Chapter-3

FOETICIDE DISASTER: ISSUES, POLICIES AND THE LAW IN INDIA
A lifetime systematic gender bias for the Indian girl child begins in the mothers’ womb itself. Sex-linked abortions have become rampant, Middle class and upper class families go for amniocentesis. Actually this test is a boon in the medical field, which will enable the doctors to know about the congenital diseases. But, by using it for a wrong purpose, we turned it into a curse.

We need to restrict the killings of baby girls in the womb and after birth. In this regard Central government has already passed an Act namely, The Prenatal Diagnostic Techniques (Prevention of Abuse) Act, 1994 and later amended in 2002. But like the Dowry Prohibition Act, this Act only barks but does not bite. To provide the claws and teeth to this Act, the enforcement authorities shall have to be very strict.

Unfortunately Article 21 of the Constitution which gives a right to life to all the citizens of India cannot be extended to the female children who are killed before they are born and become the citizens of India.

We need a law, which would severely punish the unscrupulous medical practitioners who do scanning and remove the foetus for the reason that it is a female child and not for the reasons mentioned in section 3 of Medical Termination of Pregnancy Act 1971 nor for diagnosing the congenital diseases. We need such a law which would equally punish the heartless parents, who are biased towards male children and kill their daughters before they are born.

A very complex problem arises when the pro-abortion persons argue that they, under the Constitution have a right to personal liberty which includes the right to or not to bear or beget a child, the right to be or not to be
a parent, the right to or not to use contraceptive, the right to or not to sterilized oneself, the right to have sex without the nuisance of sex. by artificial insemination. The right may accordingly be held to include the right to stoppage of parenthood in transit, that is, the right to terminate pregnancy prematurely.¹

If the right to terminate pregnancy is thus comprised in and follows from the right to personal liberty guaranteed as a fundamental right by and under Article 21 of the Constitution, then under the mandate of that Article, as amplified by the Supreme Court in Maneka Gandhi² and later cases³, no person can be deprived of such personal liberty except according to procedure established by law which must be “reasonable, right, just and fair”. The relevant provisions⁴ of the Indian Penal Code, however prescribed very severe punishments for termination of pregnancy in all cases except when caused in good faith for the purpose of saving the life of the woman concerned. These provisions, drawn up more than a century ago in keeping with the then English law on the point and the concept of social morality then prevailing, have accordingly rendered themselves liable to be questioned as violative of the fundamental rights to personal liberty. But, the medical Termination of Pregnancy Act, 1971, has abated the rigour of these provisions to a considerable extent. Having provided for termination of Pregnancy in cases of unwanted motherhood would appear to be more filling with the wide triumphal arch being currently constructed for the ‘Right to Personal Liberty.’

But granting that the right to personal liberty of a woman includes her right to terminate pregnancy, the question that has been raised is whether or not the exercise of such a right would affect the right to life of the unborn child. You may have the right or liberty to swing your arm, but not to give a

² Maneka Gandhi v. Union of India, (1978), ISCC 248
³ Francis Cordalie Mullin v Administrator Union Territory, (1981) ISCC 608
⁴ Sections 312-316, Indian Penal code, 1860
blow to another’s nose thereby. The answer to this question would depend on the answers to the questions, namely, whether or not an unborn child is a person within the meaning of the life and liberty clause of the Constitution and, whether or not it has life.\(^5\)

A foetus or a child in the mother’s womb is not a natural person within the meaning of I.P.C. In all jurisprudential jurisdictions, however, a child *en ventre sa mere* is recognized as a legal persons, capable of inheriting or otherwise acquiring and holding property and also other rights. Medical jurisprudence also treats it as a living being as proved by Dr. Nathensan. Thus granting that a child in the womb is not a natural but only a legal person not entitled to the protection of life, liberty and property clauses look absurd. Even if, for the sake of argument we agree to this absurd proposition, analogical reasoning is in favour of the unborn persons’ right to life. We know that a non-natural but legal person, like a statutory corporation or a company, has all along been treated as a person within the meaning and protection of the equality clause of the Constitution guaranteeing to every persons equality before the law and equal protection of the laws.\(^6\) The life, liberty clause of the Constitution guaranteeing right to life and liberty to every person, would obviously apply, as it does, to all-natural but legal persons also capable in a law of acquiring property, like statutory corporation and incorporated companies and no such person, even though non-natural, can be denied the protection. A non-natural but legal person, being thus undoubtedly a person within the meaning and protection of the life, liberty and the equality clauses of the Constitution, cannot be deprived of life without due process. It can accordingly be argued that since a foetus of child in the mother’s womb, even though a non-natural persons, would nevertheless be a person within the meaning of Article 21 of the Constitution, it cannot be deprived of its life, without reasonable, right, just and fair process.

\(^5\) *Supra* note 1. p.60

\(^6\) Article 14 of the Indian Constitution
It has been difficult to find a legal basis for the protection of the foetus and keeping pace with the scientific advancement in diagnostic techniques even to the societal needs of the time. The legislative policy and the judicial efforts in India are very encouraging, while the difficulty lies with the pragmatic use of the law and making it reachable to the larger human population strained with the egocentric die-hard mind set. Though only law cannot ban female foeticide, a properly implemented law can facilitate and create an environment for that purpose.

The Constitution of India, 1950, guarantees non-discrimination of gender and enjoins upon every citizen a duty of renounce practices that are against the dignity of women; the Indian Penal Code, 1860, penalizes miscarriage; the Medical Termination of Pregnancy Act, 1971, permits abortion only in certain cases and disallows those which are based on gender; and the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, penalizes the misuse of pre-natal diagnostic procedures for sex detection. The Act has been amended in 2002 to include cases of pre-conception sex selection.

India has ratified the United Nations Convention on the Rights of the Child, 1989, and the Convention on the Elimination of All forms of Discriminating Against Women 1989. It has also endorsed the twenty-seven survival and development goals laid down by the World Summit for Children. Despite all these, the practice of female foeticide continues to thrive in India. The reasons are many; incongruence of legislative provisions with governmental policies, shortcomings of existing legislations, ineffective implementation machinery, etc.

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There is common perception that an unborn child or (foetus) has no legal standing or personality. Contrary to popular belief, an unborn person is a legal person.

The discussion below clears the air.

Legal Status of Unborn Child/Foetus

The law recognizes legal personality to unborn children. A child in mother's womb (en ventre sa mere) is by fiction treated as already born and regarded as person for many purposes. The Hindu law has equated ‘person in womb’ to a ‘person in existence’ for many purposes. Similar is the position under the Transfer of Property Act, 1882. Some of the instances are:

i). Hindu law of partition requires a share to be allotted to a child in womb along with the other living heirs. If pregnancy is known, the partition should be postponed till the birth, but if (male) coparceners do not agree to this, then a share equal to share of a son should be reserved. If a son is born, he takes it, and if a female is born, a marriage provision should be made for her. In case no share is reserved for a son in womb, he can, after his birth, demand re-opening of partition. However, if the child does not take birth alive, his share may be equally portioned between the surviving heirs.

ii). A child in womb can inherit property. Under the Hindus Succession Act, 1956, the property of a male Hindu dying intestate (without making a will) shall devolve firstly upon the Class 1 heirs, which includes Son/ Daughter. “Son means inter alia a posthumous son (i.e. child in womb at the time of death of intestate, borne alive later). The position of ‘daughter’ is same as that of a son. Likewise, posthumous children are included in the scheme of succession to the property of a female Hindu dying intestate.

iii). The traditional Hindu law did not recognize gifts to unborn person. The rule of pure Hindu law that a gift in favour of an unborn person is wholly void so that it cannot be made even through the medium of a

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8 The above discussion is not in any way derogatory to the reproductive freedom of a woman. It only emphasizes the fact that foetus personality (and consequent implications of not recognizing it) cannot be ignored out rightly

9 Sections 8-11, Hindu Succession Act, 1956

10 Ibid, Sections 15-16. The child must be in the womb (justo matrimonio i.e. moment of conception) at the time of the death of intestate and the child must be born alive (Section 20)
trust was modified by the Hindu disposition of Property Act 15 of 1916, by the Madras Act 1 of 1914, and by Act 8 of 1921.

