Chapter-IV
Legal Issues and Legislation in India
CHAPTER IV

LEGAL ISSUES AND LEGISLATION IN INDIA

A. Abortion

Abortion generally refers to the expulsion from the uterus of the product of conception. According to Webster’s New International Dictionary ‘abortion’ means an act of giving premature birth. The word abortion has been derived from a Latin term ‘abortus’ means an object which had been detached from its proper site, means an act of giving pre-mature birth, especially the expulsion of human foetus pre-maturely at any time before it is viable or capable of sustaining life.\(^1\)

There have been a lot of discussions as to a definition of the word abortion. Though there are various dictionary definitions of the word but what the vast majority of people in world wide understand when one refers to abortion is the direct and intentional killing, by what ever means, of an unborn child at whatever stage of his or her development from conception upto birth and including birth. At the moment of birth, the killing of the child is called partial birth abortion. After birth the killing of the child is called infanticide.

According to Dr. Declan Keane, Master of the National Maternity Hospital, Holles Street, Dublin,\(^2\)...in the medical

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\(^1\) Modi Medical Jurisprudence, p. 332 (1955)
profession we have always defined and in the clinical textbooks—an abortion, as a pregnancy that is lost in the first trimester of pregnancy, which is up to fourteen weeks.

A miscarriage, technically, was the definition of loss of pregnancy between fourteen weeks up to a period of viability of the foetus which used to be taken as twenty-eight weeks but which is increasingly coming down because we can now keep babies alive from about twenty-four week’s gestation onwards.

The medical term ‘abortion’ means the pre-mature ending of a pregnancy before the foetus or baby is viable— that can happen spontaneously and, in general, we refer that as ‘miscarriage’— but that whatever there is a medical condition that necessitates that the pregnancy needs to be ended before the foetus is viable, that is what is considered an abortion.

Agreeing, with the above mentioned definitions of abortion noted, the other definition that is usually taught is the expulsion of the foetus-placenta post-conception prior to the age of viability but the understanding of all that is from a uterus, a pregnancy in the womb. When we talk about termination or legal abortion we are talking about intervening in that situation with the direct intention of taking the life of the foetus or unborn. That is what we mean by procured abortion.³

Thus abortion means in both medical and lay usage the destruction of an embryo or foetus at a hospital or private clinic.

This is a deliberate ending of the life of a little human being by whatever means. The action having been taken before birth and where he or she could have survived with recognized antenatal care. So, the abortion is said to occur when the life of the foetus or embryo is destroyed in the woman’s womb or the pregnant uterus empties pre-maturely.

Abortion Classified

We have seen, that generally, the word abortion refers to the expulsion from the uterus of the product of conception. More specifically, abortion can be divided into three different classifications depending upon the nature and circumstances under which it occurs: spontaneous, therapeutic and criminal.

a. Spontaneous or Natural Abortion

A spontaneous, or natural abortion is an abortion which results from some diseased condition in the mother or the foetus, or which is produced unintentionally by some other cause. This type of abortion may be regarded primarily as a medical problem. Spontaneous abortion sometimes may take place because of pathological reasons where pregnancy cannot be completed and the uterus empties before the maturity of foetus. This may happen because of the metabolic circumstances or accumulation of poison,

4 Dr. Alistair McFarlane, op. cit supra note 2 p.21
which interferes with the development of embryo and advancement of pregnancy.\(^5\)

b. Therapeutic Abortion

A therapeutic abortion is an abortion induced in good faith by duly qualified medical practitioner when he is satisfied that continuance of his patient's pregnancy will endanger her life or result in a serious impairment of her health. Therapeutic abortions are also performed in some cases where there is a reason to believe that the child, if born, will be mentally or physically handicapped. The recent change in the abortion law in India has expanded the legal definition of a therapeutic abortion and the troubles some questions, which result, are discussed later in this chapter.

c. Criminal or Induced Abortion

A criminal abortion is an abortion caused by a deliberate interference with the course of a pregnancy in circumstances, which do not provide a legal justification for such interference. Criminally induced abortion is the procuring of termination of pregnancy so as to destroy offspring. Induced abortion is defined in law as an untimely delivery voluntarily procured with intent to destroy the foetus. It may be procured at any time before the natural birth of the child.\(^6\) However ion medical terminology

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\(^5\) Jhala, R. M. and Raju, V.B. Medical Jurisprudence 426-28 (5th ed. 1990)

\(^6\) Queen Empress V. Ademma, (1886) I.L.R. 9 Mad 369 at p. 370
abortion means untimely delivery of a child before it is viable i.e., capable of living independently or of being reared, if born at the time of the act of abortion. A child is considered viable, thus living independently, from the twenty-eight week of pregnancy.\textsuperscript{7}

Abortions, whether spontaneous or induced, whether in hands of skilled or unskilled persons are almost always fraught with hazards, resulting in maternal morbidity and mortality. Where abortion is legal and statistics relatively accurate, the mortality ratio ranges from 1 to 3.5 per 100,000 abortions is developed countries.\textsuperscript{8} In India, mortality is reported to be 7.8 per 1000 “random abortion.”\textsuperscript{9} This is because; most of random abortions are illegally induced.

