals seeking to create therapeutic abortion committees that no hospital can qualify. Alternatively, our hypothetical woman may confront a therapeutic abortion committee in her local hospital which defines "health" in purely physical terms or which refuses to countenance abortions for married women. In each of these cases, it is the administrative structures and procedures established by s. 251 itself that would in practice prevent the woman from gaining the benefit of the defence held out to her in s. 251(4).

The facts indicate that many women do indeed confront these problems. Doctors from the Chedoke-McMaster Hospital in Hamilton testified that they received telephone calls from women throughout Ontario who had applied for therapeutic abortions at local hospitals and been refused. At one point, 80 per cent of abortion patients at Chedoke McMaster were from outside Hamilton, and the hospital was forced to restrict access for women from outside its catchment area. The Powell Report revealed that in over 50 per cent of Ontario counties in 1986, the majority of women obtaining abortions had the procedure away from their place of residence (p. 7). Even more telling is the fact that "a minimum of 5000 Ontario women obtain abortions each year in freestanding clinics in Canada and the United States" (p. 7).

The Crown argues in its supplementary factum that women who face difficulties in obtaining abortions at home can simply travel elsewhere in Canada to procure a therapeutic abortion. That submission would not be especially troubling if the difficulties facing women were not in large measure created by the procedural requirements of s. 251 itself. If women were seeking anonymity outside their home town or were simply confronting the reality that it is often difficult to obtain medical services in rural areas, it might be appropriate to say "let them travel". But the evidence establishes convincingly that it is the law itself which in many ways prevents access to local therapeutic abortion facilities. The enormous emotional and financial burden placed upon women who must travel long distances from home to obtain an abortion is a burden created in many instances by Parliament. Moreover, it is not accurate to say to women who would seem to qualify under s. 251(4) that they can get a therapeutic abortion as long as they are willing to travel. Ms. Carolyn Egan, administrative coordinator of the Birth Control and Venereal Disease Centre of Toronto, testified that many hospitals in Toronto had been forced to establish arbitrary abortion quotas, and that some Toronto hospitals restricted access to women inside the geographical area the hospitals were designated to serve. A woman from outside Toronto could run into serious difficulties attempting to procure a therapeutic abortion in that city. As noted above, the situation in Hamilton is now comparable to that in Toronto, because of the geographic restrictions imposed at the Chedoke-McMaster Hospital. Meanwhile, of course, days and weeks may pass and a woman may ultimately be forced to undergo a more dangerous abortion procedure. Or she may become desperate and choose to travel even further afield, to Quebec or to the United States, to obtain an abortion in a free standing clinic.

A majority of this Court held in *R. v. Jones*, at p. 304, *per* La Forest J., that:

The provinces must be given room to make choices regarding the type of administrative structure that will suit their needs unless the use of such structure is in itself so manifestly unfair, having regard to the decisions it is called upon to make, as to violate the principles of fundamental justice. [Emphasis in original.]

Similarly, Parliament must be given room to design an appropriate administrative and procedural structure for bringing into operation a particular defence to criminal liability.

But if that structure is "so manifestly unfair, having regard to the decisions it is called upon to make, as to violate the principles of fundamental justice", that structure must be struck down. In the present case, the structure -- the system regulating access to therapeutic abortions -- is manifestly unfair. It contains so many potential barriers to its own operation that the defence it creates will in many circumstances be practically unavailable to women who would *prima facie* qualify for the defence, or at least would force such women to travel great distances at substantial expense and inconvenience in order to benefit from a defence that is held out to be generally available. I conclude that the procedures created in s. 251 of the *Criminal Code* for obtaining a therapeutic abortion do not comport with the principles of fundamental justice. It isnot necessary to determine whether s. 7 also contains a substantive content leading to the conclusion that, in some circumstances at least, the deprivation of a pregnant woman's right to security of the person can never comport with fundamental justice. Simply put, assuming Parliament can act, it must do so properly. For the reasons given earlier, the deprivation of security of the person caused by s. 251 as a whole is not in accordance with the second clause of s. 7. It remains to be seen whether s. 251 can be justified for the purposes of s. 1 of the *Charter*.

V

Section 1 Analysis

Section 1 of the *Charter* can potentially be used to "salvage" a legislative provision which breaches s. 7: *Re B.C. Motor Vehicle Act*, *per* Lamer J., at p. 520. The principles governing the necessary analysis under s. 1 were set down in *R. v. Big M Drug Mart Ltd.,* and, more precisely, in *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103. A statutory provision which infringes any section of the *Charter* can only be saved under s. 1 if the party seeking to uphold the provision can demonstrate first, that the objective of the provision is "of sufficient importance to warrant overriding a constitutionally protected right or freedom" (*R. v. Big M Drug Mart Ltd.*, at p. 352) and second, that the means chosen in overriding the right or freedom are reasonable and demonstrably justified in a free and democratic society. This second aspect ensures that the legislative means are proportional to the legislative ends (*Oakes*, at pp. 139-40). In *Oakes*, at p. 139, the Court referred to three considerations which are typically useful in assessing the proportionality of means to ends. First, the means chosen to achieve an important objective should be rational, fair and not arbitrary. Second, the legislative means should impair as little as possible the right or freedom under consideration. Third, the effects of the limitation upon the relevant right or freedom should not be out of proportion to the objective sought to be achieved.

The appellants contended that the sole purpose of s. 251 of the *Criminal Code* is to protect the life and health of pregnant women. The respondent Crown submitted that s. 251 seeks to protect not only the life and health of pregnant women, but also the interests of the foetus. On the other hand, the Crown conceded that the Court is not called upon in this appeal to evaluate any claim to "foetal rights" or to assess the meaning of "the right to life". I expressly refrain from so doing. In my view, it is unnecessary for the purpose of deciding this appeal to evaluate or assess "foetal rights" as an independent constitutional value. Nor are we required to measure the full extent of the state's interest in establishing criteria unrelated to the pregnant woman's own priorities and aspirations. What we must do is evaluate the particular balance struck by Parliament in s. 251, as it relates to the priorities and aspirations of pregnant women and the government's interests in the protection of the foetus.

Section 251 provides that foetal interests are not to be protected where the "life or health" of the woman is threatened. Thus, Parliament itself has expressly stated in s. 251 that the "life or health" of pregnant women is paramount. The procedures of s. 251(4) are clearly related to the pregnant woman's "life or health" for that is the very phrase used by the subsection. As McIntyre J. states in his reasons (at p. 155), the aim of s. 251(4) is "to restrict abortion to cases where the continuation of the pregnancy would, or would likely, be injurious to the life or health of the woman concerned, not to provide unrestricted access to abortion." I have no difficulty in concluding that the objective of s. 251 as a whole, namely, to balance the competing interests identified by Parliament, is sufficiently important to meet the requirements of the first step in the *Oakes* inquiry under s. 1. I think the protection of the interests of pregnant women is a valid governmental objective, where life and health can be jeopardized by criminal sanctions. Like Beetz and Wilson JJ., I agree that protection of foetal interests by Parliament is also a valid governmental objective. It follows that balancing these interests, with the lives and health of women a major factor, is clearly an important governmental objective. As the Court of Appeal stated at p. 366, "the contemporary view [is] that abortion is not always socially undesirable behavior."

I am equally convinced, however, that the means chosen to advance the legislative objectives of s. 251 do not satisfy any of the three elements of the proportionality component of *R. v. Oakes*. The evidence has led me to conclude that the infringement of the security of the person of pregnant women caused by s. 251 is not accomplished in accordance with the principles of fundamental justice. It has been demonstrated that the procedures and administrative structures created by s. 251 are often arbitrary and unfair. The procedures established to implement the policy of s. 251 impair s. 7 rights far more than is necessary because they hold out an illusory defence to many women who would *prima facie* qualify under the exculpatory provisions of s. 251(4). In other words, many women whom Parliament professes not to wish to subject to criminal liability will nevertheless be forced by the practical unavailability of the supposed defence to risk liability or to suffer other harm such as a traumatic late abortion caused by the delay inherent in the s. 251 system. Finally, the effects of the limitation upon the s. 7 rights of many pregnant women are out of proportion to the objective sought to be achieved. Indeed, to the extent that s. 251(4) is designed to protect the life and health of women, the procedures it establishes may actually defeat that objective. The administrative structures of s. 251(4) are so cumbersome that women whose health is endangered by pregnancy may not be able to gain a therapeutic abortion, at least without great trauma, expense and inconvenience.

I conclude, therefore, that the cumbersome structure of subs. (4) not only unduly subordinates the s. 7 rights of pregnant women but may also defeat the value Parliament itself has established as paramount, namely, the life and health of the pregnant woman. As I have noted, counsel for the Crown did contend that one purpose of the procedures required by subs. (4) is to protect the interests of the foetus. State protection of foetal interests may well be deserving of constitutional recognition under s. 1. Still, there can be no escape from the fact that Parliament has failed to establish either a standard or a procedure whereby any such interests might prevail over those of the woman in a fair and non-arbitrary fashion.

Section 251 of the *Criminal Code* cannot be saved, therefore, under s. 1 of the *Charter*.

VI

Defence Counsel's Address to the Jury

In his concluding remarks to the jury at the trial of the appellants, defence counsel asserted:

The judge will tell you what the law is. He will tell you about the ingredients of the offence, what the Crown has to prove, what the defences may be or may not be, and you must take the law from him. But I submit to you that it is up to you and you alone to apply the law to this evidence and you have a right to say it shouldn't be applied.

The burden of his argument was that the jury should not apply s. 251 if they thought that it was a bad law, and that, in refusing to apply the law, they could send a signal to Parliament that the law should be changed. Although my disposition of the appeal makes it unnecessary, strictly speaking, to review Mr. Manning's argument before the jury, I find the argument so troubling that I feel compelled to comment.

It has long been settled in Anglo-Canadian criminal law that in a trial before judge and jury, the judge's role is to state the law and the jury's role is to apply that law to the facts of the case. In *Joshua v. The Queen*, [1955] A.C. 121 (P.C.), at p. 130, Lord Oaksey enunciated the principle succinctly:

It is a general principle of British law that on a trial by jury it is for the judge to direct the jury on the law and in so far as he thinks necessary on the facts, but the jury, whilst they must take the law from the judge, are the sole judges on the facts.

The jury is one of the great protectors of the citizen because it is composed of twelve persons who collectively express the common sense of the community. But the jury members are not expert in the law, and for that reason they must be guided by the judge on questions of law.

The contrary principle contended for by Mr. Manning, that a jury may be encouraged to ignore a law it does not like, could lead to gross inequities. One accused could be convicted by a jury who supported the existing law, while another person indicted for the same offence could be acquitted by a jury who, with reformist zeal, wished to express disapproval of the same law. Moreover, a jury could decide that although the law pointed to a conviction, the jury would simply refuse to apply the law to an accused for whom it had sympathy. Alternatively, a jury who feels antipathy towards an accused might convict despite a law which points to acquittal. To give a harsh but I think telling example, a jury fueled by the passions of racism could be told that they need not apply the law against murder to a white man who had

killed a black man. Such a possibility need only be stated to reveal the potentially frightening implications of Mr. Manning's assertions. The dangerous argument that a jury may be encouraged to disregard the law was castigated as long ago as 1784 by Lord Mansfield in a criminal libel case, *R. v. Shipley* (1784), 4 Dougl. 73, 99 E.R. 774, at p. 824:

So the jury who usurp the judicature of law, though they happen to be right, are themselves wrong, because they are right by chance only, and have not taken the constitutional way of deciding the question. It is the duty of the Judge, in all cases of general justice, to tell the jury how to do right, though they have it in their power to do wrong, which is a matter entirely between God and their own consciences.

To be free is to live under a government by law . . . . Miserable is the condition of individuals, dangerous is the condition of the State, if there is no certain law, or, which is the same thing, no certain administration of law, to protect individuals, or to guard the State.

...

In opposition to this, what is contended for? -- That the law shall be, in every particular cause, what any twelve men, who shall happen to be the jury, shall be inclined to think; liable to no review, and subject to no control, under all the prejudices of the popular cry of the day, and under all the bias of interest in this town, where thousands, more or less, are concerned in the publication of newspapers, paragraphs, and pamphlets. Under such an administration of law, no man could tell, no counsel could advise, whether a paper was or was not punishable.

I can only add my support to that eloquent statement of principle.

It is no doubt true that juries have a *de facto* power to disregard the law as stated to the jury by the judge. We cannot enter the jury room. The jury is never called upon to explain the reasons which lie behind a verdict. It may even be true that in some limited circumstances the private decision of a jury to refuse to apply the law will constitute, in the words of a Law Reform Commission of Canada working paper, "the citizen's ultimate protection against oppressive laws and the oppressive enforcement of the law" (Law Reform Commission of Canada, Working Paper 27, *The Jury in Criminal Trials* (1980)). But recognizing this reality is a far cry from suggesting that counsel may encourage a jury to ignore a law they do not support or to tell a jury that it has a right to do so. The difference between accepting the reality of *de facto* discretion in applying the law and elevating such discretion to the level of a right was stated clearly by the United States Court of Appeals, District of Columbia Circuit, in *United States v. Dougherty*, MANU/UDCC/0257/1972 : 473 F.2d 1113 (1972), *per* Leventhal J., at p. 1134

The jury system has worked out reasonably well overall, providing "play in the joints" that imparts flexibility and avoid[s] undue rigidity. An equilibrium has evolved -- an often marvelous balance -- with the jury acting as a "safety valve" for exceptional cases, without being a wildcat or runaway institution. There is reason to believe that the simultaneous achievement of modest jury equity and avoidance of intolerable caprice depends on formal instructions that do not expressly delineate a jury charter to carve out its own rules of law.

To accept Mr. Manning's argument that defence counsel should be able to encourage juries to ignore the law would be to disturb the "marvelous balance" of our system of criminal trials before a judge and jury. Such a disturbance would be irresponsible. I agree with the trial judge and with the Court of Appeal that Mr. Manning was quite simply wrong to say to the jury that if they did not like the law they need not enforce it. He should not have done so.

VII

Conclusion

Section 251 of the *Criminal Code* infringes the right to security of the person of many pregnant women. The procedures and administrative structures established in the section to provide for therapeutic abortions do not comply with the principles of fundamental justice. Section 7 of the *Charter* is infringed and that infringement cannot be saved under s. 1.

In oral argument, counsel for the Crown submitted that if the Court were to hold that procedural aspects of s. 251 infringed the *Charter*, only the procedures set out in the section should be struck down, that is subss. (4) and (5). After being pressed with questions from the bench, Ms. Wein conceded that the whole of s. 251 should fall if it infringed s. 7. Mr. Blacklock for the Attorney General of Canada took the same position. This was a wise approach, for in *Morgentaler (1975)*, at p. 676, the Court held that "s. 251 contains a comprehensive code on the subject of abortions, unitary and complete within itself". Having found that this "comprehensive code" infringes the *Charter*, it is not the role of the Court to pick and choose among the various aspects of s. 251 so as effectively to re-draft the section. The appeal should therefore be allowed and s. 251 as a whole struck down under s. 52(1) of the *Constitution Act, 1982*.

The first constitutional question is therefore answered in the affirmative as regards s. 7 of the *Charter* only. The second question, as regards s. 7 of the *Charter* only, is answered in the negative. Questions 3, 4 and 5 are answered in the negative. I answer question 6 in the manner proposed by Beetz J. It is not necessary to answer question 7.

The reasons of Beetz and Estey JJ. were delivered by

R. *V.* MORGENTALER *Beetz J.*
R. *C.* MORGENTALER *Le juge Beetz*

BEETZ J.--I have had the advantage of reading the reasons for judgment written by the Chief Justice, as well as the reasons written by Justice McIntyre and Justice Wilson.

I agree with the Chief Justice and Wilson J. that this case finds its resolution in the answers to the first two constitutional questions stated by the Chief Justice in so far as those questions relate to s. 7 and s. 1 of the *Canadian Charter of Rights and Freedoms*. Although the greatest part of my reasons is devoted to responding to the first two constitutional questions, I consider it necessary to answer the sixth

constitutional question concerning the validity of s. 605(1)(*a*) of the *Criminal Code*, R.S.C. 1970, c. C- 34, under the *Charter* in order to establish the Crown's right to appeal the verdict of acquittal in this case. Finally, I have decided that it is appropriate to address the appellants' arguments pertaining to s. 91(27) and s. 96 of the *Constitution Act, 1867*, as well as the argument that s. 251 of the *Criminal Code* is in effect an unconstitutional delegation of legislative power.

Like the Chief Justice and Wilson J., I would allow the appeal and answer the first constitutional question in the affirmative and the second constitutional question in the negative. This however is a result which I reach for reasons which differ from those of the Chief Justice and those of Wilson J.

I find it convenient to outline at the outset the steps which lead me to this result:

I -- Before the advent of the *Charter*, Parliament recognized, in adopting s. 251(4)(*c*) of the *Criminal Code*, that the interest in the life or health of the pregnant woman takes precedence over the interest in prohibiting abortions, including the interest of the state in the protection of the foetus, when "the continuation of the pregnancy of such female person would or would be likely to endanger her life or health". In my view, this standard in s. 251(4) became entrenched at least as a minimum when the "right to life, liberty and security of the person" was enshrined in the *Canadian Charter of Rights and Freedoms* at s. 7.

II -- "Security of the person" within the meaning of s. 7 of the *Charter* must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction. If an act of Parliament forces a pregnant woman whose life or health is in danger to choose between, on the one hand, the commission of a crime to obtain effective and timely medical treatment and, on the other hand, inadequate treatment or no treatment at all, her right to security of the person has been violated.

III -- According to the evidence, the procedural requirements of s. 251 of the*Criminal Code* significantly delay pregnant women's access to medical treatment resulting in an additional danger to their health, thereby depriving them of their right to security of the person.

IV -- The deprivation referred to in the preceding proposition does not accord with the principles of fundamental justice. While Parliament is justified in requiring a reliable, independent and medically sound opinion as to the "life or health" of the pregnant woman in order to protect the state interest in the foetus, and while any such statutory mechanism will inevitably result in some delay, certain of the procedural requirements of s. 251 of the *Criminal Code* are nevertheless manifestly unfair. These requirements are manifestly unfair in that they are unnecessary in respect of Parliament's objectives in establishing the administrative structure and that they result in additional risks to the health of pregnant women.

V -- The primary objective of s. 251 of the *Criminal Code* is the protection of the foetus. The protection of the life and health of the pregnant woman is an ancillary objective. The primary objective does relate to

concerns which are pressing and substantial in a free and democratic society and which, pursuant to s. 1 of the *Charter*, justify reasonable limits to be put on a woman's right. However, rules unnecessary in respect of the primary and ancillary objectives which they are designed to serve, such as some of the rules contained in s. 251, cannot be said to be rationally connected to these objectives under s. 1 of the *Charter*. Consequently, s. 251 does not constitute a reasonable limit to the security of the person.

It is not necessary to decide whether there is a proportionality between the effects of s. 251 and the objective of protecting the foetus, nor is it necessary to answer the question concerning the circumstances in which there is a proportionality between the effects of s. 251 which limit the right of pregnant women to security of the person and the objective of the protection of the foetus. But I feel bound to observe that the objective of protecting the foetus would not justify the severity of the breach of pregnant women's right to security of the person which would result if the exculpatory provision of s. 251 was completely removed from the *Criminal Code*. However, a rule that would require a higher degree of danger to health in the latter months of pregnancy, as opposed to the early months, for an abortion to be lawful, could possibly achieve a proportionality which would be acceptable under s. 1 of the *Charter*.

I -- Section 251 of the *Criminal Code*

Section 251 of the *Criminal Code* provides:

251. (1) Every one who, with intent to procure the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose of carrying out his intention is guilty of an indictable offence and is liable to imprisonment for life.

(2) Every female person who, being pregnant, with intent to procure her own miscarriage, uses any means or permits any means to be used for the purpose of carrying out her intention is guilty of an indictable offence and is liable to imprisonment for two years.

(3) In this section, "means" includes
(*a*) the administration of a drug or other noxious thing,
(*b*) the use of an instrument, and
(*c*) manipulation of any kind.
(4) Subsections (1) and (2) do not apply to
(*a*) a qualified medical practitioner, other than a member of a therapeutic abortion committee for any hospital, who in good faith uses in an accredited or approved hospital any means for the purpose of carrying out his intention to procure the miscarriage of a female person, or
(*b*) a female person who, being pregnant, permits a qualified medical practitioner to use in an accredited or approved hospital any means described in paragraph (*a*) for the purpose of carrying out her intention to procure her own miscarriage, if, before the use of those means, the therapeutic abortion committee for that accredited or approved hospital, by a majority of the members of the committee and at a meeting of the committee at which the case of such female person has been reviewed,
(*c*) has by certificate in writing stated that in its opinion the continuation of the pregnancy of such female person would or would be likely to endanger her life or health, and
(*d*) has caused a copy of such certificate to be given to the qualified medical practitioner.

(5) The Minister of Health of a province may by order (*a*) require a therapeutic abortion committee for any hospital in that province, or any member thereof, to furnish to him a copy of any certificate described in paragraph (4)(*c*) issued by that committee, together with such other information relating to the circumstances surrounding the issue of that certificate as he may require, or

(*b*) require a medical practitioner who, in that province, has procured the miscarriage of any female person named in a certificate described in paragraph (4)(*c*), to furnish to him a copy of that certificate, together with such other information relating to the procuring of the miscarriage as he may require.

(6) For the purposes of subsections (4) and (5) and this subsection

"accredited hospital" means a hospital accredited by the Canadian Council on Hospital Accreditation in which diagnostic services and medical, surgical and obstetrical treatment are provided;

"approved hospital" means a hospital in a province approved for the purposes of this section by the Minister of Health of that province;

"board" means the board of governors, management or directors, or the trustees, commission or other person or group of persons having the control and management of an accredited or approved hospital;

"Minister of Health" means

(*a*) in the Provinces of Ontario, Quebec, New Brunswick, Manitoba, Newfoundland and Prince Edward Island, the Minister of Health,
(*a*.1) in the Province of Alberta, the Minister of Hospitals and Medical Care,
(*b*) in the Province of British Columbia, the Minister of Health Services and Hospital Insurance,
(c)in the Provinces of Nova Scotia and Saskatchewan, the Minister of Public Health, and
(*d*) in the Yukon Territory and the Northwest Territories, the Minister of National Health and Welfare;
"qualified medical practitioner" means a person entitled to engage in the practice of medicine under the laws of the province in which the hospital referred to in subsection (4) is situated;

"therapeutic abortion committee" for any hospital means a committee, comprised of not less than three members each of whom is a qualified medical practitioner, appointed by the board of that hospital for the purpose of considering and determining questions relating to terminations of pregnancy within that hospital
(7) Nothing in subsection (4) shall be construed as making unnecessary the obtaining of any authorization or consent that is or may be required, otherwise than under this Act, before any means are used for the purpose of carrying out an intention to procure the miscarriage of a female person.

Subsection (1) defines the indictable offence committed when a person uses any means for the purpose of carrying out his or her intention of procuring the miscarriage of a female person. Subsection (2) states that a pregnant woman who uses any means or permits any means to be used for the purpose of procuring her own miscarriage is guilty of an indictable offence with a lesser maximum penalty. Subsection (3) defines the expression "means" for s. 251.

Subsection (4), when read in conjunction with subss. (5), (6) and (7), outlines the circumstances in which an abortion can be lawfully performed. For the purposes of this appeal in which the existence of a constitutional right of access to abortion and the extent of that right is in issue, it is of special importance to understand the circumstances in which Parliament decriminalized abortion and thereby rendered it available without criminal sanction under ordinary law. Indeed, before the advent of the *Charter*, Parliament recognized that the interest in the life or health of the pregnant woman takes precedence over the interest in prohibiting abortions, including the interest of the state in the protection of the foetus, when the continuation of the pregnancy would or would be likely to endanger the pregnant woman's life or health. Access to lawful abortion under the *Criminal Code*, albeit in limited circumstances, exists independently of any right which may or may not be founded upon the *Charter*.

As its opening words make plain, subs. (4) is an exculpatory provision: subss. (1) and (2), which indicate when conduct related to procuring a miscarriage is an indictable offence, "do not apply" when the terms of subs. (4) are respected. Until section 18 of the *Criminal Law Amendment Act, 1968-69*, S.C. 1968-69, c. 38, added subss. (4), (5), (6) and (7), there was no statutory exception to the crime of abortion. In the case at bar, the Ontario Court of Appeal 1985 CanLII 116 (ON CA), (1985), 52 O.R. (2d) 353, explained the historical significance of the adoption in 1969 of these exculpatory provisions in the following terms, at p. 366:

By defining criminal conduct more narrowly, these amendments reflected the contemporary view that abortion is not always socially undesirable behaviour.

Access to abortion without risk of criminal penalty under the *Criminal Code* is expressed by Parliament in subss. (4), (5), (6) and (7) of s. 251 as relieving provisions in respect of the indictable offences defined at s. 251(1) and (2). According to Laskin C.J. (dissenting) in *Morgentaler v. The Queen*, 1975 CanLII 8 (SCC), [1976] 1 S.C.R. 616 [hereinafter "*Morgentaler (1975)*"], these relieving provisions "simply permit a person to make conduct lawful which would otherwise be unlawful" (at p. 631). In the same case, Pigeon J. said that in 1969 "an explicit and specific definition was made of the circumstances under which an abortion could lawfully be performed" (at p. 660).

What is important, for our purposes, in considering subs. (4) is not, of course, the name we give to the exculpatory rule but the rule itself: Parliament has recognized that circumstances exist in which an abortion can be procured lawfully. The Court of Appeal observed, *supra*, at p. 378:

A woman's only right to an abortion at the time the Charter came into force would accordingly appear to be that given to her by s-s. (4) of s. 251.

Given that it appears in a criminal law statute, s. 251(4) cannot be said to create a "right", much less a constitutional right, but it does represent an exception decreed by Parliament pursuant to what the Court of Appeal aptly called "the contemporary view that abortion is not always socially undesirable behaviour". Examining the content of the rule by which Parliament decriminalizes abortion is the most appropriate first step in considering the validity of s. 251 as against the constitutional right to abortion alleged by the appellants in argument.

By enacting subss. (4), (5), (6) and (7) of s. 251 in 1969, Parliament endeavoured to decriminalize abortion in one circumstance, described in substantive terms in s. 251(4) (*c*): when the continuation of the pregnancy of the woman would or would be likely to endanger her life or health. This is the crux of the exception. This is the circumstance in which Parliament decided to allow women to procure a miscarriage without criminal sanction either for themselves or for their doctors. Laskin C.J. referred to this "would or would be likely to endanger her life or health" element in s. 251(4)(*c*) as the "standard in s. 251(4)" in *Morgentaler (1975)*, *supra*, at p. 629.

The remaining provisions of subss. (4), (5), (6) and (7) of s. 251 are designed to ascertain whether the standard has been met in a given case. To employ the expression of the Attorney General of Canada who intervened in this case in defence of s. 251, these provisions were designed, in part, "to allow relief from criminal sanction where there is a reliable, independent and medically sound judgment that the life or health of the mother would be or would likely be endangered...." Section 251(4)(*a*) requires, for example, that a therapeutic abortion committee give its opinion in writing that the standard has been met. The committee is comprised of not less than three qualified medical practitioners appointed by the board of the hospital where the treatment would take place. The qualified medical practitioner who would perform the abortion may not be a member of a therapeutic abortion committee for any hospital. The opinion must be that of the majority of the members of the committee and must be made by certificate in writing and given to the practitioner who, according to s. 251(4)(*a*), must be in "good faith" and, consequently, have no reason to believe that the standard in s. 251(4) (*c*) has not been met. The Minister of Health of the province in which the certificate was issued may by order require the therapeutic abortion committee to furnish him with a copy of the certificate. Other aspects of s. 251(4) are designed to ensure the safety of the abortion itself after the standard has been met and after the certificate to this effect has been issued enabling the woman to have a lawful abortion. These include the requirements that the practitioner be properly qualified and that the abortion be carried out in an accredited or approved hospital.

Overall, the procedure set forth at s. 251(4) is in place to ensure that the standard of the exception -- that the continuation of the pregnancy would or would be likely to endanger the pregnant woman's health -- is met before Parliament will allow an abortion to be performed without punishment. Parliament will protect the life and health of the pregnant woman by allowing her access to an abortion when it has been established, through the means selected by Parliament, that her life or health would or would likely be in danger if her pregnancy continued. The other provisions in s. 251(4), though necessary for an abortion to be lawful, were enacted to ensure that the standard was met and that, once met, the lawful abortion would be performed safely. These other rules are a means to an end and not an end unto themselves. As a whole, subss. (4), (5), (6) and (7) of s. 251 seek to make therapeutic abortions lawful and available but also to ensure that the excuse of therapy will not be abused and that lawful abortions be safe.

That abortions are recognized as lawful by Parliament based on a specific standard under its ordinary laws is important, I think, to a proper understanding of the existence of a right of access to abortion founded on rights guaranteed by s. 7 of the *Charter*. The constitutional right does not have its source in the *Criminal Code*, but, in my view, the content of the standard in s. 251(4) that Parliament recognized in the Criminal Law *Amendment Act, 1968-69* was for all intents and purposes entrenched at least as a minimum in 1982 when a distinct right in s. 7 became part of Canadian constitutional law.

II -- The Right to Security of the Person in s. 7 of the *Charter*

Section 7 of the *Charter* provides:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

I share the view first expressed by Wilson J. in *Singh v. Minister of Employment and Immigration*, 1985 CanLII 65 (SCC), [1985] 1 S.C.R. 177, at p. 205, and confirmed by Lamer J. in *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486, at p. 500, that "it is incumbent upon this Court to give meaning to each of the elements, life, liberty and security of the person, which make up the 'right' contained in s. 7." The full ambit of this constitutionally protected right will only be revealed over time. Consequently, the minimum content which I attribute to s. 7 does not preclude, or for that matter assure, the finding of a wider constitutional right when the courts will be faced with this or other issues in other contexts. As we shall see, the content of the "security of the person" element of the s. 7 right is sufficient in itself to invalidate s. 251 of the *Criminal Code* and consequently dispose of the appeal.

In discussing the content of the right protected by s. 7 of the *Charter* in the case at bar, the Ontario Court of Appeal wrote, at pp. 377-78, that "it would place too narrow an interpretation on s. 7 to limit it to protection against arbitrary arrest and detention". It will be seen from what follows that I agree with this view. Indeed the natural meaning of "life, liberty and security of the person" belies this limited view of the scope of s. 7. As Estey J. observed in *Law Society of Upper Canada v. Skapinker*, 1984 CanLII 3 (SCC), [1984] 1 S.C.R. 357, at p. 377, examining the "Legal Rights" heading which introduces ss. 7 to 14 of the *Charter* is at best one step in the constitutional interpretation process and is not necessarily of controlling importance. I am mindful, however, that it is in the criminal law context that "security of the person" and the alleged violation of s. 7 arise in this case. Enjoying "security of the person" free from criminal sanction is central to understanding the violation of the *Charter* right which I describe herein. It is not necessary to decide whether s. 7 would apply in other circumstances.

A pregnant woman's person cannot be said to be secure if, when her life or health is in danger, she is faced with a rule of criminal law which precludes her from obtaining effective and timely medical treatment.

Generally speaking, the constitutional right to security of the person must include some protection from state interference when a person's life or health is in danger. The *Charter* does not, needless to say, protect men and women from even the most serious misfortunes of nature. Section 7 cannot be invoked simply because a person's life or health is in danger. The state can obviously not be said to have violated, for example, a pregnant woman's security of the person simply on the basis that her pregnancy in and of itself represents a danger to her life or health. There must be state intervention for "security of the person" in s. 7 to be violated.

If a rule of criminal law precludes a person from obtaining appropriate medical treatment when his or her life or health is in danger, then the state has intervened and this intervention constitutes a violation of that man's or that woman's security of the person. "Security of the person" must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction.

If an act of Parliament forces a person whose life or health is in danger to choose between, on the one hand, the commission of a crime to obtain effective and timely medical treatment and, on the other hand, inadequate treatment or no treatment at all, the right to security of the person has been violated.

This interpretation of s. 7 of the *Charter* is sufficient to measure the content of s. 251 of the *Criminal Code* against that of the *Charter* in order to dispose of this appeal. While I agree with McIntyre J. that a breach of a right to security must be "based upon an infringement of some interest which would be of such nature and such importance as to warrant constitutional protection", I am of the view that the protection of life or health is an interest of sufficient importance in this regard. Under the *Criminal Code*, the only way in which a pregnant woman can legally secure an abortion when the continuation of the pregnancy would or would be likely to endanger her life or health is to comply with the procedure set forth in s. 251(4). Where the continued pregnancy does constitute a danger to life or health, the pregnant woman faces a choice: (1) she can endeavour to follow the s. 251(4) procedure, which, as we shall see, creates an additional medical risk given its inherent delays and the possibility that the danger will not be recognized by the state-imposed therapeutic abortion committee; or (2) she can secure medical treatment without respecting s. 251(4) and subject herself to criminal sanction under s. 251(2).

III -- Delays Caused by s. 251 Procedure in Violation of Security of the Person

This chapter requires a review of the evidence, part of which is to be found in two reports, the *Report of the Committee on the Operation of the Abortion Law* (the "Badgley Report"), and the *Report on Therapeutic Abortion Services in Ontario* (the "Powell Report").

The Badgley Report (1977) was written by a committee appointed by the Privy Council with a mandate to conduct a study to determine whether the procedure provided in the *Criminal Code* for obtaining therapeutic abortions is operating equitably across Canada and to make findings on the operation of this law rather than recommendations on the underlying policy: Badgley Report, at p. 27.

The Powell Report (1987) is a study commissioned by the Ministry of Health with terms of reference limited to a review of access to therapeutic abortion services in Ontario. Like those for the Badgley Report, these terms did not include the mandate for an evaluation of the underlying policy of the *Criminal Code*: Powell Report, Appendix 1.

I propose to consider first the delays caused by the s. 251 procedure and then the consequences of the delays.

1. *Delays Caused by the s. 251 Procedure*

The evidence reveals that the actual workings of s. 251(4) are the source of certain delays which create an additional medical risk for many pregnant women whose medical condition already meets the standard of s. 251(4)(*c*). Stated simply, when pregnant women suffer from a condition which represents a danger to their life or health, their efforts to conform to the procedure set forth for obtaining lawful abortions in the

Criminal Code often create an additional risk to their health. They may have to choose between bearing the burden of these risks by accepting delayed medical treatment, and committing a crime by seeking timely medical treatment outside s. 251(4). Given that the procedure in s. 251(4) is the source of this additional risk, it constitutes a violation of the pregnant woman's security of the person. I shall first endeavour to show that these delays have their origin in s. 251. I will then cite evidence that these procedural delays create an additional risk to the health of pregnant women.

While only administrative inefficiencies that are caused by the rules in s. 251 are relevant to the evaluation of the constitutionality of the legislation under s. 7 of the *Charter*, the evidence which relates to the availability of therapeutic abortions under the *Criminal Code* reveals three sorts of delay, all of which can be traced to the requirements of s. 251 itself: (1) the absence of hospitals with therapeutic abortion committees in many parts of Canada; (2) the quotas which some hospitals with committees impose on the number of therapeutic abortions which they perform and (3) the committee requirement itself each create delays for pregnant women who seek timely and effective medical treatment.

Lack of Hospitals with Therapeutic Abortion Committees

Hospitals with therapeutic abortion committees are completely lacking in many parts of Canada, forcing women to go elsewhere and suffer delays in order to gain access to hospitals in which they may obtain therapeutic abortions free from criminal sanction. The requirements which hospitals must meet under s. 251 are responsible for this absence of eligible hospitals. Often, the absence of hospitals can be traced to the prerequisites which hospitals must meet under s. 251(6). In other cases, the absence is caused by the refusal of certain hospital boards to appoint committees in hospitals which would otherwise qualify under the law, as is their prerogative under s. 251(6). I shall consider each of these in turn.

The effect of certain definitions in s. 251(6), when read in conjunction with s. 251(4), is to cause an absence of hospitals in which therapeutic abortions can legally be performed. A "therapeutic abortion committee" for any hospital means, according to s. 251(6), a committee comprised of not less than three physicians from which the physician who performs the abortion is excluded under s. 251(4). As the Chief Justice observed, the combined effect of these two provisions is to require at least four physicians at the hospital so that the therapeutic abortion can be lawfully authorized and performed. The four-physician requirement obviously precludes therapeutic abortions from being performed in hospitals where four doctors are not available.

Moreover, the requirement in s. 251(4) that lawful abortions can only be performed in "accredited" or "approved" hospitals also has the effect of contributing to the absence of hospitals, in some parts of Canada, in which lawful abortions are available. Section 251(6) defines "accredited hospital" as a hospital accredited by the Canadian Council on Hospital Accreditation in which diagnostic services and medical, surgical and obstetrical treatment are provided. Not only are some hospitals unable to qualify because they do not provide all these services, but some hospitals also fail to meet the Council's accreditation requirements.

Alternatively, therapeutic abortions may be performed in hospitals "approved" by the Ministers of Health in the province, and standards to be met for approval vary considerably from province to province. The Badgley Report, at pp. 91 *et seq.*, noted this variation in 1977. In Newfoundland, for example, the Department of Health guidelines required hospitals seeking approval to establish therapeutic abortion committees to have a minimum of six members of the medical staff willing to cooperate with or recognize the existence of a therapeutic abortion committee, the presence of a gynaecologist on the medical staff, and 100 beds or more in the hospital, even though many abortions are done on an out-patient basis. Thus, of 46 public general hospitals in the province in 1976, 35 were excluded by these provincial criteria, leaving only 11 hospitals qualified to establish therapeutic abortion committees, with no obligation to do so. In Saskatchewan, where provincial regulations included a requirement of a rated bed capacity of 50 beds or more, 110 of 133 general hospitals were ineligible to establish a therapeutic abortion committee. In Ontario, where the provincial regulations included a requirement of 10 or more members on a hospital's active medical staff, 51 of 205 general hospitals were ineligible to establish committees.

The *Criminal Code*, under the "approved" hospital requirement, not only allows for an unequal distribution of hospitals across Canada, but also permits provincial authorities to set standards which appear at times largely irrelevant to the performance of therapeutic abortions.

Thus, the requirements of s. 251 seriously limit the number of hospitals which are eligible to perform lawful abortions, causing an absence or a serious lack of therapeutic abortion facilities in many parts of the country. The conclusions of the Badgley Report are startling (at p. 105):

Of the total of 1,348 non-military hospitals in Canada in 1976, 789 hospitals, or 58.5 percent, were ineligible in terms of their major treatment functions, the size of their medial staff, or their type of facility to establish therapeutic abortion committees.

The rules in s. 251(4) limiting the number of eligible hospitals means that a significant proportion of Canada's population is not served by hospitals in which therapeutic abortions can lawfully be performed. The Badgley Report, at p. 109, concluded in 1977 that 39.3 per cent of the total female population of Canada was not served by eligible hospitals. As we have already seen, the absence of eligible hospitals in some parts of Canada compels many pregnant women to leave their own communities to seek medical treatment in a place where an eligible hospital is available to admit them as patients. A pregnant woman in these circumstances will inevitably incur a delay in obtaining a therapeutic abortion.

The lack of hospitals with therapeutic abortion committees is made more serious by the refusal of certain hospital boards to appoint therapeutic abortion committees in hospitals which would otherwise qualify under the *Criminal Code*. Given that therapeutic abortions can only be performed in eligible hospitals and that the committee certifying the abortion must come from that hospital, this effectively contributes to the inaccessibility of the treatment. Nothing in the *Criminal Code* obliges the board of an eligible hospital to appoint therapeutic abortion committees. Indeed, a board is entitled to refuse to appoint a therapeutic abortion committee in a hospital that would otherwise qualify to perform abortions and boards often do so in Canada. Given that the decision to appoint a committee is, in part, one of conscience and, in some cases, one which affects religious beliefs, a law cannot force a board to appoint a committee any more

than it could force a physician to perform an abortion. The defect in the law is not that it does not force boards to appoint committees, but that it grants exclusive authority to those boards to make such appointments.

In "Abortion and the Just Society" (1970), 5*R.J.T.* 27, at p. 36, lawyer Natalie Fochs Isaacs correctly anticipated the effect of the exclusive authority of hospital boards in establishing committees

S. 237 [now s. 251] sets out the requirement of the certification of therapeutic abortion by a therapeutic abortion committee prior to its performance. But the section does not require any hospital to set up such a committee. Given the undesirability of forcing any hospital to do so, the restriction of legal abortions to this type of preliminary certification fails nevertheless to provide for alternative methods of prior medical consultation among those staff members of any hospital opposed to the creation of the committee required, who themselves approve of therapeutic abortions. The new legislation in this manner also places the prospective petitioner for the operation at the mercy of the institutional policy of what may be the only hospital available in her community. [Footnotes omitted.]