Thus, a gift can be made to a child en venturce as venturce as mere and could be accepted on its behalf. A person capable of taking under a will must either in fact, or in contemplation of law, be in existence at the death of the testator. Thus, a request can be made to an unborn person.

iv). A child in womb may be beneficiary of a trust. Sec. 9 of the Indian Trusts Act, 1882, says; “Every person capable of holding property may be a beneficiary.” If some of the beneficiaries of a trust are unborn persons, the trust cannot be varied without obtaining court’s consent on their behalf.

The recognition of the legal personality of child in the womb of the mother is illustrated in the rule of procedure, which lays down that a pregnant woman condemned to death cannot be executed until she has delivered her child. Under the Indian Penal Code, 1860, injury to a child in womb is a punishable offence. Willful or negligent injury inflicted on a child in the womb, by reason of which it dies after having been born alive, amounts to murder or manslaughter under the Indian Penal Code.

International Law and Other Laws on Status of Unborn Child

Major international laws and treaties deal with several rights to protect women and children. Implicitly all conventions recognize the rights of unborn child. Article 1 of the UN Convention on the Rights of the Child 1989, gives the definition of the age of the child: “For the purpose of the present Convention, a child means every human being below the age of 18 years unless under the law applicable to the child, majorities attained earlier.”

12 See Sec. 122, Transfer of property Act, 1882. The world’s ‘accepted by or on behalf of the donee’ show that the donee may be a person unable to express acceptance.
13 The Indian Succession Act, 1925 governs the wills made by Hindus.
14 Under the English law, such expectant mothers were sentenced to life imprisonment instead of death under the Sentence of death (Expectant Mothers) Act, 1931.
15 See Sections 312, 313, and 316, I.P.C 1860. These provisions should be studied in the light of the law of abortion contained in Medical Termination of Pregnancy Act, 1971.
16 Ibid
minimum age is defined. This was done to avoid debate over abortion, which could have threatened the acceptance of the Convention\(^\text{17}\).

In 1974, the Austrian Constitutional Court was confronted with the question as to whether Art. 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides that everyone’s right to life shall be protected by law, is applicable to unborn life. The court refused to included unborn life in the definition of the term ‘everyone’ as pleaded by the Austrian government, because some member states did not recognize a right to life for beings yet unborn, and held that the term ‘everyone’ is limited to born human beings. It was illogical to include protection of inborn life in the Convention, since the Convention provides in certain specified cases for the deprivation of life\(^\text{18}\).

Like international conventions, very few countries explicitly recognize the right of foetus. Article 40 (3) of the Irish Constitution recognizes the right to life of the unborn. It was added \textit{vide} Amendment to the Constitution in 1982. It says -

\begin{quote}
"The State acknowledges the right to life of the unborn, and with regard to the equal right to life of the mother, guaranteed in its laws to respect, and as far as practicable by its laws to defend and vindicate that right\(^\text{19}\)."
\end{quote}

In USA, foetus is a “person” within the languages and meaning of the “due process clause” of the Fourteenth Amendment to the United States Constitution. Like Indian Constitution (Art. 21-Right to life), there is, however, no explicit recognition. In \textit{Rosen La. State Board of Medical Examiners},\(^\text{20}\) the court announced that embryonic and foetal life might be


\(^{19}\) Ireland is one of the few countries that do not permit abortion under any circumstances. As per Sec. 7 (2), Abortion Act, the termination of pregnancy is illegal and punishable under the law, See K.D. Gaur, Supra.

\(^{20}\) 380 F. Supp. 1217 (ED La 1970). In \textit{Abele v markle} (1972), the court, however, invalidated a statute protecting human life from the moment of conception by failing to find a compelling State interest in it, reasoning on the basis of the mother’s right to privacy. In \textit{Roe v Wade} (1973), the US
protected by the State from destruction by the mother. In protecting the rights
of the foetus to survive, on the basis of equality with human beings generally,
the state is not violating the rights of the mother.

The Canadian law recognizes legal personality of an unborn child, in
the historic case of *Montréal Tramways Co. v Leveille* a claim was made by
female infant against the tramway company for the deformity caused to her
while in her mother's womb due to defendant's negligence. The court
awarded damages. The Irish Court, had, however, denied damages to an
infant child under the similar circumstances

The court ruled that the railway company owed no duty of care
towards a person whose existence was unknown to them. But the court did not
specially say that unborn child has no right to claim damages for personal
harm.

Significantly, Paton (a noted jurist) does not recognize a child in the
mother's womb as a legal person because he is without rights. In his view,
legal personality is conferred on a child only after he is born alive and
completely separated from his mother's womb. It is, however, submitted that
this view is not tenable, as many legal systems of the world have incorporated
provisions in their laws extending legal protection and safeguarding the
contingent rights of an unborn child.

**Constitutional Provisions**

The Constitution of India, the fundamental law of the country provides a protective umbrella for the rights of women and children. The

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Supreme Court refrained form resolving the difficult question of 'when life begins' and said that when those trained in the respective disciplines of medicines, philosophy and theology are unable to arrive at any consensus, the judiciary, is not in a position to speculate as to the answer.

21 (1933) 4 DLR 337 (Canada)

22 *Walker v Great Northern Rly. of Ireland* (1890) 28 LR Ire. 69.


24 *Ibid*

25 The Constitution of India came into effect on 26 January 1950.
bracketing of women with children showed the patronizing attitude on the part of the makers of the Constitution. The Constitution guarantees the right to equality before the law and equal protection of the law. The Supreme Court of India has, however, held that differential treatment could be given to people or objects if such differential treatment was based on reasonable classification.

The Constitution specifically bars any classification on the ground only of religion or caste or race or sex or place of birth. Therefore, no declassification can take place on the ground of sex. But there is a distinct provision which says that the state may make special provision for the benefit of women and children. This means that classification can be made on the basis of sex which is for the benefit of women; likewise, laws can be made giving special protection of children.

The above-stated rights are included in Part-III of the Constitution. The fundamental right in Part III are enforceable in courts. Thus if these rights are violated, a writ petition can be filed in the Supreme Court or the High Court. Some of the other fundamental rights beneficial to women and children are: Right to freedom including the freedom of speech and expression (Art. 19 (1) (a)), personal liberty, right to due process of law (right to life) (Art. 21), right against exploitation (Art. 23) and religious, cultural and educational rights (Art. 29).

Under the Constitution (Directive Principles) it is the duty of the State to secure that children of tender age are not abused and forced by economic necessity to enter vocations unsuited to their age and strength (Art. 39 (e) and to ensure that children are given opportunities and facilities to develop in a

27 Charanjit Lal v Union of India AIR 1951 SC 41.
28 Art. 15 (1) & (2), Constitution of India, 1950. See also Art. 16 (2).
29 Id. Art. 15 (3)
31 Arts. 32 and 226 of the Constitution of India, 1950.
healthy manner and in conditions of freedom and dignity (Art. 39 (f). The directive principles provide for maternity relief. (Article 42). Right provided under Part IV (directive principles) of the Constitution can be read into the fundamental rights provided in Part-III and hence enforceable in courts. Because of Judicial interpretation, many of the directive principles have now become enforceable through legal actions brought before the courts (for example, the right to education).  