Data indicates that the seventh and eighth week of gestation is the optimal time for termination of pregnancy.\textsuperscript{10} Studies indicate that the risk of death is seven times higher for women who wait until the second trimester to terminate pregnancy.\textsuperscript{11}

\section*{B. The Development of the Law and Practice Relating to Abortion}

Abortion is a universal phenomenon existing from time immemorial and the changes, if any, have largely been in respect

\textsuperscript{8} WHO (1978), Techn. Rep. Ser., No. 623
of the methods and control of this supposedly immoral and antisocial practice. The evolution of social and legal constraints on induced abortion reflects a variety of changes in the structure of society, including changes in demographic patterns, family organization, religious influences, urbanization, unemployment and poverty, sex and marriage practices, educational levels, the status of women and the like. Anthropological studies and records of primitive tribes and early societies in the Indian subcontinent reveal many instances in which the termination of pregnancy was socially sanctioned and generally practiced.

In fact, there is hardly any society in human history that ever has entirely prohibited abortion. Of course, the acceptable grounds for abortion and the techniques used have varied according to culture traditions and socio-economic circumstances. In India, available records indicate that the permissible grounds for abortion have included such matters as conception outside a socially sanctioned relationship and danger to the health of the pregnant woman. Customary methods through which abortions have been procured in Indian communities include the use of heavy massage on the pregnant girl, the administration of certain herbs and chemical compounds and uterine insertions of crude devices like tubes, rods and the like. While in many cases the pregnant woman carries out these techniques themselves, a substantial number of the abortions are performed by doctors, nurses, quacks, ayahs, midwives or other women with prior
experience in the practice. They are always done in secret and only come to the notice of the officials when the women are admitted to hospitals with post-abortion complications.\textsuperscript{12}

From very early times, under the influence of religious and moral pressures, society has employed the criminal law with varying degrees of severity to suppress the practice of causing miscarriage. In India, where the social order has largely been sustained through religious sanctions and a strict moral code born out of religion, it is not surprising to find the common man equating abortion with sin and immorality. According to certain religious text, woman who practiced abortion was equated with a prostitute who would be reborn again as prostitute in the next life.\textsuperscript{13} The social consequences of such a restrictive law of abortion have been great and varied. One direct consequence was an alarming increase in illegal abortions bringing with it untold suffering, disease and death to individual women who were forced to seek refuge in the hands of unqualified abortionists under “desperate conditions”. It is estimated that there are four to five million abortions in India every year of which more than three million are criminal.\textsuperscript{14} According to reliable estimates one seventh of the women who become pregnant in India every year resort to illegal abortions at the hands of the unqualified persons with all the attendant consequences of morbidity and mortality. The

\textsuperscript{13} Mankekar, Kamla, Abortion: A Social Dilemma (1973) p-24
\textsuperscript{14} Madhva Menon, N.R. Supra note 12 p. 633
restrictive law of abortion is also considered responsible for a large number of suicides, infanticides, abandonment and cruelty towards children.

C. Abortion and Indian Penal Code

The provisions regarding abortion in the Indian Penal Code were enacted more than a century ago and were in conformity with the English law at that time. In India, beginning in 1861, abortion, except to save the life of the mother, became illegal regardless of whether or not the foetus had attained the viability, i.e., capacity to live independently outside the mother's womb. The Indian Penal Code uses the expression "causing miscarriage" to denote abortion. Miscarriage technically refers to spontaneous abortion, whereas "voluntarily causing miscarriage" (induced abortion) which forms the offence under the Indian Penal Code, 1860 stands for criminal abortion. The law of the land has always held human life to be sacred and the protection that the law gives to human life it extends also to the unborn child in the mother's womb. The unborn child must not be destroyed unless it is for the purpose of preserving the yet more precious life of the mother. Mother's life is more precious than of the unborn child because she is the originator of the foetus and her life is well established. The mother has with duties and responsibilities and allowing the mother to die would also kill the foetus in most cases. Keeping

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15 See SS. 58 and 59, offences Against the person Act, 1861, 24 and 25 vict., c. 100
16 Act No. XLV of 1860
this in view the code has designated causing miscarriage (induced abortion) a serious offence, and made both causing miscarriage “with the consent” or “without the consent” of the women punishable under section 312 and 313 of the Indian Penal Code 1860, respectively.

However, to attract the provisions of section 312 of the Indian Penal Code two essential elements must be satisfied,

(i) Miscarriage should have been caused voluntarily; and
(ii) Miscarriage should not have been caused in good faith for the purpose of saving the life of the woman.

According to section 312\(^ {17} \) of the Indian Penal Code, as it stood before the Medical Termination of Pregnancy Act, 1971, voluntarily causing a woman with child to miscarry was punishable with imprisonment of up to three years and, if the woman was quick with child, the imprisonment of up to seven years, unless the abortion was done in good faith to preserve the life of the mother. The offender could be the woman herself or any other person.