The Badgley Report, at p. 93, again documented the reduction of the number of hospitals with therapeutic abortion committees due to the refusal of boards of hospitals which would otherwise qualify under the law to appoint committees. In Newfoundland, 6 of the 11 hospitals which were otherwise qualified to perform therapeutic abortions did in fact appoint committees so that only 6 of a total of 46 general hospitals were eligible to perform therapeutic abortions under the *Criminal Code*. In Quebec, 31 of 128 general hospitals appointed therapeutic abortion committees. In Saskatchewan, 10 of 133 general hospitals appointed committees. In Manitoba, 8 of 78 general hospitals appointed committees. Overall, the Badgley Report, *supra*, at p. 105, concluded in the following terms:

In terms of all civilian hospitals (1,348) in Canada in 1976, 20.1 percent had established a therapeutic abortion committee. If only those general hospitals which met hospital practices and provincial requirements and were not exempt in terms of their special treatment facilities are considered, then of these 559 hospitals, 271 hospitals, or 48.5 percent, had established therapeutic abortion committees, while 288 hospitals, or 51.5 percent, did not have these committees.

According to the Powell Report, a comparable fraction of hospitals had established therapeutic abortion committees in Ontario: "out of 176 accredited acute care hospitals, 95 (54%) had therapeutic abortion committees" (at p. 24). The figures reported by the Badgley Committee in 1977 were confirmed in a recent Statistics Canada report according to which the total number of hospitals with therapeutic abortion committees fell across the country from 271 in 1976 to 250 in 1985 (*Therapeutic abortions, 1985* (1986), at p. 12).

For the purposes of the case at bar, it is important to reiterate that the absence of hospitals with therapeutic abortion committees in many parts of Canada is caused by the following requirements of the law:

(a) that a total of four physicians in the hospital must participate in the authorization and performance of the therapeutic abortion;

(b) that the hospital must be "approved" or "accredited"; and
(c) that only the board of the hospital is entitled to appoint a therapeutic abortion committee.

Finally, it is worth noting that 18 per cent of the hospitals that did have therapeutic abortion committees in 1984 performed no therapeutic abortions (*Therapeutic abortions, 1985*, *supra*, at p. 38). Dr. Augustin Roy, the President of the Corporation professionnelle des médecins du Québec, testified at trial that of the 30 hospitals with therapeutic abortion committees in Quebec, "only about fourteen or fifteen of these hospitals are operational, because many of them, say half of them, have a committee but they don't do any abortions. It is a committee on paper."

A hospital with a dormant committee is no more useful to a pregnant woman seeking a therapeutic abortion than a hospital without a committee or no hospital at all. The delay suffered by a pregnant woman because her local hospital has a dormant committee is perhaps more the result of internal hospital policy than of s. 251 of the *Criminal Code*, but s. 251 is at least indirectly the cause of the delay in requiring an opinion from the therapeutic abortion committee of that hospital before a lawful abortion can be performed there.

(2) Delays Caused by Quotas

Delays result not only from the absence or inactivity of therapeutic abortion committees. The evidence discloses that some hospitals with committees impose quotas on the number of therapeutic abortions which they perform while others place quotas on patients depending on their place of residence. The evidence at trial confirmed that these quotas, initially observed in the Badgley Report, at pp. 258 *et seq.*, have been retained in many Canadian hospitals and that they often delay timely medical treatment for pregnant women seeking therapeutic abortions. It is true, of course, that these quotas are set by internal hospital policy and not by the terms of the law itself. It is also true that quotas may be necessary given hospitals' limited resources and the significant demands placed on those resources by pregnant women seeking abortions, some of whom may not qualify for therapeutic abortions in respect of the standard of s. 251(4). There is evidence, however, of quotas in absolute numbers of abortions performed and quotas based on the place of residence which can affect women who otherwise qualify for lawful abortions under s. 251(4)(*c*). Indeed the Badgley Committee reported in 1977, at p. 259, that:

Two out of five hospitals (38.2 per cent) considered only applications from women who were considered to reside with the hospital's usual service catchment area. Residential requirements and patient quotas were more often adopted in the Maritimes (43.8 per cent) and Quebec (66.7 per cent) than among hospitals elsewhere where about a third followed this practice. Where the proportion of the hospitals with committees having these residency or quota requirements was higher in a province or a region, there were proportionately more women who went to the United States to obtain induced abortions.

These quotas are inevitable given that s. 251 requires that therapeutic abortions be performed only in eligible hospitals and that there is a lack of hospitals with committees in some parts of the country. The quotas cannot, therefore, be said to reflect simple administrative or budgetary constraints. In this respect, the s. 251 procedure is again the source of delays in medical treatment.

Delays Caused by the Committee Requirement

The committee requirement itself contributes to a delay in securing treatment. The law requires the therapeutic abortion committee to certify that the standard of s. 251(4) has been met before a therapeutic abortion can proceed lawfully. As I shall endeavour to explain in my consideration of s. 251 and the principles of fundamental justice, I believe that the state interest in the protection of the foetus justifies the requirement that the standard of s. 251(4) be ascertained by independent medical opinion. This being the case, some delay will always be incurred whatever system is put in place to ensure that the standard has been met. However, at this stage of my analysis, I seek only to establish that a delay has in fact been caused by the present requirements of the *Criminal Code.*

The time needed to convene the committee in the hospital, for the pregnant woman's file to come before the committee, for her application to be evaluated by whatever means the committee may choose and for the certificate to be issued to the qualified medical practitioner together create some delay for obtaining treatment. The Badgley Report, at p. 146, identified an average interval of 8.0 weeks until the induced abortion operation was done after the pregnant woman's initial visit to her physician. Some of this delay is attributable to the absence of committees and hospital quotas which I have outlined above. It is difficult to isolate with precision the fraction of the delay attributable to the committee requirement taken by itself. It is relevant as one part of the overall delay which pregnant women must endure to obtain a therapeutic abortion.

In spite of evidence that the overall delay has been reduced, as will be seen shortly, the committee requirement continues to add to the delay. In 1987, the Powell Report, at p. 27, identified as one problem the number of committee members who must certify that the s. 251(4) standard has been met:

The number of members on the TAC [therapeutic abortion committee] ranges from three to five although up to seven members sit on some committees. When five or seven members have been appointed and no quorum is stated, a majority of the committee (three to five) must be present and three must approve each abortion. This has caused problems in several of the hospitals contacted, where it was not possible for an adequate number of members to be present and the meeting had to be rescheduled. Thus precious time was lost and the abortion delayed to a more advanced gestational age.

Furthermore, the delays caused by the committee requirements necessarily impact upon the pregnant woman who seeks to become a patient of the hospital for which the committee has been appointed. Section 251(4) states in part that it is "the therapeutic abortion committee for that accredited or approved hospital" which must issue the certificate [emphasis added]. This precludes a committee from one hospital from authorizing abortions which take place at other hospitals. Eliminating such a requirement would have the effect of shortening the delays without forcing reluctant hospital boards or hospital staff to participate. 2. *Consequences of the Delays*

The delays which a pregnant woman may have to suffer as a result of the requirements of s. 251(4) must undermine the security of her person in order that there be a violation of this element of s. 7 of the *Charter*. As I said earlier, s. 7 cannot be invoked simply because a woman's pregnancy amounts to a

medically dangerous condition. If, however, the delays occasioned by s. 251(4) of the *Criminal Code* result in an additional danger to the pregnant woman's health, then the state has intervened and this intervention constitutes a violation of that woman's security of the person. By creating this additional risk, s. 251 prevents access to effective and timely medical treatment for the continued pregnancy which would or would be likely to endanger her life or health. If an effective and timely therapeutic abortion may only be obtained by committing a crime, then s. 251 violates the pregnant woman's right to security of the person.

The evidence reveals that the delays caused by s. 251(4) result in at least three broad types of additional medical risks. The risk of post-operative complications increases with delay. Secondly, there is a risk that the pregnant woman require a more dangerous means of procuring a miscarriage because of the delay. Finally, since a pregnant woman knows her life or health is in danger, the delay created by the s. 251(4) procedure may result in an additional psychological trauma. I shall explain each of the additional risks in turn.

The Chief Justice outlined the different techniques employed to perform abortions at different stages of pregnancy and the increasing risk attached to each method as gestational age advances. As he also noted, the evidence showed that within the periods appropriate to each method of abortion, the earlier the abortion was performed, the lower the risk of complication. Evidence introduced at trial confirms findings in the Badgley Report, at pp. 308 *et seq.*, and the Powell Report, at p. 23, that the earlier an abortion is performed, the less chance a woman has of experiencing a post-operative complication, whatever abortion technique is used. The respondent agrees with this proposition but cites the low complication rate across Canada and the negligible mortality rate reported since 1974 as evidence that abortion under the current system is very safe. According to *Therapeutic abortions, 1985*, *supra*, at p. 20, no Canadian women have died as a result of therapeutic abortion since 1979.One such death took place in 1974 and another in 1979.

It should be noted, however, that reported complication rates for any given abortion technique are generally limited to certain post-operative physical complications and do not include data on psychological complications inherent to those techniques. Furthermore, the psychological trauma that women suffer before the operation is not reflected in reported figures. This is equally true for any physical complications associated with the pregnant woman's initially dangerous condition which may arise during the delay before the therapeutic abortion.
However low the post-operative complication rate may appear, it increases as gestational age advances. In other words, with each passing week of pregnancy, even in the very early stages, the risk to health that an abortion represents increases. *Therapeutic abortions, 1982* confirms this. The complication rate for abortions performed under nine weeks was 0.7 per cent. This increased to 1.0 per cent in the 9 to 12 week gestation period. A complication rate of 8.5 per cent was reported for the 13 to 16 week gestation period. The complication rate for the 17 to 20 week gestation period was higher still, reported as 22 per cent (*Therapeutic abortions, 1982* (1984), at p. 111). Ontario statistics cited in the Powell Report confirm these national figures for that province. Data from 1976, 1981 and 1984 confirm the relation between abortion complications and gestational age in Ontario. In terms of absolute numbers, there were twice as many reported complications for women with gestational age 13 weeks and above compared to gestational age under 13 weeks. The rate expressed as a percentage of total reported therapeutic abortions

performed ("per 100 gestational age specific abortions") was ten times higher for the group of women with gestational age 13 weeks and above (see Powell Report, at p. 23 and Table 4).

The procedure set forth in s. 251(4) of the *Criminal Code* often causes, as we have seen, significant delays in obtaining therapeutic abortions. Delay increases the risk of post-operative complications. Section 251(4) thereby violates a pregnant woman's security of the person.

As I have already observed, the evidence indicates that the different techniques employed to perform abortions in Canada at different stages of pregnancy progressively increase risks to the woman. Expert testimony established that the suction dilation and curettage method generally used in the first twelve weeks is the safest technique. The dilation and evacuation method used from the thirteenth to the sixteenth week is relatively more dangerous. From the sixteenth week of pregnancy, an even more dangerous instillation method may be used. This method involves the introduction of prostaglandin, urea or saline solution which causes the woman to go into labour, giving birth to a foetus which is usually dead but not invariably so. Although the number of abortions done by the instillation technique amounts to only 4.5 per cent of the total number of therapeutic abortions performed in Canada, saline, urea or prostaglandin instillation is nevertheless used for 85.6 per cent of therapeutic abortions for women at least 16 weeks pregnant (*Therapeutic abortions, 1985*, *supra*, at pp. 18-19). It has been shown that the complication rate increases dramatically with the use of the instillation procedure (ibid., at p. 50). In addition, psychological trauma resulting from induced labour and the birth of the foetus is a very real consideration which is not included in post- operative statistics. It is in the pregnant woman's utmost interest that the delay for obtaining a therapeutic abortion be as short as possible so that the risks associated with more dangerous abortion techniques can be avoided.

Women are aware of the increased risk associated with the later stage abortion techniques. They are also aware of the more traumatic circumstances in which these techniques, particularly the instillation methods, are carried out. It is thus not only the risk of post-operative complications that increases progressively with each method. Women are aware of the increased risk well before the operation is performed. Experts testified at trial that awareness of the increased post-operative risk and of the added trauma associated with the later-stage methods create an increased psychological risk to health distinct from the increased physical risk. There is a world of difference, from the psychological point of view of the patient, between a reputedly safe technique of abortion performed under local anaesthetic requiring only a few hours in a hospital and an abortion procedure with a substantially higher complication rate performed under general anaesthetic requiring a longer period of hospitalization, and involving the trauma of induced labour and the delivery of a dead foetus. When the delays caused by s. 251(4) require a woman to undergo a saline procedure abortion, for example, the psychological trauma associated with that procedure amounts to an additional risk to health attributable to the *Criminal Code*. More generally, the delay that a pregnant woman must endure before she receives treatment of any kind results in psychological trauma. To force a woman, under threat of criminal sanction, to wait for medical treatment when she knows that her pregnancy represents a danger to her life or health is a violation of her right to security of the person. As was stated in *Collin v. Lussier*, [1983] 1 F.C. 218, at p. 239 (later reversed on appeal, reflex, [1985] 1 F.C. 124, but cited with approval on this point by Wilson J. in *Singh v. Minister of Employment and Immigration*, *supra*, at p. 208):

. . . such detention, by increasing the applicant's anxiety as to his state of health, is likely to make his illness worse and, by depriving him of access to adequate medical care, it is in fact an impairment of the security of his person

The psychological trauma that a pregnant woman suffers as a result of the delay shows that the procedure established by the *Criminal Code* violates the security of her person.

I have observed three instances in which s. 251 of the *Criminal Code* results in delays for women who qualify for therapeutic abortions in respect of the standard of s. 251(4) (*c*). This being said, the overall delay appears to have been reduced from the 8.0 weeks observed by the Badgley Committee in 1977. Evidence indicates that where a hospital with a committee is in place in a region, as in the case of Toronto, pregnant women can obtain therapeutic abortions within one to three weeks from their initial contact with a physician. Experts testified at trial that these delays are longer in some parts of the country, particularly in Quebec, but that overall delays have, on balance, been reduced. Furthermore, therapeutic abortion committees generally can speed up the certification process in an emergency situation, particularly when the pregnant woman's gestational age requires immediate medical attention. In spite of the reduction, however, these delays continue to result in an additional risk to the health of these women. The risk of post-operative complications increases with each passing week of delay. There is a heightenephysical and psychological risk associated with later stage pregnancy techniques for abortion. Finally, psychological trauma increases with delay. The delays mean therefore that the state has intervened in such a manner as to create an additional risk to health, and consequently this intervention constitutes a violation of the woman's security of the person.

IV -- The Principles of Fundamental Justice

I turn now to a consideration of the manner in which pregnant women are deprived of their right to security of the person by s. 251. Section 7 of the *Charter* states that everyone has the right not to be deprived of security of the person except in accordance with the principles of fundamental justice. As I will endeavour to demonstrate, s. 251(4) does not accord with the principles of fundamental justice. I am of the view, however, that certain elements of the procedure for obtaining a therapeutic abortion which counsel for the appellants argued could not be saved by the second part of s. 7 are in fact in accordance with the principles of fundamental justice. The expression of the standard in s. 251(4)(*c*), and the requirement for some independent medical opinion to ascertain that the standard has been met as well as the consequential necessity of some period of delay to ascertain the standard are not in breach of s. 7 of the *Charter*.

Counsel for the appellants argued that the expression of the standard in s. 251(4)(*c*) is so imprecise that it offends the principles of fundamental justice. He submits that pregnant women are arbitrarily deprived of their s. 7 right by reason of the different meanings that can be given to the word "health" in s. 251(4)(*c*) by therapeutic abortion committees.

I agree with McIntyre J. and the Ontario Court of Appeal that the expression "the continuation of the pregnancy of such female person would or would be likely to endanger her life or health" found in s. 251(4)(*c*) does provide, as a matter of law, a sufficiently precise standard by which therapeutic abortion committees can determine when therapeutic abortions should be granted.

As the Court of Appeal said, *supra*, at p. 388:

In this case . . . from a reading of s. 251 with its exceptions, there is no difficulty in determining what is proscribed and what is permitted. It cannot be said that no sensible meaning can be given to the words of the section. Thus, it is for the courts to say what meaning the statute will bear.

Laskin C.J. held in *Morgentaler (1975)*, at p. 634, that s. 251(4)(*c*) was not so vague so as to constitute a violation of "security of the person" without due process of law under s. 1(*a*) of the *Canadian Bill of Rights*:

It is enough to say that Parliament has fixed a manageable standard because it is addressed to a professional panel, the members of which would be expected to bring a practised judgment to the question whether "the continuation of the pregnancy . . . would or would be likely to endanger . . . life or health." Moreover, I am of the view that Parliament would assign such an exercise of judgment to a professional group without colliding with any imperatives called for by due process of law under s. 1 (*a*).

I agree with Laskin C.J. that the standard is manageable because it is addressed to a panel of doctors exercising medical judgment on a medical question. This being the case, the standard must necessarily be flexible. Flexibility and vagueness are not synonymous. Parliament has set a medical standard to be determined over a limited range of circumstances. With the greatest of respect, I cannot agree with the view that the therapeutic abortion committee is a "strange hybrid, part medical committee and part legal committee" as the Chief Justice characterizes it (at p. 69). In section 251(4) Parliament has only given the committee the authority to make a medical determination regarding the pregnant woman's life or health. The committee is not called upon to evaluate the sufficiency of the state interest in the foetus as against the woman's health. This evaluation of the state interest is a question of law already decided by Parliament in its formulation of s. 251(4). Evidence has been submitted that many committees fail to apply the standard set by Parliament by requiring the consent of the woman's spouse, by refusing to authorize second abortions or by refusing all abortions to married women. In so far as these and other requirements fall outside s. 251(4)(*c*), they constitute an unfounded interpretation of the plain terms of the *Criminal Code*. These patent excesses of authority do not, however, mean that the standard of s. 251 is vague.

The wording of s. 251(4)(*c*) limits the authority of the committee. The word "health" is not vague but plainly refers to the physical or mental health of the pregnant woman. I note with interest the decision of the Supreme Court of the United States in*United States v. Vuitch*, MANU/USSC/0086/1971 : 402 U.S. 62 (1971), in which a District of Columbia statute outlawing abortions except when they were "necessary for the preservation of the mother's life or health" was at issue. It was argued that the word "health" was so imprecise and had so uncertain a meaning that the statute offended the Due Process Clause of the United States Constitution. Mindful of the differences between the Due Process Clause and the principles of fundamental justice in s. 7 of the *Charter*, I nevertheless believe the following extract, at p. 72, of the majority opinion delivered by Black J. to be instructive:

. . . the general usage and modern understanding of the word "health" . . . includes psychological as well as physical well-being. Indeed Webster's Dictionary, in accord with that common usage, properly defines

health as the "[s]tate of being ... sound in body [or] mind." Viewed in this light, the term "health" presents no problem of vagueness. Indeed, whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered.

The standard is further circumscribed by the word "endanger". Not only must the continuation of the pregnancy affect the woman's life or health, it must endanger life or health, so that a committee that authorizes an abortion when this element is not present or fails to authorize it when it is present exceeds its authority. Finally, the expression "would or would be likely" eliminates any requirement that the danger to life or health be certain or immediate at the time the certificate is issued. The presence of the exculpatory provision in the *Criminal Code* and the wording of the standard itself point to the parameters of s. 251(4). The required standard of threat to life or health must necessarily be lesser than that required under the common law defence of necessity, otherwise s. 251(4) would be superfluous. It is proper to infer, on the other hand, that s. 251(4) must be interpreted as relating solely to therapeutic grounds since only qualified medical practitioners are entitled to evaluate the threat to life or health.

Not only is the standard expressed in s. 251(4)(*c*) sufficiently precise to permit therapeutic abortion committees to determine when therapeu- tic abortions should be granted, but the crime of procuring a miscarriage is expressed with sufficient clarity for those subject to its terms so as not to offend the principles of fundamental justice. In this respect, counsel for the respondent correctly observed in his written argument that ". . . s. 251 presents no degree of uncertainty or vagueness as to potential criminal liability: anyone charged with an offence would know whether prohibited conduct was being undertaken and whether an exemption certificate had been received. Equally, any official entrusted with enforcing this section would know whether an offence had been committed." Police officers are not called upon by the section to define "health" but, in respect of the medical justification for a therapeutic abortion, they must ensure that a certificate in writing has been duly issued.

Just as the expression of the standard in s. 251(4)(*c*) does not offend the principles of fundamental justice, the requirement that an independent medical opinion be obtained for a therapeutic abortion to be lawful also cannot be said to constitute a violation of these principles when considered in the context of pregnant women's right to security of the person.

I n *R. v. Jones*, 1986 CanLII 32 (SCC), [1986] 2 S.C.R. 284, at p. 304, La Forest J. explained that the legislator must be accorded a certain latitude to make choices regarding the type of administrative structure that will suit its needs unless the use of such structure is in itself "so manifestly unfair, having regard to the decisions it is called upon to make [emphasis added], as to violate the principles of fundamental justice". An administrative structure made up of unnecessary rules, which result in an additional risk to the health of pregnant women, is manifestly unfair and does not conform to the principles of fundamental justice. Section 251(4), taken as a whole, does not accord with the principles of fundamental justice in that certain of the procedural requirements of s. 251 create unnecessary delays. As will be seen, some of these requirements are manifestly unfair because they have no connection whatsoever with Parliament's objectives in establishing the administrative structure in s. 251(4). Although connected to Parliament's objectives, other rules in s. 251(4) are manifestly unfair because they are not necessary to assure that the objectives are met.

As I noted in my analysis of s. 251(4), by requiring that a committee state that the medical standard has been met for the criminal sanction to be lifted, Parliament seeks to assure that there is a reliable, independent and medically sound opinion that the continuation of the pregnancy would or would be likely to endanger the woman's life or health. Whatever the failings of the current system, I believe that the purpose pursuant to which it was adopted does not offend the principles of fundamental justice. As I shall endeavour to explain, the current mechanism in the *Criminal Code* does not accord with the principles of fundamental justice. This does not preclude, in my view, Parliament from adopting another system, free of the failings of s. 251(4), in order to ascertain that the life or health of the pregnant woman is in danger, by way of a reliable, independent and medically sound opinion.

Parliament is justified in requiring a reliable, independent and medically sound opinion in order to protect the state interest in the foetus. This is undoubtedly the objective of a rule which requires an independent verification of the practising physician's opinion that the life or health of the pregnant woman is in danger. It cannot be said to be simply a mechanism designed to protect the health of the pregnant woman. While this latter objective clearly explains the requirement that the practising physician be a "qualified medical practitioner" and that the abortion take place in a safe place, it cannot explain the necessary intercession of an in-hospital committee of three physicians from which is excluded the practising physician.

While a second medical opinion is very often seen as necessary in medical circles when difficult questions as to a patient's life or health are at issue, the independent opinion called for by the *Criminal Code* has a different purpose. Parliament requires this independent opinion because it is not only the woman's interest that is at stake in a decision to authorize an abortion. The Ontario Court of Appeal alluded to this at p. 378 when it stated that "One cannot overlook the fact that the situation respecting a woman's right to control her own person becomes more complex when she becomes pregnant, and that some statutory control may be appropriate". The presence of the foetus accounts for this complexity. By requiring an independent medical opinion that the pregnant woman's life or health is in fact endangered, Parliament seeks to ensure that, in any given case, only therapeutic reasons will justify the decision to abort. The amendments to the *Criminal Code* in 1969 amounted to a recognition by Parliament, as I have said, that the interest in the life or health of the pregnant woman takes precedence over the interest of the state in the protection of the foetus when the continuation of the pregnancy would or would be likely to endanger the pregnant woman's life or health. Parliament decided that it was necessary to ascertain this from a medical point of view before the law would allow the interest of the pregnant woman to indeed take precedence over that of the foetus and permit an abortion to be performed without criminal sanction.

I do not believe it to be unreasonable to seek independent medical confirmation of the threat to the woman's life or health when such an important and distinct interest hangs in the balance. I note with interest that in a number of foreign jurisdictions, laws which decriminalize abortions require an opinion as to the state of health of the woman independent from the opinion of her own physician. The Crown, in its book of authorities, cited the following statutes which included such a mechanism: United Kingdom, *Abortion Act, 1967*, 1967, c. 87, s. 1(1)(*a*); Australian Northern Territory, *Criminal Law Consolidation Act and Ordinance*, s. 79 A(3)(a); South Australia, *Criminal Law Consolidation Act*, 1935-1975, s. 82a(1)(*a*); Federal Republic of Germany, *Criminal Code*, as amended by the *Fifteenth Criminal Law*

Amendment Act(1976), s. 219; Israel, *Penal Law*, 5737-1977 (as amended), s. 315; New Zealand, *Crimes Act 1961*, as amended by the *Crimes Amendment Act 1977* and the *Crimes Amendment Act 1978*, s. 187A(4); *Code pénal suisse*, art. 120(1). This said, the practising physician must, according to s. 251(4)(*a*), be in "good faith" and, consequently, have no reason to believe that the standard in s. 251(4)(*c*) has not been met. The practising physician is, however, properly excluded from the body giving the independent opinion. I believe that Parliament is justified in requiring what is no doubt an extraordinary medical practice in its regulation of the criminal law of abortion in accordance with the various interests at stake.

The assertion that an independent medical opinion, distinct from that of the pregnant woman and her practising physician, does not offend the principles of fundamental justice would need to be reevaluated if a right of access to abortion is founded upon the right to "liberty" in s. 7 of the *Charter*. I am of the view that there would still be circumstances in which the state interest in the protection of the foetus would require an independent medical opinion as to the danger to the life or health of the pregnant woman. Assuming without deciding that a right of access to abortion can be founded upon the right to "liberty", there would be a point in time at which the state interest in the foetus would become compel- ling. From this point in time, Parliament would be entitled to limit abortions to those required for therapeutic reasons and therefore require an independent opinion as to the health exception. The case law reveals a substantial difference of opinion as to the state interest in the protection of the foetus as against the pregnant woman's right to liberty. Wilson J., for example, in her discussion of s. 1 of the *Charter* in the case at bar, notes the following, at p. 183:

The precise point in the development of the foetus at which the state's interest in its protection becomes "compelling" I leave to the informed judgment of the legislature which is in a position to receive guidance on the subject from all the relevant disciplines. It seems to me, however, that it might fall somewhere in the second trimester.

This view as to when the state interest becomes compelling may be compared with that of O'Connor J. of the United States Supreme Court in her dissenting opinion in*City of Akron v. Akron Center for Reproductive Health, Inc.*, MANU/USSC/0082/1983 : 462 U.S. 416 (1983), at pp. 460-61:

In *Roe* [*Roe* v. *Wade* MANU/USSC/0177/1972 : 410 U.S. 113 (1973)], the Court held that although the State had an important and legitimate interest in protecting potential life, that interest could not become compelling until the point at which the fetus was viable. The difficulty with this analysis is clear: *potential* life is no less potential in the first weeks of pregnancy than it is at viability or afterward. At any stage in pregnancy, there is the *potential* for human life. Although the Court refused to "resolve the difficult question of when life begins," *id*., at 159, the Court chose the point of viability -- when the foetus is *capable* of life independent of its mother -- to permit the complete proscription of abortion. The choice of viability as the point at which state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward. Accordingly, I believe that the State's interest in protecting potential human life exists throughout the pregnancy.

As I indicated at the outset of my reasons, it is nevertheless possible to resolve this appeal without attempting to delineate the right to "liberty" in s. 7 of the *Charter*. The violation of the right to "security of the person" and the relevant principles of fundamental justice are sufficient to invalidate s. 251 of the *Criminal Code*.

Some delay is inevitable in connection with any system which purports to limit to therapeutic reasons the grounds upon which an abortion can be performed lawfully. Any statutory mechanism for ensuring an independent confirmation as to the state of the woman's life or health, adopted pursuant to the objective of assuring the protection of the foetus, will inevitably result in a delay which would exceed whatever delay would be encountered if an independent opinion was not required. Furthermore, rules promoting the safety of abortions designed to protect the interest of the pregnant woman will also cause some unavoidable delay. It is only in so far as the administrative structure creates delays which are unnecessary that the structure can be considered to violate the principles of fundamental justice. Indeed, an examination of the delays caused by certain of the procedural requirements in s. 251(4) reveals that they are unnecessary, given Parliament's objectives in establishing the administrative structure. I note parenthetically that it is not sufficient to argue that the structure would operate in a fair manner but for the applications from women who do not qualify in respect of the standard in s. 251(4)(*c*). A fair structure, put in place to decide between those women who qualify for a therapeutic abortion and those who do not, should be designed with a view to efficiently meeting the demands which it must necessarily serve.

One such example of a rule which is unnecessary is the requirement in s. 251(4) that therapeutic abortions must take place in an eligible hospital to be lawful. I have observed that s. 251(4) directs that therapeutic abortions take place in accredited or approved hospitals, with at least four physicians, and that, because of the lack of such hospitals in many parts of Canada, this often causes delay for women seeking treatment. As I noted earlier, this requirement was plainly adopted to assure the safety of the abortion procedure generally, and particularly the safety of the pregnant woman, after the standard of s. 251(4) has been met and after the certificate to this effect has been issued enabling the woman to have a lawful abortion. The objective in respect of which the in- hospital rule was adopted is safety and not the state interest in the protection of the foetus. As the rule stands in s. 251(4), however, no exception is currently possible. The evidence discloses that there is no justification for the requirement that all therapeutic abortions take place in hospitals eligible under the *Criminal Code*. In this sense, the delays which result from the hospital requirement are unnecessary and, consequently, in this respect, the administrative structure for therapeutic abortions is manifestly unfair and offends the principles of fundamental justice.

Experts testified at trial that the principal justification for the in-hospital rule is the problem of post-operative complications. There are of course instances in which the danger to life or health observed by the therapeutic abortion committee will constitute sufficient grounds for the procedure to take place in a hospital. There are other instances in which the circumstances of the procedure itself requires that it be performed in hospital, such as certain abortions performed at an advanced gestational age or cases in which the patient is particularly vulnerable to what might otherwise be a simple procedure.

In many cases, however, there is no medical justification that the therapeutic abortion take place in a hospital. Experts testified at trial, that many first trimester therapeutic abortions may be safely performed

in specialized clinics outside of hospitals because the possible complications can be handled, and in some cases better handled, by the facilities of a specialized clinic. The parties submitted statistics comparing complication rates for in-hospital abortions and those performed in non-hospital facilities. These statistics are of limited value for our purposes because, not surprisingly, the higher reported rates in hospitals are due in part to the fact that the more dangerous cases are treated in hospital. What is more revealing, however, are statistics which show that a high percentage of therapeutic abortions performed in Canada are performed on an out patient basis:

The average length of stay in hospitals per therapeutic abortion case was less than a day in 1985. This average includes 46,567 cases or 76.9 per cent of 60,518 therapeutic abortion cases for women, for whom the pregnancy terminations took place on an outpatient (day care) basis. The per cent of outpatient therapeutic abortions increased to 76.9% in 1985 from 59.7% in 1981 and 34.9% in 1975. [*Therapeutic abortions, 1985*, *supra*, at p. 20.]

The substantial increase in the percentage of abortions performed on an out-patient basis since 1975 underscores the view that the in-hospital requirement, which may have been justified when it was first adopted, has become exorbitant. One suspects that the number of out-patient abortions would be even higher if the *Criminal Code* did not prevent women in many parts of Canada from obtaining timely and effective treatment by requiring them to travel to places where eligible hospital facilities were available. Furthermore, these figures do not include out-patient abortions which may have qualified as therapeutic under the standard in s. 251(4)(*c*) which were performed on Canadian women in the United States and in clinics currently operating in Canada outside the s. 251(4) exception. Citing the Canadian abortion law's in-hospital requirement as a legislative standard which is difficult to satisfy, Rebecca J. Cook and Bernard M. Dickens observe that "Rigid statutory formulae may not improve . . . distribution of services but may obstruct appropriate response to health needs": *Abortion Laws in Commonwealth Countries* (1979), at p. 28.

In the Powell Report, several recommendations were made as to options for abortion service delivery in Ontario. In support of these recommendations, the Report included the following, at pp. 21 and 35:

When many countries legalized abortion, hospitals were viewed as the appropriate providers of safe abortion services. Since then, studies have demonstrated that abortions can be performed safely in other types of facilities, (Tietze & Henshaw, 1986). The complication rate for all abortions performed in nonhospital facilities, is no higher than for those which take place in hospitals (Grimes et al., 1981).
...
Hospitals are often hard pressed to find time in the busy operating room schedules to fit in abortion procedures. In most hospitals, abortions are not viewed as a priority for scheduling. Gynaecologists must fit abortions into their allotted time in operating rooms. Although abortions can be performed in minor procedure rooms with no jeopardy to the patient, this is an unusual practice.

The presence of legislation in other jurisdictions permitting certain abortions to be performed outside of hospitals is especially revealing as to the safety of the procedure in those circumstances and of the necessity to provide alternative means given the limited resources of hospitals. In the Powell Report, it

was observed, at p. 21, that: In a number of European countries, including the Netherlands, Poland and West Germany, approximately half of the abortions are performed in non-hospital facilities. In France in 1982, 53 percent of abortions were performed in 90 "centres d'interruption volontaire de grossesse" which were administered by hospitals but were in practice separate abortion clinics. The French government ordered all public hospitals that could not meet the demand for abortions to provide such clinics.

Particularly striking is the United States experience in respect of the in-hospital rule. The Powell Report noted that 82 per cent of abortions performed in the United States in 1982 were done outside of hospitals (at p. 22). Experts confirmed this finding at trial. Dr. Christopher Tietze, a recognized expert on abortion, explained at trial that in 1981 all out-of-hospital abortion clinics in the United States performed abortions up to 10 weeks gestational age, 90 per cent of clinics performed abortions up to 12 weeks, 50 per cent of clinics up to 14 weeks and 20 per cent accepted patients up to 16 weeks. Although the legal basis upon which women assert a constitutional right of access to abortion is different in the United States than that which I find in the case at bar, the American experience as to the inappropriateness of a universal in-hospital requirement remains relevant.

The Powell Report proposed a number of projects as alternatives to the in-hospital rule for therapeutic abortions. Each proposal is designed to be "under the jurisdiction of a hospital board or several hospital boards with approval for abortion services provided through hospital therapeutic abortion committee mechanisms" (at p. 37). One such proposal is for the establishment of comprehensive women's health care clinics which would provide first trimester abortions, referrals to hospitals for second trimester abortions and post-abortion counselling. Regional centres for therapeutic abortion clinics affiliated with but not necessarily located in a hospital are also proposed in the Report, which goes on to emphasize that first trimester ambulatory abortions are those most appropriate for a non-hospital setting.

The Badgley Committee also made a series of proposals designed to reduce the number and type of complications associated with therapeutic abortions. These included a proposal, at p. 322, for "concentrating the performance of the abortion procedure into specialized units with a full range of the required equipment and facilities and staffed by experienced and specially trained nurses and medical personnel".

Whatever the eventual solution may be, it is plain that the in-hospital requirement is not justified in all cases. Although the protection of health of the woman is the objective which the in-hospital rule is intended to serve, the requirement that all therapeutic abortions be performed in eligible hospitals is unnecessary to meet that objective in all cases. In this sense, the rule is manifestly unfair and offends the principles of fundamental justice. I appreciate that the precise nature of the administrative solution may be complicated by the constitutional division of powers between Parliament and the provinces. There is no doubt that Parliament could allow the criminal law exception to operate in all hospitals, for example, though the provinces retain the power to establish these hospitals under s. 92(7) of the *Constitution Act, 1867*. On the other hand, if Parliament decided to allow therapeutic abortions to be performed in provincially licensed clinics, it is possible that both Parliament and the provinces would be called upon to collaborate in the implementation of the plan.

An objection can also be raised in respect of the requirement that the committee come from the accredited or approved hospital in which the abortion is to be performed. It is difficult to see a connection between this requirement and any of the practical purposes for which s. 251(4) was enacted. It cannot be said to have been adopted in order to promote the safety of therapeutic abortions or the safety of the pregnant woman. Nor is the rule designed to preserve the state interest in the foetus. The integrity of the independent medical opinion is no better served by a committee within the hospital than a committee from outside the hospital as long as the practising physician remains excluded in both circumstances as part of a proper state participation in the choice of the procedure necessary to secure an independent opinion. In a recent unpublished paper entitled *Options for Abortion Policy Reform: A Consultation Document* (1986), at p. 74, the Fetal Status Working Group, (Edward W. Keyserlingk, Director), Protection of Life Project of the Law Reform Commission of Canada confirmed the view that the requirement that abortion committees be limited to hospitals is unnecessary:

Restricting the existence of these committees to hospitals appears to be one of the reasons for delays and inequitable access. There appears to be no compelling medical reason why committees should not be attached to clinics which are equipped and licensed to provide this procedure. The Law Reform Commission's Working Group raises the possibility of regional abortion committees to replace the current rule (*supra*, at p. 76). The Powell Report proposals include a model whereby a central therapeutic abortion committee could serve several hospitals (*supra*, at p. 38).

Whatever solution is finally retained, it is plain that the requirement that the therapeutic abortion committee come from the hospital in which the abortion will be performed serves no real purpose. The risk resulting from the delay caused by s. 251(4) in this respect is unnecessary. Consequently, this requirement violates the principles of fundamental justice.

Other aspects of the committee requirement in s. 251(4) add to the manifest unfairness of the administrative structure. These include requirements which are at best only tenuously connected to the purpose of obtaining independent confirmation that the standard in s. 251(4)(*c*) has been met and which do not usefully contribute to the realization of that purpose. Hospital boards are entitled to appoint committees made up of three or more qualified medical practitioners. As I observed earlier, if more than three members are appointed, precious time can be lost when quorum cannot be established because members are absent. Whatever the number of members necessary to arrive at an independent appreciation of the state of the woman's life or health may in fact be, this number should be kept to a minimum to avoid unnecessary delays which, as I have explained, result in increased risk to women. Allowing a board to increase the number of members above a statutory minimum of three members does not add to the integrity of the independent opinion. This aspect of the current rule is unnecessary and, since it can result in increased risks, offends the principles of fundamental justice.

Similarly, the exclusion of all physicians who practise therapeutic abortions from the committees is exorbitant. This rule was no doubt included in s. 251(4) to promote the independence of the therapeutic abortion committees' appreciation of the standard. As I have said, the exclusion of the practising physician, although it diverges from usual medical practice, is appropriate in the criminal context to

ensure the independent opinion with respect to the life or health of that physician's patient. The exclusion of all physicians who perform therapeutic abortions from committees, even when they have no connection with the patient in question, is not only unnecessary but potentially counterproductive. There are no reasonable grounds to suspect bias from a physician who has no connection with the patient simply because, in the course of his or her medical practice, he or she performs lawful abortions. Furthermore, physicians who perform therapeutic abortions have useful expertise which would add to the precision and the integrity of the independent opinion itself. Some state control is appropriate to ensure the independence of the opinion. However, this rule as it now stands is excessive and can increase the risk of delay because fewer physicians are qualified to serve on the committees.

The foregoing analysis of the administrative structure of s. 251(4) is by no means a complete catalogue of all the current systems' strengths and failings. It demonstrates, however, that the administrative structure put in place by Parliament has enough shortcomings so that s. 251(4), when considered as a whole, violates the principles of fundamental justice. These shortcomings stem from rules which are not necessary to the purposes for which s. 251(4) was established. These unnecessary rules, because they impose delays which result in an additional risk to women's health, are manifestly unfair.

V -- Section 1 of the *Charter*

I agree with the view that s. 1 of the *Charter* can be used to save a legislative provision which breaches s. 7 in the manner which s. 251 of the *Criminal Code* violates s. 7 in this case. Section 1 states:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Chief Justice provided an analysis of s. 1 in *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, at pp. 138-39, which is appropriate for the purposes of addressing s. 1 in the case at bar. Those seeking to uphold s. 251 of the *Criminal Code* must demonstrate the following:

(1) the objective which s. 251 is designed to serve must "relate to concerns which are pressing and substantial"; and
(2) "once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves a 'form of proportionality test'." I shall consider each of these two criteria which must be met if the limit on the s. 7 right is to be found reasonable.