The legislative powers in India cannot contravene the fundamental rights. There are three Lists which provide for distributing of legislative powers between the Union and states  

‘Health’ is included in State List. The subjects under concurrent List (both Union and States empowered to legislate) include general laws and social welfare- marriage and divorce, infants and minors, vital statistics including registration of births and deaths, etc.  

A special mention should be made of the fundamental right provided by Article 21 (Protection of life and personal liberty). It lays down that, “no person shall be deprived of his life or personal liberty except according to the procedure established by law”. Right to life’ includes right of an unborn child to be born, as unborn child is also a person having legal personality. While ‘right to education ‘has been made a fundamental right recently, such right of an unborn child should also be expressly made a fundamental right.  

This will result in an enhancement of the status of an unborn child. When the parents themselves want to get rid of an unborn child, the State can claim such right on behalf of the unborn child. Further the state providing early childhood care and education for all children of 0-6 age group is  

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32 A. Bajpai, Supra note 17, pp.6-7
33 See 7th Schedule to the Constitution of India, 1950.
34 Ibid Entry 5, List III- Concurrent List.
35 Ibid Entry 30
36 The Constitution 86th Amendment (2001) added a new Art. 21-A after Art 21 making the ‘right to education of children of the age of 6-14 years a fundamental right. It also substitutes a new Article for Art. 45 (directive principles): “The State shall endeavours to provide early childhood care and education for all children until they complete the age of 6 years.
37 Ibid.
significant in the context of practice of female infanticide still prevalent in many parts of the country.

**International Conventions**

International instruments stress ‘participation’s a core value along with survival, protection and development. Laws and legal strategies must be devised to encourage these values. The Supreme Court of India has held that ‘once signed, any international treaty or convention will be treated as a party of law unless otherwise stated’. The Indian government is thus bound in its obligation to implement any convention or treaty that is signed. India has ratified the United Nations Convention on the Rights of the Child and the Convention on All forms of Discrimination against Women.

The U. N Convention on the Rights of the Child, 1989 contains set of universal legal standards or norms for the protection and well being of children. Every child has the ‘Right to survival’ (viz. right of life, health and nutrition), ‘Right to protection’ (viz. freedom from all forms of exploitation, abuse, neglect), and ‘Right of participation’ (viz. freedom of expression, respect for the views of the child).

The Convention prohibits discrimination on the basis of sex; girls should be given the same opportunities as boys. Further, when the authorities of a state take decisions which affect children, the best interests of children must be primary consideration. The principle relates to decisions by courts of law, legislative bodies, and both public and private social- welfare institutes.

The Convention imposes the obligation on a state to take effective measures to abolish traditional practice prejudicial to the health of children (although not mentioned expressly, this includes female circumcision) and

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38 A. Bajpai, Supra note 17, pp. 14-15.
to provide for rehabilitative measures for child victims of neglect, abuse, and exploitation (Arts, 26 (3) and 39). 40

The Convention on the Elimination of All forms of Discrimination Against Women (CEDAW), 1989, obligates State parties of eradicate all kinds of discrimination against women “in effect, “in all walks of human activity.41 The SAARC countries, of which India is a member, announced the year 1990 as “SAARC year of the Girls” and observed “SAARC Decade of the Girl Child” January 1991-2001, so as to create the right environment to secure a rightful place for female children.

The Supreme Court of India has discussed the impact and value of international instruments on human rights domestically in its case Vishakha v State of Rajasthan.42 The court held that international conventions and norms that are in keeping with fundamental rights can be used for interpretation of those rights, particularly in the absence of domestic legislation on these issues, The judgment directed the government to rely on CEDAW to construe its guidelines on sexual harassment in the workplace.

**Reproductive Rights**

Rights relating to reproductive sexual health care are found in a variety of international sources. Human rights that are set fourth in treaties like the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights,43 the Convention on the Rights of the Child, CEDAW, etc. Include 44

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40 A. Bajpai, Supra note 17, P.21
43 India became a party to both the International Convent on human rights by ratifying them on March, 27 1979.
(i) Right to life, survival, security and sexuality.
(ii) Right to reproductive self-determination and free choice of maternity.
(iii) Right health and the benefits of scientific progress.
(iv) Right of education, information and decision-making in addition, certain legal principles have been identified as fundamental to the precision of reproductive health services.
(v) Informed decision-making
(vi) Decision-making
(vii) Decision-making free from any form of coercion.
(viii) Privacy
(ix) Confidentiality.
(x) Competent delivery of services, and
(xi) Safety and efficacy of products. 45

In addition to these treaties are a number of key international policy documents that set norms on international human rights, for instance, the ICPD programme of Action, one of the principal reproductive rights instruments, defines 'reproductive rights as including the:

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...... right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have information and means to do so, and the right to attain the highest standard of sexual and reproductive health. 46
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It uses the internationally recognized definition of reproductive health as:

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..... a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity ...." 47
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When it comes to reproductive and sexual health care, the ICPD Programme of Action has identified a number of areas where these rights are translated into information, education, services and counseling in issues such

46 Programme of Action of the International Conference on Population and Development, Cairo, Egypt, Para 7.3 September 5-13, 1994
47 Ibid, Para 7.2
as family planning, pre-natal care, safe delivery and post-natal care, infertility, abortion, etc.\textsuperscript{48}

The Indian government does not seem fully committed to the reproductive rights approach. In other words, it has not explicitly created a legally enforceable reproductive rights regime through either legislative or judicial acts.\textsuperscript{49} There are, however, a number of legislations relating to children and women in India.\textsuperscript{50} There has been an articulation for the general right to health and for specific aspects of reproductive health within Constitutional law.\textsuperscript{51}

In essence, India has yet to adopt a reproductive rights approach to issues of reproductive health, population and development. There are very few explicit reproductive rights articulated under Indian law, while the ICPD has been useful in the drafting of policies. In our country (viz the target-free approach of the 2000 national population Policy), we need to move to the next step and implement laws with accountability mechanisms and enforceable remedies. A comprehensive law on reproductive rights – one grounded in a theory of right to gender equality – would be positive step in such a direction.\textsuperscript{52}

A ‘reproductive rights regime’, however, needs to be complemented by a ‘women empowerment regime’, otherwise in a patriarchal society like India: reproductive decisions may turn out to be disadvantageous for a girl child. The reproductive rights should focus on the value of the girl child.

\textsuperscript{48} Ibid, Para 7.6
\textsuperscript{49} S. Barot, Supra note 44.
\textsuperscript{50} Few legislations that deal with reproductive rights /health are: Child marriage restraint Act, 1929; Hindu Marriage Act, 1955 (See Option of puberty, the wife’s special ground of divorce); Maternity Benefit Act, 1961; Medical Termination of Pregnancy Act, 1971; Pre Natal Diagnostic Techniques Act, 1994; Infant Milk Substitutes, feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992.
\textsuperscript{51} Fundamental Rights (under the Constitutions of India, 1950); Right to life and Liberty (Art. 21). Right to privacy (implied right under Art. 21), Right to health (implied right under Art. 21) Right to equality (Art 14) and non discrimination (Art 15) The Directive Principles under the Constitution contain several economic an social rights that uphold health right and thereby, reproductive, rights Art 39 (e) directs the State to secure the health and strength of workers both men and women; Art. 42 provides for maternity relief; and, Art. 47 regard improvement of public health as the primary duty of the State.
\textsuperscript{52} Supra note 44.
Indian Penal Code Provisions

Section 312-318 of the Indian Penal Code, 1860 (hereinafter referred to as the Code/IPC relate to miscarriage, injuries to unborn children, exposure of infants and concealment of births. Thus, there are provisions under the IPC for foeticide and infanticide; Sex-selective abortion, through not expressly mentioned, is covered under the terms “miscarriage” and “injuries to unborn children”.

a). Causing Miscarriage (Sections. 312-314)

Section 312 makes the causing of miscarriage with the consent of the woman and Sec. 313 causing miscarriage without the woman’s consent punishable. As per explanation to Sec. 312, a woman who causes herself to miscarry is also guilty.