Thus, this section 312 of the IPC [Indian Penal Code] deals with causing of miscarriage with the consent of the woman. The saving grace of the offence, in the section, is good faith and life-

\(^{17}\) 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 the 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. Exception— A woman who causes herself to miscarry, is within the meaning of this section
saving necessity. This offence of foeticide may be committed with or without the consent of the woman.

The framers of the code have not used the word 'abortion', in section 312, which relates to an unlawful termination of pregnancy. This was probably done to avoid hurting the sentiments of traditionally bound and conservative Indian society. The section speaks of 'miscarriage' only, which has not been defined in the code. However, miscarriage in its popular sense is synonymous with abortion and consists in the expulsion of the embryo-foetus at any time before, it reaches full growth. A woman 'with child', in the section means a pregnant woman.

'Miscarriage' technically refers to spontaneous abortion whereas voluntarily causing miscarriage, which is an offence under the Indian Penal Code, stands for criminal abortion i.e., induced abortion.

Modi has stated that, legally miscarriage means the premature expulsion of the product of the conception, an ovum or a foetus from the uterus at any period before the full term is reached. Medically three distinct terms i.e., abortion, miscarriage and pre-mature labour are used to denote the expulsion of a foetus at different stages of gestation. Thus the term 'abortion' is used only when an ovum is expelled within the first three months of pregnancy before the placenta is formed. Miscarriage is used when the foetus is expelled from the fourth to seventh month of

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gestation, before it is viable, while pre-mature labour is the
delivery of a viable child, possibly capable of being reared, before
it has become fully mature.

If the child was born alive and the pregnancy was beyond
seven months medically it is a case of pre-mature labour and not
of miscarriage. Act of doctors and nurses which facilitate or
accelerate delivery cannot be treated as offences under the section
only because the delivery otherwise would have been delayed and
particularly when the child is born alive and no injury is caused to
the mother or child.¹⁹

Foeticide or causing miscarriage consists of causing the
expulsion of the contents of the uterus after conception and before
the term of gestation is completed. “Causing miscarriage” is a
popular expression for this operation. Now, miscarriage, as we
know, may be natural or violent. Neither this section nor the next,
dealing with the same issue] deals with the natural abortion. It
only penalizes violent or forced i.e., induced abortion.²⁰

The term “causing miscarriage” has not been defined and
requires a word of explanation. It would include anything done or
given to the woman to procure abortion and which has that result.
A mere verbal advice as to the potency of certain drugs to procure
abortion is not sufficient. Such a person may be guilty of abetment
but he cannot be convicted of an attempt to commit this offence or

¹⁹ Gour Sir Hari Singh. The Penal Law of India, p. 2805 (1982) also In re Malayara Seethu, AIR
1955 Mysore 27 (1) p-29
²⁰ Id. p.2806
of commission under this section. But in England where the
offence consists of “administering or causing it to be taken”... it
has been held that a mere delivery of the poison or other noxious
thing to the woman is not sufficient unless she swallows a part of
it, in which case the administering is complete.\textsuperscript{21}

\textbf{a. Woman ‘with child’ and Woman ‘quick with child’}

Section 312 of Indian Penal Code, divides the crime into two
grades i.e.

Causing miscarriage:

(i) When a woman is with child, and

(ii) When she is quick with child

As per judicial interpretation, a woman is said to be with
child, when there is a child in the uterus. It may be in a most
rudimentary state; infact it may be a mere foetus or an embryo, but
then it must exist. Consequently the woman must be pregnant.
Thus, woman is considered to be ‘with child’ as soon as gestation
begins.

A woman is said, to ‘quick with child’ when the motion is
felt by the mother, i.e., which refers to that advance stage of
pregnancy when the quickening takes place. In other words,
quickening is a perception by the mother that the movement of the
foetus has started. Thus, it obviously refers to an advance stage of
pregnancy. Taking into account the nature and gravity of the

\textsuperscript{21} Cadman, R & MCCR 114 quoted in Sir Hari Singh Gour, The Penal Law of India. Vol. III
(1982) p-2807
offence in case of causing miscarriage when the woman is ‘quick with child’, severe punishment of imprisonment which may extend to seven years and fine, whereas in case of, causing miscarriage when woman is ‘with child’, a lesser punishment of three years imprisonment or fine or both, have been provided under section 312 of Indian Penal Code.\textsuperscript{22}

However in the absence of any statutory provision courts have made attempt to elaborate these expressions. As a matter of fact, criminal abortion is rarely attempted before the third months. It is more common in the fourth and fifth months when the woman begins to feel certain about her pregnancy.\textsuperscript{23} But it is not necessary for the crime that there should be the perception by the mother of the movements of the foetus or that the embryo should have assumed a foetal form. Pregnancy takes place, if at all, with conception. She is thence forward liable for causing miscarriage though at that early stage her pregnancy may be difficult of proof. In \textit{Queen Empress V. Ademma}\textsuperscript{24}, it was held that a woman is with child within the meaning of section 312 of the Indian Penal Code as soon as she is pregnant. In this case the session Court of North Arcot, acquitted the prisoner Bandi Ademma of the charge of causing miscarriage under section 312 of the Penal Code. The Session Judge, however held that since the prisoner had been