(1) *The Objective of s. 251*
I agree with Wilson J.'s characterization of s. 251, explained in the following terms, at p. 181:

In my view, the primary objective of the impugned legislation must be seen as the protection of the foetus. It undoubtedly has other ancillary objectives, such as the protection of the life and health of pregnant women, but I believe that the main objective advanced to justify a restriction on the pregnant woman's s. 7 right is the protection of the foetus.

The primary objective of the protection of the foetus is the main objective relevant to the analysis of s. 251 under the first test of *Oakes*. With the greatest respect, I believe the Chief Justice incorrectly identifies (at p. 75) the objective of balancing foetal interests and those of pregnant women, "with the lives and health of women a major factor", as "sufficiently important to meet the requirements of the first step in the *Oakes* inquiry under s. 1".

The focus in *Oakes* is the objective "which the measures responsible for a limit on a *Charter* right or freedom are designed to serve" (*supra,* at p. 138). In the context of the criminal law of abortion, the objective, which the measures in s. 251 responsible for a limit on the s. 7 *Charter* right are designed to serve, is the protection of the foetus. The narrow aim of s. 251(4) should not be confused with the primary objective of s. 251 as a whole. Given that s. 251 is a "comprehensive code", to use the expression of the Chief Justice, it is inappropriate, in my view, to focus on the exculpatory provision alone as the statement of Parliament's objective in establishing the crime. (See *R. v. Edwards Books and Art Ltd.*, 1986 CanLII 12 (SCC), [1986] 2 S.C.R. 713, at p. 751, in which the Court unanimously held that an exemption must be read in light of the affirmative provision to which it relates.) The ancillary objective of protecting the life or health of the pregnant woman, whether viewed alone or balanced against the protection of the foetus, is not the primary objective which the measures responsible for a limit on the constitutional right to security of the person were put in place to achieve.

This balance cannot be considered as Parliament's objective in establishing the crime nor in maintaining this activity as a crime following the amendments to the *Criminal Code* in 1969. Section 251(4) only applies in specified circumstances. When the life or health of a pregnant woman is not in danger and she seeks an abortion on the basis of her own non-medical "priorities and aspirations", it is plain that the rules in s. 251 precluding her from obtaining a lawful abortion have as their sole objective the protection of the foetus.

Furthermore, as federal legislation in respect of Parliament's jurisdiction over the criminal law in s. 91(27) of the *Constitution Act, 1867*, s. 251 cannot be said to have as its sole or principal objective, as the appellants argue, the protection of the life or health of pregnant women. Legislation which in its pith and substance is related to the life or health of pregnant women, depending of course on its precise terms, would be characterized as in relation to one of the provincial heads of power (see *Schneider v. The Queen*, 1982 CanLII 26 (SCC), [1982] 2 S.C.R. 112, at p. 137,*per* Dickson J., as he then was). The exculpatory provision in s. 251(4) cannot stand on its own as a valid exercise of Parliament's criminal law power.

Does the objective of protecting the foetus in s. 251 relate to concerns which are pressing and substantial in a free and democratic society? The answer to the first step of the *Oakes* test is yes. I am of the view that the protection of the foetus is and, as the Court of Appeal observed, always has been, a valid objective in Canadian criminal law. I have already elaborated on this objective in my discussion of the principles of fundamental justice. I think s. 1 of the *Charter* authorizes reasonable limits to be put on a woman's right having regard to the state interest in the protection of the foetus.

(2) *Proportionality*

I turn now to the second test in *Oakes*. The Crown must show that the means chosen in s. 251 are reasonable and demonstrably justified. In *Oakes*, *supra*, at p. 139, the Chief Justice outlined three components of the proportionality test:

First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M. Drug Mart Ltd., ...* at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".

For the purposes of the first component of proportionality, I observe that it was necessary, in my discussion of s. 251(4) and the principles of fundamental justice, to explain my view that certain of the rules governing access to therapeutic abortions free from criminal sanction are unnecessary in respect of the objectives which s. 251 is designed to serve. A rule which is unnecessary in respect of Parliament's objectives cannot be said to be "rationally connected" thereto or to be "carefully designed to achieve the objective in question". Furthermore, not only are some of the rules in s. 251 unnecessary to the primary objective of the protection of the foetus and the ancillary objective of the protection of the pregnant woman's life or health, but their practical effect is to undermine the health of the woman which Parliament purports to consider so important. Consequently, s. 251 does not meet the proportionality test in *Oakes*.

There is no saving s. 251 by simply severing the offending portions of s. 251(4). The current rule expressed in s. 251, which articulates both Parliament's principal and ancillary objectives, cannot stand without the exception in s. 251(4). The violation of pregnant women's security of the person would be greater, not lesser, if s. 251(4) was severed leaving the remaining subsections of s. 251 as they are in the *Criminal Code*.

Given my conclusion in respect of the first component of the proportionality test, it is not necessary to address the questions as to whether the means in s. 251 "impair as little as possible" the s. 7 *Charter* right and whether there is a proportionality between the effects of s. 251 and the objective of protecting the foetus. Thus, I am not required to answer the difficult question concerning the circumstances in which there is a proportionality between the effects of s. 251 which limit the right of pregnant women to security of the person and the objective of the protection of the foetus. I do feel bound, however, to comment upon the balance which Parliament sought to achieve between the interest in the protection of the foetus and the interest in the life or health of the pregnant woman in adopting the amendments to the *Criminal Code* in 1969.

In *Oakes*, *supra*, at p. 140, the Chief Justice further explained the third component of the proportionality test in the following terms:

Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society. [Emphasis added.]

The objective of protecting the foetus would not justify, in my view, the severity of the breach of pregnant women's right to security which would result if the exculpatory provision was completely removed from the *Criminal Code*. The gist of s. 251(4) is, as I have said, that the objective of protecting the foetus is not of sufficient importance to defeat the interest in protecting pregnant women from pregnancies which represent a danger to life or health. I take this parliamentary enactment in 1969 as an indication that, in a free and democratic society, it would be unreasonable to limit the pregnant woman's right to security of the person by a rule prohibiting abortions in all circumstances when her life or health would or would likely be in danger. This decision of the Canadian Parliament to the effect that the life or health of the pregnant woman takes precedence over the state interest in the foetus is also reflected in legislation in other free and democratic societies.

In *Emerging Issues in Commonwealth Abortion Laws, 1982* (1983), *passim*, submitted as an exhibit at trial, Rebecca J. Cook and Bernard M. Dickens report that, on the basis of the law in force as of November 1, 1982, the United Kingdom, New Zealand and Australia Capital Territory, New South Wales, Northern Territory, Queensland, South Australia, and Victoria, among other Commonwealth jurisdictions, include risk to the pregnant woman's life, physical health and mental health as legal grounds for abortion. The Crown and the Attorney General of Canada, in their books of authorities, cited statutes from these and other jurisdictions which indicate that a danger to the life or health of the pregnant woman takes precedence over the state interest in the foetus: the United Kingdom, *Abortion Act, 1967*, 1967, c. 87, s. 1(1)(*a*); Australian Northern Territory, *Criminal Law Consolidation Act and Ordinance*, s. 79 A(3)(a); South Australia, *Criminal Law Consolidation Act*, 1935-1975, s. 82a(1)(*a*)(*i*); Federal Republic of Germany, *Criminal Code*, as amended by the *Fifteenth Criminal Law Amendment Act* (1976), s. 218a(1); Israel, *Penal Law*, 5737-1977 (as amended), art. 316(*a*)(4); New Zealand, *Crimes Act 1961*, as amended by the *Crimes Amendment Act 1977* and the *Crimes Amendment Act 1978*, s. 187A(1)(a); and France, *Code pénal*, art. 317 and *Code de la santé publique*, art. 162-1 and 162-12. This substantiates the view that the legislative decision in Canada that the life or health of the woman takes precedence over the state interest in the foetus is in accordance with s. 1 of the *Charter*.

I note that the laws in some of these foreign jurisdictions, unlike s. 251 of the *Criminal Code*, require a higher standard of danger to health in the latter months of pregnancy, as opposed to the early months, for an abortion to be lawful. Would such a rule, if it was adopted in Canada, constitute a reasonable limit on the right to security of the person under s. 1 of the *Charter*? As I have said, given the actual wording of s. 251, pursuant to which the standard necessary for a lawful abortion does not vary according to the stage of pregnancy, this Court is not required to consider this question under s. 1 of the *Charter*. It is possible that a future enactment by Parliament along the lines of the laws adopted in these jurisdictions could achieve a proportionality which is acceptable under s. 1. As I have stated, however, I am of the view that the objective of protecting the foetus would not justify the complete removal of the exculpatory provisions from the *Criminal Code*.

Finally, I wish to stress that we have not been asked to decide nor is it necessary, given my own conclusion that s. 251 contains rules unnecessary to the protection of the foetus, to decide whether a foetus is included in the word "everyone" in s. 7 so as to have a right to "life, liberty and security of the person" under the *Charter*.

VI -- Other Grounds for Appeal

Counsel for the appellants raised several other grounds for appeal before this Court. The argument concerning the alleged invalidity of s. 605(1)(*a*) of the *Criminal Code* is the only *Charter* argument, apart from that pertaining to s. 7, which must be addressed. If the Crown had no right of appeal, the appellants would necessarily succeed on this sole ground as this Court would be required to quash the decision of the Court of Appeal. Although, as a result of my answers to the first and second constitutional questions, I am not required to respond to the other arguments to dispose of this appeal, I believe that it is appropriate to answer the non-*Charter* issues.

Section 91(27) of the *Constitution Act, 1867*

I agree with McIntyre J. and the Court of Appeal that there is no merit in the argument that s. 251 is *ultra vires* of Parliament. In *Morgentaler (1975)*, *supra*, this Court unanimously held that s. 251 is not colourable provincial legislation in relation to health but that it constitutes a proper exercise of Parliament's criminal law power pursuant to s. 91(27) of the *Constitution Act, 1867*. I agree. Indeed, as I have decided, s. 251 cannot be said to be simply a mechanism designed to protect the life or health of the pregnant woman. While this ancillary objective explains, in part, certain of the requirements of the exculpatory provision in s. 251(4), it does not represent the principal objective of s. 251 as a whole, which is to protect the state interest in the foetus. Parliament established the indictable offence of procuring a miscarriage, defined in s. 251(1) and s. 251(2), pursuant to this primary objective. I consider this a valid exercise of the criminal law power.

Section 96 of the *Constitution Act, 1867*

I agree with McIntyre J. that s. 251 does not give judicial powers to therapeutic abortion committees which were exercised by county, district and superior courts at the time of Confederation. As I have observed, in s. 251(4) Parliament has only given the committee the authority to make a medical determination regarding the pregnant woman's life or health. The panel of doctors exercises medical judgment on a medical question and performs no s. 96 judicial function. There is no merit in this argument.

Unlawful Delegation and Abdication of the Criminal Law Power

For the reasons given by McIntyre J., I agree that s. 251 does not constitute an unlawful delegation of federal legislative power nor does it represent an abdication of the criminal law power by Parliament.

Section 605(1)(*a*) of the *Criminal Code*

For the reasons given by McIntyre J., I agree that there is no merit in this argument.

Section 610(3) of the *Criminal Code*

Counsel for the appellants argued that s. 610(3) of the *Criminal Code*, which prohibits the awarding of

costs in appeals involving indictable offences, violates ss. 7, 11(*d*), (*f*), (*h*) and 15 of the *Charter*. He also argued that this Court had the power to award costs on appeals under s. 24(1) of the *Charter*. It is unnecessary to decide whether or not s. 610(3) of the *Criminal Code* violates a *Charter* right. I agree with the Court of Appeal that, whatever this Court's power to award costs in appeals such as this one, costs should not be awarded in this case.

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With regard to defence counsel's address to the jury at trial, I associate myself completely with the comments made by the Chief Justice. In his address, Mr. Manning wrongly chose not to respect the very distinct roles the trial judge and the jury play in our system of criminal justice. In *Mezzo v. The Queen*, 1986 CanLII 16 (SCC), [1986] 1 S.C.R. 802, at p. 836, McIntyre J., in a different context, stated:

No authority need be cited for the proposition that in a jury trial all questions of law are for the judge alone and, of equal importance, all questions of fact are for the jury alone. The distinction is of fundamental importance. It should be preserved so long as it is considered right to continue the use of the jury in criminal law.

The defence submission was, as the Court of Appeal stated, "a direct attack on the role and authority of the trial judge and a serious misstatement to the jury as to its duty and right in carrying out its oath" (*supra*, at p. 434). I am of the view that these strongly stated observations are required for the benefit of counsel who in other proceedings may be tempted to follow this unacceptable practice.

Conclusion

The constitutional questions should be answered as follows:

1. Question:

Does section 251 of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 2(*a*), 7, 12, 15, 27 and 28 of the *Canadian Charter of Rights and Freedoms*?

Answer:

The first constitutional question is answered in the affirmative in respect of the right of a pregnant woman to "security of the person" in s. 7 of the *Charter*.

2. Question:

If section 251 of the *Criminal Code* of Canada infringes or denies the rights and freedoms guaranteed by ss. 2(*a*), 7, 12, 15, 27 and 28 of the *Canadian Charter of Rights and Freedoms*, is s. 251 justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

Answer:

In respect of the violation of the right of a pregnant woman to "security of the person" in s. 7 caused by s. 251 of the *Criminal Code*, s. 251 is not justified by s. 1 of the *Charter*.

3. Question:
Is section 251 of the *Criminal Code* of Canada *ultra vires* the Parliament of Canada?
Answer:
No, in the sense that s. 251 is within the proper jurisdiction of Parliament on the basis of s. 91(27) of the *Constitution Act, 1867*.
4. Question:
Does section 251 of the *Criminal Code* of Canada violate s. 96 of the *Constitution Act, 1867*?
Answer:
No.
5. Question:
Does section 251 of the *Criminal Code* of Canada unlawfully delegate federal criminal power to provincial Ministers of Health or Therapeutic Abortion Committees, and in doing so, has the Federal Government abdicated its authority in this area?
Answer:
No.
6. Question:
Do sections 605 and 610(3) of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 7, 11(*d*), 11(*f*), 11(*h*) and 24(1) of the *Canadian Charter of Rights and Freedoms*?
Answer:
With respect to s. 605, the answer is no. Whether or not s. 610(3) of the *Criminal Code* violates a *Charter* right, I agree with the Court of Appeal that, whatever this Court's power to award costs in appeals such as this one, costs should not be awarded in this case.

7. Question:
If sections 605 and 610(3) of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 7, 11(*d*), 11(*f*), 11(*h*) and 24(1) of the *Canadian Charter of Rights and Freedoms*, are ss. 605 and 610(3) justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982?*
Answer:
Given the answer to question 6, this question does not call for an answer. On the basis of my answers to the first two constitutional questions, I would allow the appeal.
The reasons of McIntyre and La Forest JJ. were delivered by

R. *v.* MORGENTALER *McIntyre J.*
R. *c.* MORGENTALER *Le juge McIntyre*

MCINTYRE J. (dissenting)--I have read the reasons for judgment prepared by my colleagues, the Chief Justice and Justices Beetz and Wilson. I agree that the principal issue which arises is whether s. 251 of the *Criminal Code*, R.S.C. 1970, c. C-34, contravenes s. 7 of the *Canadian Charter of Rights and Freedoms*. I will make some comments later on other issues put forward by the appellants. The Chief Justice has set out the constitutional questions and the relevant statutory provisions, as well as the facts and procedural history. He has considered the scope of s. 7 of the *Charter* and, having found that it has been offended, he would allow the appeal. I am unable to agree with his reasons or his disposition of the appeal. I find

myself in broad general agreement with the reasons of the Court of Appeal, and I would dismiss the appeal on that basis and for reasons that I will endeavour to set forth.

Section 251 of the *Criminal Code*

I would say at the outset that it may be thought that this case does not raise the *Charter* issues which were argued and which have been addressed in the reasons of my colleagues. The charge here is one of conspiracy to breach the provisions of s. 251 of the *Criminal Code*. There is no doubt, and it has never been questioned, that the appellants adopted a course which was clearly in defiance of the provisions of the *Code* and it is difficult to see where any infringement of their rights, under s. 7 of the *Charter*, could have occurred. There is no female person involved in the case who has been denied a therapeutic abortion and, as a result, the whole argument on the right to security of the person, under s. 7 of the *Charter*, has been on a hypothetical basis. The case, however, was addressed by all the parties on that basis and the Court has accepted that position.

Section 251(1) and (2) of the *Criminal Code* make it an indictable offence for a person to use any means to procure the miscarriage of a female person and prescribe on conviction a maximum sentence of two years' imprisonment, in the case of the woman herself, and a maximum sentence of life imprisonment in the case of another person. Parliament has decreed that procuring a non-therapeutic abortion is a crime deserving of severe punishment. Subsection (4) provides that subss. (1) and (2) shall not apply where an abortion is performed in accordance with paras. (*a*), (*b*), (*c*) and (*d*) of subs.

(4). These paragraphs provide that a qualified medical practitioner may perform an abortion, and a pregnant woman may permit an abortion, in an accredited or an approved hospital where the therapeutic abortion committee for the hospital (defined in subs. (6)) has given its certificate in writing, stating that in its opinion the continuation of the woman's pregnancy would or would be likely to endanger her life or health. The certificate may be given to a qualified medical practitioner only after the committee, by a majority of its members and at a meeting where the woman's case has been reviewed, has authorized the giving of the certificate. Subsection (5) empowers the Minister of Health of a province to require a therapeutic abortion committee to furnish copies of certificates issued by the committee and such other information relating to the issuing of the certificate as he may require, and gives the Minister power to require similar information from a medical practitioner who has procured an abortion. Subsection (6) is the definitional section. It is clear from the foregoing that abortion is prohibited and that subs. (4) provides relieving provisions allowing an abortion in certain limited circumstances. It cannot be said that s. 251 of the *Criminal Code* confers any general right to have or to procure an abortion. On the contrary, the provision is aimed at protecting the interests of the unborn child and only lifts the criminal sanction where an abortion is necessary to protect the life or health of the mother.

In considering the constitutionality of s. 251 of the *Criminal Code*, it is first necessary to understand the background of this litigation and some of the problems which it raises. Section 251 of the *Code* has been denounced as ill-conceived and inadequate by those at one extreme of the abortion debate and as immoral and unacceptable by those at the opposite extreme. There are those, like the appellants, who assert that on moral and ethical grounds there is a simple solution to the problem: the inherent "right of women to control their own bodies" requires the repeal of s. 251 in favour of the principle of "abortion on demand".

Opposing this view are those who contend with equal vigour, and also on moral and ethical grounds, for a clear and simple solution: the inherent "right to life of the unborn child" requires the repeal of s. 251(4), (5), (6) and (7) in order to leave an absolute ban on abortions. The battle lines so drawn are firmly held and the attitudes of the opposing parties admit of no compromise. From the submission of the Attorney General of Canada (set out in his factum at paragraph 6), however, it may appear that a majority in Canada do not see the issue in such black and white terms. Paragraph 6 is in these words:

The evidence of opinion surveys indicates that there is a surprising consistency over the years and in different survey groups in the spectrum of opinions on the issue of abortion. Roughly 21 to 23% of people at one end of the spectrum are of the view, on the one hand, that abortion is a matter solely for the decision of the pregnant woman and that any legislation on this subject is an unwarranted interference with a woman's right to deal with her own body, while about 19 to 20% are of the view, on the other hand, that destruction of the living fetus is the killing of human life and tantamount to murder. The remainder of the population (about 60%) are of the view that abortion should be prohibited in some circumstances.

Parliament has heeded neither extreme. Instead, an attempt has been made to balance the competing interests of the unborn child and the pregnant woman. Where the provisions of s. 251(4) are met, the abortion may be performed without legal sanction. Where they are not, abortion is deemed to be socially undesirable and is punished as a crime. In *Morgentaler v. The Queen,* 1975 CanLII 8 (SCC), [1976] 1 S.C.R. 616 [hereinafter *Morgentaler (1975)*], Laskin C.J. said (in dissent, but not on this point), at p. 627:

What is patent on the face of the prohibitory portion of s. 251 is that Parliament has in its judgment decreed that interference by another, or even by the pregnant woman herself, with the ordinary course of conception is socially undesirable conduct subject to punishment. That was a judgment open to Parliament in the exercise of its plenary criminal law power, and the fact that there may be safe ways of terminating a pregnancy or that any woman or women claim a personal privilege to that end, becomes immaterial. I need cite no authority for the proposition that Parliament may determine what is not criminal as well as what is, and may hence introduce dispensations or exemptions in its criminal legislation.

Parliament's view that abortion is, in its nature, "socially undesirable conduct" is not new. Parliament's policy, as expressed by s. 251 of the *Code*, is consistent with that which has governed Canadian criminal law since Confederation and before: see Dickson J. (as he then was) in *Morgentaler (1975), supra*, at p. 672, and the reasons of the Ontario Court of Appeal in this case: 1985 CanLII 116 (ON CA), (1985), 52 O.R. (2d) 353, at pp. 364-66. It is against this background that I turn to the question of judicial review in light of the *Charter*.

Scope of Judicial Review under the *Charter*

Before the adoption of the *Charter*, there was little question of the limits of judicial review of the criminal law. For all practical purposes it was limited to a determination of whether the impugned enactment dealt with a subject which could fall within the criminal law power in s. 91(27) of the *Constitution Act, 1867*. There was no doubt of the power of Parliament to say what was and what was not criminal and to prohibit criminal conduct with penal sanctions, although from 1960 onwards legislation was subject to review under the *Canadian Bill of Rights*: see *Morgentaler (1975)*, *supra*. The adoption of the *Charter* brought a

significant change. The power of judicial review of legislation acquired greater scope but, in my view, that scope is not unlimited and should be carefully confined to that which is ordained by the *Charter*. I am well aware that there will be disagreement about what was ordained by the *Charter* and, of course, a measure of interpretation of the *Charter* will be required in order to give substance and reality to its provisions. But the courts must not, in the guise of interpretation, postulate rights and freedoms which do not have a firm and a reasonably identifiable base in the *Charter*. In his reasons, the Chief Justice refers to the problem. He says, at pp. 45-46:

During argument before this Court, counsel for the Crown emphasized repeatedly that it is not the role of the judiciary in Canada to evaluate the wisdom of legislation enacted by our democratically elected representatives, or to second-guess difficult policy choices that confront all governments. In *Morgentaler v. The Queen*, 1975 CanLII 8 (SCC), [1976] 1 S.C.R. 616, at p. 671, (hereinafter "*Morgentaler (1975)*") I stressed that the Court had "not been called upon to decide, or even to enter, the loud and continuous public debate on abortion." Eleven years later, the controversy persists, and it remains true that this Court cannot presume to resolve all of the competing claims advanced in vigorous and healthy public debate. Courts and legislators in other democratic societies have reached completely contradictory decisions when asked to weigh the competing values relevant to the abortion question. See, e.g., *Roe v. Wade*, MANU/USSC/0177/1972 : 410 U.S. 113 (1973);*Paton v. United Kingdom* (1980), 3 E.H.R.R. (European Court of Human Rights);*The Abortion Decision of the Federal Constitutional Court -- First Senate -- of the Federal Republic of Germany*, February 25, 1975, translated and reprinted in (1976), 9 John Marshall J. Prac. and Proc. 605; and the *Abortion Act, 1967*, 1967, c. 87 (U.K.)

But since 1975, and the first *Morgentaler* decision, the Court has been given added responsibilities. I stated in *Morgentaler* (*1975*), at p. 671, that:

The values we must accept for the purposes of this appeal are those expressed by Parliament which holds the view that the desire of a woman to be relieved of her pregnancy is not, of itself, justification for performing an abortion.
Although no doubt it is still fair to say that courts are not the appropriate forum for articulating complex and controversial programmes of public policy, Canadian courts are now charged with the crucial obligation of ensuring that the legislative initiatives pursued by our Parliament and legislatures conform to the democratic values expressed in the *Canadian Charter of Rights and Freedoms* . . . . It is in this latter sense that the current *Morgentaler* appeal differs from the one we heard a decade ago.

While I differ with the Chief Justice in the disposition of this appeal, I would accept his words, referred to above, which describe the role of the Court, but I would suggest that in "ensuring that the legislative initiatives pursued by our Parliament and legislatures conform to the democratic values expressed in the *Canadian Charter of Rights and Freedoms*" the courts must confine themselves to such democratic values as are clearly found and expressed in the *Charter* and refrain from imposing or creating other values not so based.

It follows, then, in my view, that the task of the Court in this case is not to solve nor seek to solve what might be called the abortion issue, but simply to measure the content of s. 251 against the *Charter*. While this may appear to be self-evident, the distinction is of vital importance. If a particular interpretation enjoys no support, express or reasonably implied, from the *Charter,* then the Court is without power to clothe such an interpretation with constitutional status. It is not for the Court to substitute its own views on the merits of a given question for those of Parliament. The Court must consider not what is, in its view, the best solution to the problems posed; its role is confined to deciding whether the solution enacted by Parliament offends the *Charter*. If it does, the provision must be struck down or declared inoperative, and Parliament may then enact such different provisions as it may decide. I adopt the words of Holmes J., which were referred to in *Ferguson v. Skrupka*, MANU/USSC/0067/1963 : 372 U.S. 726 (1963), at pp. 729-30:

There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. In this manner the Due Process Clause was used, for example, to nullify laws prescribing maximum hours for work in bakeries, *Lochner* v. *New York*, MANU/USSC/0253/1905 : 198 U.S. 45 (1905), outlawing "yellow dog" contracts, *Coppage* v. *Kansas*, MANU/USSC/0294/1915 : 236 U.S. 1 (1915), setting minimum wages for women, *Adkins* v. *Children's Hospital*, MANU/USSC/0294/1923 : 261 U.S. 525 (1923), and fixing the weight of loaves of bread, *Jay Burns Baking Co.* v. *Bryan*, MANU/USSC/0239/1924 : 264 U.S. 504 (1924). This intrusion by the judiciary into the realm of legislative value judgments was strongly objected to at the time, particularly by Mr. Justice Holmes and Mr. Justice Brandeis. Dissenting from the Court's invalidating a state statute which regulated the resale price of theatre and other tickets, Mr. Justice Holmes said:

"I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain".

And in an earlier case he had emphasized that, "The criterion of constitutionality is not whether we believe the law to be for the public good."

The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns,* and like cases -- that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely -- has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. Holmes J. wrote in 1927, but his words have retained their force in American jurisprudence: see *New Orleans v. Dukes,* MANU/USSC/0046/1976 : 427 U.S. 297 (1976), at p. 304, *Minnesota v. Clover Leaf Creamery Co.,* MANU/USSC/0191/1981 : 449 U.S. 456 (1981), at p. 469, and *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, MANU/USSC/0079/1982 : 455 U.S. 489 (1982), at pp. 504-5. In my view, although written in the American context, the principle stated is equally applicable in Canada.

It is essential that this principle be maintained in a constitutional democracy. The Court must not resolve an issue such as that of abortion on the basis of how many judges may favour "pro-choice" or "pro-life". To do so would be contrary to sound principle and the rule of law affirmed in the preamble to the *Charter*

which must mean that no discretion, including a judicial discretion, can be unlimited. But there is a problem, for the Court must clothe the general expression of rights and freedoms contained in the *Charter* with real substance and vitality. How can the courts go about this task without imposing at least some of their views and predilections upon the law? This question has been the subject of much discussion and comment. Many theories have been postulated but few have had direct reference to the problem in the Canadian context. In my view, this Court has offered guidance in this matter. In such cases as *Hunter v. Southam Inc*., 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145, at pp. 155-56, and*R. v. Big M Drug Mart Ltd.,* 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, at p. 344, it has enjoined what has been termed a "purposive approach" in applying the *Charter* and its provisions. I take this to mean that the Courts should interpret the *Charter* in a manner calculated to give effect to its provisions, not to the idiosyncratic view of the judge who is writing. This approach marks out the limits of appropriate *Charter* adjudication. It confines the content of *Charter* guaranteed rights and freedoms to the purposes given expression in the *Charter*. Consequently, while the courts must continue to give a fair, large and liberal construction to the *Charter* provisions, this approach prevents the Court from abandoning its traditional adjudicatory function in order to formulate its own conclusions on questions of public policy, a step which this Court has said on numerous occasions it must not take. That *Charter* interpretation is to be purposive necessarily implies the converse: it is not to be "non-purposive". A court is not entitled to define a right in a manner unrelated to the interest which the right in question was meant to protect. I endeavoured to formulate an approach to the problem in *Reference Re Public Service Employee Relations Act*, 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313, in these words, at p. 394:

It follows that while a liberal and not overly legalistic approach should be taken to constitutional interpretation, the *Charter* should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time. The interpretation of the *Charter*, as of all constitutional documents, is constrained by the language, structure and history of the constitutional text, by constitutional tradition, and by the history, traditions, and underlying philosophies of our society. The approach, as I understand it, does not mean that judges may not make some policy choices when confronted with competing conceptions of the extent of rights or freedoms. Difficult choices must be made and the personal views of judges will unavoidably be engaged from time to time. The decisions made by judges, however, and the interpretations that they advance or accept must be plausibly inferable from something in the *Charter*. It is not for the courts to manufacture a constitutional right out of whole cloth. I conclude on this question by citing and adopting the following words, although spoken in dissent, from the judgment of Harlan J. in *Reynolds v. Sims*, MANU/USSC/0237/1964 : 377 U.S. 533 (1964), which, in my view, while stemming from the American experience, are equally applicable in a consideration of the Canadian position. Harlan J. commented, at pp. 624-25, on the:

. . . current mistaken view of the Constitution and the constitutional function of this Court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional "principle," and that this Court should "take the lead" in promoting reform when other branches of government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements. The Constitution is an instrument of government, fundamental to which is the premise that in a diffusion of governmental

authority lies the greatest promise that this Nation will realize liberty for all its citizens. This Court, limited in function in accordance with that premise, does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process. For when, in the name of constitutional interpretation, the Court *adds* something to the Constitution that was deliberately excluded from it, the Court in reality substitutes its view of what should be so for the amending process.

The Right to Abortion and s. 7 of the *Charter*

The judgment of my colleague, Wilson J., is based upon the proposition that a pregnant woman has a right, under s. 7 of the *Charter*, to have an abortion. The same concept underlies the judgment of the Chief Justice. He reached the conclusion that a law which forces a woman to carry a foetus to term, unless certain criteria are met which are unrelated to her own priorities and aspirations, impairs the security of her person. That, in his view, is the effect of s. 251 of the *Criminal Code*. He has not said in specific terms that the pregnant woman has the right to an abortion, whether therapeutic or otherwise. In my view, however, his whole position depends for its validity upon that proposition and that interference with the right constitutes an infringement of her right to security of the person. It is said that a law which forces a woman to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations interferes with security of her person. If compelling a woman to complete her pregnancy interferes with security of her person, it can only be because the concept of security of her person includes a right not to be compelled to carry the child to completion of her pregnancy. This, then, is simply to say that she has a right to have an abortion. It follows, then, that if no such right can be shown, it cannot be said that security of her person has been infringed by state action or otherwise.

All laws, it must be noted, have the potential for interference with individual priorities and aspirations. In fact, the very purpose of most legislation is to cause such interference. It is only when such legislation goes beyond interfering with priorities and aspirations, and abridges rights, that courts may intervene. If a law prohibited membership in a lawful association it would be unconstitutional, not because it would interfere with priorities and aspirations, but because of its interference with the guaranteed right of freedom of association under s. 2(*d*) of the *Charter*. Compliance with the *Income Tax Act* has, no doubt, frequently interfered with priorities and aspirations. The taxing provisions are not, however, on that basis unconstitutional, because the ordinary taxpayer enjoys no right to be tax free. Other illustrations may be found. In my view, it is clear that before it could be concluded that any enactment infringed the concept of security of the person, it would have to infringe some underlying right included in or protected by the concept. For the appellants to succeed here, then, they must show more than an interference with priorities and aspirations; they must show the infringement of a right which is included in the concept of security of the person.

The proposition that women enjoy a constitutional right to have an abortion is devoid of support in the language of s. 7 of the *Charter* or any other section. While some human rights documents, such as the *American Convention on Human Rights, 1969* (Article 4(1)), expressly address the question of abortion, the *Charter* is entirely silent on the point. It may be of some significance that the *Charter* uses specific

language in dealing with other topics, such as voting rights, religion, expression and such controversial matters as mobility rights, language rights and minority rights, but remains silent on the question of abortion which, at the time the *Charter* was under consideration, was as much a subject of public controversy as it is today. Furthermore, it would appear that the history of the constitutional text of the *Charter* affords no support for the appellants' proposition. A reference to the Minutes of the Special Joint Committee of Senate and House of Commons on the Constitution of Canada (Proceedings 32nd. Parl., Sess. 1 (1981), vol. 46, p. 43) reveals the following exchange:

Mr. Crombie: . . . And I ask you then finally, what effect will the inclusion of the due process clause have on the question of marriage, procreation, or the parental care of children?

...

Mr. Chrétien: The point, Mr. Crombie, that it is important to understand the difference is that we pass legislation here on abortion, criminal code, and we pass legislation on capital punishment; parliament [*sic*] has the authority to do that, and the court at this moment, because we do not have the due process of law written there, cannot go and see whether we made the right decision or the wrong decision in Parliament. If you write down the words, "due process of law" here, the advice I am receiving is the court could go behind our decision and say that their decision on abortion was not the right one, their decision on capital punishment was not the right one, and it is a danger, according to legal advice I am receiving, that it will very much limit the scope of the power of legislation by the Parliament and we do not want that; and it is why we do not want the words "due process of law". These are the two main examples that we should keep in mind.

You can keep speculating on all the things that have never been touched, but these are two very sensitive areas that we have to cope with as legislators and my view is that Parliament has decided a certain law on abortion and a certain law on capital punishment, and it should prevail and we do not want the courts to say that the judgment of Parliament was wrong in using the constitution.

This passage, of course, revolves around the second and not the first limb of s. 7, but it offers no support for the suggestion that it was intended to bring the question of abortion into the *Charter*.

It cannot be said that the history, traditions and underlying philosophies of our society would support the proposition that a right to abortion could be implied in the *Charter*. The history of the legal approach to this question, reflective of public policy, was conveniently canvassed in the Ontario Court of Appeal in this case in these terms, at pp. 364-66:

History of the law of abortion

The history of the law of abortion is of some importance. At common law procuring an abortion before quickening was not a criminal offence. Quickening occurred when the pregnant woman could feel the foetus move in her womb. It was a misdemeanour to procure an abortion after quickening: *Blackstone's Commentaries on the Laws of England*, Book 1, pp. 129-30. The law of criminal abortion was first codified in England in *Lord Ellenborough's Act,* 1803 (U.K.), c. 58. That Act made procuring an abortion of a quick foetus a capital offence and provided lesser penalties for abortion before quickening. After the *Offences Against the Person Act,* 1861 (U.K.), c. 100, s. 58, no differentiation in penalty was made in England on the basis of the stage of foetal development. The offence was a felony and the maximum

penalty life imprisonment. The *Infant Life (Preservation) Act*, 1929 (U.K.), c. 34, gave greater protection to a viable foetus by creating the offence of child destruction where a child capable of being born alive was caused to die except in good faith to preserve the life of the mother. In *R. v. Bourne*, [1939] 1 K.B. 687, the prohibition against abortion both at common law and by statute was held to be subject to the common law defence based upon the necessity of saving the mother's life.

The earliest statutory prohibition in Canada against attempting to procure an abortion is to be found in "An Act respecting Offences against the Person", 1869 (Can.), c. 20, ss. 59 and 60. The Act was based on *Lord Ellenborough's Act* and the *Offences Against the Person Act, 1861*. The provisions relating to abortion were included in the Canadian *Criminal Code* in 1892 (1892 (Can.), c. 29, ss. 272 to 274), and with slight changes were included in the Codes of 1906 (R.S.C. 1906, c. 146, ss. 303 to 306); 1927 (R.S.C. 1927, c. 36, ss. 303 to 306) and 1954 (1953-54 (Can.), c. 51, ss. 237 and 238).

Section 251(1) made it clear that Parliament regarded procuring an abortion as a very serious crime for which there was a maximum sentence of imprisonment for life.

In 1969, Parliament alleviated the situation by the addition to s. 251 of s-ss (4), (5), (6) and (7) as exculpatory provisions by 1968-69, c. 38, s. 18. These subsections provided that it was not a criminal act to procure an abortion where the continuation of the pregnancy would or would be likely to endanger the life or health of a female person. As can be seen, in order to come within the exceptions to s. 251(1) and (2),

(a) the majority of the members of a therapeutic abortion committee comprising not less than three qualified medical practitioners of an accredited or approved hospital had to certify in writing after reviewing the case at a meeting that in the opinion of the majority the continuation of the pregnancy would or would be likely to endanger the life or health of a female person;

(b) the abortion had to be performed in an accredited or approved hospital by a medical practitioner to whom the certificate was given who was not a member of the committee.

By defining criminal conduct more narrowly, these amendments reflected the contemporary view that abortion is not always socially undesirable behaviour.
As the Court of Appeal said, the amendments to the *Criminal Code* which imported s. 251 are indicative of a changing view on this question, but it is not possible to erect upon the words of s. 251 a constitutional right to abortion.

The historical review of the legal approach in Canada taken from the judgment of the Court of Appeal serves, as well, to cast light on the underlying philosophies of our society and establishes that there has never been a general right to abortion in Canada. There has always been clear recognition of a public interest in the protection of the unborn and there has been no evidence or indication of any general acceptance of the concept of abortion at will in our society. It is to be observed as well that at the time of adoption of the *Charter* the sole provision for an abortion in Canadian law was that to be found in s. 251 of the *Criminal Code*. It follows then, in my view, that the interpretive approach to the *Charter*, which

has been accepted in this Court, affords no support for the entrenchment of a constitutional right of abortion.

As to an asserted right to be free from any state interference with bodily integrity and serious state-imposed psychological stress, I would say that to be accepted, as a constitutional right, it would have to be based on something more than the mere imposition, by the State, of such stress and anxiety. It must, surely, be evident that many forms of government action deemed to be reasonable, and even necessary in our society, will cause stress and anxiety to many, while at the same time being acceptable exercises of government power in pursuit of socially desirable goals. The very facts of life in a modern society would preclude the entrenchment of such a constitutional right. Governmental action for the due governance and administration of society can rarely please everyone. It is hard to imagine a governmental policy or initiative which will not create significant stress or anxiety for some and, frequently, for many members of the community. Governments must have the power to expropriate land, to zone land, to regulate its use and the rights and conditions of its occupation. The exercise of these powers is frequently the cause of serious stress and anxiety. In the interests of public health and welfare, governments must have and exercise the power to regulate, control -- and even suppress -- aspects of the manufacture, sale and distribution of alcohol and drugs and other dangerous substances. Stress and anxiety resulting from the exercise of such powers cannot be a basis for denying them to the authorities. At the present time there is great pressure on governments to restrict -- and even forbid -- the use of tobacco. Government action in this field will produce much stress and anxiety among smokers and growers of tobacco, but it cannot be said that this will render unconstitutional control and regulatory measures adopted by governments. Other illustrations abound to make the point.

To invade the s. 7 right of security of the person, there would have to be more than state-imposed stress or strain. A breach of the right would have to be based upon an infringement of some interest which would be of such nature and such importance as to warrant constitutional protection. This, it would seem to me, would be limited to cases where the state-action complained of, in addition to imposing stress and strain, also infringed another right, freedom or interest which was deserving of protection under the concept of security of the person. For the reasons outlined above, the right to have an abortion -- given the language, structure and history of the *Charter* and given the history, traditions and underlying philosophies of our society -- is not such an interest. Any right to an abortion will remain circumscribed by the terms of s. 251 of the *Criminal Code*. I refer to the following passage from the judgment of the court below, at p. 378:

One cannot overlook the fact that the situation respecting a woman's right to control her own person becomes more complex when she becomes pregnant, and that some statutory control may be appropriate. We agree with Parker A.C.J.H.C. in the court below that, bearing in mind the statutory prohibition against abortion in Canada which has existed for over 100 years, it could not be said that there is a right to procure an abortion so deeply rooted in our traditions and way of life as to be fundamental. A woman's only right to an abortion at the time the Charter came into force would accordingly appear to be that given to her by s-s. (4) of s. 251.