Under Sec. 312, whoever voluntarily causes a ‘women with child’ to miscarry, unless such miscarriage has been caused for the purposes of saving the life of the woman, is guilty. In case of ‘women quick with child’, the punishment increases.53

Miscarriage has not been defined in the Code. In its popular sense, it is synonymous with abortion, and means expulsion of the immature foetus at any time before it reaches full growth. Miscarriage technically refers to spontaneous abortion, whereas voluntarily causing (Induced) miscarriage, which constitutes an offence under the Code, stands for criminal abortion.54

Section 312 permit abortion on therapeutic medical grounds in order to protect the life of the mother. That is to say, the unborn child must not be

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53 In case of ‘women with child, the punishment prescribed is imprisonment for three years or with fine or birth; in cause of women with quick child’, it is imprisonment for seven years and fine. As per judicial interpretation, a woman is considered 0 be in the former situation as soon as gestation beings, and in he latter situation when the mother feels the motion. In other words, quickening is a perception by the mother that movement of the foetus has started; it can be interpreted to mean a child capable of being born alive.
54 Supra note 18, p.501.
destroyed except for the purpose of preserving the yet more precious life of the mother. The provision by implication recognizes the foetuses right to life.\textsuperscript{55}

If the act is done in good faith,\textsuperscript{56} the person is entitled to the protection of law. But good faith is deceptive and ambiguous enough to protect most therapeutic abortions long as they are conducted ostensibly to preserve the mother's life. In fact, what constitute good faith is not a question of law, but of fact, to be decided in each and every case according to the facts and circumstances.\textsuperscript{57}

In \textit{Rex v Bourne},\textsuperscript{58} it was held that all therapeutic abortions are lawful. In this case, a girl under 15, who was criminally assaulted, became pregnant. The surgeon, who terminated her pregnancy, was prosecuted for causing abortion against the law. Justice Machnaghten opined that the bona fide object of avoiding the practically certain physical or mental breakdown of the mother will afford and excuse.

The Explanation clause appended to Sec. 312, IPC makes it clear that the offender could be woman herself or any other person. In an early the offender could be a woman herself or any other person. In an early case,\textsuperscript{59} a woman was charged for causing herself to miscarry, though she had been for only one months, and there was noting which could be called a foetus or 'child '. The Madras High Court held that it was the absolute duty of a prospective mother to protect her infant from the very moment of conception.\textsuperscript{60} Thus, the High Court effectively used the provision of the Code to protect an embryonic life. A person who aids and facilitates a miscarriage a

\textsuperscript{55} \textit{Ibid}, p.502
\textsuperscript{56} As per Sec. 52, IPC “Nothing is said to be done or believed in good faith which is done or believed without due care and attention”.
\textsuperscript{57} K.D. Gaur, \textit{Supra} note 18.
\textsuperscript{58} (1938) 3 All ER 615.
\textsuperscript{59} \textit{Queen Empress v Adamma} (1886) ILR 9 Mad 369.
\textsuperscript{60} K.D. Gaur, \textit{Supra} note 18.
miscarriage is liable for the abetment of the offence of miscarriage under sec. 312, read with Sec.109, IPC even though the abortion did not take place. A person is also liable for attempt to commit a criminal abortion under sec. 312 read with Sec. 511, IPC, even if the fails in this endeavors.

While miscarriage with consent is dealt with under sec. 312, Sec.313 penalizes voluntarily causing miscarriage of a woman with child without her consent. Under Sec. 313, it does not matter that the woman is quick with child or not. Further , sec. 313 provides for enhanced punishment in case of aggravating in case of aggravating nature of the offence of miscarriage. It may be noted that under sec. 313 only the person procuring the abortion is liable to punishment , whereas under Sec. 312. The woman is also liable to punishment. In the Indian context, the consent of a woman is not necessarily her free consent. Thus, a re-look is required of these provisions.

Section 314 punished when the death of a woman has occurred in causing miscarriage. It is not essential that the offender should know that the act is likely to cause death. He should have intent to cause the miscarriage of a woman with child and does any act which causes the death of such woman.

b). Injuries to Unborn Children (Sections. 315-316, Sec.299) IPC

Section 315 and 316, IPC covers the cases of foeticide or infanticide. Sec. 315 lays down that whoever before the birth of any child does any act with intent to prevent a child from being born alive or to cause it to die after birth, and does so, be punishable unless the act is done its good faith for the purpose of saving the mother’s life.

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61 The punishment prescribed is imprisonment for life, or imprisonment up to 10 years and fine. The offence is cognizable, no-bailable, non compoundable and may be tried by the Court of Sessions. The offence under Sec. 312 is bailable
62 The punishment prescribed is imprisonment up to 10years and fine. If the act is done without the women’s consent, it is imprisonment for life or up to 10 years and fine.
63 The punishment prescribed is imprisonment up to 10 years, or with fine, or both.
Section 316 punishes the causing of death of a quick unborn child by an act amounting to culpable homicide. Illustration appended to this section reads -

A, knowing he is likely to cause the death of a pregnant woman, does and 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 is thereby cause. A is guilty of the offence defined in this section.

Explanation 3 to sec. 299 (Culpable homicide), IPC. may also be noted here, According to it -

The causing of the death of child in the mother’s womb is not homicide, But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth thought the child may not have breathed or been completely born.

As per this Explanation, the life of child, while it remains within the womb, is a part of the mother’s life, and not a separate and distinct existence. But as soon as any part of the child has been brought forth form the womb, the child is regarded as a living human being, to cause whose death may be culpable homicide. Under Sec. 316, the causing of death of quick unborn child amount to culpable homicide.

Under sec. 315, the criminal act consists of doing of any act before the birth of a child with intent to prevent if form is born alive or to cause it to die after birth.

Thus, under these provision of the Indian Penal Code, the injuries to unborn children in order to amount culpable homicide should have been

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64 The punishment prescribed is imprisonment up to 10 years and fine. The offence (as under Sec. 315) is cognizable, non-bailable, no-compoundable and is triable by a sessions court.
65 The English law on this point is different. Under the English law, the child should have completely emerged, whereas under Sec. 299, it is sufficient if any part (say, even a finger) of the child has come out of its mother’s womb.
66 The punishment prescribed for culpable homicide under Sec. 304, IPC is imprisonment for life, or imprisonment up to 10 years and fine. However, the prescribed punishment under sec. 316 is imprisonment up to 10 years and fine.
caused while the child is “about to being born”. Cases of miscarriage (Sec. 312-314, IPC) provide for the killing of child (foetus) at an earlier stage, but that does not amount to culpable homicide. Further, the killing of an unborn child does not amount to ‘murder’ under any of these provisions.

c). Exposure and Abandonment of Infant (Sec. 317)

According to Sec. 317, exposure and abandonment of a child under 12 years in any place by parents or persons having care of the child with the intention of wholly abandoning it is an offence. If the child dies in consequence of the exposure, the offender will also be guilty of murder of culpable homicide as the case may be (Explanation to Sec. 317)

This section is intended to protect infants/children of tender years, who are unable to take care of themselves. In India, abandonment of a girl child is not an uncommon phenomenon. Case of female infanticide could be covered under Sec. 317.