\textsuperscript{22} Gaur, K.D. Abortion and Law in Countries of Indian Subcontinent, ASEAN Region, United Kingdom Ireland and United States of America. JILI, vol 37 No. 3 (1995) p.296
\textsuperscript{23} 2 Taylor, 186; According to Lyon, the sensation called ‘quickening’ may be felt by the mother as early as the twelth week; ordinarily, it is felt between fourteenth and twenty fourth week, but in some cases it is not felt at all; Medical jurisprudence (22\textsuperscript{nd} ed.), 336. quoted in Sir Hari Singh Gour. The Penal Law of India (1982) p. 2807
\textsuperscript{24} 1886 I.L.R. 9 Mad, 369
pregnant for only one month, so she could not be said to have been
“with child” within the meaning of section 312 of IPC, as there
was nothing which could be called even a rudimentary foetus of
child. But the Appellate criminal court set aside the acquittal and
held that the term miscarriage is not defined in the Penal Code. In
its popular sense it is synonymous with abortion and consists in
the expulsion of the embryo or foetus, i.e., the immature produce
of conception. The stage to which pregnancy has advanced and the
form which the ovum or embryo may have assumed are immaterial.
Section 312 of the Penal Code requires the proof that the woman is
‘with child”, but it is enough if the fact of pregnancy and the
intentional expulsion of the immature contents of the uterus are
established. The expression “with child” means pregnant and it is
not necessary to show that quickening, i.e. perception by the
mother of the movements of the foetus, has taken place or the
embryo has assumed a foetal form.\(^25\) Quickening is the name
applied to peculiar sensations experienced by woman in the fourth
and fifth month of pregnancy. The symptoms are popularly
ascribed to the first perception of movement of the foetus.\(^26\)

In re Malayara Seethu,\(^27\) the Mysore High Court also had an
opportunity to make the distinction between these two expressions.

In this case, the appellant was charged with the offence of

\(^{25}\) Id. p 371
\(^{27}\) AIR 1955 Mysore 27
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caus ing miscarriage to a woman “with child” under section 312 of the Penal Code. According to the appellant who was an experienced village nurse, the girl had advanced in pregnancy for a period of nine months of time. The child in this case was born alive and it was established that the pregnancy was beyond seven months. The court relying on Modi’s Medical jurisprudence, declared it a case of pre mature labour and not of miscarriage. The court held that the acts of doctors and nurses which facilitate or accelerate delivery can not be treated as offences under this sections only because the delivery otherwise would have been delayed and particularly when the child is born alive and no injury is caused to the mother or the child as in this case."

The explanation clause appended to section 312 of the Penal Code makes it clear that the offender could be a woman herself or any other person. The desire of a woman to be relieved of her pregnancy is no justification for termination of pregnancy. As early as 1886 in Ademma it was held by the High Court that, it was the absolute duty of a prospective mother to protect her infant from the very moment of conception.

The Penal Code does not make an attempt to cause miscarriage to be specifically punishable. Such an attempt,

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28 Op. cit
29 Supra note, 23
30 Supra note 6
therefore, becomes punishable under section 511. A person is also liable for an attempt to commit a criminal abortion under section 312 read with section 511 of the Indian Penal Code, even if he fails in his endeavour.

In *R. V. Spicer*, the accused had sent some pills giving impression that they would cause abortion. They were taken but were found to be innocuous. It was held that the accused is liable under section 312 read with section 511 of the Indian Penal Code for attempting to commit the offence of miscarriage.

In *R. V. Goodall*, wherein the accused administers a poisonous substance to a woman, with an intention to cause miscarriage. It turns out that the woman was not pregnant. Nevertheless the accused was held to have attempted to cause miscarriage. Again, for instance, the Calcutta High Court in *Queen V. Arunja Bewa*, where the term or pregnancy was almost complete and an attempted abortion resulted in the birth of the child, set aside the conviction under section 312 and maintained conviction under section 312 read with section 511 of the Indian Penal Code for attempt to commit miscarriage. The reason given

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31 S. 511 of the Penal Code:
Whoever attempts to commit an offence punishable by this code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this code for the punishment of such attempt, be punished (imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence) or with such fine as is provided for the offence, or with both.

32 (1955) 39 Cr. App. 189
33 *R. V. Goodall*, 2 Cox CC.41
34 (1873) 19S.W.R. (Cr. Rul) 32 (1)
was that section 312 only contemplates expulsion of the child from the mother’s womb before the period of gestation is completed.

In *Munah Binti Ali V. Public Prosecutor*[^35] (a case from Malaysia) the accused, who tried to procure an illegal abortion, by inserting an instrument into a woman’s vagina with the view thereby of causing a miscarriage was held guilty of an attempt to cause abortion by the lower court under section 312 read with section 511 of the Malaysian Penal Code and sentenced to three month’s imprisonment though the woman unknown to the parties was not pregnant.