I would only add that even if a general right to have an abortion could be found under s. 7 of the *Charter*, it is by no means clear from the evidence the extent to which such a right could be said to be infringed by the requirements of s. 251 of the *Code*. In the nature of things that is difficult to determine. The mere fact

of pregnancy, let alone an unwanted pregnancy, gives rise to stress. The evidence reveals that much of the anguish associated with abortion is inherent and unavoidable and that there is really no psychologically painless way to cope with an unwanted pregnancy.

It is for these reasons I would conclude, that save for the provisions of the *Criminal Code*, which permit abortion where the life or health of the woman is at risk, no right of abortion can be found in Canadian law, custom or tradition, and that the *Charter*, including s. 7, creates no further right. Accordingly, it is my view that s. 251 of the *Code* does not in its terms violate s. 7 of the *Charter*. Even accepting the assumption that the concept of security of the person would extend to vitiating a law which would require a woman to carry a child to the completion of her pregnancy at the risk of her life or health, it must be observed that this is not our case. As has been pointed out, s. 251 of the *Code* already provides for abortion in such circumstances.

Procedural Fairness

I now turn to the appellant's argument regarding the procedural fairness of s. 251 of the *Criminal Code*. The basis of the argument is that the exemption provisions of subs. (4) are such as to render illusory or practically illusory any defence arising from the subsection for many women who seek abortions. It is pointed out that therapeutic abortions are available only in accredited or approved hospitals, that hospitals so accredited or approved may or may not appoint abortion committees, and that "health" is defined in vague terms which afford no clear guide to its meaning. Statistically, it was said that abortions could be lawfully performed in only twenty per cent of all hospitals in Canada. Because abortions are not generally available to all women who seek them, the argument goes, the defence is illusory, or practically so, and the section therefore fails to comport with the principles of fundamental justice.

Precise evidence on the questions raised is, of course, difficult to obtain and subject to subjective interpretation depending upon the views of those adducing it. Much evidence was led at trial based largely on the Ontario experience. Additional material in the form of articles, reports and studies was adduced, from which the Court was invited to conclude that access to abortion is not evenly provided across the country and that this could be the source of much dissatisfaction. While I recognize that in constitutional cases a greater latitude has been allowed concerning the reception of such material, I would prefer to place principal reliance upon the evidence given under oath in court in my considerations of the factual matters. Evidence was adduced from the chairman of a therapeutic abortion committee at a hospital in Hamilton, where in 1982 eleven hundred and eighty-seven abortions were performed, who testified that of all applications received by his committee in that year less than a dozen were ultimately refused. Refusal in each case was based upon the fact that a majority of the committee was not convinced that "the continuation of the pregnancy would be detrimental to the woman's health". All physicians who performed abortions under the *Criminal Code* provisions admitted in cross-examination that they had never had an application for a therapeutic abortion on behalf of the patient ultimately refused by an abortion committee. No woman testified that she personally had applied for an abortion anywhere in Canada and had been refused, and no physician testified to his participation in such an application. In 1982, the province of Ontario had ninety-nine hospitals with abortion committees. In that year in Ontario, hospitals performed 31,379 abortions and thirty-six of those hospitals performed more than two hundred in one year. There were seventeen hospitals with abortion committees in metropolitan Toronto and they

performed 16,706 abortions in 1982, nine of them performing more than one thousand abortions each. In 1982 all ten provinces and both territories had at least one hospital with an abortion committee. The evidence was not as clear as to the situation in rural or more remote areas. It would be reasonable to assume that access to abortion would have been more difficult outside of the principal inhabited areas. This situation, however, is common to the delivery of all health-care services. Significantly, the testimony and exhibits entered at trial reflect that even in the more permissive abortion regime in the United States there is a similar problem of access. Ten years after the decision in *Roe v. Wade*, MANU/USSC/0177/1972 : 410 U.S. 113 (1973), only slight gains in access had been made in rural areas. It is also worth noting that the evidence adduced at trial, comparing the respective abortion regimes in Canada and the United States, reveals other significant parallels. For example, there is a close parallel in the two countries concerning such matters as the stage in the pregnancy at which abortions are performed and the procedures used to perform abortions at the respective stages. There is also a high degree of similarity in the two countries regarding the percentages and methods of abortion performed in the crucial early second trimester. In both countries, it appears that many of the problems that have arisen in relation to abortion reflect the more general reality that medical services are subject to budgetary, time, space and staff constraints. With abortion, in particular, matters are further complicated by the fact that many physicians regard abortions as unethical and refuse to perform them. In all, the extent to which the statutory procedure contributes to the problems connected with procuring an abortion is anything but clear. Accordingly, even if one accepts that it would be contrary to the principles of fundamental justice for Parliament to make available a defence which, by reason of its terms, is illusory or practically so, it cannot, in my view, be said that s. 251 of the *Code* has had that effect.

It would seem to me that a defence created by Parliament could only be said to be illusory or practically so when the defence is not available in the circumstances in which it is held out as being available. The very nature of the test assumes, of course, that it is for Parliament to define the defence and, in so doing, to designate the terms and conditions upon which it may be available. The Chief Justice has said in his reasons, at p. 70:

The criminal law is a very special form of governmental regulation, for it seeks to express our society's collective disapprobation of certain acts and omissions. When a defence is provided, especially a specifically-tailored defence to a particular charge, it is because the legislator has determined that the disapprobation of society is not warranted when the conditions of the defence are met.

From this comment, I would suggest it is apparent that the Court's role is not to second-guess Parliament's policy choice as to how broad or how narrow the defence should be. The determination of when "the disapprobation of society is not warranted" is in Parliament's hands. The Court's role when the enactment is attacked on the basis that the defence is illusory is to determine whether the defence is available in the circumstances in which it was intended to apply. Parliament has set out the conditions, in s. 251(4), under which a therapeutic abortion may be obtained, free from criminal sanction. It is patent on the face of the legislation that the defence is circumscribed and narrow. It is clear that this was the Parliamentary intent and it was expressed with precision. I am not able to accept the contention that the defence has been held out to be generally available. It is, on the contrary, carefully tailored and limited to special circumstances. Therapeutic abortions may be performed only in certain hospitals and in accordance with certain specified

provisions. It could only be classed as illusory or practically so if it could be found that it does not provide lawful access to abortions in circumstances described in the section. No such finding should be made upon the material before this Court. The evidence will not support the proposition that significant numbers of those who meet the conditions imposed in s. 251 of the *Criminal Code* are denied abortions.

It is evident that what the appellants advocate is not the therapeutic abortion referred to in s. 251 of the *Code*. Their clinic was called into being because of the perceived inadequacies of s. 251. They propose and seek to justify "abortion on demand". The defence in s. 251(4) was not intended to meet the views of the appellants and provide a defence at large which would effectively repeal the operative subsections of s. 251. Some feel strongly that s. 251 is not adequate in today's society. Be that as it may, it does not follow that the defence provisions of s. 251(4) are illusory. They represent the legislative choice on this question and, as noted, it has not been shown that therapeutic abortions have not been available in cases contemplated by the provision.

It was further argued that the defence in s. 251(4) is procedurally unfair in that it fails to provide an adequate standard of "health" to guide the abortion committees which are charged with the responsibility for approving or disapproving applications for abortions. It is argued that the meaning of the word "health" in s. 251(4) is so vague as to render the sub-section unconstitutional. This argument was, in my view, dealt with fully and effectively in the Court of Appeal. I accept and adopt the following passage from the judgment of that court, at pp. 387-88:

Counsel for the respondent in his attack on s. 251 also argued that the section was void for "vagueness". The argument under this head was that the concepts of "health" and "miscarriage" in s. 251(4) yield an arbitrary application being so vague and uncertain that it is difficult to understand what conduct is proscribed. It is fundamental justice that a person charged with an offence should know with sufficient particularity the nature of the offence alleged.

There was a far-ranging discussion by the respondents' counsel on the concept of "health" and the meaning of the term "miscarriage"; the way in which courts deal with the "vagueness" in the interpretation of municipal by-laws, and an extensive examination of American authorities.

In this case, however, from a reading of s. 251 with its exception, there is no difficulty in determining what is proscribed and what is permitted. It cannot be said that no sensible meaning can be given to the words of the section. Thus, it is for the courts to say what meaning the statute will bear. Counsel was unable to give the Court any authority for holding a statute void for uncertainty. In any event, there is no doubt the respondents knew that the acts they proposed and carried out were in breach of the section. The fact that they did not approve of the law in this regard does not make it "uncertain". They could have no doubt but that the procuring of a miscarriage which they proposed (and we agree with the trial judge that the phrase "procuring a miscarriage" is synonymous with "performing an abortion"), could only be carried out in an accredited or approved hospital after the securing of the required certificate in writing from the therapeutic abortion committee of that hospital.

Finally, this Court has dealt with the matter. Dickson J. (as he then was), speaking for the majority in *Morgentaler (1975)*, *supra*, in concluding a discussion of s. 251(4) of the *Criminal Code*, said, at p. 675: Whether one agrees with the Canadian legislation or not is quite beside the point. Parliament has spoken unmistakably in clear and unambiguous language In the same case, Laskin C.J., while dissenting on other grounds, said at p. 634:

The contention under point 2 is equally untenable as an attempt to limit the substance of legislation in a situation which does not admit of it. In submitting that the standard upon which therapeutic abortion committees must act is uncertain and subjective, counsel who make the submission cannot find nourishment for it even in *Doe v. Bolton*. There it was held that the prohibition of abortion by a physician except when "based upon his best clinical judgment that an abortion is necessary" did not prescribe a standard so vague as to be constitutionally vulnerable. *A fortiori*, under the approach taken here to substantive due process, the argument of uncertainty and subjectivity fails. It is enough to say that Parliament has fixed a manageable standard because it is addressed to a professional panel, the members of which would be expected to bring a practised judgment to the question whether "the continuation of the pregnancy . . . would or would be likely to endanger . . . life or health".

In my opinion, then, the contention that the defence provided in s. 251(4) of the *Criminal Code* is illusory cannot be supported. From evidence adduced by the appellants, it may be said that many women seeking abortions have been unable to get them in Canada because s. 251(4) fails to respond to this need. This cannot serve as an argument supporting the claim that subs. (4) is procedurally unfair. Section 251(4) was designed to meet specific circumstances. Its aim is to restrict abortion to cases where the continuation of the pregnancy would, or would likely, be injurious to the life or health of the woman concerned, not to provide unrestricted access to abortion. It was to meet this requirement that Parliament provided for the administrative procedures to invoke the defence in subs. (4). This machinery was considered adequate to deal with the type of abortion Parliament had envisaged. When, however, as the evidence would indicate, many more would seek abortions on a basis far wider than that contemplated by Parliament, any system would come under stress and possibly fail. It is not without significance that many of the appellants' clients did not meet the standard set or did not seek to invoke it and that is why their clinic took them in. What has confronted the scheme has been a flood of demands for abortions, some of which could meet the tests of s. 251(4) and many which could not. In so far as it may be said that the administrative scheme of the Act has operated inefficiently, a proposition which may be highly questionable, it is caused principally by forces external to the statute, the external circumstances being a general demand for abortion irrespective of the provisions of s. 251. It is not open to a court, in my view, to strike down a statutory provision on this basis.

The appellants in this Court raised other arguments, most of which, in my view, may be briefly dealt with.

Section 605 of the *Criminal Code*

It was contended that s. 605(1)(*a*), giving the Crown a right of appeal against an acquittal in a trial court on any ground involving a question of law alone offended ss. 7 and 11(*d*), (*f*) and (*h*) of the *Charter*. Reliance was placed primarily on s. 11(*h*). There is a simple answer to this argument. The words of s. 11(*h*), "if finally acquitted" and "if finally found guilty", must be construed to mean after the appellate procedures have been completed, otherwise there would be no point or meaning in the word "finally". There is no merit in this ground. I would dispose of this question for the reasons given by the Court of Appeal.

Section 251 of the *Criminal Code* -- Violation of s. 15 of the *Charter*

I find no merit in the argument advanced under this heading to the effect that the equality rights of women are infringed by s. 251 of the *Criminal Code* and on this issue again I would adopt the reasons of the Ontario Court of Appeal found at 1985 CanLII 116 (ON CA), (1985), 52 O.R. (2d) 353, at pp. 392-97.

Section 251 of the *Criminal Code* and s. 2(*a*) of the *Charter*

I am unable to find any abridgement of freedom of conscience and religion in s. 251 of the *Criminal Code*. I agree with, and on this ground of appeal I would adopt, the reasons for judgment of the Ontario Court of Appeal: *supra*, at pp. 389-91.

Section 251 of the *Criminal Code* and s. 12 of the *Charter* -- Cruel and Unusual Punishment

I would reject this argument and again adopt without variation or addition the reasons of the Ontario Court of Appeal: *supra*, at p. 392.

Section 91(27) *Constitution Act, 1867* (*ultra vires*)

It was submitted on this issue that s. 251 was *ultra vires* of Parliament and could no longer be supported under the criminal power because it was colourable legislation in pith and substance, legislation for the protection of health and, therefore, within provincial competence. There is, in my view, no merit in this argument and I again adopt the reasons of the Ontario Court of Appeal: *supra*, at pp. 397-99.

Section 96 *Constitution Act, 1867*

The essence of this argument was that s. 251 of the *Criminal Code* purported to give powers to therapeutic abortion committees exercised by county, district and superior courts at the time of Confederation. There is no merit in this argument. I adopt the reasons of the Ontario Court of Appeal: *supra*, at p. 400.

Wrongful Interdelegation of Powers

I would dispose of this argument which was to the effect that s. 251 delegated powers relating to criminal law to the provinces generally, as did the Court of Appeal in their reasons: *supra*, at p. 399. I do not wish, however, to say anything about *Re Peralta and The Queen in Right of Ontario* 1988 CanLII 28 (SCC), (1985), 49 O.R. (2d) 705, which is relied upon by that court and is currently on appeal to this Court.

Defence of Necessity

This ground of appeal must also fail. There is no evidence whatever in the record that could support the defence.

Counsel's Address

In his reasons for judgment, the Chief Justice referred to defence counsel's address to the jury at trial, in which he had told the jury that they need not apply s. 251 of the *Criminal Code* if they thought it was bad law. I would associate myself with what the Chief Justice has said on this question. I am in full agreement with him that counsel was wrong in addressing the jury as he did and I would add that such practice, if commonly adopted, would undermine and place at risk the whole jury system.

Conclusion

Before leaving this case, I wish to make it clear that I express no opinion on the question of whether, or upon what conditions, there should be a right for a pregnant woman to have an abortion free of legal sanction. No valid constitutional objection to s. 251 of the *Criminal Code* has, in my view, been raised and, consequently, if there is to be a change in the law concerning this question it will be for Parliament to make. Questions of public policy touching on this controversial and divisive matter must be resolved by the elected Parliament. It does not fall within the proper jurisdiction of the courts. Parliamentary action on this matter is subject to judicial review but, in my view, nothing in the *Canadian Charter of Rights and Freedoms* gives the Court the power or duty to displace Parliament in this matter involving, as it does, general matters of public policy.

I would adopt as clearly expressive of the proper approach to be taken by the courts in dealing with *Charter* issues the words of Taylor J., of the Supreme Court of British Columbia, in the case of *Harrison v. University of British Columbia,* 1986 CanLII 1297 (BC SC), [1986] 6 W.W.R. 7. The facts of that case concerned the question of a mandatory retirement provision for employees of the University of British Columbia. The question of discrimination under s. 15 was raised. In dealing with the question of the purpose and constitutional effect of the *Charter*, Taylor J., at p. 11, after noting that the *Charter* functions assigned to the courts do not "allocate to the courts the responsibility for designing, initiating or directing social or economic policy", continued:

It is, of course, true that the function of the courts has been extended. In many cases in which the meaning or proper application of the Charter is in doubt the courts must decide whether or not a legislative, administrative or other act complained of requires constitutional sanction, and such decisions may well have social or economic consequences. As has been emphasized by Lamer J. in *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486 at 496-97, [1986] 1 W.W.R. 481 (sub nom.*Ref. re S. 94(2) of Motor Vehicle Act*), 69 B.C.L.R. 145, 48 C.R. (3d) 289, 36 M.V.R. 240, 23 C.C.C. (3d) 289, 24 D.L.R. (4th) 536, 18 C.R.R. 30, 63 N.R. 266, this imposes on the courts a new and onerous duty. In carrying out that task, however, the courts can be concerned with social or economic implications only to the extent that they assist in answering the question whether or not the right claimed is one entitled to constitutional protection. The rights to which the Charter grants protection are those fundamental to the free and democratic society.

This approach is applicable to the abortion question. The solution to this question in this country must be left to Parliament. It is for Parliament to pronounce on and to direct social policy. This is not because Parliament can claim all wisdom and knowledge but simply because Parliament is elected for that purpose in a free democracy and, in addition, has the facilities -- the exposure to public opinion and information -- as well as the political power to make effective its decisions. I refer with full approval to a further comment by Taylor J., *supra*, at p. 12:

The present case may serve, perhaps, to emphasize that the courts lack both the exposure to public opinion required in order to discharge the essentially "political" task of weighing social or economic interests and deciding between them, and also the ability to gather the information they would need for that task. When it has run its course the litigation may also have served to demonstrate -- if demonstration

be needed -- that the judicial system of necessity lacks the capacity of parliamentary bodies to act promptly when economic or social considerations indicate that a change in the law is desirable and, of equal impor tance, to react promptly when results show either that a change made for that purpose has not achieved its objective or that the objective is no longer desirable.

For all of these reasons, I would dismiss the appeal. I would answer the constitutional questions as follows:

1. Question:

Does section 251 of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 2(*a*), 7, 12, 15, 27 and 28 of the *Canadian Charter of Rights and Freedoms*?

Answer:

No.

2. Question:

If section 251 of the *Criminal Code* of Canada infringes or denies the rights and freedoms guaranteed by ss. 2(*a*), 7, 12, 15, 27 and 28 of the *Canadian Charter of Rights and Freedoms*, is s. 251 justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

Answer:

No answer is required.

3. Question:

Is section 251 of the *Criminal Code* of Canada *ultra vires* the Parliament of Canada?

Answer:

No.

4. Question:

Does section 251 of the *Criminal Code* of Canada violate s. 96 of the *Constitution Act, 1867*?

Answer:

No.

5. Question:

Does section 251 of the *Criminal Code* of Canada unlawfully delegate federal criminal power to provincial Ministers of Health or Therapeutic Abortion Committees, and in doing so, has the Federal Government abdicated its authority in this area?

Answer:

No.

6. Question:

Do sections 605 and 610(3) of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 7, 11(*d*), 11(*f*), 11(*h*) and 24(1) of the *Canadian Charter of Rights and Freedoms*?

Answer:

With respect to s. 605, the answer is No. As to s. 610(3), I adopt the reasons of the Court of Appeal and say that no costs should be awarded.

7. Question:
If sections 605 and 610(3) of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 7, 11(*d*), 11(*f*), 11(*h*) and 24(1) of the *Canadian Charter of Rights and Freedoms*, are ss. 605 and 610(3) justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?
Answer:
No answer is required.

The following are the reasons delivered by

R. *v.* MORGENTALER *Wilson J.*
R. *c.* MORGENTALER *Le juge Wilson*

WILSON J.--At the heart of this appeal is the question whether a pregnant woman can, as a constitutional matter, be compelled by law to carry the foetus to term. The legislature has proceeded on the basis that she can be so compelled and, indeed, has made it a criminal offence punishable by imprisonment under s. 251 of the *Criminal Code*, R.S.C. 1970, c. C-34, for her or her physician to terminate the pregnancy unless the procedural requirements of the section are complied with.

My colleagues, the Chief Justice and Justice Beetz, have attacked those requirements in reasons which I have had the privilege of reading. They have found that the requirements do not comport with the principles of fundamental justice in the procedural sense and have concluded that, since they cannot be severed from the provisions creating the substantive offence, the whole of s. 251 must fall.

With all due respect, I think that the Court must tackle the primary issue first. A consideration as to whether or not the procedural requirements for obtaining or performing an abortion comport with fundamental justice is purely academic if such requirements cannot as a constitutional matter be imposed at all. If a pregnant woman cannot, as a constitutional matter, be compelled by law to carry the foetus to term against her will, a review of the procedural requirements by which she may be compelled to do so seems pointless. Moreover, it would, in my opinion, be an exercise in futility for the legislature to expend its time and energy in attempting to remedy the defects in the procedural requirements unless it has some assurance that this process will, at the end of the day, result in the creation of a valid criminal offence. I turn, therefore, to what I believe is the central issue that must be addressed.

1. The Right of Access to Abortion

Section 7 of the *Charter* provides:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. I agree with the Chief Justice that we are not called upon in this case to delineate the full content of the right to life, liberty and security of the person. This would be an impossible task because we cannot envisage all the contexts in which such a right might be asserted. What we are asked to do, I believe, is define the content of the right in the context

of the legislation under attack. Does section 251 of the *Criminal Code* which limits the pregnant woman's access to abortion violate her right to life, liberty and security of the person within the meaning of s. 7?

Leaving aside for the moment the implications of the section for the foetus and addressing only the s. 7 right of the pregnant woman, it seems to me that we can say with a fair degree of confidence that a legislative scheme for the obtaining of an abortion which exposes the pregnant woman to a threat to her security of the person would violate her right under s. 7. Indeed, we have already stated in *Singh v. Minister of Employment and Immigration,* 1985 CanLII 65 (SCC), [1985] 1 S.C.R. 177, that security of the person even on the purely physical level must encompass freedom from the threat of physical punishment or suffering as well as freedom from the actual punishment or suffering itself. In other words, the fact of exposure is enough to violate security of the person. I agree with the Chief Justice and Beetz J. who, for differing reasons, find that pregnant women are exposed to a threat to their physical and psychological security under the legislative scheme set up in s. 251 and, since these are aspects of their security of the person, their s. 7 right is accordingly violated. But this, of course, does not answer the question whether even the ideal legislative scheme, assuming that it is one which poses no threat to the physical and psychological security of the person of the pregnant woman, would be valid under s. 7. I say this for two reasons: (1) because s. 7 encompasses more than the right to security of the person; it speaks also of the right to liberty, and (2) because security of the person may encompass more than physical and psychological security; this we have yet to decide.

It seems to me, therefore, that to commence the analysis with the premise that the s. 7 right encompasses only a right to physical and psychological security and to fail to deal with the right to liberty in the context of "life, liberty and security of the person" begs the central issue in the case. If either the right to liberty or the right to security of the person or a combination of both confers on the pregnant woman the right to decide for herself (with the guidance of her physician) whether or not to have an abortion, then we have to examine the legislative scheme not only from the point of view of fundamental justice in the procedural sense but in the substantive sense as well. I think, therefore, that we must answer the question: what is meant by the right to liberty in the context of the abortion issue? Does it, as Mr. Manning suggests, give the pregnant woman control over decisions affecting her own body? If not, does her right to security of the person give her such control? I turn first to the right to liberty.

(a) *The Right to Liberty*

In order to ascertain the content of the right to liberty we must, as Dickson C.J. stated in *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, commence with an analysis of the purpose of the right. Quoting from the Chief Justice at p. 344: **.** . . the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection.

We are invited, therefore, to consider the purpose of the *Charter* in general and of the right to liberty in particular.

The *Charter* is predicated on a particular conception of the place of the individual in society. An individual is not a totally independent entity disconnected from the society in which he or she lives. Neither, however, is the individual a mere cog in an impersonal machine in which his or her values, goals and aspirations are subordinated to those of the collectivity. The individual is a bit of both. The *Charter* reflects this reality by leaving a wide range of activities and decisions open to legitimate government control while at the same time placing limits on the proper scope of that control. Thus, the rights guaranteed in the *Charter* erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass. The role of the courts is to map out, piece by piece, the parameters of the fence.

The *Charter* and the right to individual liberty guaranteed under it are inextricably tied to the concept of human dignity. Professor Neil MacCormick, Regius Professor of Public Law and the Law of Nature and Nations, University of Edinburgh, in his work entitled *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (1982), speaks of liberty as "a condition of human self-respect and of that contentment which resides in the ability to pursue one's own conception of a full and rewarding life" (p. 39). He says at p. 41: To be able to decide what to do and how to do it, to carry out one's own decisions and accept their consequences, seems to me essential to one's self-respect as a human being, and essential to the possibility of that contentment. Such self-respect and contentment are in my judgment fundamental goods for human beings, the worth of life itself being on condition of having or striving for them. If a person were deliberately denied the opportunity of self-respect and that contentment, he would suffer deprivation of his essential humanity.

Dickson C.J. in *R. v. Big M Drug Mart Ltd.* makes the same point at p. 346:

It should also be noted, however, that an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government. It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is this same centrality that in my view underlies their designation in the *Canadian Charter of Rights and Freedoms* as "fundamental". They are the *sine qua non* of the political tradition underlying the *Charter*.

It was further amplified in Dickson C.J.'s discussion of *Charter* interpretation in *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, at p. 136:

A second contextual element of interpretation of s. 1 is provided by the words "free and democratic society". Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions

which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

The idea of human dignity finds expression in almost every right and freedom guaranteed in the *Charter*. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the *Charter*, namely that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.

Thus, an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in *Singh,* is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.

This view is consistent with the position I took in the case of *R. v. Jones*, 1986 CanLII 32 (SCC), [1986] 2 S.C.R. 284. One issue raised in that case was whether the right to liberty in s. 7 of the *Charter* included a parent's right to bring up his children in accordance with his conscientious beliefs. In concluding that it did I stated at pp. 318- 19:

I believe that the framers of the Constitution in guaranteeing "liberty" as a fundamental value in a free and democratic society had in mind the freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric -- to be, in to-day's parlance, "his own person" and accountable as such. John Stuart Mill described it as "pursuing our own good in our own way". This, he believed, we should be free to do "so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it". He added:
Each is the proper guardian of his own health, whether bodily *or* mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest. Liberty in a free and democratic society does not require the state to approve the personal decisions made by its citizens; it does, however, require the state to respect them.

This conception of the proper ambit of the right to liberty under our *Charter* is consistent with the American jurisprudence on the subject. While care must undoubtedly be taken to avoid a mechanical application of concepts developed in different cultural and constitutional contexts, I would respectfully agree with the observation of my colleague, Estey J., in *Law Society of Upper Canada v. Skapinker*, 1984 CanLII 3 (SCC), [1984] 1 S.C.R. 357, at pp. 366-67:

With the *Constitution Act, 1982* comes a new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights, a dimension which, like the balance of the Constitution, remains to be interpreted and applied by the Court.
The courts in the United States have had almost two hundred years experience at this task and it is of

more than passing interest to those concerned with these new developments in Canada to study the experience of the United States courts. As early as the 1920's the American Supreme Court employed the Fifth and Fourteenth Amendments to the American Constitution to give parents a degree of choice in the education of their children. In *Meyer v. Nebraska*, MANU/USSC/0204/1923 : 262 U.S. 390 (1923), the Court struck down a law prohibiting the teaching of any subject in a language other than English. In *Pierce v. Society of Sisters,* MANU/USSC/0147/1925 : 268 U.S. 510 (1925), an Oregon statute requiring all "normal children" to attend public school and thus prohibiting private school attendance was held to be unconstitutional. The Court in *Pierce* at pp. 534-35 characterized the interest being infringed as "the liberty of parents and guardians to direct the upbringing and education of children The sanctity of the family was underlined by the decision in *Skinner v. Oklahoma*, MANU/USSC/0152/1942 : 316 U.S. 535 (1942), where the Supreme Court invalidated a state law authorizing the sterilization of individuals convicted of two or more crimes involving moral turpitude. While the law was struck down on the basis that it violated the equal protection clause of the Fourteenth Amendment, the Court had this to say of the interest at stake: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race" (at p. 541).

Later the Supreme Court was asked to determine the constitutionality of a Connecticut statute forbidding the use of contraceptives by married couples. In *Griswold v. Connecticut,* MANU/USSC/0210/1965 : 381 U.S. 479 (1965), the majority held this statute to be invalid. The judges writing for the majority used various constitutional routes to arrive at this conclusion but the common denominator seems to have been a profound concern over the invasion of the marital home required for the enforcement of the law. *Griswold* was interpreted by the Supreme Court in the later case of *Eisenstadt v. Baird,* MANU/USSC/0240/1972 : 405 U.S. 438 (1972), where the majority stated at p. 453:
It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make up. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.
In *Eisenstadt* the Court struck down a Massachusetts law that prohibited the distribution of any drug for the purposes of contraception to unmarried persons on the ground that it violated the equal protection clause. The equal protection clause was also used by the Supreme Court in *Loving v. Virginia,* MANU/USSC/0093/1967 : 388 U.S. 1 (1967), to strike down legislation that purported to forbid inter-racial marriage. The Court tied its decision to the previous line of cases that protected basic choices relating to family life. It stated at p. 12: "The freedom to marry has long been recognized as one of the 'vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival . . . . [The] freedom to marry . . . resides with the individual . . . ." Thus, by a process of accretion the scope of the right of individuals to make fundamental decisions affecting their private lives was elaborated in the United States on a case by case basis. The parameters of the fence were being progressively defined.

For our purposes the most interesting development in this area of American law are the decisions of the Supreme Court in *Roe v. Wade*, MANU/USSC/0177/1972 : 410 U.S. 113 (1973), and its sister case *Doe v.*

Bolton, 410 U.S. 179 (1973). In *Roe v. Wade* the Court held that a pregnant woman has the right to decide whether or not to terminate her pregnancy. This conclusion, the majority stated, was mandated by the body of existing law ensuring that the state would not be allowed to interfere with certain fundamental personal decisions such as education, child-rearing, procreation, marriage and contraception. The Court concluded that the right to privacy found in the Fourteenth Amendment guarantee of liberty ". . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy" (p. 153).

This right was not, however, to be taken as absolute. At some point the legitimate state interests in the protection of health, proper medical standards, and pre-natal life would justify its qualification. Lawrence H. Tribe, Professor of Law at Harvard University, in his work entitled *American Constitutional Law* (1978), conveniently summarizes the limits the Court found to be inherent in the woman's right. I quote from pp. 924-25: Specifically, the Court held that, because the woman's right to decide whether or not to end a pregnancy is fundamental, only a compelling interest can justify state regulation impinging in any way upon that right. During the first trimester of pregnancy, when abortion is less hazardous in terms of the woman's life than carrying the child to term would be, the state may require only that the abortion be performed by a licensed physician; no further regulations peculiar to abortion as such are compellingly justified in that period.

After the first trimester, the compelling state interest in the mother's health permits it to adopt reasonable regulations in order to promote safe abortions -- but requiring abortions to be performed in hospitals, or only after approval of another doctor or committee in addition to the woman's physician, is impermissible, as is requiring that the abortion procedure employ a technique that, however preferable from a medical perspective, is not widely available.

Once the fetus is viable, in the sense that it is capable of survival outside the uterus with artificial aid, the state interest in preserving the fetus becomes compelling, and the state may thus proscribe its premature removal (i.e., its abortion) except to preserve the mother's life or health.

The decision in *Roe v. Wade* was re-affirmed by the Supreme Court in *City of Akron v. Akron Center for Reproductive Health, Inc.,* MANU/USSC/0082/1983 : 462 U.S. 416 (1983), and again, though by a bare majority, in *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S. Ct. 2169 (1986). In *Thornburgh,* Blackmun J., speaking for the majority, identifies the core value which the American courts have found to inhere in the concept of liberty. He states at pp. 2184-85: Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government . . . . [citations omitted] That promise extends to women as well as to men. Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision -- with the guidance of her physician and within the limits specified in *Roe* -- whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.

In my opinion, the respect for individual decision-making in matters of fundamental personal importance reflected in the American jurisprudence also informs the Canadian *Charter.* Indeed, as the Chief Justice pointed out in *R. v. Big M Drug Mart Ltd.,* beliefs about human worth and dignity "are the *sine qua non* of the political tradition underlying the *Charter*". I would conclude, therefore, that the right to liberty contained in s. 7 guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives. The question then becomes whether the decision of a woman to terminate her pregnancy falls within this class of protected decisions. I have no doubt that it does. This decision is one that will have profound psychological, economic and social consequences for the pregnant woman. The circumstances giving rise to it can be complex and varied and there may be, and usually are, powerful considerations militating in opposite directions. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be the response of the whole person. It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma. As Noreen Burrows, lecturer in European Law at the University of Glasgow, has pointed out in her essay on "International Law and Human Rights: the Case of Women's Rights", in *Human Rights: From Rhetoric to Reality* (1986), the history of the struggle for human rights from the eighteenth century on has been the history of men struggling to assert their dignity and common humanity against an overbearing state apparatus. The more recent struggle for women's rights has been a struggle to eliminatediscrimination, to achieve a place for women in a man's world, to develop a set of legislative reforms in order to place women in the same position as men (pp. 81-82). It has not been a struggle to define the rights of women in relation to their special place in the societal structure and in relation to the biological distinction between the two sexes. Thus, women's needs and aspirations are only now being translated into protected rights. The right to reproduce or not to reproduce which is in issue in this case is one such right and is properly perceived as an integral part of modern woman's struggle to assert her dignity and worth as a human being. Given then that the right to liberty guaranteed by s. 7 of the *Charter* gives a woman the right to decide for herself whether or not to terminate her pregnancy, does s. 251 ofthe *Criminal Code* violate this right? Clearly it does. The purpose of the section is to take the decision away from the woman and give it to a committee. Furthermore, as the Chief Justice correctly points out, at p. 56, the committee bases its decision on "criteria entirely unrelated to [the pregnant woman's] own priorities and aspirations". The fact that the decision whether a woman will be allowed to terminate her pregnancy is in the hands of a committee is just as great a violation of the woman's right to personal autonomy in decisions of an intimate and private nature as it would be if a committee were established to decide whether a woman should be allowed to continue her pregnancy. Both these arrangements violate the woman's right to liberty by deciding for her something that she has the right to decide for herself.

(b) *The Right to Security of the Person*

Section 7 of the *Charter* also guarantees everyone the right to security of the person.
Does this, as Mr. Manning suggests, extend to the right of control over one's own body?

I agree with the Chief Justice and with Beetz J. that the right to "security of the person" under s. 7 of the *Charter* protects both the physical and psychological integrity of the individual. State enforced medical or surgical treatment comes readily to mind as an obvious invasion of physical integrity. Lamer J. held in *Mills v. The Queen*, 1986 CanLII 17 (SCC), [1986] 1 S.C.R. 863, that the right to security of the person entitled a person to be protected against psychological trauma as well -- in that case the psychological trauma resulting from delays in the trial process under s. 11(*b*) of the *Charter*. He found that psychological trauma could take the form of "stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to outcome and sanction". I agree with my colleague and I think that his comments are very germane to the instant case because, as the Chief Justice and Beetz J. point out, the present legislative scheme for the obtaining of an abortion clearly subjects pregnant women to considerable emotional stress as well as to unnecessary physical risk. I believe, however, that the flaw in the present legislative scheme goes much deeper than that. In essence, what it does is assert that the woman's capacity to reproduce is not to be subject to her own control. It is to be subject to the control of the state. She may not choose whether to exercise her existing capacity or not to exercise it. This is not, in my view, just a matter of interfering with her right to liberty in the sense (already discussed) of her right to personal autonomy in decision-making, it is a direct interference with her physical "person" as well. She is truly being treated as a means -- a means to an end which she does not desire but over which she has no control. She is the passive recipient of a decision made by others as to whether her body is to be used to nurture a new life. Can there be anything that comports less with human dignity and self-respect? How can a woman in this position have any sense of security with respect to her person? I believe that s. 251 of the *Criminal Code* deprives the pregnant woman of her right to security of the person as well as her right to liberty.

2. The Scope of the Right under s. 7

I turn now to a consideration of the degree of personal autonomy the pregnant woman has under s. 7 of the *Charter* when faced with a decision whether or not to have an abortion or, to put it into the legislative context, the degree to which the legislature can deny the pregnant woman access to abortion without violating her s. 7 right. This involves a consideration of the extent to which the legislature can "deprive" her of it under the second part of s. 7 and the extent to which it can put "limits" on it under s. 1.

(a) *The Principles of Fundamental Justice*

Does section 251 deprive women of their right to liberty and to security of the person "in accordance with the principles of fundamental justice"? I agree with Lamer J. who stated in *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486, at p. 513, that the principles of fundamental justice "cannot be given any exhaustive content or simple enumerative definition, but will take on concrete meaning as the courts address alleged violations of s. 7". In the same judgment Lamer J. also stated at p. 503:

In other words, the principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system. Such an approach to the interpretation of "principles of fundamental justice" is consistent with the wording and structure of s. 7, the context of the section, *i.e.*, ss. 8 to 14, and the character and larger objects of the *Charter* itself. It provides meaningful content for the s. 7 guarantee

all the while avoiding adjudication of policy matters. While Lamer J. draws mainly upon ss. 8 to 14 of the *Charter* to give substantive content to the principles of fundamental justice, he does not preclude, but seems rather to encourage, the idea that recourse may be had to other rights guaranteed by the *Charter* for the same purpose. The question, therefore, is whether the deprivation of the s. 7 right is in accordance not only with procedural fairness (and I agree with the Chief Justice and Beetz J. for the reasons they give that it is not) but also with the fundamental rights and freedoms laid down elsewhere in the *Charter*.

This approach to s. 7 is supported by comments made by La Forest J. in *R. v. Lyons*, 1987 CanLII 25 (SCC), [1987] 2 S.C.R. 309. He urged that the rights enshrined in the *Charter* should not be read in isolation. Rather, he states at p. 326:

. . . the *Charter* protects a complex of interacting values, each more or less fundamental to the free and democratic society that is Canada (*R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, at p. 136), and the particularization of rights and freedoms contained in the *Charter* thus represents a somewhat artificial, if necessary and intrinsically worthwhile attempt to structure and focus the judicial exposition of such rights and freedoms. The necessity of structuring the discussion should not, however, lead us to overlook the importance of appreciating the manner in which the amplification of the content of each enunciated right and freedom imbues and informs our understanding of the value structure sought to be protected by the *Charter* as a whole and, in particular, of the content of the other specific rights and freedoms it embodies.

I believe, therefore, that a deprivation of the s. 7 right which has the effect of infringing a right guaranteed elsewhere in the *Charter* cannot be in accordance with the principles of fundamental justice.

In my view, the deprivation of the s. 7 right with which we are concerned in this case offends s. 2(*a*) of the *Charter*. I say this because I believe that the decision whether or not to terminate a pregnancy is essentially a moral decision, a matter of conscience. I do not think there is or can be any dispute about that. The question is: whose conscience? Is the conscience of the woman to be paramount or the conscience of the state? I believe, for the reasons I gave in discussing the right to liberty, that in a free and democratic society it must be the conscience of the individual. Indeed, s. 2(*a*) makes it clear that this freedom belongs to "everyone", i.e., to each of us individually. I quote the section for convenience:

2. Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion;

In *R. v. Big M Drug Mart Ltd., supra,* Dickson C.J. made some very insightful comments about the nature of the right enshrined in s. 2(*a*) of the *Charter* at pp. 345-47: Beginning, however, with the Independent faction within the Parliamentary party during the Commonwealth or Interregnum, many, even among those who shared the basic beliefs of the ascendent religion, came to voice opposition to the use of the State's coercive power to secure obedience to religious precepts and to extirpate nonconforming beliefs. The basis of this opposition was no longer simply a conviction that the State was enforcing the wrong set of beliefs and practices but rather the perception that belief itself was not amenable to compulsion. Attempts to compel belief or practice denied the reality of individual conscience and dishonoured the God that had planted it in His creatures. It is from these antecedents that the concepts of freedom of religion and freedom of conscience became associated, to form, as they do in s. 2(*a*) of our *Charter*, the single

integrated concept of "freedom of conscience and religion". What unites enunciated freedoms in the American First Amendment, in s. 2(*a*) of the *Charter* and in the provisions of other human rights documents in which they are associated is the notion of the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation. In *Hunter v. Southam Inc.*, *supra*, the purpose of the *Charter* was identified, at p. 155, as "the unremitting protection of individual rights and liberties". It is easy to see the relationship between respect for individual conscience and the valuation of human dignity that motivates such unremitting protection. It should also be noted, however, that an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government. It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is this same centrality that in my view underlies their designation in the *Canadian Charter of Rights and Freedoms* as "fundamental". They are the *sine qua non* of the political tradition underlying the *Charter*. Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the *Charter*. Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice. It may perhaps be that freedom of conscience and religion extends beyond these principles to prohibit other sorts of governmental involvement in matters having to do with religion. For the present case it is sufficient in my opinion to say that whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose. I leave toanother case the degree, if any, to which the government may, to achieve a vital interest or objective, engage in coercive action which s. 2(*a*) might otherwise prohibit. [Emphasis added.]