In *Emperor v Cripps*, the mother of newly-born child with a view to dispose of the child, secretly gave it to A, who carried it by a railway train and left it in a second class compartment. The child was carefully wrapped and its side left a bottle of milk. The mother was held guilty under Sections 317 and 109 (Abetment), and A under Sec.317. The court observed that any person receiving an infant from its mother on the understanding that the mother never desired or wished to have it back again must be regarded as a person having care of it. A has, therefore, the care of the child.

d). Concealment of Birth (Sec. 318)

Intentional concealment of (or endeavour to conceal) the birth of a child by secretly burying or otherwise disposing of the dead body of the

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67 The punishment prescribed for causing murder, under Sec.302, is death of imprisonment for life and fine.
68 The punishment prescribed is imprisonment for 7 years, or with fine, or both. The offence is cognizable, bailable, non-compoundable and is triable by a Magistrate of First Class.
69 (1916) 18 Bom LR 934.
child, whether such child dies before or after or during the birth, is an offence under Sec. 318.\textsuperscript{70}

The essential ingredient of this offence is that the culprit must secretly dispose of the dead body of a child. If the disposal of a living child, then Sec. 317 would cover the action of the culprit. The secret disposal of the body must be with the sole intention of concealing or attempting conceal its birth. If it is a foetus only, then Sections 312 and 511 (Attempt) of the Code will apply.

This section has relevancy in cases where people try to hide their sinful acts of foeticide / infanticide (especially female) in order to escape liability under the provision of the code (Secs.312-317)

**IPC Provision : A Critique**

The provisions under the Code (Sections. 312-318) are formulated in gender- neutral terms and deal with the men and women in the same manner. In fact they seem to be protective of women as they law down a greater punishment if the offence is committed without the woman’s consent.\textsuperscript{71}

The gender- neutral terms of the IPC provision, however, making women equally liable for abortion or injury to foetus and infants ignore that women in India are socialized in the religious and cultural environment of ‘son preference’. The law further ignores women’s experiences by keeping certain other aspects of childbearing outside its ambit. For example, impregnating a woman regardless of her wishes or against the advice of a doctor. It is also not an offence to abandon a pregnant women or deny her required medical care and attention during pregnancy or at childbirth or soon thereafter.\textsuperscript{72}

\textsuperscript{70} The punishment prescribed is imprisonment up to 2 years, or with fine, or both. The offence is cognizable, bailable, non- compoundable, tribal by a Magistrate of First Class
\textsuperscript{71} V. Kumari, “Gender Analysis of the Indian Penal Code”, Engendering Law EBC, Lucknow, pp.147-148 (1999)
\textsuperscript{72} Ibid
The IPC provisions are equally applicable whether the foetus or child victim in question is male or female. Male foeticide and infanticide, however, are rather uncommon in India. The problem is of female foeticide and infanticide. The provisions have a limitation in this area, i.e., sex-selective abortions. Further, it is doubtful whether these provisos could take care of the recent reproductive technologies, under which the sex-selective abortion can be done “outside a woman’s body” under controlled laboratory conditions.

The IPC provision (Sections 312-316) have now become subject to the provision contained in the Medical Termination of Pregnancy Act (MTPA), 1971. Even after the commencement of the said Act, the IPC provisions relating to miscarriage have not been amended, redrafted or repealed (wherever necessary) to take into account the fact that abortions are now permissible under the MTPA under certain circumstances.

**The Medical Termination of Pregnancy Act, 1971**

The provisions of the Indian Penal Code, 1860, which criminalize abortion, are curbed by the Medical Termination of Pregnancy Act, 1971, (MTPA)\(^73\), which set forth the grounds for obtaining a legal abortion and the rules regarding where abortion may take place and who may perform them. The MPTA softened the rigours of the law of abortion contained in the Code.

The strict penal law led to various illegal abortions in India. Women carrying unwanted or illegitimate children often report to abortion with the help of quacks or unregistered medical practitioners\(^74\). The high risk involved in such abortions prompted Parliament to make a law to regulate termination of pregnancy in certain cases only by registered medical practitioners.

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\(^73\) The Medical Termination of Pregnancy Bill, 1969, having been passed by both the Houses of Parliament was assented by the President of 10 August 1971. The Act No. 34 of 1971 came into force on 1\(^{st}\) April, 1972.

\(^74\) As many as 11 million abortions, a majority of them illegal, are carried out every year in India. Unsafe abortions kill over 20,000 women every year. See the *Time of India*, New Delhi, September 10, 2005.
The MTPA was enacted to safeguard the right of women and the doctors who performed abortion. As per the objects and reasons of the MTPA-

"In recent years, when health services have expanded and hospitals are availed to the fullest extend by all classes of society, doctors have often been confronted with gravely ill or dying pregnant woman whose pregnant uterus have been tempered with a view to causing in abortion and consequently suffered very severely. There is this avoidable wastage of the mother’s health strength and sometimes life. Furthermore, most of these mothers are married women, and are under no particular necessity to conceal their pregnancy."

The proposed measure which seeks to liberalize certain existing provision relating to termination of pregnancy has been conceived (1) as a health measure- when there is danger to the life or risk to physical or mental health of the woman; (2) on humanitarian grounds – such as when pregnancy arises form a sex crime like rape of intercourse with a lunatic woman, etc: and (3) eugenic grounds- where there is substantial risk that the child, if born. would suffer form deformities and diseases.75

The legislation legalizes termination of pregnancy on various socio medical grounds' it does not raise any moral or religious issues76. The object of the Act, besides being the elimination of the high indigence of illegal abortions, is perhaps to confer on the woman the right to decide about her own body (at least in theory). Another important feature of the Act is to encourage a reduction in the rate of population growth by permitting termination of an unwanted pregnancy on the ground that a contraceptive device (used for the purpose of limiting family size) has failed.77

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76 The term “Medical Termination of pregnancy” was used to reduce opposition form religious an social groups averse to the liberalization of abortion.
It may be noted that nowhere in the existing framework of legislations of abortion in India, has a “right to abortion” been guaranteed to woman. Only upon fulfillment of the necessary conditions (according to the opinion of registered medical practitioner and emergency situations) can a woman obtain a legal abortion.78

**What Constitutes Abortion**

The basic concept of “abortion” contemplates that kind of conduct which leads to the expulsion of the foetus from the uterus before its full maturity.79 Foetus refers to the period from the 57th day, ending at birth. That means “Medical-abortion” is not a species of abortion.80

The MTPA has not defined the term ‘abortion’. As per the provision of the Act, abortion is the termination of pregnancy before the foetus is sufficiently developed to survive independently (foetus less than 20 weeks of pregnancy). Under the Act, if the length of pregnancy is less than 12 weeks (3 months), it still has to be terminated by a registered medical practitioner.

**Circumstance Under Which Pregnancy may be Terminated**

The MPTA provided for termination of pregnancy by a registered medical practitioner81 where the pregnancy does not exceed 12 weeks and by two medical practitioners in case the pregnancy exceed 12 weeks but does not exceed 20 weeks. if he is or they are, or opinion, formed in good faith, that82—

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80 *Ibid*
81 Sec. 2(d), MTPA reads: “registered medical practitioner” Means a medical practitioner who possesses any recognized medical qualification as defined in Sec.2 (h) of the Indian Medical Council Act, 1956, whose name has been entered in a State Medical register and who has such experience of training in gynecology and obstetrics as may be prescribed by rules made under this act.
82 Sec. 3(2), MTPA, 1971. As per Sec. 3(3), in determining whether the continuance of a pregnancy would involve such risk of injury to the health, account may be taken to the pregnant woman’s actual or reasonable foreseeable environment.
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(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.