Dismissing the appeal against the conviction, the High Court of the Federation of Malaya by a majority of two to one held that in a charge of attempting to cause a woman to have a miscarriage, it is not necessary for the court to be satisfied that the woman is ‘with child’ before that court proceeded to convict.

### b. Abortion on therapeutic grounds

S- 312 of the Indian Penal as stated earlier, permits termination of pregnancy on therapeutic (medical) grounds [...if such miscarriage be not caused in good faith for the purpose of saving the life of the woman...] in order to protect the life of the mother. The unborn child in the womb must not be destroyed unless the destruction of the child is for the purpose of preserving

[^35]: (1958) 24 MLJ 159 (C.A. Malaysia). Penal Code of India Pakistan, Bangladesh Malaysia and Singapore in S-511 provide punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment quoted in supra note, 19.
the yet more precious life of the mother. The provision by implication recognizes that the foetus has a right to life.

To claim exemption from criminal liability on therapeutic grounds, the threat of life, however, need not be imminent or certain. If the act is done in good faith the person is entitled to protection of law. But good faith is deceptive and ambiguous enough to protect most therapeutic abortions so long as they are conducted ostensibly to protect the mother’s life. In fact, what constitutes good faith is not a question of law but of fact, to be decided in each and every case according to its facts and circumstances.

In an English case, a girl hardly 15 years old had become pregnant as a result of a rape having been committed on her. She was operated upon to cause abortion openly by a surgeon of the highest repute without fee in a London hospital. The surgeon was tried for having unlawfully procured the abortion of the girl. In the charge the jury were directed that the prosecution had to establish beyond reasonable doubt that the operation was not performed in good faith with the object of preserving the life of the girl. It was held that the surgeon was not guilty of the offence charged and that the surgeon was not required to wait until the patient was in peril of immediate death, if, on reasonable grounds, he was of the opinion that the probable consequence of the

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36 S. 52, of Penal Code says – nothing is said to be or believed in “good faith” which is done or believed without the due care and attention; see, Royal College of Nursing V Department of health and social security[1981] 1 All. E.R. 545(H.L.)
37 Rex V. Bourne (1938) 3 All E.R. 615-21 quoted in SH. H. S. Gour. The Indian Penal Code vol III (10th ed) 2808, (1982-83)
continuance of pregnancy was to make the patient a physical and mental wreck.

Causing miscarriage is a non-cognizable offence but warrant should ordinarily issue in the first instance. The points requiring proof are:

i) that the woman was with child
ii) that the accused did some act to cause her to miscarry
iii) that he did so voluntarily
iv) that the act caused her to miscarry
v) that he did not cause the miscarriage in good faith in order to save the mother’s life.

To which may be added the following aggravating circumstances:

vi) that the woman was then quick with child.

In cases, when the termination of pregnancy is caused without the consent of the woman, punishment may extend to imprisonment for life or imprisonment of either description for a term, which may extend to ten years and fine.

According to section 314 of the Indian Penal Code, if the death of the woman is caused by an act done with intent to cause

38 Gour, Sh. H. S. op. cit p. 2809
39 Section 313 Indian Penal Code 1860
40 Death caused by act done with intent to cause miscarriage—whoever with intent to cause 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 woman’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 imprisonment above mentioned,
miscarriage with her consent punishment may extend to ten years of imprisonment and fine, and if it is done without her consent, imprisonment for life and ten years and fine.

In this section the offence consists in doing an act with intent to cause miscarriage. That act may be done by either administering some abortive, or performing an abortion. In either case he is equally responsible if the woman dies in consequence of his act. The intention to cause miscarriage would have to be gathered from the surrounding circumstances, such as undue intimacy with the deceased, the procuring of abortive, consulting persons on the subjects and the like. The fact that the woman was not pregnant is, of course, immaterial, for it is not a mistake of fact which justifies his killing her.

However, the only mitigating circumstance recognized in the section is consent of the woman; such consent may be express or implied. If an abortive is given to her and she knowingly takes it, it shall be presumed that she has given her consent to that act.

Further, if an act done with intent to prevent a child from being born alive or to cause it to die after birth is punishable upto ten years of imprisonment or fine or both. The section is aimed at foeticide while in the womb, after the foetus develops sufficiently to assume the human form which it does in normal cases in the sixth months, for which the accused is held more responsible.

Explanation—It is not essential to this offence that the offender should know that the act is likely to cause death.
owing to the more advance stage of foetal life.\textsuperscript{41} The intention of the offender is to cause abortion failing which, to prevent the birth of a living child or to ensure its death after the birth.