The Chief Justice sees religious belief and practice as the paradigmatic example of conscien- tiously-held beliefs and manifestations and as such protected by the *Charter*. But I do not think he is saying that a personal morality which is not founded in religion is outside the protection of s. 2(*a*). Certainly, it would be my view that conscientious beliefs which are not religiously motivated are equally protected by freedom of conscience in s. 2(*a*). In so saying I am not unmindful of the fact that the *Charter* opens with an affirmation that "Canada is founded upon principles that recognize the supremacy of God . . . ." But I am also mindful that the values entrenched in the *Charter* are those which characterize a free and democratic society. As is pointed out by Professor Cyril E. M. Joad, then Head of the Department of Philosophy and Psychology at Birkbeck College, University of London, in*Guide to the Philosophy of Morals and Politics* (1938), the role of the state in a democracy is to establish the background conditions under which individual citizens may pursue the ethical values which in their view underlie the good life. He states at p. 801: For the welfare of the state is nothing apart from the good of the citizens who compose it. It is no doubt true that a State whose citizens are compelled to go right is more efficient than

one whose citizens are free to go wrong. But what then? To sacrifice freedom in the interests of efficiency, is to sacrifice what confers upon human beings their humanity. It is no doubt easy to govern a flock of sheep; but there is no credit in the governing, and, if the sheep were born as men, no virtue in the sheep. Professor Joad further emphasizes at p. 803 that individuals in a democratic society can never be treated "merely as means to ends beyond themselves" because: To the right of the individual to be treated as an end, which entails his right to the full development and expression of his personality, all other rights and claims must, the democrat holds, be subordinated. I do not know how this principle is to be defended any more than I can frame a defence for the principles of democracy and liberty. Professor Joad stresses that the essence of a democracy is its recognition of the fact that the state is made for man and not man for the state (p. 805). He firmly rejects the notion that science provides a basis for subordinating the individual to the state. He says at pp. 805-6:

Human beings, it is said, are important only in so far as they fit into a biological scheme or assist in the furtherance of the evolutionary process. Thus each generation of women must accept as its sole function the production of children who will constitute the next generation who, in their turn, will devote their lives and sacrifice their inclinations to the task of producing a further generation, and so on *ad infinitum.* This is the doctrine of eternal sacrifice -- "jam yesterday, jam tomorrow, but never jam today". For, it may be asked, to what end should generations be produced, unless the individuals who compose them are valued in and for themselves, are, in fact, ends in themselves? There is no escape from the doctrine of the perpetual recurrence of generations who have value only in so far as they produce more generations, the perpetual subordination of citizens who have value only in so far as they promote the interests of the State to which they are subordinated, except in the individualist doctrine, which is also the Christian doctrine, that the individual is an end in himself. It seems to me, therefore, that in a free and democratic society "freedom of conscience and religion" should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality. Indeed, as a matter of statutory interpretation, "conscience" and "religion" should not be treated as tautologous if capable of independent, although related, meaning. Accordingly, for the state to take sides on the issue of abortion, as it does in the impugned legislation by making it a criminal offence for the pregnant woman to exercise one of her options, is not only to endorse but also to enforce, on pain of a further loss of liberty through actual imprisonment, one conscientiously-held view at the expense of another. It is to deny freedom of conscience to some, to treat them as means to an end, to deprive them, as Professor MacCormick puts it, of their "essential humanity". Can this comport with fundamental justice? Was Blackmun J. not correct when he said in *Thornburgh, supra,* at p. 2185:

A woman's right to make that choice freely is fundamental. Any other result . . . would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.

Legislation which violates freedom of conscience in this manner cannot, in my view, be in accordance with the principles of fundamental justice within the meaning of s. 7.

(b) *Section 1 of the Charter*

The majority of this Court held in *Re B.C. Motor Vehicle Act*, *supra*, that a deprivation of the s. 7 right in violation of the principles of fundamental justice in the substantive sense could nevertheless constitute a reasonable limit under s. 1 and be justified in a free and democratic society. It is necessary therefore to

consider whether s. 251 of the *Criminal Code* can be saved under s. 1. The section provides:
1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

This section received judicial scrutiny by this Court in *R. v. Oakes*, *supra.* Dickson C.J., speaking for the majority, set out two criteria which must be met if the limit is to be found reasonable: (1) the objective which the legislation is designed to achieve must relate to concerns which are pressing and substantial; and (2) the means chosen must be proportional to the objective sought to be achieved. The Chief Justice identified three important components of proportionality at p. 139:

First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in the first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".

Does section 251 meet this test?

In my view, the primary objective of the impugned legislation must be seen as the protection of the foetus. It undoubtedly has other ancillary objectives, such as the protection of the life and health of pregnant women, but I believe that the main objective advanced to justify a restriction on the pregnant woman's s. 7 right is the protection of the foetus. I think this is a perfectly valid legislative objective. Miss Wein submitted on behalf of the Crown that the Court of Appeal was correct in concluding at p. 378 that "the situation respecting a woman's right to control her own person becomes more complex when she becomes pregnant, and that some statutory control may be appropriate". I agree. I think s. 1 of the *Charter* authorizes reasonable limits to be put upon the woman's right having regard to the fact of the developing foetus within her body. The question is: at what point in the pregnancy does the protection of the foetus become such a pressing and substantial concern as to outweigh the fundamental right of the woman to decide whether or not to carry the foetus to term? At what point does the state's interest in the protection of the foetus become "compelling" and justify state intervention in what is otherwise a matter of purely personal and private concern?

In *Roe v. Wade*, *supra*, the United States Supreme Court held that the state's interest became compelling when the foetus became viable, i.e., when it could exist outside the body of the mother. As Miss Wein pointed out, no particular justification was advanced by the Court for the selection of viability as the relevant criterion. The Court expressly avoided the question as to when human life begins. Blackmun J. stated at p. 159:
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 not in a position to speculate as to the answer.

He referred, therefore, to the developing foetus as "potential life" and to the state's interest as "the protection of potential life".

Miss Wein submitted that it was likewise not necessary for the Court in this case to decide when human life begins although she acknowledged that the value to be placed on "potential life" was significant in assessing the importance of the legislative objective sought to be achieved by s. 251. It would be my view, and I think it is consistent with the position taken by the United States Supreme Court in *Roe v. Wade*, that the value to be placed on the foetus as potential life is directly related to the stage of its development during gestation. The undeveloped foetus starts out as a newly fertilized ovum; the fully developed foetus emerges ultimately as an infant. A developmental progression takes place in between these two extremes and, in my opinion, this progression has a direct bearing on the value of the foetus as potential life. It is a fact of human experience that a miscarriage or spontaneous abortion of the foetus at six months is attended by far greater sorrow and sense of loss than a miscarriage or spontaneous abortion at six days or even six weeks. This is not, of course, to deny that the foetus is potential life from the moment of conception. Indeed, I agree with the observation of O'Connor J., dissenting in *City of Akron v. Akron Center for Reproductive Health, Inc., supra,* at p. 461, (referred to by my colleague Beetz J. in his reasons, at p. 113) that the foetus is potential life from the moment of conception.

It is simply to say that in balancing the state's interest in the protection of the foetus as potential life under s. 1 of the *Charter* against the right of the pregnant woman under s. 7 greater weight should be given to the state's interest in the later stages of pregnancy than in the earlier. The foetus should accordingly, for purposes of s. 1, be viewed in differential and developmental terms: see L. W. Sumner, Professor of Philosophy at the University of Toronto, *Abortion and Moral Theory* (1981), pp. 125-28. As Professor Sumner points out, both traditional approaches to abortion, the so-called "liberal" and "conservative" approaches, fail to take account of the essentially developmental nature of the gestation process. A developmental view of the foetus, on the other hand, supports a permissive approach to abortion in the early stages of pregnancy and a restrictive approach in the later stages. In the early stages the woman's autonomy would be absolute; her decision, reached in consultation with her physician, not to carry the foetus to term would be conclusive. The state would have no business inquiring into her reasons. Her reasons for having an abortion would, however, be the proper subject of inquiry at the later stages of her pregnancy when the state's compelling interest in the protection of the foetus would justify it in prescribing conditions. The precise point in the development of the foetus at which the state's interest in its protection becomes "compelling" I leave to the informed judgment of the legislature which is in a position to receive guidance on the subject from all the relevant disciplines. It seems to me, however, that it might fall somewhere in the second trimester. Indeed, according to Professor Sumner (p. 159), a differential abortion policy with a time limit in the second trimester is already in operation in the United States, Great Britain, France, Italy, Sweden, the Soviet Union, China, India, Japan and most of the countries of Eastern Europe although the time limits vary in these countries from the beginning to the end of the second trimester (cf. Stephen L. Isaacs, "Reproductive Rights 1983: An International Survey" (1982-83), 14 *Columbia Human Rights Law Rev.* 311, with respect to France and Italy).

Section 251 of the *Criminal Code* takes the decision away from the woman at all stages of her pregnancy. It is a complete denial of the woman's constitutionally protected right under s. 7, not merely a limitation

on it. It cannot, in my opinion, meet the proportionality test in *Oakes*. It is not sufficiently tailored to the legislative objective and does not impair the woman's right "as little as possible". It cannot be saved under s. 1. Accordingly, even if the section were to be amended to remedy the purely procedural defects in the legislative scheme referred to by the Chief Justice and Beetz J. it would, in my opinion, still not be constitutionally valid. One final word. I wish to emphasize that in these reasons I have dealt with the existence of the developing foetus merely as a factor to be considered in assessing the importance of the legislative objective under s. 1 of the *Charter*. I have not dealt with the entirely separate question whether a foetus is covered by the word "everyone" in s. 7 so as to have an independent right to life under that section. The Crown did not argue it and it is not necessary to decide it in order to dispose of the issues on this appeal.

3. Disposition

I would allow the appeal. I would strike down s. 251 of the *Criminal Code* as having no force or effect under s. 52(1) of the *Constitution Act, 1982*. I would answer the first constitutional question in the affirmative as regards s. 7 of the *Charter* and the second constitutional question in the negative. I would answer questions 3, 4 and 5 in the negative and question 6 in the manner proposed by Beetz J. It is not necessary to answer question 7.

I endorse the Chief Justice's critical comments on Mr. Manning's concluding remarks to the jury.

Annexure: 03

IN THE SUPREME COURT OF INDIA

Special Leave Petition (Civil) No. 12612 of 2022
Decided On: 21.07.2022
Appellants: **X**
Vs.
Respondent: **The Principal Secretary, Health and Family Welfare Department and Ors.**

Hon'ble Judges/Coram:
Dr. D.Y. Chandrachud, Surya Kant and A.S. Bopanna, JJ.

JUDGMENT

Dr. D.Y. Chandrachud, J.

1. Issue notice.
2 . Ms. Aishwarya Bhati, Additional Solicitor General, with Mr. G.S. Makker, AOR,accepts notice on behalf of the second Respondent.

3 . We have heard Dr. Amit Mishra, counsel appearing on behalf of the Petitioner. We have requested Ms. Aishwarya Bhati to assist the Court on the interpretative aspects ofSection 3(2)(b) of the Medical Termination of Pregnancy Act 19711 and Rule 3B of theMedical Termination of Pregnancy Rules 20032.

4 . The Petitioner is a permanent resident of Manipur and is stated to be currently residing in Delhi. The Petitioner has averred that she was in a consensual relationshipand, in the month of June 2022 she learnt that she was pregnant. On 5 July 2022, anultrasound scan revealed a single intrauterine pregnancy of a term of twenty-two weeks. The Petitioner decided to terminate the pregnancy; her relationship has failed. She hasstated that she is the eldest amongst five siblings and her parents are agriculturists. ThePetitioner has stated that she holds a BA degree and, in the absence of a source of livelihood, she would be unable to raise and nurture a child. She moved a writ petitionbefore the High Court of Delhi.

5. The Division Bench of the High Court, by an order dated 15 July 2022, issued notice restricted only to prayer C of the petition, in which the Petitioner has sought a direction for the inclusion of an unmarried woman within the ambit of Rule 3B of the MTP Rulesfor the termination of pregnancy in terms of the provisions of Clause (b) of Sub-section(2) of Section 3 of the MTP Act.

6. No notice has been issued by the High Court on prayer A or prayer B of the petition which effectively stand rejected.

7 . For convenience of reference, prayers A, B and C of the petition before the High Court are extracted below:

A. Permit the Petitioner to terminate her ongoing pregnancy through registered medical practitioners at any approved private or government center or Hospitalbefore 15.07.2022 as her relief will be infructuous after that as the pregnancywill be of around 24 Weeks by that time;
B. Restrain the Respondent from taking any coercive action or criminal proceedings against the Petitioner or any Registered Medical Practitioner terminating the pregnancy of the Petitioner at any approved private center or hospital registered by Govt. NCT of Delhi;

C. Direct the Respondent to include unmarried woman also within the ambit of the Rule 3B of the Medical Termination of Pregnancy Rules 2003 (as amended o n 21.10.2021) for termination of pregnancy under Clause (b) of Sub-section (2) Section 3 of the MTP Act, for a period of up to twenty-four weeks;

The Petitioner has completed 24 weeks of her pregnancy on 18 July 2022.

8. Section 3 of the MTP Act reads as follows:

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 twenty weeks, if such medical practitioner is, or

(b) where the length of the pregnancy exceeds twenty weeks but does not exceed twenty-four weeks in case of such category of woman as may be prescribed by Rules made under this Act, if not less than two registered medical practitioners are, of the 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 any serious physical or mental abnormality.

Explanation 1.--For the purposes of Clause (a), where anypregnancy occurs as a result of failure of any device or methodused by any woman or her partner for the purpose of limiting the number of children or preventing pregnancy, the anguish caused by such pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation 2.--For the purposes of Clauses (a) and (b), where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by the pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

(2A) The norms for the registered medical practitioner whose opinion is required for termination of pregnancy at different gestational age shall be such as may be prescribed by Rules made under this Act.

(2B) The provisions of Sub-section (2) relating to the length of the pregnancy shall not apply to the termination of pregnancy by the medical practitioner where such termination is necessitated by the diagnosis of any of the substantial foetal abnormalities diagnosed by a Medical Board.

(2C) Every State Government or Union territory, as the case may be, shall, by notification in the Official Gazette, constitute a Board to be called a Medical Board for the purposes of this Act to exercise such powers and functions as may be prescribed by Rules made under this Act.

(2D) The Medical Board shall consist of the following, namely:
(a) a Gynaecologist;
(b) a Paediatrician;
(c) a Radiologist or Sonologist; and
(d) such other number of members as may be notified in the Official Gazette by the State Government or Union territory, as the case may be.

(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 reasonably 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 amentally ill person, shall be terminated except with the consent inwriting of her guardian.

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

9 . Clause (a) of Sub-section (2) of Section 3 permits the termination of pregnancy where the length of pregnancy does not exceed twenty weeks. Clause (b) permits termination where the length of pregnancy exceeds twenty weeks but does not exceed twenty four weeks for such categories of women "as may be prescribed by Rules made under this Act". However, an opinion must be formed by not less than two registered medical practitioners that inter alia "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".

10. Explanation 1 to Section 3 stipulates that for the purpose of Clause (a), where a pregnancy has occurred as a result of a failure of any device or method used by any woman or her partner for the purpose of limiting the number of children or preventingpregnancy, the anguish caused by such

pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman. Explanation 1 evidently qualifies Clause (a) but not Clause (b).

11. Rule 3B of the MTP Rules has been made in pursuance of the provisions of Clause (b) of Sub-section (2) of Section 3 of the MTP Act. Rule 3B is as follows:

3B. Women eligible for termination of pregnancy up to twenty-four weeks. - The following categories of women shall be considered eligible for termination of pregnancy under Clause (b) of Sub-section (2) Section 3 of the Act, for a period of up to twenty-four weeks, namely:

(a) survivors of sexual assault or rape or incest;
(b) minors;
(c) change of marital status during the ongoing pregnancy (widowhood and divorce);
(d) women with physical disabilities [major disability as per criteria laid down under the Rights of Persons with Disabilities Act, 2016 (49 of 2016)];
(e) mentally ill women including mental retardation;
(f) the foetal malformation that has substantial risk of beingincompatible with life or if the child is born it may suffer from such physical or mental abnormalities to be seriously handicapped; and
(g) women with pregnancy in humanitarian settings or disaster or emergency situations as may be declared by the Government.

1 2 . The High Court held that since the Petitioner is an unmarried woman whose pregnancy arose out of a consensual relationship, her case is "clearly not covered" by any of the above clauses of Rule 3B and, as a consequence, Section 3(2)(b) is not applicable.

13. On the submission that Rule 3B, insofar as it excludes an unmarried woman, is violative of Article 14 of the Constitution, the High Court has issued notice on the writ petition. However, it held that as of the date of its order, it was not open to it to traverse beyond the provisions of Rule 3B in the exercise of the jurisdiction Under Article 226 of the Constitution.

1 4 . Prima facie, quite apart from the issue of constitutionality which has been addressed before the High Court, it appears that the High Court has taken an unduly restrictive view of the provisions of Clause (c) of Rule 3B. Clause (c) speaks of a change of marital status during an ongoing pregnancy and is followed in parenthesis by the words "widowhood and divorce". The expression "change of marital status" should be given a purposive rather than a restrictive interpretation. The expressions "widowhood and divorce" need not be construed to be exhaustive of the category which precedes it.
15. The fundamental principle of statutory interpretation is that the words of a statute must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act and the intent of the legislature. Parliament by amending the MTP Act through Act 8 of 2021 intended to include unmarried women and single women within the ambit of the Act. This is evident from the replacement of the word 'husband' with 'partner' in Explanation I of Section 3(2) of the Act.

16. Explanation 1 expressly contemplates a situation involving an unwanted pregnancy caused as a result of the failure of any device or method used by a woman or her partner for the purpose of limiting the number of children or preventing pregnancy. The Parliamentary intent, therefore, is clearly not to confine the beneficial provisions of the MTP Act only to a situation involving a matrimonial relationship. On the contrary, a reference to the expression "any woman or her partner" would indicate that a broad meaning and intent has been intended to be ascribed by Parliament. The statute has recognized the reproductive choice of a woman and her bodily integrity and autonomy. Both these rights embody the notion that a choice must inhere in a woman on whether or not to bear a child. In recognizing the right the legislature has not intended to make a distinction between a married and unmarried woman, in her ability to make a decision
on whether or not to bear the child. These rights, it must be underscored, are in consonance with the provisions of Article 21 of the Constitution.

In this case, the Petitioner submits that she was deserted by her partner at the last stage in June 2022 causing her immense mental agony, trauma, and physical suffering. Excluding unmarried women and single women from the ambit of the statute goes against the purpose of the legislation. The Statement of Objects and Reasons of the MTP Act seeks to "liberalise certain existing provisions relating to termination of pregnancy… (1) as a health measure--when there is danger to the life or risk to physical or mental health of the woman".

18. A comparison between the two provisions before and after the 2021 amendment is tabulated below:

MTP, 1971	MTP Amendment 2021
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	Explanation 1: For the purposes of Clause (a), where any pregnancy occurs as a result of failure of any device or method used by any woman or her partner for the purpose of limiting the number of children or preventing pregnancy, the anguish caused by such pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

The above table shows that the phrase 'married woman' was replaced by 'any woman' and the word 'husband' was replaced by 'partner'. But evidently, there is a gap in the law: while Section 3 travels beyond conventional relationships based on marriage, Rule 3B of the MTP Rules does not envisage a situation involving unmarried women, but recognizes other categories of women such as divorcees, widows, minors, disabled and mentally ill women and survivors of sexual assault or rape. There is no basis to deny unmarried women the right to medically terminate the pregnancy, when the same choice is available to other categories of women.

19. A woman's right to reproductive choice is an inseparable part of her personal liberty Under Article 21 of Constitution. She has a sacrosanct right to bodily integrity. In Suchita Srivastava v. Chandigarh

Administration MANU/SC/1580/2009 : (2009) 9 SCC 1, this Court has recognized that a woman's right to reproductive autonomy is a dimension of Article 21 of the Constitution:

22. There is no doubt that a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood Under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods.

In Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors. MANU/SC/1044/2017 : (2017) 10 SCC 1, the decision of a woman to procreate or abstain from procreating has been recognized as a facet of her right to lead a life with dignity and the right to privacy Under Article 21 of the Constitution:

298. [p]rivacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised.

The Bombay High Court in High Court on its Own Motion v. State of Maharashtra MANU/MH/1886/2016 : 2017 Cri LJ 218 (Bom HC) observed as follows:

1 4 . A woman's decision to terminate a pregnancy is not a frivolous one. Abortion is often the only way out of a very difficult situation for a woman. An abortion is a carefully considered decision taken by a woman who fears that the welfare of the child she already has, and of other members of the household that she is obliged to care for with limited financial and other resources, may be compromised by the birth of another child. These are decisions taken by responsible women who have few other options. They are women who would ideally have preferred to prevent an unwanted pregnancy, but were unable to do so. **If a woman does not want to continue with the pregnancy, then forcing her to do so represents a violation of the woman's bodily integrity and aggravates her mental trauma which would be deleterious to her mental health**

(Emphasis Supplied)

20. Denying an unmarried woman the right to a safe abortion violates her personal autonomy and freedom. Live-in relationships have been recognized by this Court. In S. Khusboo v. Kanniammal MANU/SC/0310/2010 : (2010) 5 SCC 600, this Court observed that criminal law should not be weaponized to interfere with the domain of personal autonomy. It was observed:

46. While there can be no doubt that in India, marriage is an important social institution, we must also keep our minds open to the fact that there are certain individuals or groups who do not hold the same view. To be sure, there are some indigenous groups within our country wherein sexual relations outside the marital setting are accepted as a normal occurrence. **Even in the societal mainstream, there are a significant number of people who see nothing wrong in engaging in premarital sex. Notions of social morality are inherently subjective and the criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy. Morality and criminality are not co-extensive.**

(Emphasis Supplied)

21. On the above premises, we are inclined to entertain the Special Leave Petition. In the meantime, we are of the view that allowing the Petitioner to suffer an unwanted pregnancy would be contrary to the intent of the law enacted by Parliament. Moreover, allowing the Petitioner to terminate her pregnancy, on a proper interpretation of the statute, prima facie, falls within the ambit of the statute and the Petitioner should not be denied the benefit on the ground that she is an unmarried woman. The distinction between a married and unmarried woman does not bear a nexus to the basic purpose and object which is sought to be achieved by Parliament which is conveyed specifically by the provisions of Explanation 1 to Section 3 of the Act. The Petitioner had moved the High Court before she had completed 24 weeks of pregnancy. The delay in the judicial process cannot work to her prejudice.

22. In the above background, we pass the following ad interim order:

(i) We request the Director of the All India Institute of Medical Sciences, Delhi to constitute a Medical Board in terms of the provisions of Section 3(2D) of the Act, extracted in the earlier part of this order, during the course of 22 July 2022; and
(ii) In the event that the Medical Board concludes that the fetus can be aborted without danger to the life of the Petitioner, a team of doctors at the All India Institute of Medical Sciences shall carry out the abortion in terms of the request which has been made before the High Court and which has been reiterated both in the Special Leave Petition and in the course of the submissions before this Court by counsel appearing on behalf of the Petitioner. Before doing so the wishes of the Petitioner shall be ascertained again and her written consent obtained after due verification of identity.

23. The report shall be furnished to this Court after compliance with this order within a period of one week thereafter.

24. For considering the report of the Medical Board, list the Special Leave Petition on 2 August 2022.

25. The ad interim direction of the High Court of Delhi declining to grant interim relief shall stand modified in the above terms.

1"MTP Act"
2"MTP Rules"

Annexure : 04

IN THE HIGH COURT OF BOMBAY

Suo Motu Public Interest Litigation No. 1 of 2016
Decided On: 19.09.2016
Appellants: **High Court on its own Motion**
Vs.
Respondent: **The State of Maharashtra**

Hon'ble Judges/Coram:
V.K. Tahilramani and Mridula Bhatkar, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Manjiri Shah, Advocate
For Respondents/Defendant: Arfan Sait, APP

ORDER

V.K. Tahilramani, J.

1. The background of this PIL, coming before us, is that Ms. A.S. Shende, Judge, City Civil & Sessions Court, Greater Bombay visited Byculla District Prison on 25.4.2016 in view of directions of this Court. Generally women prisoners in Mumbai are kept in District Women Prison, Byculla, Mumbai. During the visit, one inmate/under-trial prisoner namely Shahana gave a requisition for obtaining permission to terminate her pregnancy. The requisition given by Shahana is part of this PIL. In the requisition, she has stated that she already has a baby who is five months old. The baby was suffering from convulsion/epilepsy, hernia, loose motion as well as fever. Shahana's health was also not good and she was suffering from repeated bleeding. Shahana was four months pregnant. Shahana stated that in all these circumstances, it was very difficult for her to maintain and take care of her five months old baby and herself and in addition, the baby which she was expecting, hence, she requested that she be allowed to medically terminate her pregnancy.

2. Ms. Shende, the learned Judge made inquiry with the Jail Superintendent as well as the Medical Officer attached to the jail. She was informed by the Medical Officer about the health condition of five months old baby of Shahana and pregnancy of Shahana. The medical officer also supported the contention of Shahana in respect of termination of pregnancy. Learned Judge Ms. Shende was further informed by the Medical Officer attached to jail that for obtaining permission for termination of pregnancy, a proposal has to be sent to the Committee which will take time, therefore, considering the state of health of the baby and the mother and the application given by Shahana, the learned City Civil & Sessions Judge thought it fit to forward all the papers including the application/requisition given by Shahana to the High Court for information and urgent action, by her letter dated 26.4.2016. Along with the letter, Ms. Shende sent

requisition of Shahana along with her medical papers along with copy of application dated 21.3.2016 sent by the Superintendent, Mumbai District Women Prison, Byculla, Mumbai addressed to Sir J.J. Group of Hospitals, Mumbai for grant of permission for surgery/medical termination of pregnancy. The concern of the learned Judge was that though the letter dated 21.3.2016 was addressed to the hospital, till 26.4.2016, no medical termination of pregnancy was carried out. In view of that, the learned Judge Ms. Shende requested for urgent directions to be given to Jail Authorities as well as Dean of J.J. Hospital to take immediate necessary action according to law. In view of this report, the Registry of this Court then sought following directions:--

A. Registry be permitted to forward the report of City Civil Judge, Mumbai dated 26.4.2016 with annexures to the Dean of Sir JJ Hospital for taking immediate needful action as permissible under law.

AND
B. Registry be permitted to inform Jail Superintendent, Mumbai District Women Prison, Byculla, Mumbai to immediately co-ordinate with the authority of Sir J.J. Hospital and to produce the concerned Under Trial Prisoner at Sir J.J. Hospital for giving immediate medical treatment including MTP as per medical advice and permissible under law.

AND
C. Registry be also permitted to inform the concerned City Civil & Sessions Judge to monitor the action taken by the Jail Authorities and Sir J.J. Hospital for avoiding delay as there is requirement of urgent steps to be taken by the Authorities in respect of Under Trial Prisoners.

OR
D. Your Lordship may issue any other appropriate directions as may be deemed fit."

3 . The directions at 'A' to 'C' were approved and the matter was placed before theHon'ble the then Chief Justice who directed that this matter be treated as Suo Motu PIL and assigned the matter to this Bench. This is how this matter has come up before us as a number of female prisoners are faced with a similar situation.

4. Meanwhile as per the directions of the Jail Superintendent of Byculla Prison, Mumbai, under-trial prisoner Shahana was taken to the J.J. Hospital, Mumbai on 30.4.2016 for medical termination of her pregnancy. She was directed to be brought before the concerned unit of J.J. Hospital on 3.5.2016. Accordingly, she was brought to J.J. Hospital on 3.5.2016 and on that day itself, her pregnancy was medically terminated.

5. This Court appointed Advocate Ms. Manjiri Shah to assist this Court as amicus curiae in this matter. This Court also directed the learned APP to file an affidavit stating the procedure which is followed in case of Medical Termination of Pregnancy of a female prisoner. Pursuant to the said directions, learned APP tendered the affidavit of Dr. Khan Sayeed Ahmed, Medical Officer presently working at Byculla District Prison, Mumbai. In the affidavit, it is stated that Chapter XLI, at Page No. 607 of Maharashtra

Prisons Manual deals with women prisoners. Rule 5 thereof deals with the facilities to women prisoners. Rule 6 deals with medical aid to women prisoners including cases of pregnancy. Rule 7 deals with pregnancy. Rule 8 deals with births in prison. In the said affidavit, it is further stated that records are being maintained by Prison Authorities and as soon as the prisoner viz. under-trial/convicts are admitted to prisons/jails, entry is made in the register maintained by the Prison Authorities. The prisoners at the time of admission in the prison are medically examined. Female prisoners at the time of admission are examined and history about last menstrual period is taken down. Urine pregnancy test is also conducted. After conducting the test, if a woman prisoner is found to be pregnant, this fact is intimated to the Superintendent of the Jail and thereafter the woman prisoner is taken to the Government Hospital for further investigation, treatment and for registration of pregnancy in Government Hospital at the earliest.

6 . On 29.8.2016, Advocate Ms. Manjiri Shah brought to our notice that an under-trial prisoner Anjali who was lodged at Thane Central Prison as under-trial prisoner F-346/16 was arrested on 25.6.2016 and she wanted to terminate her pregnancy, however, no steps were being taken in this regard. We then directed the Superintendent of Thane Central Prison to record the statement of under-trial prisoner F-346/16 (Anjali) and to produce it in the Court on the next date. Accordingly, the statement of under-trial prisoner F-346/16 was produced before us on the next date i.e on 30.8.2016. In her statement, she clearly stated that she wanted to terminate her pregnancy as it was not possible to continue the same for various reasons stated in her statement. We were also informed that the said prisoner had been referred to the Civil Hospital, Thane for medical tests including sonography and the report of the tests will be produced on the next date i.e 31.8.2016. On 31.8.2016, the medical reports of under-trial prisoner F- 346/16 were produced before us. It showed that she was fifteen weeks pregnant as on 30.8.2016. The Medical Officer of Thane Central Prison who was present before the Court stated that in view of the statement of the said under-trial prisoner, the undertrial prisoner will be immediately referred to Thane Civil Hospital so that pregnancy can be terminated. As 3rd to 5th Sept. were holidays, we kept the matter on 6.9.2016 to find out the progress of the matter. On 6.9.2016, we were informed that prisoner was admitted in hospital on 3.9.2016 for medical termination of pregnancy and on 4.9.16, the pregnancy was medically terminated.

7. If a pregnancy is to be terminated, it is to be done strictly as per the norms provided in the Medical Termination of Pregnancy Act, 1971 (for short, 'The Act') especially Sections 3, 4 and 5. The Medical Termination of Pregnancy Act, 1971 sets some limitations regarding the circumstances when abortion is permissible, the persons who are competent to perform the procedure and the place where it could be performed. Sections 3 to 5 are relevant for our purpose. Sections 3, 4 and 5 of the Act reads thus:--
"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 I.--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 II.--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 [mentally ill person], shall be terminated except with the consent in writing of her guardian. (4)(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 or a District Level Committee constituted by that Government with the Chief Medical Officer or District Level Committee constituted by that Government with the Chief Medical Officer or District Health Officer as the Chairperson of the said committee:

Provided that the District Level Committee shall consist of not less than three and not more than five members including the Chairperson, as the Government may specify from time to time.
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 pregnancy by a person who is not a registered medical practitioner shall be an offence punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years under that Code, and that Code shall, to this extent, stand modified.

(3) Whoever terminates any pregnancy in a place other than that mentioned in section 4, shall be punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years.

(4) Any person being owner of a place which is not approved under clause (b) of section 4 shall be punishable with rigorous imprisonment for a term which shall not be less that two years but which may extend to seven years.

Explanation 1 -For the purpose of this section, the expression "owner" in relation to a place means any person who is the administrative head or otherwise responsible for the working or maintenance of a hospital or place, by whatever name called, where the pregnancy may be terminated under this Act.

Explanation 2 - For the purpose of this section, so much of the provisions of clause (d) of section 2 as relate to the possession, by registered medical practitioner, of experience or training in gynecology and obstetrics shall not apply.]"

8 . Sections 3 and 5 of the Act are the only sections which allow termination of pregnancy. Section 5 can be invoked at any time if the registered medical practitioner is of the opinion in good faith that termination of pregnancy is immediately necessary to save the life of the pregnant woman irrespective of restriction of 12 or 20 weeks as mentioned in Section 3. Thus, Section 5 stands altogether on different footing. We are concerned with Section 3. Whether a woman can make her choice to continue with the pregnancy or to terminate it within a restricted period as contemplated in Section 3 of the Act.

9. In the affidavit of Dr. Khan Sayeed Ahmed, Medical Officer of Byculla District Prison, it is clearly stated that if a prisoner who is pregnant shows her willingness for termination of pregnancy, the norms set out in Section 3 of the Act are strictly followed and if the length of the pregnancy exceeds maximum of 20 weeks as stated in Section 3 of the Act, then Section 5 of the Act is followed.

10. It appears that earlier, there was some misconception that for obtaining permission for medical termination of pregnancy of a prisoner, the proposal has to be sent to a Committee. Referring the case to a Committee would entail delay in the termination of pregnancy. This delay in terminating the pregnancy could have some serious or unnecessary complications which may affect the pregnant lady adversely. However, on going through the Medical Termination of Pregnancy Act and the Rules, as well as the Prison Manual, we find that it is not necessary to refer the case of a pregnant prisoner who wants to terminate her pregnancy to a Committee. The Committee which is referred to under 2(e) of the Medication Termination of Pregnancy Rules 2003 and to which there is a reference in Section 4 of the Act is a Committee whose job is only to approve the place where a pregnancy can be terminated. A

prisoner has to simply indicate that she wants to terminate her pregnancy as its continuance would cause grave injury to her physical and mental health. She would then be referred to the Government hospital and if her case was covered by Sections 3 or 5 of the Act, the pregnancy would be terminated.

1 1 . Section 3(2) states that where the length of pregnancy does not exceed twelve weeks, it can be terminated by a registered medical practitioner if he is of the opinion that the case falls under Section 3(2)(a), (b)(i) or (ii). In case of termination of pregnancy exceeding twelve weeks and not exceeding 20 weeks, then same opinion but of not less than two registered medical practitioners is to be sought. The registered medical practitioners should opine that the continuance of pregnancy either would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health. Section 3(2)(b)(ii) pertains to the risk involved to the health of the child. The present case of medical termination of pregnancy is to be considered under Section 3(2)(b)(i) which allows the termination of pregnancy if there is risk to the life of the pregnant woman or of grave injury to her physical or mental health.

12. Besides physical injury, the legislature has widened the scope of the termination of pregnancy by including "a injury" to mental health of the pregnant woman. Thus, if continuance of pregnancy is harmful to the mental health of a pregnant woman, then that is a good and legal ground to allow termination if the pregnancy is not exceeding 20 weeks. Explanations 1 and 2 have stated the presumptions in respect of grave injury to mental health of the pregnant woman. The law-makers have considered and taken care of the mental condition of the pregnant woman. In the case of termination of pregnancy, the injury caused either to body or mind is considered. However, mental health can deteriorate if it is forced or unwanted pregnancy. Let us advert to Explanation 1. Under Explanation 1, if a woman is pregnant due to rape, then anguish caused by such pregnancy is to be presumed to constitute a grave injury to mental health of the pregnant woman. As per Explanation 2, if the pregnancy is accidental on account of failure of device or method used by married woman or her husband for the purpose of limiting the number of children, then the said pregnancy if unwanted, it may be presumed to constitute grave injury to mental health of the pregnant woman. These two explanations stating presumptions do not restrict the scope of the various other circumstances causing grave injury to mental health of woman who is pregnant. We do not want to deal with Explanation 1, as it is very specific about cases of rape and mental anguish to a woman in such cases is obvious. If pregnancy is due to rape, then there is bound to be complete mental break down of a victim. We need to interpret Explanation 2 which is restricted only to a married couple. However, today a man and a woman who are in live-in-relationship, cannot be covered under Explanation 2 whereas Explanation 2 should be read to mean any couple living together like a married couple.

13. A woman irrespective of her marital status can be pregnant either by choice or it can be an unwanted pregnancy. To be pregnant is a natural phenomenon for which woman and man both are responsible. Wanted pregnancy is shared equally, however, when it is an accident or unwanted, then the man may not be there to share the burden but it may only be the woman on whom the burden falls. Under such circumstances, a question arises why only a woman should suffer. There are social, financial and other aspects immediately attached to the pregnancy of the woman and if pregnancy is unwanted, it can have serious repercussions. It undoubtedly affects her mental health.

The law makers have taken care of helpless plight of a woman and have enacted Section 3(2)(b)(i) by incorporating the words "grave injury to her mental health". It is mandatory on the registered medical practitioner while forming opinion of necessity of termination of pregnancy to take into account whether it is injurious to her physical or mental health. While doing so, the woman's actual or reasonable foreseeable environment may be taken into account.

14. A woman's decision to terminate a pregnancy is not a frivolous one. Abortion is often the only way out of a very difficult situation for a woman. An abortion is a carefully considered decision taken by a woman who fears that the welfare of the child she already has, and of other members of the household that she is obliged to care for with limited financial and other resources, may be compromised by the birth of another child. These are decisions taken by responsible women who have few other options. They are women who would ideally have preferred to prevent an unwanted pregnancy, but were unable to do so. If a woman does not want to continue with the pregnancy, then forcing her to do so represents a violation of the woman's bodily integrity and aggravates her mental trauma which would be deleterious to her mental health.

15. According to international human rights law, a person is vested with human rights only at birth; an unborn foetus is not an entity with human rights. The pregnancy takes place within the body of a woman and has profound effects on her health, mental wellbeing and life. Thus, how she wants to deal with this pregnancy must be a decision she and she alone can make. The right to control their own body and fertility and motherhood choices should be left to the women alone. Let us not lose sight of the basic right of women: the right to autonomy and to decide what to do with their own bodies, including whether or not to get pregnant and stay pregnant.

16. Women in different situations have to go for termination of pregnancy. She may be a working woman or homemaker or she may be a prisoner, however, they all form one common category that they are pregnant women. They all have the same rights in relation to termination of pregnancy. As stated earlier, as per Prison Manual, for prisoners, there is provision for pregnant prisoners. Chapter XLI is on Women Prisoners. Rule 7 in said Chapter pertains to "Pregnancy of Women Prisoners, which is as follows: "When a woman prisoner (convict or undertrial) is found or suspected to be pregnant at the time of her admission or at any time thereafter, the Medical Officer shall report the fact to the Superintendent. As soon as possible arrangements shall be made to get such prisoner medically examined at the hospital for ascertaining the state of her health, pregnancy, duration of pregnancy, probable date of delivery etc. After ascertaining necessary particulars, a report shall be sent to the Dy. Inspector of General of Prisons, stating the date of her admission, term of sentence, the date of release, duration of pregnancy, probable date of delivery etc."

Rule 8 states about Births in prison. Rule 9 is in respect of children of women prisoners. However there is no provision specifically relating to termination of pregnancy of women prisoners either convict or under-trial.

17. When a woman prisoner is admitted in prison, she is medically examined, history of her last menstrual period is taken and urine pregnancy test is carried out. One register is maintained in which noting on these aspects is made including if she is pregnant and if pregnant, procedure stated in paragraph 5 above is followed. However, we understand that sometimes a convict or under-trial women prisoner

may not be aware of her pregnancy and she may be unable to disclose the fact of pregnancy at the time of admission in the prison. Hence, medical check up of all the women prisoners who are of reproductive age should be done at least once every month for two months from their admission in jail to ascertain whether the woman is pregnant. Moreover, a woman prisoner if found pregnant should be informed by the Medical Officer attached to the prison that she can get the pregnancy terminated if it is such that it falls under Section 3(2)(a), (b)(i) or (ii). This onus is cast on the medical officer. If she wants to terminate the pregnancy, she should be sent to the civil hospital on an urgent basis to help her to terminate the pregnancy.

18. Rule 1 of Section II of Chapter " Non Statutory Rules" falling in Chapter IV relating to Maharashtra Prisons (Prison Hospital) Rules 1970 reads as under:--

"1. For all administrative purposes, the Medical Officer is subordinate to the Superintendent of the prison except as regards the medical treatment of the sick. He shall have a free hand in the medical treatment of the inmates of the Hospital whether sick or convalescent or under observation, subject to Jail discipline. He is under the general control of the I.G. of Prisons."