In certain cases, the anguish caused by a pregnancy constitutes a grave injury to the “mental health” of a pregnant woman:

(1) Where pregnancy is alleged to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to her mental health.\(^3\)

(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 her mental health.\(^4\)

Failure of contraceptive device is a ground available irrespective of the method used (natural methods/barrier methods/hormonal methods). In fact, all pregnancies can be terminated using this criterion.\(^5\) The words “may be presumed”: are, however, used under this ground and not the words “shall be presumed” as under the ground of rape.

In certain emergency cases, the pregnancy could be terminated beyond the period of 20 weeks. In a case where a registered medical practitioner is of the opinion, formed in good faith, that the termination of pregnancy is immediately necessary to save the life of the pregnant woman, the length of the pregnancy as well as the opinion of at least two medical practitioners if the pregnancy is more than 12 but less than 20 weeks will not be necessary.\(^6\)

In England under the Human Fertilization and Embryology Act, 1990, the time limit for lawful abortions is 24 weeks. But in certain cases there shall

\(^3\) Explanation 1, Sec. 3(2) of MTPA 1971

\(^4\) Ibid, Explanation 2


\(^6\) Sec. 5, MTPA, 1971. For the purposes of this section, the registered allopathic medical practitioner causing abortions need not possess experience or training in gynecology and obstetrics. Also, the facility may not have prior certification. However, the provider is required to report an abortion done to save a woman’s life within one working day.
be not time-limit (i.e. an abortion may be perfumed right up to the end of the pregnancy) viz. to prevent grave permanent injury to the physical or mental health of the mother, to save her life, or if there is a substantial risk of serious physical or mental abnormalities to the child. 

In Germany, while abortion on the ground of rape would be permissible without any strict limit of period, abortion on the ground of saving the mother’s health would be permissible only if two requirements are satisfied which are (1) that such abortion should be performed within 12 weeks of the commencement of pregnancy, and (2) that the woman should have pre-abortion counseling.

The attitude of the people, influence of religion and various other social, economic and moral factors influence the lawmakers in a country permit abortion with qualifications, etc. The countries can broadly be classified into four categories, viz

First, countries that do not permit abortion under any circumstances are Indonesia, Philippines and Ireland where termination of pregnancy is illegal and punishable under the law.

Second, countries like Bangladesh, Pakistan, Sri Lanka, and Malaysia permit abortion only to save the mother’s life.

Third, countries like India, United Kingdom, and United States of America Permit induced abortion under prescribed conditions.

Fourth, Countries like Singapore, which permits abortion at the discretion of the woman with no restriction of any sort except that a registered

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88 P.M. Bakshi, Supra note 79. The writer observes: in India, as in Germany, the Constitution guarantees the right to life. But in both countries, after guaranteeing it, the Constitution does not proceed to define the moment when life begins and the moment when it ends. The question arose in Germany as to how far statutes permitting abortion were constitutional. Ultimately, the judiciary settled on what may be called a compromise and now the German Parliament has responded by reforming the law.
89 K.D. Gaur, Supra note 18 pp. 507-508.
Abortion as a matter of right is also found in Austria, Canada, China Cuba, Denmark and South Africa, where abortion is available on demand, if asked with within a first trimester of pregnancy.
medical practitioner in a hospital or clinic approved by the government should perform it.

The law of abortion in Singapore would reveal that it is one of the most progressive legislations on the subject in as much as it gives absolute immunity and freedom to a woman to decide about her own life and to chose to bear a child or not. In other words, the Act (Terminated of Pregnancy Act, 1974) confers on a woman the right to privacy of her life.90

Another Southeast Asian Country, and a neighbor of Singapore, Indonesia, on the other hand, does not permit abortion under any circumstances. While Malaysia, a neighbor of both Singapore and Indonesia, permit abortion only to save the life of the mother. Similarity contrails like Bangladesh, Pakistan and Sri Lanka, neighbors of India, permit abortion only to save the mother’s life. While, India like UK and USA91 have a fairly liberal abortion policy.

Socio-religious or socio-economic factors prevalent in a community do influence the legislative policy and intent.92 Further, such customs have a “localized” effect (a country’s policy is not affected by the policy is not affected by the policy of its neighboring country). In India, sex-selective abortions are undermining the country’s effort at a liberal abortion policy. Here, again the socio-religious or socio-economic factors come into play. Thus, despite having a fairly liberal abortion policy akin to UK and USA the western influences could not undo the social attitudes disfavoring a girl child.

**Age and Consent for Pregnant Woman**

The MTPA specifically provides that the pregnancy of a woman who has not attained the age of 18 years cannot be terminated except with the

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90 Ibid
91 A recent US legislation (2003) banning late abortion has ran into controversy.
92 For instance, no serious efforts have been made to liberalize the law of abortion in Pakistan and Bangladesh to control the unprecedented explosion if population.
written consent of her guardian. Similarly, if a woman is above 18 years and mentally ill, the written consent of her guardian is essential. In all other cases, the consent of the pregnant woman (married or unmarried) has been made essential under the Act.

In theory, the law recognizes the woman's right, as the medical practitioner has to consider only the woman's environment. Under the law, even the consent of the husband is not necessary. In reality, however, women's right to abortion is very restricted, and in most instances, it is invariably the family's decision. The courts have chosen to restrict the absolute right given under the statute, and tend to view abortion from a patriarchal perspective. Various decisions have held that aborting a foetus without the husband's consent would amount to 'cruelty' under Sec. 13 (1) (i-a) of the Hindu's Marriage Act, 1955, and hence a ground for divorce.

In Satya v Siri Ram, the Punjab and Haryana High Court observed:

"In this sort a case, the court has to attach due weight to the general principal underlying the Hindu law of marriage and sonship and the importance attached by Hindus to the principle of spiritual benefit of having a son who can who can offer a funeral cake and libation of water to the manes of his ancestors".

In Suishil Kumar v Usha, the Delhi High Court opined that whether or not an abortion would amount to cruelty would also depended upon whether one of the parties desired a child and did not consent to it. The court further held that aborting the foetus in the very first pregnancy by a deliberate act without the husband's consent amount to cruelty.

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93 Sec. 3 (4) (a), MTPA, 1971
94 Ibid, Sec. 3(4) (b). The legally protected decision to abort is made by health professional, instead of the pregnant woman.
95 AIR 1993 P & H 252.
96 AIR 1987 Del 86. The English Courts have also opined that wife's refusal to have children would amount to cruelty. See Forbes v Forbes (1955) 2 All ER 311; P v P (1965) 2 All ER 456.
The opinion expressed in an English case\textsuperscript{97} may also be noted here.

The court observed:

"If a man takes contraceptive measures against the will of his wife... so as to prevent her having children without reasonable excuse for so doing, then it is easy to infer that he does it with intent to inflict misery on her... But when a wife herself takes contraceptive measures, or asks her husband to take them, her conduct can often be attributed to fear for the consequences to herself, without any intention of injuring him. She fears the pains and risk of childbirth. This is very unnatural and unfortunate, but it is not cruelty unless she has also an intention to inflict misery on her husband."

The aforesaid opinion goes well with the reproductive autonomy of a woman. And it does not ignore a man altogether. Such opinions are, however, few and far between. The judiciary has implicitly recognition in the MTPA has been challenged A’s noted above, the Act grants women sole discretionary power to seek an abortion without reference to a male. The question arises: ought fathers to have a say equal to that of mothers in determining whether a medical termination of pregnancy is justified?

A women’s control over her body argument does not permit an affirmative answer to the above question. In many cases, the woman simply may not have a choice. Her pregnancy could have been the result of rape, she may not have the economic resources to bring up a child, she may just not be mentally prepared for motherhood or she may have no access to appropriate contraception. In any of these cases, she has the absolute right to make an informed choice to terminate the pregnancy, the only condition being that she should not endanger her health.\textsuperscript{98}

\textsuperscript{97} Power v Fowler (1952) 2 TLR 143, See Kusum, Family Law Lectures, Butterworths India. p.50. 2003.