Under section 316 of the Indian Penal Code\textsuperscript{42}, the offender need not necessarily cause abortion or intend to kill the inner life. But, if he does an act likely to cause its death though neither intended nor desired, he would be guilty of this offence. Such would be the case where a blow struck to a pregnant woman destroys the child, or cause premature labour ending in its destruction. This offence can only be committed after the woman became ‘quick’ with child, and before the birth.\textsuperscript{43} Thus under this section, causing of death of a quick unborn child [advanced stage of pregnancy] by an act amounting to culpable homicide is punishable upto ten years of imprisonment and fine.

c. Inadequacy of Law to protect Illegal Abortions

The provisions of law relating to abortion in the Indian Penal Code were modeled after the British law on the subject. In the United Kingdom, abortion was made crime under section 58

\textsuperscript{41} Section 315 IPC, \textit{Act done with intent to prevent child being born alive or 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 is not caused in good faith for the purpose of saving the life

\textsuperscript{42} \textit{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 by 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.

\textsuperscript{43} Sir H. S. Gour, Supra note 19 p-2818
and 59 of the offences Against the Person Act, 1861, which provided that the mother and the abortionist were both subject to punishment in all cases except where the life of the mother was in danger.

A careful perusal of the provisions contained in Section 312 to 316 of Indian Penal Code would reveal that the law of abortion in India till the enactment of Medical Termination of Pregnancy Act, 1971, was very strict. There are a large number of cases of illegal abortions and they occur in both rural and urban areas. It was estimated that before the enactment of MTP Act, as many as four to five million induced abortions were carried out in India every year, of which more than three million were illegal and approximately one-seventh of women who became pregnant were resorting to back street abortions at the hand of inexperienced and unqualified persons, such as quacks and paramedical personnel, like nurses, midwives, etc., in strict secrecy to avoid the horror of law, through variety of crude and unhygienic methods for paltry sums of money ranging from Rs. 50 to Rs 300, with all the risk of morbidity and mortality. While society as a whole has recognized certain ethical and religious attitudes, many individual women have risked their lives to terminate their pregnancies which were unwanted by resorting to illegal abortions.

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44 See SS 58 and 59, Offences Against the Person Act, 1861, 24 & 25 Vict., C. 100
45 See Medical Termination of Pregnancy Act, 1971, S-3 for grounds of termination of pregnancy
It is an incontrovertible fact that large numbers of mothers are prepared to risk even their lives in an illegal abortion rather than carry that particular child till birth. Furthermore, most of these mothers are married women, and under no particular necessity to conceal their pregnancy. At times greedy doctors would exploit helpless victims by extorting the huge sum of money for terminating a pregnancy. The rigidity of legal provisions in seeking public men, doctors, social workers and social scientists who advocated reform now and then, the changed attitude towards a liberalized law of abortion really came about only when the idea was mooted by the Central Planning Board of the Government of India, in 1964. The Central Family Planning Board at their sixteenth meeting held on 25th August 1964, expressed anxiety on the reported increase in the number of induced abortions under unsanitary conditions affecting the health and life of the mother. The Board considered that the question of abortion is indeed complex which should be considered by a committee and recommended that a committee be formed to examine this question.

In pursuance of the recommendation of the Central Family Planning Board, Ministry of Health constituted a committee to study the question of legalization of abortion in the country on 29th September 1964. The terms of reference of the committee were to examine the question of legalization of abortion in all its
aspects, medical, social, legal and moral and to make recommendations.

The concern/apathy on the part of the Government and social reformers was perhaps because of the fear of opposition by fundamentalists, fanatics, anti-abortionist groups and conservative religious leaders against any move for liberalization in laws of abortion under any circumstances. There was an unprecedented uneasiness in the Ministry of Health and Family Welfare over the large number of abortions taking place in the country. The Crux of the problem seems to be that with the stringent law on abortions, the rate of maternal mortality resulting from illegal abortions has been considerable as abortions are being performed mostly by unqualified people under unhygienic conditions. The Government of India was also much concerned about the unprecedented rise in population. India’s population on 1st March 2001, stood at 1027 million (531.3 million males and 495.7 million females) which has further gone upward.

Thus as widely believed and expected, India became the only second country in the world after China (1277.6 million, 01-02-2000), to officially cross the one billion mark. USA being the third most populous country of the world with 281.4 million people as on April 2000. It is certainly most unlikely that in the

\[48\] Gandhian Institute of Rural Health and Planning in the State of Tamil Nadu estimated that out of every 100 conceptions, 25 were abortions, 15 induced and 10 spontaneous

history of mankind any country other than India and China would be shaping the lives and future of over a billion people.\textsuperscript{50}

The estimated global population in 2000 was 6055 million. The population of ten most populous countries of the world is given in table 1. Their relative share in the global population is shown in Figure 1.