Though pregnancy is not a sickness, the case of pregnant prisoner will fall in "Under Observation" category, hence, the Medical Officer will have the right to decide whether the prisoner requires termination of pregnancy and send her to Civil Hospital on urgent basis to help her to terminate the pregnancy.

19. If a pregnant prisoner wants to terminate her pregnancy, then provision of section 3(2)(b)(i) or (ii) are applicable. She being a prisoner should not be treated differently than any other pregnant women. We, with all responsibility state that Section 3 of Medical Termination of Pregnancy Act bestows a very precious right to a pregnant woman to say no to motherhood. It is the right of a woman to be a mother so also it is the right of a woman not be a mother and her wish has to be respected. This right emerges from her human right to live with dignity as a human being in the society and protected as a fundamental right under Article 21 of the Constitution of India with reasonable restrictions as contemplated under the Act. Human rights are natural rights and thus a woman has a natural right in relation to her body which includes her willingness to be a mother or her unwillingness to be a mother.

20. Section 3(2)(b)(i) is an extension of the human right of a woman and this needs to be protected. Woman owns her body and has right over it. Abortion is always a difficult and careful decision and woman alone should be the choice maker. A child when born and takes first breath, is a human entity and thus, unborn foetus cannot be put on a higher pedestal than the right of a living woman. Thus, fundamental right under Article 21 of Constitution of India protects life and personal liberty which covers women. This right of exercise of reproductive choice though is restricted by Medical Termination of Pregnancy Act, 1971, it also recognizes and protects her right to say no to the pregnancy if her mental or physical health is at stake. Thus, it is a regulated procedure.

21. We would like to refer to the decision of the Supreme Court in the case of Suchita Srivastava and Anr. v. Chandigarh Administration MANU/SC/1580/2009 : (2009) 9 SCC 1 where it is observed that there is

no doubt that a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India. It is important to recognize that reproductive choice can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected."

22. Advocate Ms. Manjiri Shah stated that she had a discussion with the Head of the Department of Gynaecology in J.J. Hospital where women prisoners in Mumbai are referred in cases of pregnancy. The Out Patient Department (O.P.D.) timings are 8.00 a.m. to 12.00 p.m and it was found that generally women prisoners were brought to the hospital at about 11.30 a.m. to 12.00 p.m., hence, on that day, though the woman prisoner is examined, it is not possible to carry out all the tests which are necessary in relation to the pregnancy. Therefore, it was felt that it would be advisable that the woman prisoner who is pregnant reaches the hospital at about 8.00 or 8.30 a.m. and after examination, the tests can be prescribed and carried out on the same day by the afternoon and the tests results would be received by the evening, hence, by the time, the woman prisoner went back to the prison, the entire tests and reports are ready due to which the next step can be decided and the next date of operation/medical procedure can be decided on that day itself.

23. In Mumbai, when the prisoners are to be taken to the Court or hospital, it is the job of L.A. Squad to escort them, however, it is seen that except in cases of dire medical emergency, the L.A. Squad gives preference to prisoners who are to be produced in the Court and sometimes, sufficient staff is not available to take the prisoners to the hospital. In case where there is no emergency, then that prisoner is not taken to the hospital on that day and may be taken to hospital after a day or two. In case of pregnant prisoner, if the pregnancy has to be terminated, normally it has to be done in 12 weeks as set out in Section 3(2)(a) or 20 weeks as set out in 3(2)(b) of the Act provided it falls under Section 3(2)(b)(i) or (ii). In cases of pregnancy, every day is important on account of growth of foetus. Once a woman prisoner is found to be pregnant and she indicates that she wants to terminate the pregnancy, she should be immediately referred to the hospital and it should be ensured that her pregnancy is terminated. The Jail Administration and Escort Division to ensure that as far as possible such lady prisoner reaches the hospital by 8.30 a.m. A female prisoner cannot have access to facility of medical termination of pregnancy if her case falls under Section 3 or 5 of the Act, therefore not providing her with the facility amounts to forcing a woman to continue with a pregnancy she does not want which by itself constitutes a grave injuryto her mental health and as such would fall under Section 3(2)(b)(i) of the Act. Hence, such a pregnancy can be lawfully terminated.

24. We are further informed that in the prison, OPD case papers are maintained in loose format. In such case, there is risk of the case papers getting mixed up or lost. In our opinion, it would be proper that in addition, an 'OPD Register' is maintained in the jail in which brief details of the patient are given. The name of the prisoner, medical problem and follow up should be stated briefly in the register. This OPD Register be produced for inspection to the Sessions Judge/Magistrate who is deputed to visit the jail.
25. In view of the above, directions are given as under:--

"1. (i). Upon admission into a jail/prison, every woman prisoner of child bearing age shall undergo a Urine Pregnancy Test (UPT) within 5 days of being admitted to jail.

(ii) Every woman prisoner of child bearing age shall undergo a second UPT approximately 30 days after admission into jail/prison in case the UPT under 1(i) is not positive.

2. In case, the urine pregnancy test is positive, the Medical Officer shall inform the prisoner that she can get the pregnancy terminated if her case falls under Section 3 or 5 of The Medical Termination of Pregnancy Act.

3. If the prisoner indicates she wants to terminate the pregnancy, her statement should be recorded by the Jail Authority or Medical Officer to that effect and the record of the statement be maintained. A copy of that statement be forwarded with the prisoner when she is referred to the hospital.

4 . If the prisoner indicates that she wants to terminate the pregnancy, the Medical Officer and Jail Superintendent shall ensure that woman prisoner issent on urgent basis to the nearest Government Hospital to help her terminate the pregnancy. It is made clear that they shall not wait for any order of the Court if the case falls under Sections 3 or 5 of the Act.

5 . Every prison shall maintain "Prison OPD Register" where details of every prisoner examined either by the prison medical officer/doctor or visiting doctor are entered. Such register shall contain in brief (i) the name of the prisoner;

(ii) convict or undertrial number, (iii) the medical complaint of the prisoner;
(iv) the advice of the doctor (including referral of the patient to the nearest government Hospital) and
(v) the date for follow up when necessary. The Prison OPD Register be produced for inspection of the Sessions Judge/Magistrate deputed to visit the prison.

6 . The Jail Superintendent and escort division to ensure that such prisoner as well as other prisoners needing medical treatment in a hospital are sent to the hospital as far as possible by 8:30 a.m. i.e when O.P.D opens.

7. After discharge from the said hospital, the prison authorities shall take due care of the woman prisoner until she fully recovers from the medical termination of her pregnancy."

2 6 . Copy of this order be forwarded for information and implementation to the following:--

"(1) Principal Secretary (Home Department), Government of Maharashtra;
(2) Principal Secretary (Home Department -Prisons), Government of Maharashtra;
(3) Principal Secretary (Women and Health), Government of Maharashtra;
(4) Principal Secretary (Health), Government of Maharashtra;
(5) Principal District & Sessions Judge;
(6) Chief Metropolitan Magistrate;
(7) Inspector General of Prisons;
(8) Addl. Director General (Prisons), Pune;
(9) Superintendents of all prisons in Maharashtra;
(10) Medical Officers of Prisons in Maharashtra."With these directions, the P.I.L. is disposed of.

27. Before we part with this case, we wish to place on record our appreciation for the valuable assistance rendered by Advocate Ms. Manjiri Shah and Learned APP Mr. Arfan Sait.

Annexure : 05

SUPREME COURT OF THE UNITED STATES

No. 70-18
Decided On: 11.10.1972
Appellants: **Jane ROE, et al.**
Vs.
Respondent: **Henry WADE**

Hon'ble Judges:
Blackmun, Rehnquist and Stewart, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Sarah R. Weddington, Adv.

For Respondents/Defendant: Robert C. Flowers, Asst. Atty. Gen. and Jay Floyd, Asst. Atty. Gen.

JUDGMENT

Mr. Justice Blackmun

This Texas federal appeal and its Georgia companion, Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201, present constitutional challenges to state criminal abortion legislation. The Texas statutes under attack here are typical of those that have been in effect in many States for approximately a century. The Georgia statutes, in contrast, have a modern cast and are a legislative product that, to an extent at least, obviously reflects the influences of recent attitudinal change, of advancing medical knowledge and techniques and of new thinking about an old issue.

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

In addition, population growth, pollution, poverty and racial overtones tend to complicate and not to simplify the problem.

Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection. We seek earnestly to do this, and, because we do, we have inquired into and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's

attitudes toward the abortion procedure over the centuries. We bear in mind, too, Mr. Justice Holmes' admonition in his now-vindicated dissent in Lochner v. New York, MANU/USSC/0253/1905 : 198 U.S. 45, 76, 25 S.Ct. 539, 547, 49 L.Ed. 937 (1905):

'(The Constitution) is made for people of fundamentally differing views and the accident of our finding certain opinions natural and familiar, or novel and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.'

* The Texas statutes that concern us here are Arts. 1191-1194 and 1196 of the State's Penal Code,1 Vernon's Ann.P.C. These make it a crime to 'procure an abortion,' as therein defined, or to attempt one, except with respect to 'an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.' Similar statutes are in existence in a majority of the States.2

Texas first enacted a criminal abortion statute in 1854. Texas Laws 1854, c. 49, § 1, set forth in 3 H. Gammel, Laws of Texas 1502 (1898). This was soon modified into language that has remained substantially unchanged to the present time. See Texas Penal Code of 1857, c. 7, Arts. 531-536; G. Paschal, Laws of Texas, Arts. 2192-2197 (1866); Texas Rev.Stat., c. 8, Arts. 536-541 (1879); Texas Rev.Crim.Stat., Arts. 1071- 1076 (1911). The final article in each of these compilations provided the same exception, as does the present Article 1196, for an abortion by 'medical advice for the purpose of saving the life of the mother.'3

II

Jane Roe,4 a single woman who was residing in Dallas County, Texas, instituted this federal action in March 1970 against the District Attorney of the county. She sought a declaratory judgment that the Texas criminal abortion statutes were unconstitutional on their face and an injunction restraining the defendant from enforcing the statutes.

Roe alleged that she was unmarried and pregnant; that she wished to terminate her pregnancy by an abortion 'performed by a competent, licensed physician, under safe, clinical conditions'; that she was unable to get a 'legal' abortion in Texas because her life did not appear to be threatened by the continuation of her pregnancy; and that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions. She claimed that the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth and Fourteenth Amendments. By an amendment to her complaint Roe purported to sue 'on behalf of herself and all other women' similarly situated.

James Hubert Hallford, a licensed physician, sought and was granted leave to intervene in Roe's action. In his complaint he alleged that he had been arrested previously for violations of the Texas abortion statutes and that two such prosecutions were pending against him. He described conditions of patients who came to him seeking abortions and he claimed that for many cases he, as a physician, was unable to determine whether they fell within or outside the exception recognized by Article 1196. He alleged that, as a consequence, the statutes were vague and uncertain, in violation of the Fourteenth Amendment and that

they violated his own and his patients' rights to privacy in the doctor-patient relationship and his own right to practice medicine, rights he claimed were guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments.

John and Mary Doe,5 a married couple, filed a companion complaint to that of Roe. They also named the District Attorney as defendant, claimed like constitutional deprivations and sought declaratory and injunctive relief. The Does alleged that they were a childless couple; that Mrs. Doe was suffering from a 'neural-chemical' disorder; that her physician had 'advised her to avoid pregnancy until such time as her condition has materially improved' (although a pregnancy at the present time would not present 'a serious risk' to her life); that, pursuant to medical advice, she had discontinued use of

birth control pills; and that if she should become pregnant, she would want to terminate the pregnancy by an abortion performed by a competent, licensed physician under safe, clinical conditions. By an amendment to their complaint, the Does purported to sue 'on behalf of themselves and all couples similarly situated.'

The two actions were consolidated and heard together by a duly convened three-judge district court. The suits thus presented the situations of the pregnant single woman, the childless couple, with the wife not pregnant and the licensed practicing physician, all joining in the attack on the Texas criminal abortion statutes. Upon the filing of affidavits, motions were made for dismissal and for summary judgment. The court held that Roe and members of her class and Dr. Hallford, had standing to sue and presented justiciable controversies, but that the Does had failed to allege facts sufficient to state a present controversy and did not have standing. It concluded that, with respect to the requests for a declaratory judgment, abstention was not warranted. On the merits, the District Court held that the 'fundamental right of single women and married persons to choose where to have children is protected by the Ninth Amendment, through the Fourteenth Amendment,' and that the Texas criminal abortion statutes were void on their face because they were both unconstitutionally vague and constituted an overbroad infringement of the plaintiffs' Ninth Amendment rights. The court then held that abstention was warranted with respect to the requests for an injunction. It therefore dismissed the Does' complaint, declared the abortion statutes void and dismissed the application for injunctive relief. 314 F.Supp. 1217, 1225 (N.D.Tex.1970).

The plaintiffs Roe and Doe and the intervenor Hallford, pursuant to 28 U.S.C. § 1253, have appealed to this Court from that part of the District Court's judgment denying the injunction. The defendant District Attorney has purported to cross-appeal, pursuant to the same statute, from the court's grant of declaratory relief to Roe and Hallford. Both sides also have taken protective appeals to the United States Court of Appeals for the Fifth Circuit. That court ordered the appeals held in abeyance pending decision here. We postponed decision on jurisdiction to the hearing on the merits. 402 U.S. 941, 91 S.Ct. 1610, 29 L.Ed. 108 (1971).

III

It might have been preferable if the defendant, pursuant to our Rule 20, had presented to us a petition for certiorari before judgment in the Court of Appeals with respect to the granting of the plaintiffs' prayer for declaratory relief. Our decisions in Mitchell v. Donovan, MANU/USSC/0054/1970 : 398 U.S. 427, 90

S.Ct. 1763, 26 L.Ed.2d 378 (1970) and Gunn v. University Committee, MANU/USSC/0068/1970 : 399 U.S. 383, 90 S.Ct. 2013, 26 L.Ed.2d 684 (1970), are to the effect that § 1253 does not authorize an appeal to this Court from the grant or denial of declaratory relief alone. We conclude, nevertheless, that those decisions do not foreclose our review of both the injunctive and the declaratory aspects of a case of this kind when it is property here, as this one is, on appeal under § 1253 from specific denial of injunctive relief and the arguments as to both aspects are necessarily identical. See Carter v. Jury Comm'n, MANU/USSC/0091/1970 : 396 U.S. 320, 90 S.Ct. 518, 24 L.Ed.2d 549 (1970); Florida Lime and Avocado Growers, Inc. v. Jacobsen, MANU/USSC/0137/1960 : 362 U.S. 73; 80-81, 80 S.Ct. 568, 573-574, 4 L.Ed.2d 568 (1960). It would be destructive of time and energy for all concerned were we to rule otherwise. Cf. Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201.

IV

We are next confronted with issues of justiciability, standing and abstention. Have Roe and the Does established that 'personal stake in the outcome of the controversy,' Baker v. Carr, MANU/USSC/0170/1962 : 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962), that insures that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution,' Flast v. Cohen, MANU/USSC/0178/1968 : 392 U.S. 83, 101, 88 S.Ct. 1942, 1953, 20 L.Ed.2d 947 (1968) and Sierra Club v. Morton, MANU/USSC/0238/1972 : 405 U.S. 727, 732, 92 S.Ct. 1361, 1364, 31 L.Ed.2d 636 (1972)? And what effect did the pendency of criminal abortion charges against Dr. Hallford in state court have upon the propriety of the federal court's granting relief to him as a plaintiff-intervenor? A. Jane Roe. Despite the use of the pseudonym, no suggestion is made that Roe is a fictitious person. For purposes of her case, we accept as true and as established, her existence; her pregnant state, as of the inception of her suit in March 1970 and as late as May 21 of that year when she filed an alias affidavit with the District Court; and her inability to obtain a legal abortion in Texas.

Viewing Roe's case as of the time of its filing and thereafter until as late as May, there can be little dispute that it then presented a case or controversy and that, wholly apart from the class aspects, she, as a pregnant single woman thwarted by the Texas criminal abortion laws, had standing to challenge those statutes. Abele v. Markle, 452 F.2d 1121, 1125 (CA2 1971); Crossen v. Breckenridge, MANU/FEST/0218/1971 : 446 F.2d 833, 8380-839 (CA6 1971); Poe v. Menghini, 339 F.Supp. 986, 990-991 (D.C.Kan. 1972). See Truax v. Raich, MANU/USSC/0183/1915 : 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1951). Indeed, we do not read the appellee's brief as really asserting anything to the contrary. The 'logical nexus between the status asserted and the claim sought to be adjudicated,' Flast v. Cohen, 392 U.S., at 102, 88 S.Ct., at 1953 and the necessary degree of contentiousness, Golden v. Zwickler, MANU/USSC/0084/1969 : 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969), are both present.

The appellee notes, however, that the record does not disclose that Roe was pregnant at the time of the District Court hearing on May 22, 1970,6 or on the following June 17 when the court's opinion and judgment were filed. And he suggests that Roe's case must now be moot because she and all other members of her class are no longer subject to any 1970 pregnancy.

The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review and not simply at the date the action is initiated. United States v. Munsingwear, Inc., MANU/USSC/0012/1950 : 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950); Golden v. Zwickler, supra; SEC v. Medical Committee for Human Rights, 404 U.S. 403, 92 S.Ct. 577, 30 L.Ed.2d 560 (1972).

But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition, yet evading review.' Southern Pacific Terminal Co. v. ICC, MANU/USSC/0158/1911 : 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911). See Moore v. Ogilvie, MANU/USSC/0072/1969 : 394 U.S. 814, 816, 89 S.Ct. 1493, 1494, 23 L.Ed.2d 1 (1969); Carroll v. President and Commissioners of Princess Anne, MANU/USSC/0142/1968 : 393 U.S. 175, 178-179, 89 S.Ct. 347, 350, 351, 21 L.Ed.2d 325 (1968); United States v. W. T. Grant Co., MANU/USSC/0040/1953 : 345 U.S. 629, 632-633, 73 S.Ct. 894, 897-898, 97 L.Ed. 1303 (1953).

We, therefore, agree with the District Court that Jane Roe had standing to undertake this litigation, that she presented a justiciable controversy and that the termination of
her 1970 pregnancy has not rendered her case moot.

B. Dr. Hallford. The doctor's position is different. He entered Roe's litigation as a plaintiff-intervenor, alleging in his complaint that he:

'(I)n the past has been arrested for violating the Texas Abortion Laws and at the present time stands charged by indictment with violating said laws in the Criminal District Court of Dallas County, Texas to-wit: (1) The State of Texas vs.

James H. Hallford, No. C-69-5307-IH and (2) The State of Texas vs. James H. Hallford, No. C-69-2524-H. In both cases the defendant is charged with abortion . . .'

In his application for leave to intervene, the doctor made like representations as to the abortion charges pending in the state court. These representations were also repeated in the affidavit he executed and filed in support of his motion for summary judgment.

Dr. Hallford is, therefore, in the position of seeking, in a federal court, declaratory and injunctive relief with respect to the same statutes under which he stands charged in criminal prosecutions simultaneously pending in state court. Although he stated that he has been arrested in the past for violating the State's abortion laws, he makes no allegation of any substantial and immediate threat to any federally protected right that cannot be asserted in his defense against the state prosecutions. Neither is there any allegation of harassment or bad-faith prosecution. In order to escape the rule articulated in the cases cited in the next

paragraph of this opinion that, absent harassment and bad faith, a defendant in a pending state criminal case cannot affirmatively challenge in federal court the statutes under which the State is prosecuting him, Dr. Hallford seeks to distinguish his status as a present state defendant from his status as a 'potential future defendant' and to assert only the latter for standing purposes here.

We see no merit in that distinction. Our decision in Samuels v. Mackell, MANU/USSC/0055/1971 : 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971), compels the conclusion that the District Court erred when it granted declaratory relief to Dr. Hallford instead of refraining from so doing. The court, of course, was correct in refusing to grant injunctive relief to the doctor. The reasons supportive of that action, however, are those expressed in Samuels v. Mackell, supra and in Younger v. Harris, MANU/USSC/0178/1971 : 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); Boyle v. Landry, MANU/USSC/0040/1971 : 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971); Perez v. Ledesma, MANU/USSC/0184/1971 : 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971); and Byrne v. Karalexis, MANU/USSC/0024/1971 : 401 U.S. 216, 91 S.Ct. 777, 27 L.Ed.2d 792 (1971). See also Dombrowski v. Pfister, MANU/USSC/0189/1965 : 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965). We note, in passing, that Younger and its companion cases were decided after the three-judge District Court decision in this case.

Dr. Hallford's complaint in intervention, therefore, is to be dismissed.7 He is remitted to his defenses in the state criminal proceedings against him. We reverse the judgment of the District Court insofar as it granted Dr. Hallford relief and failed to dismiss his complaint in intervention.

C. The Does. In view of our ruling as to Roe's standing in her case, the issue of the Does' standing in their case has little significance. The claims they assert are essentially the same as those of Roe and they attack the same statutes. Nevertheless, we briefly note the Does' posture.

Their pleadings present them as a childless married couple, the woman not being pregnant, who have no desire to have children at this time because of their having received medical advice that Mrs. Doe should avoid pregnancy and for 'other highly personal reasons.' But they 'fear . . . they may face the prospect of becoming parents.' And if pregnancy ensues, they 'would want to terminate' it by an abortion. They assert an inability to obtain an abortion legally in Texas and, consequently, the prospect of obtaining an illegal abortion there or of going outside Texas to some place where the procedure could be obtained legally and competently.

We thus have as plaintiffs a married couple who have, as their asserted immediate and present injury, only an alleged 'detrimental effect upon (their) marital happiness' because they are forced to 'the choice of refraining from normal sexual relations or of endangering Mary Doe's health through a possible pregnancy.' Their claim is that sometime in the future Mrs. Doe might become pregnant because of possible failure of contraceptive measures and at that time in the future she might want an abortion that might then be illegal under the Texas statutes. This very phrasing of the Does' position reveals its speculative character. Their alleged injury rests on possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood and possible future impairment of health. Any one or more of these several possibilities may not take place and all may not combine. In the Does'

estimation, these possibilities might have some real or imagined impact upon their marital happiness. But we are not prepared to say that the bare allegation of so indirect an injury is sufficient to present an actual case or controversy. Younger v. Harris, 401 U.S., at 41-42, 91 S.Ct., at 749; Golden v. Zwickler, 394 U.S., at 109-110, 89 S.Ct., at 960; Abele v. Markle, 452 F.2d, at 1124-1125; Crossen v. Breckenridge, 446 F.2d, at 839. The Does' claim falls far short of those resolved otherwise in the cases that the Does urge upon us, namely, investment Co. Institute v. Camp, MANU/USSC/0183/1971 : 401 U.S. 617, 91 S.Ct. 1091, 28 L.Ed.2d 367 (1971); Association of Data Processing Service Organizations, Inc. v. Camp, MANU/USSC/0058/1970 : 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970); and Epperson v. Arkansas, MANU/USSC/0126/1968 : 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968). See also Truax v. Raich, MANU/USSC/0183/1915 : 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915).

The Does therefore are not appropriate plaintiffs in this litigation. Their complaint was properly dismissed by the District Court and we affirm that dismissal.

V

The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal 'liberty' embodied in the Fourteenth Amendment's Due Process Clause; or in personal marital, familial and sexual privacy said to be protected by the Bill of Rights or its penumbras, see Griswold v. Connecticut, MANU/USSC/0210/1965 : 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); Eisenstadt v. Baird, MANU/USSC/0240/1972 : 405 U.S. 438 (1972); id., at 460, 92 S.Ct. 1029, at 1042, 31 L.Ed.2d 349 (White, J., concurring in result); or among those rights reserved to the people by the Ninth Amendment, Griswold v. Connecticut, 381 U.S., at 486, 85 S.Ct., at 1682 (Goldberg, J., concurring). Before addressing this claim, we feel it desirable briefly to survey, in several aspects, the history of abortion, for such insight as that history may afford us and then to examine the state purposes and interests behind the criminal abortion laws.

VI

It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or even of commonlaw origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century.

1. Ancient attitudes. These are not capable of precise determination. We are told that at the time of the Persian Empire abortifacients were known and that criminal abortions were severely punished.8 We are also told, however, that abortion was practiced in Greek times as well as in the Roman Era,9 and that 'it was resorted to without scruple.'10 The Ephesian, Soranos, often described as the greatest of the ancient gynecologists, appears to have been generally opposed to Rome's prevailing freeabortion practices. He found it necessary to think first of the life of the mother and he resorted to abortion when, upon this standard, he felt the procedure advisable.11 Greek and Roman law afforded little protection to the unborn. If abortion was prosecuted in some places, it seems to have been based on a concept of a violation of the father's right to his offspring. Ancient religion did not bar abortion.12

2 . The Hippocratic Oath. What then of the famous Oath that has stood so long as the ethical guide of the medical profession and that bears the name of the great Greek (460(?)-377(?) B.C.), who has been described as the Father of Medicine, the 'wisest and the greatest practitioner of his art,' and the 'most important and most complete medical personality of antiquity,' who dominated the medical schools of his time and who typified the sum of the medical knowledge of the past?13 The Oath varies somewhat according to the particular translation, but in any translation the content is clear: '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,'14 or 'I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly, I will not give to a woman an abortive remedy.'15

Although the Oath is not mentioned in any of the principal briefs in this case or in Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201, it represents the apex of the development of strict ethical concepts in medicine and its influence endures to this day. Why did not the authority of Hippocrates dissuade abortion practice in his time and that of Rome? The late Dr. Edelstein provides us with a theory:16 The Oath was not uncontested even in Hippocrates' day; only the Pythagorean school of philosophers frowned upon the related act of suicide. Most Greek thinkers, on the other hand, commended abortion, at least prior to viability. See Plato, Republic, V, 461; Aristotle, Politics, VII, 1335b 25. For the Pythagoreans, however, it was a matter of dogma. For
them the embryo was animate from the moment of conception and abortion meant destruction of a living being. The abortion clause of the Oath, therefore, 'echoes Pythagorean doctrines,' and '(i)n no other stratum of Greek opinion were such views held or proposed in the same spirit of uncompromising austerity.'17

Dr. Edelstein then concludes that the Oath originated in a group representing only a small segment of Greek opinion and that it certainly was not accepted by all ancient physicians. He points out that medical writings down to Galen (A.D. 130-200) 'give evidence of the violation of almost every one of its injunctions.'18 But with the end of antiquity a decided change took place. Resistance against suicide and against abortion became common. The Oath came to be popular. The emerging teachings of Christianity were in agreement with the Phthagorean ethic. The Oath 'became the nucleus of all medical ethics' and 'was applauded as the embodiment of truth.' Thus, suggests Dr. Edelstein, it is 'a Pythagorean manifesto and not the expression of an absolute standard of medical conduct.'19

This, it seems to us, is a satisfactory and acceptable explanation of the Hippocratic Oath's apparent rigidity. It enables us to understand, in historical context, a long accepted and reversed statement of medical ethics.

3 . The common law. It is undisputed that at common law, abortion performed before 'quickening'-the first recognizable movement of the fetus in utero, appearing usually from the 16th to the 18th week of pregnancy20-was not an indictable offense.21 The absence of a common-law crime for pre-quickening abortion appears to have developed from a confluence of earlier philosophical, theological and civil and canon law concepts of when life begins. These disciplines variously approached the question in terms of the point at which the embryo or fetus became 'formed' or recognizably human, or in terms of when a 'person' came into being, that is, infused with a 'soul' or 'animated.' A loose concensus evolved in early English law that these events occurred at some point between conception and live birth.22 This was

'mediate animation.' Although Christian theology and the canon law came to fix the point of animation at 40 days for a male and 80 days for a female, a view that persisted until the 19th century, there was otherwise little agreement about the precise time of formation or animation. There was agreement, however, that prior to this point the fetus was to be regarded as part of the mother and its destruction, therefore, was not homicide. Due to continued uncertainty about the precise time when animation occurred, to the lack of any empirical basis for the 40-80- day view and perhaps to Aquinas' definition of movement as one of the two first principles of life, Bracton focused upon quickening as the critical point. The significance of quickening was echoed by later common-law scholars and found its way into the received common law in this country.

Whether abortion of a quick fetus was a felony at common law, or even a lesser crime, is still disputed. Bracton, writing early in the 13th century, thought it homicide.23 But the later and predominant view, following the great common-law scholars, has been that it was, at most, a lesser offense. In a frequently cited passage, Coke took the position that abortion of a woman 'quick with childe' is 'a great misprision and no murder.'24 Blackstone followed, saying that while abortion after quickening had once been considered manslaughter (though not murder), 'modern law' took a less severe view.25 A recent review of the common-law precedents argues, however, that those precedents contradict Coke and that even post-quickening abortion was never established as a common-law crime.26 This is of some importance because while most American courts ruled, in holding or dictum, that abortion of an unquickened fetus was not criminal under their received common law,27 others followed Coke in stating that abortion of a quick fetus was a 'misprision,' a term they translated to mean 'misdemeanor.'28 That their reliance on Coke on this aspect of the law was uncritical and, apparently in all the reported cases, dictum (due probably to the paucity of common-law prosecutions for post-quickening abortion), makes it now appear doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus.

4 . The English statutory law. England's first criminal abortion statute, Lord Ellenborough's Act, 43 Geo. 3, c. 58, came in 1803. It made abortion of a quick fetus, § 1, a capital crime, but in § 2 it provided lesser penalties for the felony of abortion before quickening and thus preserved the 'quickening' distinction. This contrast was continued in the general revision of 1828, 9 Geo. 4, c. 31, § 13. It disappeared, however, together with the death penalty, in 1837, 7 Will. 4 & 1 Vict., c. 85, § 6 and did not reappear in the Offenses Against the Person Act of 1861, 24 & 25 Vict., c. 100, § 59, that formed the core of English anti-abortion law until the liberalizing reforms of 1967. In 1929, the Infant Life (Preservation) Act, 19 & 20 Geo. 5, c. 34, came into being. Its emphasis was upon the destruction of 'the life of a child capable of being born alive.' It made a willful act performed with the necessary intent a felony. It contained a proviso that one was not to be found guilty of the offense 'unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother.'
A seemingly notable development in the English law was the case of Rex v. Bourne, (1939) 1 K.B. 687. This case apparently answered in the affirmative the question whether an abortion necessary to preserve the life of the pregnant woman was excepted from the criminal penalties of the 1861 Act. In his instructions to the jury, Judge MacNaghten referred to the 1929 Act and observed that that Act related to 'the case where a child is killed by a willful act at the time when it is being delivered in the ordinary

course of nature.' Id., at 691. He concluded that the 1861 Act's use of the word 'unlawfully,' imported the same meaning expressed by the specific proviso in the 1929 Act, even though there was no mention of preserving the mother's life in the 1861 Act. He then construed the phrase 'preserving the life of the mother' broadly, that is, 'in a reasonable sense,' to include a serious and permanent threat to the mother's health and instructed the jury to acquit Dr. Bourne if it found he had acted in a good-faith belief that the abortion was necessary for this purpose. Id., at 693-694. The jury did acquit.

Recently, Parliament enacted a new abortion law. This is the Abortion Act of 1967, 15 & 16 Eliz. 2, c. 87. The Act permits a licensed physician to perform an abortion where two other licensed physicians agree (a) 'that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated,' or (b) 'that 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.' The Act also provides that, in making this determination, 'account may be taken of the pregnant woman's actual or reasonably foreseeable environment.' It also permits a physician, without the concurrence of others, to terminate a pregnancy where he is of the good-faith opinion that the abortion 'is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman.'

5. The American law. In this country, the law in effect in all but a few States until mid- 19th century was the pre-existing English common law. Connecticut, the first State to enact abortion legislation, adopted in 1821 that part of Lord Ellenborough's Act that related to a woman 'quick with child.'29 The death penalty was not imposed. Abortion before quickening was made a crime in that State only in 1860.30 In 1828, New York enacted legislation31 that, in two respects, was to serve as a model for early antiabortion statutes. First, while barring destruction of an unquickend fetus as well as a quick fetus, it made the former only a misdemeanor, but the latter second-degree manslaughter. Second, it incorporated a concept of therapeutic abortion by providing that an abortion was excused if it 'shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose.' By 1840, when Texas had received the common law,32 only eight American States had statutes dealing with abortion.33 It was not until after the War Between the States that legislation began generally to replace the common law. Most of these initial statutes dealt severely with abortion after quickening but were lenient with it before quickening. Most punished attempts equally with completed abortions. While many statutes included the exception for an abortion thought by one or more physicians to be necessary to save the mother's life, that provision soon disappeared and the typical law required that the procedure actually be necessary for that purpose.

Gradually, in the middle and late 19th century the quickening distinction disappeared from the statutory law of most States and the degree of the offense and the penalties were increased. By the end of the 1950's a large majority of the jurisdictions banned abortion, however and whenever performed, unless done to save or preserve the life of the mother.34 The exceptions, Alabama and the District of Columbia, permitted abortion to preserve the mother's health.35 Three States permitted abortions that were not 'unlawfully' performed or that were not 'without lawful justification,' leaving interpretation of those standards to the courts.36 In the past several years, however, a trend toward liberalization of abortion statutes has resulted in adoption, by about onethird of the States, of less stringent laws, most of them patterned after the ALI Model Penal Code, § 230.3,37 set forth as Appendix B to the opinion in Doe v. Bolton, 410 U.S. 205, 93 S.Ct. 754.

It is thus apparent that at common law, at the time of the adoption of our Constitution and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.

6. The position of the American Medical Association. The anti-abortion mood prevalent in this country in the late 19th century was shared by the medical profession. Indeed, the attitude of the profession may have played a significant role in the enactment of stringent criminal abortion legislation during that period.

An AMA Committee on Criminal Abortion was appointed in May 1857. It presented its report, 12 Trans. of the Am.Med.Assn. 73-78 (1859), to the Twelfth Annual Meeting. That report observed that the Committee had been appointed to investigate criminal abortion 'with a view to its general suppression.' It deplored abortion and its frequency and it listed three causes of 'this general demoralization':

'The first of these causes is a wide-spread popular ignorance of the true character of the crime-a belief, even among mothers themselves, that the foetus is not alive till after the period of quickening.

'The second of the agents alluded to is the fact that the profession themselves are frequently supposed careless of foetal life. . . .

'The third reason of the frightful extent of this crime is found in the grave defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth, as a living being. These errors, which are sufficient in most instances to prevent conviction, are based and only based, upon mistaken and exploded medical dogmas. With strange inconsistency, the law fully acknowledges the foetus in utero and its inherent rights, for civil purposes; while personally and as criminally affected, it fails to recognize it and to its life as yet denies all protection.' Id., at 75-76.

The Committee then offered and the Association adopted, resolutions protesting 'against such unwarrantable destruction of human life,' calling upon state legislatures to revise their abortion laws and requesting the cooperation of state medical societies 'in pressing the subject.' Id., at 28, 78.

In 1871 a long and vivid report was submitted by the Committee on Criminal Abortion. It ended with the observation, 'We had to deal with human life. In a matter of less importance we could entertain no compromise. An honest judge on the bench would call things by their proper names. We could do no less.' 22 Trans. of the Am.Med.Assn. 258 (1871). It proffered resolutions, adopted by the Association, id., at 38-39, recommending, among other things, that it 'be unlawful and unprofessional for any physician to induce abortion or premature labor, without the concurrent opinion of at least one respectable consulting physician and then always with a view to the safety of the child-if that be possible,' and calling 'the attention of the clergy of all denominations to the perverted views of morality entertained by a large class of females-aye and men also, on this important question.'

Except for periodic condemnation of the criminal abortionist, no further formal AMA action took place until 1967. In that year, the Committee on Human Reproduction urged the adoption of a stated policy of

opposition to induced abortion, except when there is 'documented medical evidence' of a threat to the health or life of the mother, or that the child 'may be born with incapacitating physical deformity or mental deficiency,' or that a pregnancy 'resulting from legally established statutory or forcible rape or incest may constitute a threat to the mental or physical health of the patient,' two other physicians 'chosen because of their recognized professional competency have examined the patient and have concurred in writing,' and the procedure 'is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals.' The providing of medical information by physicians to state legislatures in their consideration of legislation regarding therapeutic abortion was 'to be considered consistent with the principles of ethics of the American Medical Association.' This recommendation was adopted by the House of Delegates. Proceedings of the AMA House of Delegates 40-51 (June 1967).

In 1970, after the introduction of a variety of proposed resolutions and of a report from its Board of Trustees, a reference committee noted 'polarization of the medical profession on this controversial issue'; division among those who had testified; a difference of opinion among AMA councils and committees; 'the remarkable shift in testimony' in six months, felt to be influenced 'by the rapid changes in state laws and by the judicial decisions which tend to make abortion more freely available;' and a feeling 'that this trend will continue.' On June 25, 1970, the House of Delegates adopted preambles and most of the resolutions proposed by the reference committee. The preambles emphasized 'the best interests of the patient,' 'sound clinical judgment,' and 'informed patient consent,' in contrast to 'mere acquiescence to the patient's demand.' The resolutions asserted that abortion is a medical procedure that should be performed by a licensed physician in an accredited hospital only after consultation with two other physicians and in conformity with state law and that no party to the procedure should be required to violate personally held moral principles.38 Proceedings of the AMA House of Delegates 220 (June 1970). The AMA Judicial Council rendered a complementary opinion.39

7 . The position of the American Public Health Association. In October 1970, the Executive Board of the APHA adopted Standards for Abortion Services. These were five in number:

'a. Rapid and simple abortion referral must be readily available through state and local public health departments, medical societies, or other non-profit organizations.

'b. An important function of counseling should be to simplify and expedite the provision of abortion services; if should not delay the obtaining of these services.

'c. Psychiatric consultation should not be mandatory. As in the case of other specialized medical services, psychiatric consultation should be sought for definite indications and not on a routine basis.

'd. A wide range of individuals from appropriately trained, sympathetic volunteers to highly skilled physicians may qualify as abortion counselors.

'e. Contraception and/or sterilization should be discussed with each abortion patient.' Recommended Standards for Abortion Services, 61 Am.J.Pub.Health 396 (1971).

Among factors pertinent to life and health risks associated with abortion were three that 'are recognized as important':

'a. the skill of the physician,
'b. the environment in which the abortion is performed and above all
'c. The duration of pregnancy, as determined by uterine size and confirmed by menstrual history.' Id., at 397.

It was said that 'a well-equipped hospital' offers more protection 'to cope with unforeseen difficulties than an office or clinic without such resources. . . . The factor of gestational age is of overriding importance.' Thus, it was recommended that abortions in the second trimester and early abortions in the presence of existing medical complications be performed in hospitals as inpatient procedures. For pregnancies in the first trimester, abortion in the hospital with or without overnight stay 'is probably the safest practice.' An abortion in an extramural facility, however, is an acceptable alternative 'provided arrangements exist in advance to admit patients promptly if unforeseen complications develop.' Standards for an abortion facility were listed. It was said that at present abortions should be performed by physicians or osteopaths who are licensed to practice and who have 'adequate training.' Id., at 398.

8 . The position of the American Bar Association. At its meeting in February 1972 the ABA House of Delegates approved, with 17 opposing votes, the Uniform Abortion Act that had been drafted and approved the preceding August by the Conference of Commissioners on Uniform State Laws. 58 A.B.A.J. 380 (1972). We set forth the Act in full in the margin.40 The Conference has appended an enlightening Prefatory Note.41

VII

Three reasons have been advanced to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence.

It has been argued occasionally that these laws were the product of a Victorian social concern to discourage illicit sexual conduct. Texas, however, does not advance this justification in the present case and it appears that no court or commentator has taken the argument seriously.42 The appellants and amici contend, moreover, that this is not a proper state purpose at all and suggest that, if it were, the Texas statutes are overbroad in protecting it since the law fails to distinguish between married and unwed mothers.

A second reason is concerned with abortion as a medical procedure. When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman.43 This was particularly true prior to the development of antisepsis. Antiseptic techniques, of course, were based on discoveries by Lister, Pasteur and others first announced in 1867, but were not generally accepted and employed until about the turn of the century. Abortion mortality was high. Even after 1900 and perhaps until as late as the development of antibiotics in the 1940's, standard modern techniques such as dilation and curettage were not nearly so safe as they are today. Thus, it has been argued that a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy.