\textsuperscript{98} According to socio-biology, it is this persisting male doubt about leaving behind a genetic heritage that gives rise to the so called ‘Casanova syndrome’ which simples some men to promiscuity, which is nothing but disguised obsession with fatherhood- all the more ironic in that the real Casanova is said to have been sterile. See J. Saraiya. “Fathers Right”, The Times of India, New Delhi, May 10 (2005)
In Planned Parenthood of South Eastern Pennsylvania v Casey,\textsuperscript{99} the Supreme Court of the United States struck down the “pre-abortion notification of husbands’ provision of restrictive Pennsylvania Abortion Control Act, 1982 (as amended by 1989 Amendments). The impugned provision commanded that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband.\textsuperscript{100} The court struck down the spousal notice provision as undue burden.

The US Supreme Court, however, gave sanction to other provisions of the Act. While upholding the woman’s limited right to abortion recognized by Roe\textsuperscript{101}, also sought to accommodate by a Bench of 7 to 2 the State’s interest in potential life and said restrictions could be allowed as long as they do not place and undue burden on a woman’s right. The court upheld the following parts of the controversial Pennsylvania law that make it more difficult for a woman to obtain an abortion, viz.

(a) Informed consent- A woman seeking an abortion must give her informed consent prior to the procedure, and she should be provided with certain information at least 24 hours before the performance of abortion 24-hour waiting period.\textsuperscript{102}

(b) Parental consent – There should be informed consent of one parent for minor (expectant mother) to obtain an abortion. A judge could also give such consent.\textsuperscript{103}

(c) A ‘medical emergency will excuse compliance with the foregoing requirement\textsuperscript{104}

(d) Reporting requirements/ public disclosure of clinic\textsuperscript{105} these include the doctors telling woman about foetal development and alternatives (such as, adoption), detailed reports by doctors to the government on each abortion.

\textsuperscript{99} (1992) 120 L Ed 2nd 674.
\textsuperscript{100} Sec. 3209, The Pennsylvania Abortion Control Act, 1982
\textsuperscript{101} Roe v Wade [410 US 113 (1973)].
\textsuperscript{102} Sec. 3205, The Pennsylvania Abortion Control Act, 1982
\textsuperscript{103} Ibid, Sec.3206
\textsuperscript{104} Ibid, Sec. 3203
\textsuperscript{105} Ibid, Sec. 3207 (b), 3214(a) and 3214 (f).
Whatever may be the fall out of this judgment, the legislation of abortion on request without State's obstacles is undoubtedly a necessary condition for the true equality between men and women.

**Place of Abortion**

Under the MTPA, a pregnancy can only be terminated at:

(a) a hospital established or maintained by Government, or
(b) a place for the time being approved 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.

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.

Lack of access to MTP services at the primary health care level has been cited as an important reason for the high rate of unsafe and illegal abortions. The MTPA, 1971, has been thus amended in 2002 to reduce the rate of unsafe abortions by making legal abortion more widely accessible. There is decentralization of authority for approval and registration of MTP centers from the State to the District Level committees.

In *Roe v Wade*, as regards the State's important and legitimate interest in the health of the mother, the U.S. Supreme Court said:

"In the light of present medical knowledge — the compelling point" is at approximately the end of the first trimester year.... that until the end of the first trimester year.... that until the end to the first trimester mortality in abortion may be less than mortality in abortion in normal

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106 Sec.4, MTPA, 1971 (as amended by 2002 Amendment). The provisions of Sec.4 are inapplicable in cases where the termination of pregnancy is immediately necessary to save the life of pregnant woman, Sec 591, MTPA, 1971.

107 The Medical Termination of Pregnancy (Amendment) Bill 2002, was approved by the parliament of the India on 5 December 2002, to amend the MTPA, 1971. The amended Act is aimed at eliminating abortion by untrained persons and in unhygienic conditions, thus reducing maternal morbidity and mortality.

108 A Bajpai *Supra* note 18, pp.396-397.

child birth. It follows that, form 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. Example of permissible State regulation in this are requirements as to the qualification of the person who is to perform the abortion, as to the facility in which the procedure is to be performed, that is, whether it must be hospital or may be clinic…

Overriding Effect and Punishment Under the MTPA

The MTPA has been given overriding effect by Sec. 5 (2). In view of the non-obstinate clause in the MTPA, pregnancies that are carried out in accordance with the provisions of the Act will not be subject to any scrutiny under the provision of the Indian Penal Code dealing with miscarriage (Sections. 312-316)

Section 5(2) creates a specific offence where an unregistered medical practitioner terminates pregnancy. This is an instance of illegal abortion under the MPTA. Though it is an independent offence, the punishment for it will be thought the Indian Penal Code, and the Code stands modified in that respect. Thus, the practitioners of abortion who are not registered, pursuant to the MTPA are vulnerable to prosecution under the Penal Code as they do not have the protection of the MTPA. Similarly, women undergo with non-registered medical practitioners may also be at risk of criminal liability.

Under the Penal Code, not only is the person causing the miscarriage guilty o an offence but he woman who procures the abortion is also guilty. The only circumstance, under which abortion was allowed, was where the abortion was caused in good faith and order to save the mother’s life. The

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10 Cited in K.D. Gaur, Supra note 18, p.505.
11 Sec. 5 (2) reads: Notwithstanding anything contained in the Indian Penal Code (45 of 1860), the termination of pregnancy by a person who is not a registered medical practitioners shall be an offence punishable with rigorous imprisonment for term which shall not be less then tow years but which may extend to seven years under that Code, and that Code shall, to this extent, stand modified. “Prior to 2002 amendment for the MPTA , there was no mention of imprisonment term in Sec. 5 (2).
12 Supra note 44, p.7.
MTPA was build on the “saving the life of he woman” clause, as it liberalized the grounds of abortion.

However, the provisions of the IPC and the MTPA are not in any way conflicting or contradictory to each other. The present legal position is that, the IPC provision will only be utilized to prosecute the person who obtains as well as provides the abortion, when the conditions and requirement enumerated in the MTPA have not been met or in other words, when the abortion is illegal under the MTPA.  

It may be noted that Sec.5 MTPA contemplates abortion by a registered medical practitioner he/she may not posses experience or training in gynecology and obstetrics as required by Sec.2 (d).

The termination of any pregnancy in a place other than that mentioned in Sec.4, shall be punishable with rigorous imprisonment for a term which shall not be less than 2 years but which may extend to 7 years. Any person being ‘owner’ of a place which is not approved under Sec. 4(b) shall be punishable with similar punishment.

The MTPA protects action taken in good faith, if any registered medical practitioner causes any damages by anything which is in good faith done or intended to be done under the Act, no suit or other legal proceedings can be instituted against them. Illegal action, however, will not be protected.

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113 Supra note 54, pp. 62-63.
114 Explanation 2, Sec. 5 MTPA, 1971.
115 Sec. 5 (3)-(4), MTPA, 1971. As per Explanation 1, Sec. 5, 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, where the pregnancy may be terminated under this Act. As per Rule 2(e), MPT Rules, 1975, a “place means such building, ten, vehicle or vessel, or part thereof, as is used for the establishment or maintenance therein of a hospital or clinic which is used, or intended to be used, for the termination of any pregnancy.
116 Ibid, Sec.8.
The Central Government and the state Government have been given powers to make rules and regulations under Sections 6 and 7 of the MTPA respectively. These rules/rules/regulations are concerning:

(i) experience or training of a registered medial practitioner if he intends to terminate pregnancy and other matters (Central Rules);

(ii) Regarding certification by a registered medical practitioner of any opinion (State Regulations);

(iii) Intimation of such termination and other specified information relating to termination to the Chief Medical Officer of State:

(iv) Prohibition of disclosure of intimation or information furnished.