<table>
<thead>
<tr>
<th>Sl. No.</th>
<th>Country</th>
<th>Reference date</th>
<th>Population (in million)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>China</td>
<td>01.02.2000</td>
<td>1,277.6</td>
</tr>
<tr>
<td>2</td>
<td>India</td>
<td>01.03.2001</td>
<td>1,027.0</td>
</tr>
<tr>
<td>3</td>
<td>U.S.A.</td>
<td>April, 2000</td>
<td>281.4</td>
</tr>
<tr>
<td>4</td>
<td>Indonesia</td>
<td>01.07.2000</td>
<td>212.1</td>
</tr>
<tr>
<td>5</td>
<td>Brazil</td>
<td>01.07.2000</td>
<td>170.1</td>
</tr>
<tr>
<td>6</td>
<td>Pakistan</td>
<td>01.07.2000</td>
<td>156.5</td>
</tr>
<tr>
<td>7</td>
<td>Russian Fed.</td>
<td>01.07.2000</td>
<td>146.9</td>
</tr>
<tr>
<td>8</td>
<td>Bangladesh</td>
<td>01.07.2000</td>
<td>129.2</td>
</tr>
<tr>
<td>9</td>
<td>Japan</td>
<td>01.10.2000</td>
<td>126.9</td>
</tr>
<tr>
<td>10</td>
<td>Nigeria</td>
<td>01.02.2000</td>
<td>111.5</td>
</tr>
</tbody>
</table>

* Source: 1. Population figure for India is as per Census 2001 (Provisional)
2. Population figure for U.S.A. and Japan are as per Census 2000
India accounts for a meager 2.4 per-cent of the world surface area of 135.79 million sq. km. Yet, it supports and sustains a whopping 16.7 per cent of the world population. The rapid growth of population remains one of the important problems of Indian society inspite of the efforts made by the government to control it through various family planning programmes. The population has continued to grow at the rate of 2.5 per cent per annum. Legalizing the abortion seemed to many to be another plan for restricting the growth of population.\textsuperscript{51}

Unsafe abortions are one of the major causes of maternal mortality. According to the SRS [RGI, 1998], 8.9 per cent of the maternal deaths are due to unsafe abortion. Medical Termination of Pregnancy Act, 1971 was enacted with the objective to reduce maternal morbidity and mortality due to unsafe abortion.

\textit{D. Steps to Liberalize Law of Abortion}

Induced abortion as a means of terminating unwanted pregnancies seems to have existed ever since ancient times. But illegal abortion is probably the least explored area within the scope of public health. The problem of induced abortions has assumed global importance only in the middle of the 20\textsuperscript{th} century.

One of the most crucial problems India is facing today is the explosion of population which has been growing at an alarming rate. It is increasing at about 20 percent every decade which is

\textsuperscript{51} India 2004, Publication Division: Ministry of Information and Broadcasting. Government of India, pp 6-7 (2005)
about 18 million per year. Such a rapid increase in population has very serious repercussions on socio-economic development. Visualizing the gravity and magnitude of the enormous increase in population and its adverse effects on the one hand and hardships caused to women as a result of the harsh law of miscarriage on the other, the Government of India, in pursuance of the recommendation of Central Family Planning Board, in 1964 constituted a committee to study the question of liberalization of the law of miscarriage [abortion] contained in Section 312 of the Indian Penal Code, which makes induced abortions illegal except to save the life of the woman.

Thus the process of liberalizing the stringent abortion law began in 1964. The Central Family Planning Board of the Government of India, a policy making body, met on 25<sup>th</sup> August 1964, expressed anxiety on the reported increase in the number of induced abortions under insanitary conditions affecting the health and life of the women. The Board considered that the question of abortion is indeed complex which should be considered by a committee and recommended the appointment of a committee to examine the subject of abortion in all its aspects—legal-medical, moral and social and to make suitable recommendations to alter the existing law on the subject. Accordingly, the Ministry of Health and Family Planning of the Government of India appointed an eleven member committee on 29<sup>th</sup> September 1964, under the

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<sup>52</sup> Id. p-370
Chairmanship of Mr. Shantilal H. Shah to study the question of legalization of abortion. The committee to study the question of legalization of abortion [popularly referred to as the Shantilal Shah Committee], carried out a few studies regarding trends in abortion in different countries of the world, the proportion of abortion to live births, morbidity and mortality rates for legal and illegal abortions, the prevalence of abortions among the married and unmarried, the frequency with which the women in different countries resort to induced abortions, motivation for undergoing abortions etc. In addition some data on the incidence of induced abortion and its cost were collected. In order to illicit the various data from concerned persons, a questionnaire on the subject was sent to persons in the various Ministries of the Government of India, the State Governments, the members of Planning Commission, Members of Parliament and State Legislative Assemblies. The members of the Central and State (Government) Family Planning Board and many legal, medical, political, social and religious organizations were also invited to respond.

The Minister by his own admission downplayed the demographic factor. Instead he sought the support for *firstly*, on grounds of the physical and mental health of the women and their freedom, *secondly*, on grounds of the possible physical deformity or mental retardation of the unborn child or even the possibility of

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53 See, the Shantilal Shah Committee Report, Ministry of Health & Family Planning, G.O.I. p-8
its being unwanted and therefore, unloved and lastly from the point of view of socio-economic and demographic picture.\textsuperscript{55}

The committee observed:

"Whatever may be moral and ethical feeling that are proposed by the society as a whole on the question of induced abortion, it is an incontrovertible fact that a number of mothers are prepared to risk their lives by undergoing an illegal abortion rather than carrying that particular child till birth."