Modern medical techniques have altered this situation. Appellants and various amici refer to medical data indicating that abortion in early pregnancy, that is, prior to the end of the first trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth.44 Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared. Of course, important state interests in the areas of health and medical standards do remain. The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care and to adequate provision for any complication or emergency that might arise. The prevalence of high mortality rates at illegal 'abortion mills' strengthens, rather than weakens, the State's interest in regulating the conditions under which abortions are performed. Moreover, the risk to the woman increases as her pregnancy continues. Thus, the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy,

The third reason is the State's interest-some phrase it in terms of duty-in protecting prenatal life. Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception.45 The State's interest and general obligation to protect life then extends, it is argued, to prenatal life. Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail. Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to life birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone.

Parties challenging state abortion laws have sharply disputed in some courts the contention that a purpose of these laws, when enacted, was to protect prenatal life.46 Pointing to the absence of legislative history to support the contention, they claim that most state laws were designed solely to protect the woman. Because medical advances have lessened this concern, at least with respect to abortion in early pregnancy, they argue that with respect to such abortions the laws can no longer be justified by any state interest. There is some scholarly support for this view of original purpose.47 The few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus.48 Proponents of this view point out that in many States, including Texas,49 by statute or judicial interpretation, the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another.50 They claim that adoption of the 'quickening' distinction through received common law and state statutes tacitly recognizes the greater health hazards inherent in late abortion and impliedly repudiates the theory that life begins at conception.

It is with these interests and the weight to be attached to them, that this case is concerned.

VIII

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as Union Pacific R. Co. v. Botsford, MANU/USSC/0373/1891 : 141 U.S. 250, 251,

11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, Stanley v. Georgia, MANU/USSC/0193/1969 : 394 U.S. 557, 564, 89 S.Ct. 1243, 1247, 22 L.Ed.2d 542 (1969); in the Fourth and Fifth Amendments, Terry v. Ohio, MANU/USSC/0229/1968 : 392 U.S. 1, 8-9, 88 S.Ct. 1868, 1872-1873, 20 L.Ed.2d 889 (1968), Katz v. United States, MANU/USSC/0210/1967 : 389 U.S. 347, 350, 88 S.Ct. 507, 510, 19 L.Ed.2d 576 (1967); Boyd v. United States, MANU/USSC/0306/1886 : 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886), see Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, Griswold v. Connecticut, 381 U.S., at 484-485, 85 S.Ct., at 1681-1682; in the Ninth Amendment, id., at 486, 85 S.Ct. at 1682 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see Meyer v. Nebraska, MANU/USSC/0152/1923 : 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923). These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' Palko v. Connecticut, MANU/USSC/0105/1937 : 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, Loving v. Virginia, MANU/USSC/0093/1967 : 388 U.S. 1, 12, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967); procreation, Skinner v. Oklahoma, MANU/USSC/0152/1942 : 316 U.S. 535, 541-542, 62 S.Ct. 1110, 1113-1114, 86 L.Ed. 1655 (1942); contraception, Eisenstadt v. Baird, 405 U.S., at 453-454, 92 S.Ct., at 1038-1039; id., at 460, 463465, 92 S.Ct. at 1042, 1043-1044 (White, J., concurring in result); family relationships, Prince v. Massachusetts, MANU/USSC/0137/1944 : 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944); and child rearing and education, Pierce v. Society of Sisters, MANU/USSC/0147/1925 : 268 U.S. 510, 535, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925), Meyer v. Nebraska, supra.

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

On the basis of elements such as these, appellant and some amici argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way and for whatever reason she alone chooses. With this we do not agree. Appellant's arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation

upon the woman's sole determination, are unpersuasive. The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. Jacobson v. Massachusetts, MANU/USSC/0257/1905 : 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905) (vaccination); Buck v. Bell, MANU/USSC/0222/1927 : 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000 (1927) (sterilization).

We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.

We note that those federal and state courts that have recently considered abortion law challenges have reached the same conclusion. A majority, in addition to the District Court in the present case, have held state laws unconstitutional, at least in part, because of vagueness or because of overbreadth and abridgment of rights. Abele v. Markle, 342 F.Supp. 800 (D.C.Conn.1972), appeal docketed, No. 72-56; Abele v. Markle, 351 F.Supp. 224 (D.C.Conn.1972), appeal docketed, No. 72-730; Doe v. Bolton, 319 F.Supp. 1048 (N.D.Ga.1970), appeal decided today, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201; Doe v. Scott, 321 F.Supp. 1385 (N.D.Ill.1971), appeal docketed, No. 70-105; Poe v. Menghini, 339 F.Supp. 986 (D.C.Kan.1972); YWCA v. Kugler, 342 F.Supp. 1048 (D.C.N.J.1972); Babbitz v. McCann, 310 F.Supp. 293 (E.D.Wis.1970), appeal dismissed, MANU/USSC/0011/1970 : 400 U.S. 1, 91 S.Ct. 12, 27 L.Ed.2d 1 (1970); People v. Belous, 71 Cal.2d 954, 80 Cal.Rptr. 354, 458 P.2d 194 (1969), cert. denied, 397 U.S. 915, 90 S.Ct. 920, 25 L.Ed.2d 96 (1970); State v. Barquet, 262 So.2d 431 (Fla.1972).
Others have sustained state statutes. Crossen v. Attorney General, 344 F.Supp. 587 (E.D.Ky.1972), appeal docketed, No. 72-256; Rosen v. Louisiana State Board of Medical Examiners, 318 F.Supp. 1217 (E.D.La.1970), appeal docketed, No. 70-42; Corkey v. Edwards, 322 F.Supp. 1248 (W.D.N.C.1971), appeal docketed, No. 71-92; Steinberg v. Brown, 321 F.Supp. 741 (N.D.Ohio 1970); Doe v. Rampton, 366 F.Supp. 189 (Utah 1971), appeal docketed, No. 71-5666; Cheaney v. State, Ind., 285 N.E.2d 265 (1972); Spears v. State, 257 So.2d 876 (Miss.1972); State v. Munson, S.D., 201 N.W.2d 123 (1972), appeal docketed, No. 72-631.

Although the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards and prenatal life, become dominant. We agree with this approach.

Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' Kramer v. Union Free School District, MANU/USSC/0129/1969 : 395 U.S. 621, 627, 89 S.Ct. 1886, 1890, 23 L.Ed.2d 583 (1969); Shapiro v. Thompson, MANU/USSC/0206/1969 : 394 U.S. 618, 634, 89 S.Ct. 1322, 1331, 22 L.Ed.2d 600 (1969); Sherbert v. Verner, MANU/USSC/0173/1963 : 374 U.S. 398, 406, 83 S.Ct. 1790, 1795, 10 L.Ed.2d 965

(1963) and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. Griswold v. Connecticut, 381 U.S., at 485, 85 S.Ct., at 1682; Aptheker v. Secretary of State, MANU/USSC/0099/1964 : 378 U.S. 500, 508, 84 S.Ct. 1659, 1664, 12 L.Ed.2d 992 (1964); Cantwell v. Connecticut, MANU/USSC/0110/1940 : 310 U.S. 296, 307-308, 60 S.Ct. 900, 904-905, 84 L.Ed. 1213 (1940); see Eisenstadt v. Baird, 405 U.S., at 460, 463-464, 92 S.Ct., at 1042, 1043-1044 (White, J., concurring in result).

In the recent abortion cases, cited above, courts have recognized these principles. Those striking down state laws have generally scrutinized the State's interests in protecting health and potential life and have concluded that neither interest justified broad limitations on the reasons for which a physician and his pregnant patient might decide that she should have an abortion in the early stages of pregnancy. Courts sustaining state laws have held that the State's determinations to protect health or prenatal life are dominant and constitutionally justifiable.

IX

The District Court held that the appellee failed to meet his burden of demonstrating that the Texas statute's infringement upon Roe's rights was necessary to support a compelling state interest and that, although the appellee presented 'several compelling justifications for state presence in the area of abortions,' the statutes outstripped these justifications and swept 'far beyond any areas of compelling state interest.' 314 F.Supp., at 1222-1223. Appellant and appellee both contest that holding. Appellant, as has been indicated, claims an absolute right that bars any state imposition of criminal penalties in the area. Appellee argues that the State's determination to recognize and protect prenatal life from and after conception constitutes a compelling state interest. As noted above, we do not agree fully with either formulation.

A. The appellee and certain amici argue that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment. The appellant conceded as much on reargument.51 On the other hand, the appellee conceded on reargument52 that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment.

The Constitution does not define 'person' in so many words. Section 1 of the Fourteenth Amendment contains three references to 'person.' The first, in defining 'citizens,' speaks of 'persons born or naturalized in the United States.' The word also appears both in the Due Process Clause and in the Equal Protection Clause. 'Person' is used in other places in the Constitution: in the listing of qualifications for Representatives and Senators, Art, I, § 2, cl. 2 and § 3, cl. 3; in the Apportionment Clause, Art. I, § 2, cl. 3;53 in the Migration and Importation provision, Art. I, § 9, cl. 1; in the Emoulument Clause, Art, I, § 9, cl. 8; in the Electros provisions, Art. II, § 1, cl. 2 and the superseded cl. 3; in the provision outlining qualifications for the office of President, Art. II, § 1, cl. 5; in the Extradition provisions, Art. IV, § 2, cl. 2 and the superseded Fugitive Slave Clause 3; and in the Fifth, Twelfth and Twenty-second Amendments,

as well as in §§ 2 and 3 of the Fourteenth Amendment. But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible prenatal application.54

All this, together with our observation, supra, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn.55 This is in accord with the results reached in those few cases where the issue has been squarely presented. McGarvey v. Magee-Womens Hospital, 340 F.Supp. 751 (W.D.Pa.1972); Byrn v. New York City Health & Hospitals Corp., 31 N.Y.2d 194, 335 N.Y.S.2d 390, 286 N.E.2d 887 (1972), appeal docketed, No. 72-434; Abele v. Markle, 351 F.Supp. 224 (D.C.Conn.1972), appeal docketed, No. 72-730. Cf. Cheaney v. State, Ind., 285 N.E.2d, at 270; Montana v. Rogers, MANU/FEVT/0152/1960 : 278 F.2d 68, 72 (CA7 1960), aff'd sub nom. Montana v. Kennedy, MANU/USSC/0077/1961 : 366 U.S. 308, 81 S.Ct. 1336, 6 L.Ed.2d 313 (1961); Keeler v. Superior Court, 2 Cal.3d 619, 87 Cal.Rptr. 481, 470 P.2d 617 (1970); State v. Dickinson, 28 Ohio St.2d 65, 275 N.E.2d 599 (1971). Indeed, our decision in United States v. Vuitch, MANU/USSC/0086/1971 : 402 U.S. 62, 91 S.Ct. 1294, 28 L.Ed.2d 601 (1971), inferentially is to the same effect, for we there would not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the termination of life entitled to Fourteenth Amendment protection. This conclusion, however, does not of itself fully answer the contentions raised by Texas and we pass on to other considerations

B. The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. See Dorland's Illustrated Medical Dictionary 478-479, 547 (24th ed. 1965). The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which Eisenstadt and Griswold, Stanley, Loving, Skinner and Pierce and Meyer were respectively concerned. As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy and that, therefore, the State has a compelling interest in protecting that life from and after conception. 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 not in a position to speculate as to the answer.

It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question. There has always been strong support for the view that life does not begin until live birth. This was the belief of the Stoics.56 It appears to be the predominant, though not the unanimous, attitude of the Jewish faith.57 It may be taken to represent also the position of a large segment of the Protestant community, insofar as that can be ascertained; organized groups that have taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family.58 As we have noted, the common law found greater significance in quickening. Physicians and

their scientific colleagues have regarded that event with less interest and have tended to focus either upon conception, upon live birth, or upon the interim point at which the fetus becomes 'viable,' that is, potentially able to live outside the mother's womb, albeit with artificial aid.59 Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.60 The Aristotelian theory of 'mediate animation,' that held sway throughout the Middle Ages and the Renaissance in Europe, continued to be official Roman Catholic dogma until the 19th century, despite opposition to this 'ensoulment' theory from those in the Church who would recognize the existence of life from the moment of conception.61 The latter is now, of course, the official belief of the Catholic Church. As one brief amicus discloses, this is a view strongly held by many non-Catholics as well and by many physicians. Substantial problems for precise definition of this view are posed, however, by new embryological data that purport to indicate that conception is a 'process' over time, rather than an event and by new medical techniques such as menstrual extraction, the 'morning-after' pill, implantation of embryos, artificial insemination and even artificial wombs.62

In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before life birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon life birth. For example, the traditional rule of tort law denied recovery for prenatal injuries even though the child was born alive.63 That rule has been changed in almost every jurisdiction. In most States, recovery is said to be permitted only if the fetus was viable, or at least quick, when the injuries were sustained, though few courts have squarely so held.64 In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries.65 Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life. Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property and have been represented by guardians ad litem.66 Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense.

X

In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake. We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a nonresident who seeks medical consultation and treatment there and that it has still another important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.'

With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, referred to above at 149, that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and

after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

This means, on the other hand, that, for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.

Measured against these standards, Art. 1196 of the Texas Penal Code, in restricting legal abortions to those 'procured or attempted by medical advice for the purpose of saving the life of the mother,' sweeps too broadly. The statute makes no distinction between abortions performed early in pregnancy and those performed later and it limits to a single reason, 'saving' the mother's life, the legal justification for the procedure. The statute, therefore, cannot survive the constitutional attack made upon it here. This conclusion makes it unnecessary for us to consider the additional challenge to the Texas statute asserted on grounds of vagueness. See United States v. Vuitch, 402 U.S., at 67-72, 91 S.Ct., at 1296-1299.

XI

To summarize and to repeat:

1 . A state criminal abortion statute of the current Texas type, that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

2. The State may define the term 'physician,' as it has been employed in the preceding paragraphs of this Part XI of this opinion, to mean only a physician currently licensed by the State and may proscribe any abortion by a person who is not a physician as so defined.

In Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201, procedural requirements contained in one of the modern abortion statutes are considered. That opinion and this one, of course, are to be read together.67

This holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law and with the demands of the profound problems of the present day. The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently and primarily, a medical decision and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.

XII

Our conclusion that Art. 1196 is unconstitutional means, of course, that the Texas abortion statutes, as a unit, must fall. The exception of Art. 1196 cannot be struck down separately, for then the State would be left with a statute proscribing all abortion procedures no matter how medically urgent the case.

Although the District Court granted appellant Roe declaratory relief, it stopped short of issuing an injunction against enforcement of the Texas statutes. The Court has recognized that different considerations enter into a federal court's decision as to declaratory relief, on the one hand and injunctive relief, on the other. Zwickler v. Koota, 389 U.S 241, 252-255, 88 S.Ct. 391, 397-399, 19 L.Ed.2d 444 (1967); Dombrowski v. Pfister, MANU/USSC/0189/1965 : 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965). We are not dealing with a statute that, on its face, appears to abridge free expression, an area of particular concern under Dombrowski and refined in Younger U.S., at 50, 91 S.Ct., at 753.

We find it unnecessary to decide whether the District Court erred in withholding injunctive relief, for we assume the Texas prosecutorial authorities will give full credence to this decision that the present criminal abortion statutes of that State are unconstitutional.

The judgment of the District Court as to intervenor Hallford is reversed and Dr. Hallford's complaint in intervention is dismissed. In all other respects, the judgment of the District Court is affirmed. Costs are allowed to the appellee.

It is so ordered.

Affirmed in part and reversed in part.
Mr. Justice STEWART, concurring.

In 1963, this Court, in Ferguson v. Skrupa, MANU/USSC/0067/1963 : 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93, purported to sound the death knell for the doctrine of substantive due process, a doctrine under which many state laws had in the past been held to violate the Fourteenth Amendment. As Mr. Justice Black's opinion for the Court in Skrupa put it: 'We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.' Id., at 730, 83 S.Ct., at 1031.68

Barely who years later, in Griswold v. Connecticut, MANU/USSC/0210/1965 : 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, the Court held a Connecticut birth control law unconstitutional. In view of what had been so recently said in Skrupa, the Court's opinion in Griswold understandably did its best to avoid reliance on the Due Process Clause of the Fourteenth Amendment as the ground for decision. Yet, the Connecticut law did not violate any provision of the Bill of Rights, nor any other specific provision of the Constitution.69 So it was clear to me then and it is equally clear to me now, that the Griswold decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the 'liberty' that is protected by the Due Process Clause of the Fourteenth Amendment.70 As so understood, Griswold stands as one in a long line of pre-Skrupa cases decided under the doctrine of substantive due process and I now accept it as such.

'In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed.' Board of Regents v. Roth, 408 U.S. 564, 572, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548. The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights. See Schware v. Board of Bar Examiners, MANU/USSC/0102/1957 : 353 U.S. 232, 238-239, 77 S.Ct. 752, 755-756, 1 L.Ed.2d 796; Pierce v. Society of Sisters, MANU/USSC/0147/1925 : 268 U.S. 510, 534-535, 45 S.Ct. 571, 573-574, 69 L.Ed. 1070; Meyer v. Nebraska, MANU/USSC/0152/1923 : 262 U.S. 390, 399-400, 43 S.Ct. 625, 626-627, 67 L.Ed. 1042. Cf. Shapiro v. Thompson, MANU/USSC/0206/1969 : 394 U.S. 618, 629-630, 89 S.Ct. 1322, 1328-1329, 22 L.Ed.2d 600; United States v. Guest, MANU/USSC/0245/1966 : 383 U.S. 745, 757-758, 86 S.Ct. 1170, 1177-1178, 16 L.Ed.2d 239; Carrington v. Rash, MANU/USSC/0113/1965 : 380 U.S. 89, 96, 85 S.Ct. 775, 780, 13 L.Ed.2d 675; Aptheker v. Secretary of State, MANU/USSC/0099/1964 : 378 U.S. 500, 505, 84 S.Ct. 1659, 1663, 12 L.Ed.2d 992; Kent v. Dulles, MANU/USSC/0234/1958 : 357 U.S. 116, 127, 78 S.Ct. 1113, 1118, 2 L.Ed.2d 1204; Bolling v. Sharpe, MANU/USSC/0009/1954 : 347 U.S. 497, 499-500, 74 S.Ct. 693, 694-695, 98 L.Ed. 884; Truax v. Raich, MANU/USSC/0183/1915 : 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed. 131.

As Mr. Justice Harlan once wrote: '(T)he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points priced out in terms of the taking of property;

the freedom of speech, press and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.' Poe v. Ullman, MANU/USSC/0162/1961 : 367 U.S. 497, 543, 81 S.Ct. 1752, 1776, 6 L.Ed.2d 989 (opinion dissenting from dismissal of appeal) (citations omitted). In the words of Mr. Justice Frankfurter, 'Great concepts like . . . 'liberty' . . . were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.' National Mutual Ins. Co. v. Tidewater Transfer Co., MANU/USSC/0169/1949 : 337 U.S. 582, 646, 69 S.Ct. 1173, 1195, 93 L.Ed. 1556 (dissenting opinion).

Several decisions of this Court make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. Loving v. Virginia, MANU/USSC/0093/1967 : 388 U.S. 1, 12, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010; Griswold v. Connecticut, supra; Pierce v. Society of Sisters, supra; Meyer v. Nebraska, supra. See also Prince v. Massachusetts, MANU/USSC/0137/1944 : 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645; Skinner v. Oklahoma, MANU/USSC/0152/1942 : 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655. As recently as last Term, in Eisenstadt v. Baird, MANU/USSC/0240/1972 : 405 U.S. 438, 453, 92 S.Ct. 1029, 1038, 31 L.Ed.2d 349, we recognized 'the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.' That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy. 'Certainly the interests of a woman in giving of her physical and emotional self during pregnancy and the interests that will be affected throughout her life by the birth and raising of a child are of a far greater degree of significance and personal intimacy than the right to send a child to private school protected in Pierce v. Society of Sisters, MANU/USSC/0147/1925 : 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), or the right to teach a foreign language protected in Meyer v. Nebraska, MANU/USSC/0152/1923 : 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923).' Abele v. Markle, 351 F.Supp. 224, 227 (D.C.Conn.1972).

Clearly, therefore, the Court today is correct in holding that the right asserted by Jane Roe is embraced within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment.

It is evident that the Texas abortion statute infringes that right directly. Indeed, it is difficult to imagine a more complete abridgment of a constitutional freedom than that worked by the inflexible criminal statute now in force in Texas. The question then becomes whether the state interests advanced to justify this abridgment can survive the 'particularly careful scrutiny' that the Fourteenth Amendment here requires.

The asserted state interests are protection of the health and safety of the pregnant woman and protection of the potential future human life within her. These are legitimate objectives, amply sufficient to permit a State to regulate abortions as it does other surgical procedures and perhaps sufficient to permit a State to regulate abortions more stringently or even to prohibit them in the late stages of pregnancy. But such

legislation is not before us and I think the Court today has thoroughly demonstrated that these state interests cannot constitutionally support the broad abridgment of personal liberty worked by the existing Texas law. Accordingly, I join the Court's opinion holding that that law is invalid under the Due Process Clause of the Fourteenth Amendment.

Mr. Justice REHNQUIST, dissenting.

The Court's opinion brings to the decision of this troubling question both extensive historical fact and a wealth of legal scholarship. While the opinion thus commands my respect, I find myself nonetheless in fundamental disagreement with those parts of it that invalidate the Texas statute in question and therefore dissent.

* The Court's opinion decides that a State may impose virtually no restriction on the performance of abortions during the first trimester of pregnancy. Our previous decisions indicate that a necessary predicate for such an opinion is a plaintiff who was in her first trimester of pregnancy at some time during the pendency of her lawsuit. While a party may vindicate his own constitutional rights, he may not seek vindication for the rights of others. Moose Lodge No. 107 v. Irvis, MANU/USSC/0112/1972 : 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972); Sierra Club v. Morton, MANU/USSC/0238/1972 : 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). The Court's statement of facts in this case makes clear, however, that the record in no way indicates the presence of such a plaintiff. We know only that plaintiff Roe at the time of filing her complaint was a pregnant woman; for aught that appears in this record, she may have been in her last trimester of pregnancy as of the date the complaint was filed.
Nothing in the Court's opinion indicates that Texas might not constitutionally apply its proscription of abortion as written to a woman in that stage of pregnancy. Nonetheless, the Court uses her complaint against the Texas statute as a fulcrum for deciding that States may impose virtually no restrictions on medical abortions performed during the first trimester of pregnancy. In deciding such a hypothetical lawsuit, the Court departs from the longstanding admonition that it should never 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration, MANU/USSC/0101/1885 : 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899 (1885). See also Ashwander v. TVA, MANU/USSC/0160/1936 : 297 U.S. 288, 345, 56 S.Ct. 466, 482, 80 L.Ed. 688 (1936) (Brandeis, J., concurring).
II

Even if there were a plaintiff in this case capable of litigating the issue which the Court decides, I would reach a conclusion opposite to that reached by the Court. I have difficulty in concluding, as the Court does, that the right of 'privacy' is involved in this case. Texas, by the statute here challenged, bars the performance of a medical abortion by a licensed physician on a plaintiff such as Roe. A transaction resulting in an operation such as this is not 'private' in the ordinary usage of that word. Nor is the 'privacy' that the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution, which the Court has referred to as embodying a right to privacy. Katz v. United States, MANU/USSC/0210/1967 : 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

If the Court means by the term 'privacy' no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of 'liberty' protected by the Fourteenth Amendment, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty. I agree with the statement of Mr. Justice STEWART in his concurring opinion that the 'liberty,' against deprivation of which without due process the Fourteenth Amendment protects, embraces more than the rights found in the Bill of Rights. But that liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective. Williamson v. Lee Optical Co., MANU/USSC/0037/1955 : 348 U.S. 483, 491, 75 S.Ct. 461, 466, 99 L.Ed. 563 (1955). The Due Process Clause of the Fourteenth Amendment undoubtedly does place a limit, albeit a broad one, on legislative power to enact laws such as this. If the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective under the test stated in Williamson, supra. But the Court's sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard and the conscious weighing of competing factors that the Court's opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one.

The Court eschews the history of the Fourteenth Amendment in its reliance on the 'compelling state interest' test. See Weber v. Aetna Casualty & Surety Co., MANU/USSC/0223/1972 : 406 U.S. 164, 179, 92 S.Ct. 1400, 1408, 31 L.Ed.2d 768 (1972) (dissenting opinion). But the Court adds a new wrinkle to this test by transposing it from the legal considerations associated with the Equal Protection Clause of the Fourteenth Amendment to this case arising under the Due Process Clause of the Fourteenth Amendment. Unless I misapprehend the consequences of this transplanting of the 'compelling state interest test,' the Court's opinion will accomplish the seemingly impossible feat of leaving this area of the law more confused than it found it.

While the Court's opinion quotes from the dissent of Mr. Justice Holmes in Lochner v. New York, MANU/USSC/0253/1905 : 198 U.S. 45, 74, 25 S.Ct. 539, 551, 49 L.Ed. 937 (1905), the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case. As in Lochner and similar cases applying substantive due process standards to economic and social welfare legislation, the adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be 'compelling.' The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.

The fact that a majority of the States reflecting, after all the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934). Even

today, when society's views on abortion are changing, the very existence of the debate is evidence that the 'right' to an abortion is not so universally accepted as the appellant would have us believe.

To reach its result, the Court necessarily has had to find within the Scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment. As early as 1821, the first state law dealing directly with abortion was enacted by the Connecticut Legislature. Conn.Stat., Tit. 22, §§ 14, 16. By the time of the adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion.71 While many States have amended or updated their laws, 21 of the laws on the books in 1868 remain in effect today.72 Indeed, the Texas statute struck down today was, as the majority notes, first enacted in 1857 and 'has remained substantially unchanged to the present time.' Ante, at 119.

There apparently was no question concerning the validity of this provision or of any of the other state statutes when the Fourteenth Amendment was adopted. The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter.

III

Even if one were to agree that the case that the Court decides were here and that the enunciation of the substantive constitutional law in the Court's opinion were proper, the actual disposition of the case by the Court is still difficult to justify. The Texas statute is struck down in toto, even though the Court apparently concedes that at later periods of pregnancy Texas might impose these selfsame statutory limitations on abortion. My understanding of past practice is that a statute found to be invalid as applied to a particular plaintiff, but not unconstitutional as a whole, is not simply 'struck down' but is, instead, declared unconstitutional as applied to the fact situation before the Court. Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); Street v. New York, MANU/USSC/0180/1969 : 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed. 572 (1969).

For all of the foregoing reasons, I respectfully dissent.

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1 'Article 1191. Abortion

'If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

'Art. 1192. Furnishing the means

'Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice. 'Art. 1193. Attempt at abortion

'If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result and shall be fined not less than one hundred nor more than one thousand dollars.
'Art. 1194. Murder in producing abortion
'If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.'
'Art. 1196. By medical advice
'Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.'

The foregoing Articles, together with Art. 1195, compose Chapter 9 of Title 15 of the Penal Code. Article 1195, not attacked here, reads:
'Art. 1195. Destroying unborn child

'Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years.' 2 Ariz.Rev.Stat.Ann. § 13-211 (1956); Conn.Pub.Act No. 1 (May 1972 special session) (in 4 Conn.Leg.Serv. 677 (1972)) and Conn.Gen.Stat.Rev. §§ 53-29, 53-30 (1968) (or unborn child); Idaho Code § 18-601 (1948); Ill.Rev.Stat., c. 38, § 21-1 (1971); Ind.Code § 35-1-58-1 (1971); Iowa Code § 701.1 (1971); Ky.Rev.Stat. § 436.020 (1962); LaRev.Stat. § 37:1285(6) (1964) (loss of medical license) (but see § 14-87 (Supp.1972) containing no exception for the life of the mother under the criminal statute); Me.Rev.Stat.Ann., Tit. 17, § 51 (1964); Mass.Gen.Laws Ann., c. 272, § 19 (1970) (using the term 'unlawfully,' construed to exclude an abortion to save the mother's life, Kudish v. Bd. of Registration, 356 Mass. 98, 248 N.E.2d 264 (1969)); Mich.Comp.Laws § 750.14 (1948); Minn.Stat. § 617.18 (1971); Mo.Rev.Stat. § 559.100 (1969); Mont.Rev.Codes Ann. § 94-401 (1969); Neb.Rev.Stat. § 28-405 (1964); Nev.Rev.Stat. § 200.220 (1967); N.H.Rev.Stat.Ann. § 585:13 (1955); N.J.Stat.Ann. § 2A:87-1 (1969) ('without lawful justification'); N.D.Cent.Code §§ 12-25-01, 12-25-02 (1960); Ohio Rev.Code Ann. § 2901.16 (1953); Okla.Stat.Ann., Tit. 21, § 861 (1972- 1973 Supp.); Pa.Stat.Ann., Tit. 18, §§ 4718, 4719 (1963) ('unlawful'); R.I.Gen.Laws Ann. § 11-3-1 (1969); S.D.Comp.Laws Ann. § 22-17-1 (1967); Tenn.Code Ann. §§ 39- 301, 39-302 (1956); Utah Code Ann. §§ 76-2-1, 76-2-2 (1953); Vt.Stat.Ann., Tit. 13, § 101 (1958); W.Va.Code Ann. § 61-2-8 (1966); Wis.Stat. § 940.04 (1969); Wyo.Stat.Ann. §§ 6-77, 6-78 (1957).

3 Long ago, a suggestion was made that the Texas statutes were unconstitutionally vague because of definitional deficiencies. The Texas Court of Criminal Appeals disposed of that suggestion peremptorily, saying only,

'It is also insisted in the motion in arrest of judgment that the statute is unconstitutional and void, in that it does not sufficiently define or describe the offense of abortion. We do not concur with counsel in respect to this question.' Jackson v. State, 55 Tex.Cr.R. 79, 89, 115 S.W. 262, 268 (1908).

The same court recently has held again that the State's abortion statutes are not unconstitutionally vague or overbroad. Thompson v. State, 493 S.W.2d 913 (1971), appeal docketed, No. 71-1200. The court held that 'the State of Texas has a compelling interest to protect fetal life'; that Art. 1191 'is designed to protect fetal life'; that the Texas homicide statutes, particularly Act. 1205 of the Penal Code, are intended to protect a person 'in existence by actual birth' and thereby implicitly recognize other human life that is not 'in existence by actual birth'; that the definition of human life is for the legislature and not the courts; that Art. 11196 'is more definite that the District of Columbia statute upheld in (United States v.) Vuitch' (MANU/USSC/0086/1971 : 402 U.S. 62, 91 S.Ct. 1294, 28 L.Ed.2d 601); and that the Texas statute 'is not vague and indefinite or overbroad.' A physician's abortion conviction was affirmed.

In 493 S.W.2d, at 920 n. 2, the court observed that any issue as to the burden of proof under the exemption of Art. 1196 'is not before us.' But see Veevers v. State, 172 Tex.Cr.R. 162, 168-169, 354 S.W.2d 161, 166-167 (1962). Cf. United States v. Vuitch, MANU/USSC/0086/1971 : 402 U.S. 62, 69-71, 91 S.Ct. 1294, 1298-1299, 28 L.Ed.2d 601 (1971).

4 The name is a pseudonym.
5 These names are pseudonyms.

6 The appellee twice states in his brief that the hearing before the District Court was held on July 22, 1970. Brief for Appellee 13. The docket entries, App. 2 and the transcript, App. 76, reveal this to be an error. The July date appears to be the time of the reporter's transcription. See App. 77.

7 We need not consider what different result, if any, would follow if Dr. Hallford's intervention were on behalf of a class. His complaint in intervention does not purport to assert a class suit and makes no reference to any class apart from an allegation that he 'and others similarly situated' must necessarily guess at the meaning of Art. 1196. His application for leave to intervene goes somewhat further, for it asserts that plaintiff Roe does not adequately protect the interest of the doctor 'and the class of people who are physicians . . . (and) the class of people who are . . . patients . . ..' The leave application, however, is not the complaint. Despite the District Court's statement to the contrary, 314 F.Supp., at 1225, we fail to perceive the essentials of a class suit in the Hallford complaint.

8 A Castiglioni, A. History of Medicine 84 (2d ed. 1947), E. Krumbhaar, translator and editor (hereinafter Castiglioni).

9 J. Ricci, The Genealogy of Gynaecology 52, 84, 113, 149 (2d ed. 1950) (hereinafter Ricci); L. Lader, Abortion 75-77 (1966) (hereinafter Lader); K. Niswander, Medical Abortion Practices in the United States, in Abortion and the Law 37, 38-40 (D. Smith ed. 1967); G. Williams, The Sanctity of Life and the Criminal Law 148 (1957) (hereinafter Williams); J. Noonan, An Almost Absolute Value in History, in The Morality of Abortion 1, 3-7 (J. Noonan ed. 1970) (hereinafter Noonan); Quay, Justifiable Abortion-Medical and Legal Foundations, (pt. 2), 49 Geo.L.J. 395, 406-422 (1961) (hereinafter Quay).

10 L. Edelstein, The Hippocratic Oath 10 (1943) (hereinafter Edelstein). But see Castiglioni 227.
11 Edelstein 12; Ricci 113-114, 118-119; Noonan 5.

12 Edelstein 13-14.
13 Castiglioni 148.
14 Id., at 154.
15 Edelstein 3.
16 Id., at 12, 15-18.
17 Id., at 18; Lader 76.
18 Edelstein 63.
19 Id., at 64.
20 Dorland's Illustrated Medical Dictionary 1261 (24th ed. 1965).
21 E. Coke, Institutes III *50; 1 W. Hawkins, Pleas of the Crown, c. 31, § 16 (4th ed. 1762); 1 W. Blackstone, Commentaries *129-130; M. Hale, Pleas of the Crown 433 (1st Amer. ed. 1847). For discussions of the role of the quickening concept in English common law, see Lader 78; Noonan 223-226; Means, The Law of New York Concerning Abortion and the Status of the Foetus, 1664- 1968: A Case of Cessation of Constitutionality (pt. 1), 14 N.Y.L.F. 411, 418-428 (1968) (hereinafter Means I); Stern, Abortion: Reform and the Law, 59 J.Crim.L.C. & P.S. 84 (1968) (hereinafter Stern); Quay 430-432; Williams 152.

22 Early philosophers believed that the embryo or fetus did not become formed and begin to live until at least 40 days after conception for a male and 80 to 90 days for a female. See, for example, Aristotle, Hist.Anim. 7.3.583b; Gen.Anim. 2.3.736, 2.5.741; Hippocrates, Lib. de Nat.Puer., No. 10. Aristotle's thinking derived from his three-stage theory of life: vegetable, animal, rational. The vegetable stage was reached at conception, the animal at 'animation,' and the rational soon after live birth. This theory, together with the 40/80 day view, came to be accepted by early Christian thinkers.

The theological debate was reflected in the writings of St. Augustine, who made a distinction between embryo inanimatus, not yet endowed with a soul and embryo animatus. He may have drawn upon Exodus 21:22. At one point, however, he expressed the view that human powers cannot determine the point during fetal development at which the critical change occurs. See Augustine, De Origine Animae 4.4 (Pub.Law 44.527). See also W. Reany, The Creation of the Human Soul, c. 2 and 83-86 (1932); Huser, The Crime of Abortion in Canon Law 15 (Catholic Univ. of America, Canon Law Studies No. 162, Washington, D.C., 1942).

Galen, in three treatises related to embryology, accepted the thinking of Aristotle and his followers. Quay 426-427. Later, Augustine on abortion was incorporated by Gratian into the Decretum, published about 1140. Decretum Magistri Gratiani 2.32.2.7 to 2.32.2.10, in 1 Corpus Juris Canonici 1122, 1123 (A. Friedberg, 2d ed. 1879). This Decretal and the Decretals that followed were recognized as the definitive body of canon law until the new Code of 1917.

For discussions of the canon-law treatment, see Means I, pp. 411-412; Noonan 20-26; Quay 426-430; see also J. Noonan, Contraception: A History of Its Treatment by the Catholic Theologians and Canonists 18-29 (1965).

23 Bracton took the position that abortion by blow or poison was homicide 'if the foetus be already formed and animated and particularly if it be animated.' 2 H. Bracton, De Legibus et Consuetudinibus Angliae 279 (T. Twiss ed. 1879), or, as a later translation puts it, 'if the foetus is already formed or quickened, especially if it is quickened,' 2 H. Bracton, On the Laws and Customs of England 341 (S. Thorne ed. 1968). See Quay 431; see also 2 Fleta 60-61 (Book 1, c. 23) (Selden Society ed. 1955).

24 E. Coke, Institutes III *50.

25 1 W. Blackstone, Commentaries *129-130.

26 Means, The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth- Century Common-Law Liberty?, 17 N.Y.L.F. 335 (1971) (hereinafter Means II). The bauthor examines the two principal precedents cited marginally by Coke, both contrary to his dictum and traces the treatment of these and other cases by earlier commentators. He concludes that Coke, who himself participated as an advocate in an abortion case in 1601, may have intentionally misstated the law. The author even suggests a reason: Coke's strong feelings against abortion, coupled with his determination to assert common-law (secular) jurisdiction to assess penalties for an offense that traditionally had been an exclusively ecclesiastical or canon-law crime. See also Lader 78-79, who notes that some scholars doubt that the common law ever was applied to abortion; that the English ecclesiastical courts seem to have lost interest in the problem after 1527; and that the preamble to the English legislation of 1803, 43 Geo. 3, c. 58, § 1, referred to in the text, infra, at 136, states that 'no adequate means have been hitherto provided for the prevention and punishment of such offenses.'

27 Commonwealth v. Bangs, 9 Mass. 387, 388 (1812); Commonwealth v. Parker, 50 Mass. (9 Metc.) 263, 265-266 (1845); State v. Cooper, 22 N.J.L. 52, 58 (1849); Abrams v. Foshee, 3 Iowa 274, 278-280 (1856); Smith v. Gaffard, 31 Ala. 45, 51 (1857); Mitchell v. Commonwealth, 78 Ky. 204, 210 (1879); Eggart v. State, 40 Fla. 527, 532, 25 So. 144, 145 (1898); State v. Alcorn, 7 Idaho 599, 606, 64 P. 1014, 1016 (1901); Edwards v. State, 79 Neb. 251, 252, 112 N.W. 611, 612 (1907); Gray v. State, 77 Tex.Cr.R. 221, 224, 178 S.W. 337, 338 (1915); Miller v. Bennett, 190 Va. 162, 169, 56 S.E.2d 217, 221 (1949). Contra, Mills v. Commonwealth, 13 Pa. 631, 633 (1850); State v. Slagle, 83 N.C. 630, 632 (1880).

28 See Smith v. State, 33 Me. 48, 55 (1851); Evans v. People, 49 N.Y. 86, 88 (1872); Lamb v. State, 67 Md. 524, 533, 10 A. 208 (1887).
29 Conn.Stat., Tit. 20, § 14 (1821).
30 Conn.Pub.Acts, c. 71, § 1 (1860).
31 N.Y.Rev.Stat., pt. 4, c. 1, Tit. 2, Art. 1, § 9, p. 661 and Tit. 6, § 21, p. 694 (1829).
32 Act of Jan. 20, 1840, § 1, set forth in 2 H. Gammel, Laws of Texas 177-178 (1898); see Grigsby v. Reib, 105 Tex. 597, 600, 153 S.W. 1124, 1125 (1913).
33 The early statutes are discussed in Quay 435-438. See also Lader 85-88; Stern 85- 86; and Means II 375-376.
34 Criminal abortion statutes in effect in the States as of 1961, together with historical statutory development and important judicial interpretations of the state statutes, are cited and quoted in Quay 447-

520. See Comment, A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems, 1972 U.Ill.L.F. 177, 179, classifying the abortion statutes and listing 25 States as permitting abortion only if necessary to save or preserve the mother's life.
35 Ala.Code, Tit. 14, § 9 (1958); D.C.Code Ann. § 22-201 (1967).
36 Mass.Gen.Laws Ann., c. 272, § 19 (1970); N.J.Stat.Ann. § 2A:87-1 (1969); Pa.Stat.Ann., Tit. 18, §§ 4718, 4719 (1963).