Any person who willfully contravenes or willfully fails to comply with State regulations shall be punished with fine up to Rs. 1,000.117

**MTP Rules 1975-2003**

In exercise of the powers conferred by Section 6 of the MTPA, 1971, the Central Government made the medical termination of Pregnancy Rules 1975.118 The Rules provide for the experience or training of a registered medical practitioner,119 approval of a place for the purpose of termination of pregnancy,120 inspection of place,121 cancellation or suspension of certificate of approval,122 and, review.123

No place shall be approved for the purposes of termination of any pregnancy unless the Government is satisfied that such termination may be den therein under safe and hygienic conditions and under the prescribed facilities. An application for the approval of a place shall be addressed to Chief Medical officer of the District, who shall verify or enquiry any

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117 *Ibid, Sec.7(3)*

118 Vide G.S.R.2543, dated 10th October 1975, published in the Gazette of India, Pt. II, Sec.3(i) dated 18th October 1975. The MTP Rules, 1972 are repealed except as respect things done or omitted to be done before such repeal.


120 *Ibid, Rules 4.*

121 *Ibid, Rules 5.*


123 *Ibid, Rules 7.*
information contained in such application or inspect any such place with a view to satisfy himself. If he is satisfied after such verification, enquiry or inspection, he may recommend the approval of such place to the Government, which may issue a certificate of approval. Such certificate is required to be conspicuously displayed at the place to be easily visisonal to persons vesting the place.124

If the Chief medical officer has reason to believe that there has been death of, or injury, to a pregnant woman at the place or that termination of pregnancies is not being done under safe and hygienic conditions, he may call for any information or may seize any article, medicine, ampule, admission register or other document.125 On finding lack of safe and hygienic condones and proper facilities, he shall make a report of the fact to the Government giving the details of the deficiencies or defects found at the place.126

On receipt of such report the Government may after giving the owner of the place of reasonable opportunity of being heard either cancel the certificate of approval or suspend the same. The owner may apply for the issue of a fresh certificate after making such additions or improvements in the place as he may think fit.127 He may apply for review of the order to the Government within 60 days. The Government may confirm, modify or reverse the order.128

The Government health facility providing for abortion services continues to be low despite not requiring a certification. While the private clinics face the tedious and cumbersome procedures of registration. In 2003, the MPT Rules were amended so that women's accessibility to legal and safe abortions is enhanced. The Rules provide for:

125 Ibid, Rule 5. The provision of the Code of Criminal Procedure, 1973, relating to seizure shall, so far as may be, apply to such seizures.
127 Ibid
1. Simplification of the registration process for private clinics by decentralization of the process as well as evolving of separate registration procedures for facilities providing abortion services up to 12 weeks and those providing services for 12-20 weeks gestations.

2. The Chief Medical Officer in a district will now have the decentralized power to grant recognition to private clinics with the help of local committees (comprising of representatives from Government and NGOs empowered to approved abortion facilities and ensure provision of safe abortion care).

3. The amended Rules mandates the district level committee to inspect the abortion facility within two months of receiving an application for registration and in the absence of or after rectification of any noted deficiency in the abortion facilities, for the approval to be processed within a couple of months. However, the Rules do not specify measures or redress mechanisms if certification procedures are not completed in the stipulated time frame.

4. The Rules also clearly recognized the distinction between first and second trimester abortions. While the physical standards for a facility to perform second trimester abortion remains as before, the physical standard appropriate to perform first trimester abortion have been relaxed. The Rules also allow for approval for abortion facilities without the necessity of non-site capability of managing emergency complications.

5. Inclusion of medical abortion (as a procedure) in the purview of the MTP Act. This should facilitate the so-called ‘illegal formal provider to come under the category of legal provider to come under the category of legal provider, in turn improving women’s access to safe abortion services.

The amended rules permit a registered practitioner (e.g. a family physician) to induce medical abortion in his/ her clinic using mifepristone up to seven weeks gestation provided that the doctor has either on-site capability or access to a facility capable of performing surgical abortion in the even of failed or incomplete medical abortion. However, the Drug Controller of India has licensed mifepristone for us up to seven weeks gestation only one the prescription of a gynecologist, restricting access to urban areas.

129 Ibid.
130 Ibid
MTP Act and Rules: A Critique

The MPTA does not permit abortion for the purpose of sex selection. The Act aims to give protection to the physical and mental health of a pregnant woman and also to the child in the womb (viz. if there is substantial risk of foetus being deformed/ suffering from serous abnormalities, it could be aborted). The problem is more of female foeticide and abortion in an illegal manner.

The Act sanctions abortion under the proscribed circumstance. A woman can be brought into the acceptable categories defined in Sec.4 of the Act. On finding of a female foetus, she can easily have her pregnancy terminated. The doctor's opinion, in reality, is difficult to challenge. Though the State regulations provide for certification of such opinion and intimation of it to the Chief Medical Officer of the State regulations proved for certification of such opinion and intimation of it to the Chief medical Officer of the State, the punishment for violation of it is only a fine of Rs. 1,000. Further, the Act protects the doctor's action taken in good faith for anything done or intended to be done under the Act.

There, is thus, no method to check that the reason specified by doctors for the termination of a pregnancy under the Act is true. A register giving reasons for termination of pregnancy and the period thereof has to be maintained. But is rarely is. The certificate forwarded to the government is hardly taken note of by the latter. A meager monetary punishment is provided for the violation. This is so when sex-selective abortion is totally illegal, unconstitutional, and a criminal act on the part of the doctor. It may also be noted that under the MTPA, records maintained under the Act are secret and confidential documents not open to public inspection.

In practice, in a majority of the cases, the issue is not of the reproductive right of the women or her choice but of the sex of the unborn.
child. Nearly 95% of abortions conducted in the period between 12 to 20 weeks of pregnancy has been found to be sex-selected. It is recommended by the Delhi Medical Association (DMA) that gynecologists should not abort fetuses between this period. At present, if women demand abortion during this period, it can be done with the consent of two-gynecologists. Since gynecologists do not carry out ultrasound, they are not aware that the sex of the foetus has been determined when someone asks for abortion.

The DMA has suggested and abortion in this period can be carried out only if the doctor advises it and not because the parents want it. It has also suggested that the government should come out with a policy that abortions after 12 weeks be checked by nodal agency.

These suggestions are a welcome step in the direction of checking sex-selective abortions. A major critique of the MTP Act, however, is its apparent over-medicalization. Abortion policies conceived with the intent to safeguard the women's life form the consequence of unsafe abortion confer a monopoly on medical opinion. Doctor hardly mentions the MTP Act to any of their patients, as they are legally required to when an abortion is performed. Creation of a nodal agency to check abortions after 12 weeks this idea can work only if there is a political will and commitment. The composition of that agency would determine its efficiency and sensitivity towards the issue. Representatives of the government, representative of NGOs, and those of medical community; have different agendas to deal with. All of them have to work in a coordinated way to achieve the desired result.

Despite legislation, illegal abortions continue due to various socioeconomic factors, reforms are needed in substantive law and the procedural law in order to achieve the desired objective. The recent

131 Anonymous, The Times of India, New Delhi July 12 (2005) According to Dr. K.K. Aggarwal, DMA President, “Six weeks are more than enough for an expectant mother to decide. If an abortion is sought after 12 weeks it shows sex-determination practices have been indulged in”.
132 Ibid
amendments in the MTP Act and Rules have enhanced access to safe abortion services. A strict interpretation of the law may only strengthen the gender bias against women today. There is, however, an urgent need to check the sex-selective abortions. For that particular purpose, the Act needs to be strictly construed.