37 Fourteen States have adopted some form of the ALI statute. See Ark.Stat.Ann. §§ 41-303 to 41-310 (Supp.1971); Calif. Health & Safety Code §§ 25950-25955.5 (Supp.1972); Colo.Rev.Stat.Ann. §§ 40-2-50 to 40-2-53 (Cum.Supp.1967); Del.Code Ann., Tit. 24, §§ 1790-1793 (Supp.1972); Florida Law of Apr. 13, 1972, c. 72-196, 1972 Fla.Sess.Law Serv., pp. 380-382; Ga.Code §§ 26-1201 to 26-1203 (1972); Kan.Stat.Ann. § 21-3407 (Supp.1971); Md.Ann.Code, Art. 43, §§ 137-139 (1971); Miss.Code Ann. § 2223 (Supp.1972); N.M.Stat.Ann. §§ 40A-5-1 to 40A-5-3 (1972); N.C.Gen.Stat. § 14-45.1 (Supp.1971); Ore.Rev.Stat. §§ 435.405 to 435.495 (1971); S.C.Code Ann. §§ 16-82 to 16-89 (1962 and Supp.1971); Va.Code Ann. §§ 18.1-62 to 18.1-62.3 (Supp.1972). Mr. Justice Clark described some of these States as having 'led the way.' Religion, Morality and Abortion: A Constitutional Appraisal, 2 Loyola U. (L.A.) L. Rev. 1, 11 (1969). By the end of 1970, four other States had repealed criminal penalties for abortions performed in early pregnancy by a licensed physician, subject to stated procedural and health requirements. Alaska Stat. § 11.15.060 (1970); Haw.Rev.Stat. § 453-16 (Supp.1971); N.Y.Penal Code § 125.05, subd. 3 (Supp.1972-1973); Wash.Rev.Code §§ 9.02.060 to 9.02.080 (Supp.1972). The precise status of criminal abortion laws in some States is made unclear by recent decisions in state and federal courts striking down existing state laws, in whole or in part.

38 'Whereas, Abortion, like any other medical procedure, should not be performed when contrary to the best interests of the patient since good medical practice requires due consideration for the patient's welfare and not mere acquiescence to the patient's demand; and 'Whereas, The standards of sound clinical judgment, which, together with informed patient consent should be determinative according to the merits of each individual case; therefore be it

'RESOLVED, That abortion is a medical procedure and should be performed only by a duly licensed physician and surgeon in an accredited hospital acting only after consultation with two other physicians chosen because of their professional competency and in conformance with standards of good medical practice and the Medical Practice Act of his State; and be it further 'RESOLVED, That no physician or other professional personnel shall be compelled to perform any act which violates his good medical judgment. Neither physician, hospital, nor hospital personnel shall be required to perform any act violative of personally-held moral principles. In these circumstances good medical practice requires only that the physician or other professional personnel withdraw from the case so long as the withdrawal is consistent with good medical practice.' Proceedings of the AMA House of Delegates 220 (June 1970).

39 'The Principles of Medical Ethics of the AMA do not prohibit a physician from performing an abortion that is performed in accordance with good medical practice and under circumstances that do not violate the laws of the community in which he practices.

'In the matter of abortions, as of any other medical procedure, the Judicial Council becomes involved whenever there is alleged violation of the Principles of Medical Ethics as established by the House of Delegates.'

40 'UNIFORM ABORTION ACT

'Section 1. (Abortion Defined; When Authorized.)

'(a) 'Abortion' means the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.

'(b) An abortion may be performed in this state only if it is performed:
'(1) by a physician licensed to practice medicine (or osteopathy) in this state or by a physician practicing medicine (or osteopathy) in the employ of the government of the United States or of this state, (and the abortion is performed (in the physician's office or in a medical clinic, or) in a hospital approved by the (Department of Health) or operated by the United States, this state, or any department, agency, or political subdivision of either;) or by a female upon herself upon the advice of the physician; and
'(2) within (20) weeks after the commencement of the pregnancy (or after (20) weeks only if the physician has reasonable cause to believe (i) there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the physical or mental health of the mother, (ii) that the child would be born with grave physical or mental defect, or (iii) that the pregnancy resulted from rape or incest, or illicit intercourse with a girl under the age of 16 years).

'Section 2. (Penalty.) Any person who performs or procures an abortion other than authorized by this Act is guilty of a (felony) and, upon conviction thereof, may be sentenced to pay a fine not exceeding ($1,000) or to imprisonment (in the state penitentiary) not exceeding (5 years), or both.

'Section 3. (Uniformity of Interpretation.) This Act shall be construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among those states which enact it.

'Section 4. (Short Title.) This Act may be cited as the Uniform Abortion Act.
'Section 5. (Severability.) If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application and to this end the provision of this Act are severable.

'Section 6. (Repeal.) The following acts and parts of acts are repealed:
'(1)
'(2)
'(3)
'Section 7. (Time of Taking Effect.) This Act shall take effect ___.'
41 'This Act is based largely upon the New York abortion act following a review of the more recent laws on abortion in several states and upon recognition of a more liberal trend in laws on this subject. Recognition was given also to the several decisions in state and federal courts which show a further trend toward liberalization of abortion laws, especially during the first trimester of pregnancy.

'Recognizing that a number of problems appeared in New York, a shorter time period for 'unlimited' abortions was advisable. The time period was bracketed to permit the various states to insert a figure more in keeping with the different conditions that might exist among the states. Likewise, the language limiting the place or places in which abortions may be performed was also bracketed to account for different conditions among the states. In addition, limitations on abortions after the initial 'unlimited' period were placed in brackets so that individual states may adopt all or any of these reasons, or place further restrictions upon abortions after the initial period.

'This Act does not contain any provision relating to medical review committees or prohibitions against sanctions imposed upon medical personnel refusing to participate in abortions because of religious or other similar reasons, or the like. Such provisions, while related, do not directly pertain to when, where, or by whom abortions may be performed; however, the Act is not drafted to exclude such a provision by a state wishing to enact the same.'

42 See, for example, YWCA v. Kugler, 342 F.Supp. 1048, 1074 (D.C.N.J.1972); Abele v. Markle, 342 F.Supp. 800, 805-806 (D.C.Conn.1972) (Newman, J., concurring in result), appeal docketed, No. 72-56; Walsingham v. State, 250 So.2d 857, 863 (Ervin, J., concurring) (Fla. 1971); State v. Gedicke, 43 N.J.L. 86, 90 (1881); Means II 381-382.

43 See C. Haagensen & W. Lloyd, A. Hundred Years of Medicine 19 (1943). 44 Potts, Postconceptive Control of Fertility, 8 Int'l J. of G. & O. 957, 967 (1970) (England and Wales); Abortion Mortality, 20 Morbidity and Mortality 208, 209 (June 12, 1971) (U.S. Dept. of HEW, Public Health Service) (New York City); Tietze, United States: Therapeutic Abortions, 1963-1968, 59 Studies in Family Planning 5, 7 (1970); Tietze, Mortality with Contraception and Induced Abortion, 45 Studies in Family Planning 6 (1969) (Japan, Czechoslovakia, Hungary); Tietze & Lehfeldt, Legal Abortion in Eastern Europe, 175 J.A.M.A. 1149, 1152 (April 1961). Other sources are discussed in Lader 17-23.

45 See Brief of Amicus National Right to Life Committee; R. Drinan, The Inviolability of the Right to Be Born, in Abortion and the Law 107 (D. Smith ed. 1967); Louisell, Abortion, The Practice of Medicine and the Due Process of Law, 16 U.C.L.A.L.Rev. 233 (1969); Noonan 1.

46 See, e.g., Abele v. Markle, 342 F.Supp. 800 (D.C.Conn.1972), appeal docketed, No. 72-56.47 See discussions in Means I and Means II.
48 See, e.g., State v. Murphy, 27 N.J.L. 112, 114 (1858).
49 Watson v. State, 9 Tex.App. 237, 244-245 (1880); Moore v. State, 37 Tex.Cr.R. 552,
561, 40 S.W. 287, 290 (1897); Shaw v. State, 73 Tex.Cr.R. 337, 339, 165 S.W. 930,
931 (1914); Fondren v. State, 74 Tex.Cr.R. 552, 557, 169 S.W. 411, 414 (1914); Gray v. State, 77 Tex.Cr.R. 221, 229, 178 S.W. 337, 341 (1915). There is no immunity in Texas for the father who is not married to the mother. Hammett v. State, 84 Tex.Cr.R. 635, 209 S.W. 661 (1919); Thompson v. State, Tex.Cr.App., 493 S.W.2d 913 (1971), appeal pending.

50 See Smith v. State, 33 Me., at 55; In re Vince, 2 N.J. 443, 450, 67 A.2d 141, 144
(1949). A short discussion of the modern law on this issue is contained in the Comment

to the ALI's Model Penal Code § 207.11, at 158 and nn. 35-37 (Tent.Draft No. 9, 1959).
51 Tr. of Oral Rearg. 20-21.
52 Tr. of Oral Rearg. 24.
53 We are not aware that in the taking of any census under this clause, a fetus has ever been counted.
54 When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists. The exception contained in Art. 1196, for an abortion procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. But if the fetus is a person who is not to be deprived of life without due process of law and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?
There are other inconsistencies between Fourteenth Amendment status and the typical abortion statute. It has already been pointed out, n. 49, supra, that in Texas the woman is not a principal or an accomplice with respect to an abortion upon her. If the fetus is a person, why is the woman not a principal or an accomplice? Further, the penalty for criminal abortion specified by Art. 1195 is significantly less than the maximum penalty for murder prescribed by Art. 1257 of the Texas Penal Code. If the fetus is a person, may the penalties be different?

55 Cf. the Wisconsin abortion statute, defining 'unborn child' to mean 'a human being from the time of conception until it is born alive,' Wis.Stat. § 940.04(6) (1969) and the new Connecticut statute, Pub. Act No. 1 (May 1972 Special Session), declaring it to be the public policy of the State and the legislative intent 'to protect and preserve human life from the moment of conception.'

56 Edelstein 16.

57 Lader 97-99; D. Feldman, Birth Control in Jewish Law 251-294 (1968). For a stricter view, see I. Jakobovits, Jewish Views on Abortion, in Abortion and the Law 124 (D. Smith ed. 1967).

58 Amicus Brief for the American Ethical Union et al. For the position of the National Council of Churches and of other denominations, see Lader 99-101.

59 L. Hellman & J. Pritchard, Williams Obstetrics 493 (14th ed. 1971); Dorland's Illustrated Medical Dictionary 1689 (24th ed. 1965).

60 Hellman & Pritchard, supra, n. 59, at 493.

61 For discussions of the development of the Roman Catholic position, see D. Callahan, Abortion: Law, Choice and Morality 409-447 (1970); Noonan 1.

62 See Brodie, The New Biology and the Prenatal Child, 9 J.Family L. 391, 397 (1970); Gorney, The New Biology and the Future of Man, 15 U.C.L.A.L.Rev. 273 (1968); Note, Criminal Law-abortion-The 'Morning-After Pill' and Other Pre-Implantation Birth-Control Methods and the Law, 46 Ore.L.Rev. 211 (1967); G. Taylor, The Biological Time Bomb 32 (1968); A. Rosenfeld, The Second Genesis 138-139

(1969); Smith, Through a Test Tube Darkly: Artificial Insemination and the Law, 67 Mich.L.Rev. 127 (1968); Note, Artificial Insemination and the Law, 1968 U.Ill.L.F. 203.

63 W. Prosser, The Law of Torts 33k-338 (4th ed. 1971); 2 F. Harper & F. James, The Law of Torts 1028-1031 (1956) ; Note, 63 Harv.L.Rev. 173 (1949).

64 See cases cited in Prosser, supra, n. 63, at 336-338; Annotation, Action for Death of Unborn Child, 15 A.L.R.3d 992 (1967).

65 Prosser, supra, n. 63, at 338; Note, The Law and the Unborn Child: The Legal and Logical Inconsistencies, 46 Notre Dame Law. 349, 354-360 (1971).

66 Louisell, Abortion, The Practice of Medicine and the Due Process of Law, 16 U.C.L.A.L.Rev. 233, 235-238 (1969); Note, 56 Iowa L.Rev. 994, 999-1000 (1971); Note, The Law and the Unborn Child, 46 Notre Dame Law. 349, 351-354 (1971).

67 Neither in this opinion nor in Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201, do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision. No paternal right has been asserted in either of the cases and the Texas and the Georgia statutes on their face take no cognizance of the father. We are aware that some statutes recognize the father under certain circumstances. North Carolina, for example, N.C.Gen.Stat. § 14-45.1 (Supp.1971), requires written permission for the abortion from the husband when the woman is a married minor, that is, when she is less than 18 years of age, 41 N.C.A.G. 489 (1971); if the woman is an unmarried minor, written permission from the parents is required. We need not now decide whether provisions of this kind are constitutional. 68 Only Mr. Justice Harlan failed to join the Court's opinion, 372 U.S., at 733, 83 S.Ct., at 1032. 69 There is no constitutional right of privacy, as such. '(The Fourth) Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's general right to privacy-his right to be let alone by other people-is like the protection of his property and of his very life, left largely to the law of the individual States.' Katz v. United States, MANU/USSC/0210/1967 : 389 U.S. 347, 350-351, 88 S.Ct. 507, 510-511, 19 L.Ed.2d 576 (footnotes omitted).

70 This was also clear to Mr. Justice Black, 381 U.S., at 507, (dissenting opinion); to Mr. Justice Harlan, 381 U.S., at 499, 85 S.Ct., at 1689 (opinion concurring in the judgment); and to Mr. Justice White, 381 U.S., at 502, 85 S.Ct., at 1691 (opinion concurring in the judgment). See also Mr. Justice Harlan's thorough and thoughtful opinion dissenting from dismissal of the appeal in Poe v. Ullman, MANU/USSC/0162/1961 : 367 U.S. 497, 522, 81 S.Ct. 1752, 1765, 6 L.Ed.2d 989.

71 Jurisdictions having enacted abortion laws prior to the adoption of the Fourteenth Amendment in 1868:

1. Alabama-Ala.Acts, c. 6, § 2 (1840).
2. Arizona-Howell Code, c. 10, § 45 (1865).
3. Arkansas-Ark.Rev.Stat., c. 44, div. III, Art. II, § 6 (1838).

4. California-Cal.Sess.Laws, c. 99, § 45, p. 233 (1849-1850).
5 . Colorado (Terr.)-Colo.Gen.Laws of Terr. of Colo., 1st Sess., § 42, pp. 296-297(1861).
6 . Connecticut-Conn.Stat. Tit. 20, §§ 14, 16 (1821). By 1868, this statute had been replaced by another abortion law. Conn.Pub.Acts, c. 71, §§ 1, 2, p. 65 (1860).
7. Florida-Fla.Acts 1st Sess., c. 1637, subs. 3, §§ 10, 11, subc. 8, §§ 9, 10, 11 (1868), as amended, now Fla.Stat.Ann. §§ 782.09, 782.10, 797.01, 797.02, 782.16 (1965).
8. Georgia-Ga.Pen.Code, 4th Div., § 20 (1833).
9. Kingdom of Hawaii-Hawaii Pen.Code, c. 12, §§ 1, 2, 3 (1850).
10. Idaho (Terr.)-Idaho (Terr.) Laws, Crimes and Punishments §§ 33, 34, 42, pp. 441, 443 (1863).
11. Illinois-Ill.Rev. Criminal Code §§ 40, 41, 46, pp. 130, 131 (1827). By 1868, this statute had been replaced by a subsequent enactment. Ill.Pub.Laws §§ 1, 2, 3, p. 89 (1867).
1 2 . Indiana-Ind.Rev.Stat. §§ 1, 3, p. 224 (1838). By 1868 this statute had been superseded by a subsequent enactment. Ind.Laws, c. LXXXI, § 2 (1859).
13. Iowa (Terr.)-Iowa (Terr.) Stat. 1st Legis., 1st Sess., § 18, p. 145 (1838). By 1868, this statute had been superseded by a subsequent enactment. Iowa (Terr.) Rev.Stat., c. 49, §§ 10, 13 (1843).
14. Kansas (Terr.)-Kan. (Terr.) Stat., c. 48, §§ 9, 10, 39 (1855). By 1868, this statute had been superseded by a subsequent enactment. Kan. (Terr.) Laws, c. 28, §§ 9, 10, 37 (1859).
15. Louisiana-La.Rev.Stat., Crimes and Offenses § 24, p. 138 (1856).
16. Maine-Me.Rev.Stat., c. 160, §§ 11, 12, 13, 14 (1840).
17. Maryland-Md.Laws, c. 179, § 2, p. 315 (1868).
18. Massachusetts-Mass.Acts & Resolves, c. 27 (1845).
19. Michigan-Mich.Rev.Stat., c. 153, §§ 32, 33, 34, p. 662 (1846).
20. Minnesota (Terr.)-Minn. (Terr.) Rev.Stat., c. 100, §§ 10, 11, p. 493 (1851).
21. Mississippi-Miss.Code, c. 64, §§ 8, 9, p. 958 (1848).
22. Missouri-Mo.Rev.Stat., Art. II, §§ 9, 10, 36, pp. 168, 172 (1835).
23. Montana (Terr.)-Mont. (Terr.) Laws, Criminal Practice Acts § 41, p. 184 (1864).
24. Nevada (Terr.)-Nev. (Terr.) Laws, c. 28, § 42, p. 63 (1861).
25. New Hampshire-N.H.Laws, c. 743, § 1, p. 266 (1848).
26. New Jersey-N.J.Laws, p. 266 (1849).
27. New York-N.Y.Rev.Stat., pt. 4, c. 1, Tit. 2, §§ 8, 9, pp. 12-13 (1828). By 1868, this statute had been superseded. N.Y.Laws, c. 260, §§ 1, 2, 3, 4, 5, 6, pp. 285-286 (1845); N.Y.Laws, c. 22, § 1, p. 19 (1846).
28. Ohio-Ohio Gen.Stat. §§ 111(1), 112(2), p. 252 (1841).
29. Oregon-Ore.Gen.Laws, Crim.Code, c. 43, § 509, p. 528 (1845-1964).
30. Pennsylvania-Pa.Laws No. 374 §§ 87, 88, 89 (1860).
31. Texas-Tex.Gen.Stat.Dig., c. VII, Arts. 531-536, p. 524 (Oldham & White 1859).
3 2 . Vermont-Vt.Acts No. 33, § 1 (1846). By 1868, this statute had been amended. Vt.Acts No. 57, §§ 1, 3 (1867).
33. Virginia-Va.Acts, Tit. II, c. 3, § 9, p. 96 (1848).
34. Washington (Terr.)-Wash. (Terr.) Stats., c. II, §§ 37, 38, p. 81 (1854).
35. West Virginia-Va.Acts, Tit. II, c. 3, § 9, p. 96 (1848).

36. Wisconsin-Wis.Rev.Stat., c. 133, §§ 10, 11 (1849). By 1868, this statute had been superseded. Wis.Rev.Stat., c. 164, §§ 10, 11; c. 169, §§ 58, 59 (1858).

72 Abortion laws in effect in 1868 and still applicable as of August 1970:

1. Arizona (1865).
2. Connecticut (1860).
3. Florida (1868).
4. Idaho (1863).
5. Indiana (1838).
6. Iowa (1843).
7. Maine (1840).
8. Massachusetts (1845).
9. Michigan (1846).
10. Minnesota (1851).
11. Missouri (1835).
12. Montana (1864).
13. Nevada (1861).
14. New Hampshire (1848).
15. New Jersey (1849).
16. Ohio (1841).
17. Pennsylvania (1860).
18. Texas (1859).
19. Vermont (1867).
20. West Virginia (1848).
21. Wisconsin (1858).

Annexure : 06

Safe Motherhood and Reproductive Health Rights Act, 2018

Date of Authentication:
September 18, 2018 (2075/06/02 B.S)

Act No. 9 of the year 2075 B.S.
An Act enacted to provide for matters related to safe motherhood and reproductive health rights

Preamble: Whereas, to respect, protect and fulfill woman's safe motherhood and reproductive health rights as guaranteed in the Constitution of Nepal, it is expedient to make necessary provisions relating to safe, quality, affordable and accessible maternal and reproductive health services, the Federal Parliament enacted this Act.

Chapter-1
Preliminary

1. Short title and commencement: (1) This Act may be called as "Safe Motherhood and Reproductive Health Rights Act, 2018."

(2) This Act shall come into force immediately.

2. Definitions: Unless the subject or the context otherwise requires, in this Act,

(a) "Emergency obstetric care" means the services available twenty-four hours to manage any complications during pregnancy, delivery or post-partum period.
(b) "Basic emergency obstetric care" means basic services such as administering antibiotics, magnesium sulfate or oxytocin, removal of retained placenta, assisted vaginal delivery, including with the use of medical equipment (vacuum), and removal of retained products from uterus following abortion.
(c) "Adolescents" means individuals between the ages of ten to nineteen years.
(d) "Abortion" means the spontaneous or induced termination of fetus from uterus before it becomes capable of natural birth.
(e) "Contraception" means the measure to prevent pregnancy by obstructing the common process of ovulation, expulsion of sperm, or implantation of the ovum.
(f) "Contraceptive methods" means hormone-based or other method of contraception.
(g) "Abortion service" means an abortion service performed in a listed health institution for abortion by a listed health service provider upon fulfilling the process in accordance with this Act.
(h) "Antenatal care service" means the service in accordance with Section 5 (of the Act).
(i) "Pregnancy" means the term from first day of the last menstrual period before conception till fetus remains in the woman's uterus.

(j) "Prescribed" or "as prescribed" means prescribed or as prescribed in the rules formulated under this Act.
(k) "Newborn essential care" means the services, including newborn care to keep them clean and warm, taking care of the navel and eyes, breastfeeding, as well as administering necessary vaccines.
(l) "Newborn emergency care" means services relating to managing infections of newborn by administering antibiotics, including management of hypothermia as well as complications relating to respiration.
(m) "Family planning" means individual's planning on the number or spacing of children by using or not using the contraceptives.
(n) "Reproductive health" means the state of physical, mental and social wellbeing in all matters related to the reproductive system, and to its functions and processes.
(o) "Right to reproductive health" means the rights in accordance with Section 3 (of the Act).
(p) "Reproductive Health Morbidity" means any health condition adversely impacting the reproductive system as a result of reproduction, pregnancy, abortion, labor and sexual behavior, and also refers to uterine prolapse, obstetric fistula, infertility, cervical cancer as well as any other similar health conditions that affects the reproductive functioning.
(q) "Birth attendants" means trained health worker who assist pregnant woman in childbirth.
(r) "Ministry" means the ministry of the Government of Nepal that overlooks matters relating to health.
(s) "Comprehensive emergency obstetric care" means services that includes blood transfusion and surgery in addition to basic emergency obstetric care mentioned in sub-section (b).
(t) "Safe motherhood" means maternal services provided to women during antenatal, delivery and post-partum periods, in accordance with this Act.
(u) "Health institution" means hospital, nursing home, medical college or health foundation operated by government, non-government, community or private organization, and also refers to primary health center, health post or the health institution operated under any other name.

Chapter-2
Right to Reproductive Health

3. Right to reproductive health: (1) Each woman and adolescent shall have the right to obtain education, information, counseling and service relating to sexual and reproductive health.
(2) Each person shall have the right to obtain service, counseling and information relating to reproductive health.
(3) Each woman shall have the right to safe motherhood and reproductive health. Each woman shall have the right to determine the number or spacing of children.
(4) Each person shall have the right to contraceptive information and usage.
(5) Each woman shall have the right to obtain abortion services, in accordance with this Act.
(6) Each woman shall have the right to nutritious, balanced diet and physical rest during the antenatal, postnatal and reproductive health morbidity.
(7) Each woman shall have the right to essential counseling, obstetric care, and postpartum contraceptive services from a birth attendant.
(8) Each woman shall have the right to obtain emergency obstetric care, basic emergency obstetric care,

comprehensive emergency obstetric care, new born essential care and new born emergency care.
(9) Each person shall have the right to affordable, acceptable and safe reproductive health services as needed during different stages of their lifecycle.
(10) Every person shall have the right to reproductive health services of their choice.

4. Confidentiality: Details related to reproductive health services received by each individual and its information shall remain confidential.

Chapter-3
Safe Motherhood and Newborn

5. Right to antenatal care service: (1) Each woman shall have a right to visit a health institution for check-up or examination to determine whether she is pregnant or not.
(2) Pursuant to sub-section (1), the concerned health institution shall provide the visiting pregnant woman the following services:
(a) At least four antenatal check-ups in case of normal pregnancy;
(b) Besides as stated in clause (a), additional health examination on advice of a physician/doctor or competent health worker;
(c) To receive appropriate counseling on health care;
(d) To receive minimum care and safety measures during pregnancy.

6. Providing obstetric care: (1) Government and community health institutions that provide obstetric care shall arrange for a competent health worker, or birth attendant or other trained health worker to provide obstetric care.
(2) Non-government and private health institutions, meeting the criteria prescribed by the Government of Nepal, shall provide respectful obstetric care.

7. Emergency obstetric and newborn care: (1) Government and community health institutions that provide obstetric care, should also provide emergency obstetric and newborn care.
(2) Non-government and private health institutions, meeting criteria prescribed by the Government of Nepal, should provide emergency obstetric and newborn care.
(3) Health institutions, referred to in sub-sections (1) and (2), unable to manage complications that arise while providing services shall as far as possible refer (the case) to government or community health institution and, if not, to non-governmental and private institutions.
(4) It shall be the duty of the concerned health institutions to manage health complications of pregnant and postpartum woman or newborn, referred in accordance with sub-section (3).
(5) Health institutions that provide emergency obstetric and newborn care shall arrange a resting place, as prescribed, for pregnant women with specific conditions.
8. Health care of newborn: Health institutions providing obstetric care should make arrangement for newborn health care, as prescribed.
9. Birth registration of infants: (1) Each health institution shall maintain record of infants born in the health institution.

(2) On the basis of the record, referred to in sub-section (1), the health institution shall issue birth certificate stating the name of father or mother of the infant born in that health institution, to the father or mother.
(3) Every health institution shall maintain record stating the number of infant mortality and women who have experienced miscarriage or sought abortion.
(4) Each health institution shall maintain record in case of death of a pregnant woman seeking obstetric care in the health institution.
10. Right to seek family planning services: (1) Each person shall have the right to obtain information, make choice and seek other services related to family planning.
(2) The prescribed family planning services shall be sought from the prescribed health institution.
(3) Other provisions related to family planning shall be as prescribed.
11. Forced family planning prohibited: Forced family planning under duress or threat or enticement or allurement or without obtaining written consent is prohibited.
12. Forced use of contraceptives prohibited: Forced use of contraceptives under duress or threat or enticement or allurement or without obtaining consent is prohibited.
13. Right to maternity leave: (1) A woman working in a government, non-government or private organization or institution shall have the right to paid maternity leave for a minimum period of ninety-eight days before or after childbirth.
(2) In case the maternity leave referred to in sub-section (1) is not sufficient, a pregnant woman, with the recommendation of an expert physician shall have the right to leave without pay for a maximum period of up to one year.
(3) Government, non-government or private organization or institution shall make necessary arrangement for working women to breastfeed their infant during office hours for a period of up to two years from their birth.
(4) Even in cases of still birth or death of an infant after birth, the pregnant woman shall be entitled to leave referred in sub-section (1).
(5) A male staff of government, non-governmental or private organization or institution shall get paternity leave with remuneration for 15 days before or after the child delivery of his wife.
14. Providing additional leave: In cases where as a result of reproductive health morbidity, on the opinion of a specialized physician, a woman requires critical surgery, the government, non-government or private organization or institution where the woman is working shall provide additional paid leave of up to at least thirty days before or after such surgery.

Chapter-4
Safe Abortion

15. Seeking safe abortion: A pregnant woman shall have the right to seek safe abortion under the following conditions:
(a) Up to twelve weeks of pregnancy with the consent of a pregnant woman;
(b) Up to twenty-eight weeks of pregnancy with the consent of the concerned woman, if in the opinion of a licensed physician that if an abortion is not performed, there may be danger to the life of a pregnant woman or her physical or mental health may deteriorate or a child born will be impaired;

(c) Up to twenty-eight weeks of pregnancy with the consent of the pregnant woman in case the conception is a result of rape or incest,
(d) Up to twenty-eight weeks of pregnancy with the consent of the woman who is infected with virus that deteriorates immune system (HIV) or suffering from any similar incurable disease,
(e) Up to twenty-eight weeks of pregnancy with the consent of the pregnant woman, if in the opinion of the health service provider involved in the treatment, due to fetal impairment the fetus is likely to become non-viable or unlikely to survive after birth or become deformed due to any genetic disorder or any other reason.

16. Forced abortion prohibited: (1) Except under the conditions mentioned in Section 15, no one shall seek abortion or carry out any act knowing or believing that it may cause abortion.(2) No one shall carry out abortion by enticing, coercing or threatening or alluring a pregnant woman.
(3) Whoever commits any of the following acts shall be deemed to have performed forced abortion:
(a) Carrying out abortion as referred to in sub-section (2),
(b) Termination of pregnancy resulting from an act of rage or hostility against a pregnant woman,
(c) Being an accomplice in committing any act/s referred to in clauses (a) and (b).
(4) While conducting abortion, if there is a livebirth and immediate death, it shall be deemed to be abortion for the purpose of this Section.

17. Sex-selective abortion prohibited: (1) No one shall commit or cause to commit any act identifying sex of fetus.
(2) By using intimidation or fear or duress or threat or enticement or allurement, no pregnant woman shall be coerced or compelled to identify the sex of the fetus.
(3) As referred to in sub-sections (1) and (2), no abortion shall be carried out after identifying sex of the fetus.

18. Safe abortion services: (1) In accordance with Section 15, a listed health service provider shall provide safe abortion services to a pregnant woman in a listed health institution that fulfills prescribed standards.
(2) Appropriate technology and process of the service to be provided pursuant to sub-section (1) shall be as prescribed.
(3) A pregnant woman seeking safe abortion services shall give consent to a listed health institution or listed health service provider, in prescribed format.
(4) Notwithstanding anything contained in sub-section (3), in respect of a woman with unsound mind, or unable to give the consent at the time of seeking services or who has not completed eighteen years of age, consent may be given by her guardian or custodian.
(5) Notwithstanding anything contained in sub-section (4), taking into account her best interest, safe abortion services shall be provided to a pregnant woman below eighteen years of age.

19. Confidentiality to be maintained: (1) A listed health institution or listed health service provider shall maintain the confidentiality, of information and documents, relating to reproductive health counseling and services provided to a pregnant woman.
(2) Notwithstanding anything contained in sub-section (1) the record of such information, documents and counseling services may be provided under following conditions:
(a) In case information is demanded by an investigation officer or court in course of investigation and hearing of any lawsuit;

(b) To share (such information) without revealing the identity of woman for the purpose of studies and research relating to safe abortion;
(c) In case the concerned woman demands the record thereof.

Chapter-5
Reproductive Health Morbidity

20. Right to obtain reproductive health morbidity care: (1) Each woman shall have the right to get examined, receive counseling and treatment relating to reproductive health morbidity from a health institution.
(2) While providing services in accordance with sub-section (1), it is the duty of the concerned health institution or the health worker to provide information relating to morbidity and care to be taken following surgery and the risk likely to arise, in a manner that it is understood.
21. No one shall be displaced: No one shall be or caused to be divorced or expelled from home or displaced as a result of reproductive health morbidity.

Chapter-6
Budget Allocation and Grants for Motherhood and Reproductive Health

22. Allocation of grant amount: (1) The Government of Nepal shall allocate grant amount in its yearly budget for motherhood and reproductive health services to each Local Level (government).
(2) The Provincial Government, in accordance with the Provincial law, shall allocate certain amount in its budget every year as grant for motherhood and reproductive health services to each Local Level (government).
(3) The concerned Local Level (government) shall, as prescribed, spend the amount allocated in accordance with sub-sections (1) and (2), to provide motherhood and reproductive health services for economically weak women.
23. Local Level (government) to allocate budget: (1) The Local Level (government) shall allocate essential budget for motherhood and reproductive health services in its annual budget.
(2) While allocating budget in accordance with sub-section (1), it shall be in a manner that government or community health institutions providing motherhood and reproductive health service receive it.
24. Reproductive Health Coordination Committee: (1) A Reproductive Health Coordination Committee shall be established to provide necessary recommendations to the Government of Nepal for developing policies, plans and programs relating to safe motherhood and reproductive health as follows:
(a) Secretary, Ministry of Health and Population - Chairperson
(b) Joint-secretary, Ministry of Women, Children and Senior Citizens - Member
(c) Joint-secretary, Ministry of Education, Science and Technology - Member
(d) Director General, Health Service Department - Member
(e) Representative, Nepal Medical Council - Member
(f) Representative, Nepal Nursing Council - Member
(g) Representative, Nepal Health Professionals' Council - Member

(h) Legal Officer, Ministry of Health and Population - Member
(i) Two representatives including one woman nominated by the Ministry from among the professional institutions/ persons conducting studies and research or providing service in the field of reproductive health and reproductive right - Member
(j) One representative of Nepal Health Volunteers' Association assigned by the Ministry - Member
(k) Director, Family Welfare Division, Health Service Department - Member-secretary
(2) The Coordination Committee may invite an expert working in the field of reproductive health and reproductive rights to a meeting, as necessary.
(3) The procedures relating to the meeting of the Committee shall be as determined by the Committee.

Chapter-7
Offences and Punishments

25. Offence deemed to be committed: Whoever commits any of the following acts shall deemed to have committed an offence under this Act:
(a) Depriving obstetric care services, as referred to in Section 5;
(b) Denial by a health institution providing obstetric care services to provide such services as referred to in Section 6;
(c) Pursuant to Section 7, referring or causing referral to another health institution deliberately even in cases where treatment was possible in their own health institution;
(d) A health institution does not provide birth certificate pursuant to Section 9;
(e) Forceful family planning, as referred to in Section 11;
(f) Forceful use of contraceptive, as referred to in Section 12;
(g) Abortion (conducted), as referred to in Section 16;
(h) Commission of any act of identification of sex of the fetus, in contravention with sub-sections (1) and (2) of Section 17;
(i) Abortion conducted after sex determination, as referred to in sub-section (3) of Section 17;
(j) Disclosure of confidentiality or caused to be disclosed, in contravention with sub-section (2) of Section 19;
(k) Displacing or caused to be displaced in contravention with Section 21,
(l) Discriminating in contravention with Section 29.
26. Punishment: Whoever commits any act that is an offence under Section 25 shall be liable to the following punishments, depending upon the degree of the offence committed:
(a) Imprisonment up to six months or fine up to fifty thousand rupees or both for committing or abetting to commit the crime referred to in clauses (a), (b), (c), (d) and (l);
(b) Imprisonment between three months to six months and fine up to fifty thousand rupees for committing or abetting to commit the crime committed referred to in clauses (e) and (f);
(c) Punishment in accordance with Section 188 of the National Penal (Code) Act, 2074 for committing or abetting to commit the offence referred to in clauses (g), (h) and (i);
(d) Fine up to fifty thousand rupees for committing or abetting to commit crime as referred to in clause (j);
(e) Imprisonment of up to one year or fine up to one hundred thousand rupees or both for committing or abetting to commit the crime committed as referred to in clause (k).
27. Provisions of compensation: A victim of an offence committed under this Act shall receive a reasonable amount of compensation from the perpetrator.

Chapter-8
Miscellaneous

28. Disabled-friendly service: Services under this Act, including family planning, reproductive health, safe motherhood, safe abortion, emergency obstetric care and newborn care, reproductive health morbidity, shall be adolescent and disabled friendly.
29. Discrimination prohibited: No one shall be discriminated in their right to access services, including family planning, reproductive health, safe motherhood, safe abortion, emergency obstetric care and newborn care, reproductive morbidity, menstrual care on the ground of origin, religion, color, caste, ethnicity, sex, community, occupation, business, sexual and gender identity, physical or health condition, disability, marital status, pregnancy, creed, state of being suffering from any disease or infected with virus or vulnerable to such infections, state of reproductive morbidity, personal relationship or any other such grounds.
30. Provision relating to safe/protection house: The Federal, Provincial and Local Level (governments) shall coordinate to make necessary arrangement of a Safe/Protection House to safeguard reproductive health of women who are mentally challenged, neglected by family or relatives, or victims of rape.
31. To issue directives: (1) The Ministry may issue necessary directives to health institutions for availability of reproductive health services.
(2) It shall be the duty of the concerned health institutions to comply with the directives issued as referred to sub-section (1).
32. Service charge: (1) The government health institutions or the health institutions that receive grants from government shall provide free reproductive health services.
(2) Private, non-government and community health institutions may charge (fees) for providing reproductive health service, as prescribed.
(3) Notwithstanding whatever has been written in sub-section (2), private, non-government and community health institutions, and health workers shall make services affordable, and provide free services (quota) to persons unable to pay service charge.
33. Maternity allowance: The Government of Nepal shall provide maternity allowance to destitute woman who give birth, as prescribed.
34. Saving of acts done in good faith: Notwithstanding anything contained elsewhere in this Act, no legal action shall be taken against any health institution and health worker for any reproductive health services provided in good faith.
35. Adjudicating authority: (1) District Court shall have the jurisdiction to hear and dispose case involving offences under this Act.
(2) If a person is not satisfied with the punishment or order made by District Court, in accordance with sub-section (1), s/he may appeal in the concerned High Court.
36. State case: (1) The Government of Nepal shall be the plaintiff in cases pursuant to Section 25.
(2) The cases referred to in Section 25 shall be deemed included in Schedule-1 of National Penal Procedure (Code) Act, 2074.
37. Statute of limitation: For offences committed under this Act, the statutory limitation to file a complaint shall be six months from knowledge that crime has been committed.
38. To be in accordance with prevailing law: It shall be in accordance with this Act on the matters provided for in this Act and it shall be in accordance with prevailing law on the matters not dealt with herein.

39. Power to formulate rules: The Government of Nepal may formulate necessary Rules in order to implement this Act.
40. Power to issue directives: The Ministry may, subject to this Act and Rules framed thereunder, frame and implement necessary directives.

Annexure : 07

THE MEDICAL TERMINATION OF PREGNANCY ACT, 1971

ARRANGEMENT OF SECTIONS

SECTIONS

THE MEDICAL TERMINATION OF PREGNANCY ACT, 1971

ACT NO. 34 OF 1971

[10*th 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 [1]***.

(3) It shall come into force on such date[2] 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 [3][mentally ill person];

(b) [4][(*b*) "mentally ill person" means a person who is in need of treatment by reason of any mental disorder other than mental retardation;]

(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 medical 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.[204]

Explanation I.—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 II.—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.

(2) 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 reasonably foreseeable environment.

(3) (*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[1][mentally ill person], 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.

[2][**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

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1. The words "except the State of Jammu and Kashmir" omitted by Act 34 of 2019, s. 95 and the Fifth Schedule (w.e.f. 31-10- 2019).
2. 1st April, 1972, *vide* notification No. G.S.R. 285, dated 19th February, 1972, *see* Gazette of India, Part II, sec. 3 (*i*).
3. Subs. by Act 64 of 2002, s. 2, for "lunatic" (w.e.f. 18-6-2003).
4. Subs. by s. 2, *ibid.,* for clause (*b*) (w.e.f. 18-6-2003).

(b) a place for the time being approved for the purpose of this Act by Government or a District Level Committee constituted by that Government with the Chief Medical Officer or District Health Officer as the Chairperson of the said Committee:

Provided that the District Level Committee shall consist of not less than three and not more than five members including the Chairperson, as the Government may specify from time to time.]

5. Sections 3 and 4 when not to apply.—(*1*) The provisions of section 4, and so much of the provisions of sub-section (*2*) of section 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.

[3][(*2*) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), the termination of pregnancy by a person who is not a registered medical practitioner shall be an offence punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years under that Code, and that Code shall, to this extent, stand modified.

(3) Whoever terminates any pregnancy in a place other than that mentioned in section 4, shall be punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years.

(4) Any person being owner of a place which is not approved under clause (*b*) of section 4 shall be punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years.

Explanation 1.—For the purposes of this section, the expression "owner" in relation to a place means any person who is the administrative head or otherwise responsible for the working or maintenance of a hospital or place, by whatever name called, where the pregnancy may be terminated under this Act.[205]

Explanation 2.—For the purposes of this section, so much of the provisions of clause (*d*) of section 2 as relate to the possession, by registered medical practitioner, of experience or training in gynaecology and 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

1. Subs. by Act 64 of 2002, s. 3, for "lunatic" (w.e.f. 18-6-2003).
2. Subs. by s. 4, *ibid*., for section 4 (w.e.f. 18-6-2003).
3. Subs. by s. 5, *ibid*., for sub-section (*2*) and the *Explanation* (w.e.f. 18-6-2003).

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.

[1][(*2A*) Every regulation made by the State Government under this Act shall be laid, as soon as may be after it is made, before the State Legislature.]

(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 proceeding 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.[206]

[206] 1. Ins. by Act 4 of 2005, s. 2 and the Schedule (w.e.f. 11-1-2005).