Here again, it is noteworthy to mention an observation made by Dr. Seling Neubardt, an American Obstetrician:

"I believe that the basic obligation we have to a new human being is that he is wanted. We will never all be created equal, but we will be able to come closest to that ideal when we are all born wanted. It is therefore logical that I accept abortion. The only ethical and moral position, I can take is to allow any woman who does not want to be pregnant to be aborted... with dignity, by the physician of her choice and at a price compatible with other medical service."\textsuperscript{56}

Thus the law relating to abortion, which was very harsh and stringent till the enactment of MTP, Act in 1971, was advocated by the proponents of the family planning and population control favouring liberalization with a view to lowering the birth rate, the

\textsuperscript{55} Ibid
\textsuperscript{56} Gupta, Suprio Das: "The Right to Abortion" in the Lawyer's February (1994) at p-16
medical profession was concerned about the adverse effects that the abortion conducted under unhygienic condition by non qualified, untrained and ill equipped providers, could harm the health of the women.

In view of the above-discussed issues, the Shantilal Shah Committee, submitted a comprehensive report suggesting various situations justifying termination of pregnancy. It recommended that the abortion should be allowed not only to save the life of the pregnant woman, but also to avoid grave injury to her physical or mental health arising due to pregnancy caused by rape, incestuous intercourse, and adultery etc.

As a result of joint consultation between the Ministry of Health and Family Planning and after making a careful study of the pros and cons of the entire issue and taking a pragmatic view of socio-economic and legal problems involved in cases of unwanted pregnancies, the committee recommended to Government of India for the amendment in the out dated and out lived law of miscarriage contained in Section 312 of Indian Penal Code. The Draft Bill entitled the Medical Termination of Pregnancy Bill 1969 was finalized. It was introduced by S. Chandrasekhar, then Minister of Health and Family Planning in the Rajya Sabha on 17th November 1969. The split in the Congress Party in 1969 led to a quick fall in the strength of the ruling Congress Party in the Lok Sabha and speculations about the dissolution of the Lok Sabha itself. Perhaps it was the political
uncertainty in the Lok Sabha, which led to the government deciding not to introduce the Bill there.\textsuperscript{57}

\textbf{E. Medical Termination of Pregnancy Act, 1971}

The Government of India after a careful consideration of the recommendations of the Shah Committee brought forth in 1970 a comprehensive Bill in Parliament setting forth various situations under which pregnancy could be lawfully terminated. The Bill designated as the Medical Termination of Pregnancy Bill 1970 was introduced in Lok Sabha by the then Deputy Minister of Health, D. P. Chattopadhyaya on August 2, 1971. The Bill was passed by the Lok Sabha was reintroduced in the Rajya Sabha by D. P. Chattopadhyaya. It was eventually passed by both the Houses of Parliament, i.e. Lower House and Upper House in August 1971 as the Medical Termination of Pregnancy Act 1971 (MTPA). The Act received the assent of the President of India on August 8, 1971 and came into force on 1 April 1972 after the Government framed rules for its implementation as required under Section 7 of the Act.

The majority of various groups connected in one way or other with the government policy on abortion, were of the opinion that the government took this extreme step because other methods of birth control were not proving effective. The Bill is viewed as an attempt to supplement the existing programme of family planning with its main aim being to encourage restriction of

\textsuperscript{57} Supra note 54 p-550
further population growth. This view which is strongly held by various sections of society, is important in light of the fact that both S. Chandrasekhar and D.P. Chattopadhyaya, who introduced the Bill in 1969 and 1971 respectively, persistently denied that it was to be a measure to control the population. Instead they described it as a means for emancipating Indian women. Their caution is, of course, understandable if one looks at the attitudes towards the Bill expressed by various groups within the society. Of the eleven groups whose views were elicited, only four gave their complete support to the Act: the Congress Party, which sponsored the Bill; the Communist Party of India, which had adopted a policy of endorsing the views of the Congress on most matters; Government officials, who serve the Congress government and the All India Women’s Conference, which is a pro-establishment and pro-Congress Organisation of women whose members mostly belong to the bourgeoisie.\(^5^8\)

Though the idea of liberalizing the law of abortion came from family planners as a measure to check unprecedented rise in population, the government, while introducing the Bill in Parliament, cautiously denied its having any connection with the family planning programme so as to avoid the risk of its opposition from the fundamentalists and religious fanatics, mullas and pandits. As per official statements the MTPA had been with the following three objectives.\(^5^9\)

\(^{58}\) Chattopadhyay, Savithri Supra note 54 p-551

\(^{59}\) Gaur, K. D. Supra note 22 p-300
Legal Issues and Legislation in India

i) *health measures*, when there is danger to the life or risk to physical or mental health of the women; or

ii) *humanitarian grounds*, such as when pregnancy is caused as a result of a sex crime or intercourse with a lunatic woman, etc.; or

iii) *eugenic grounds*, when there is a substantial risk that the child, if born, would suffer from deformities and disease.

The MTPA is a small Act consisting of eight sections. Its object is besides elimination of the high incidence of illegal abortions, perhaps to confer on the women the right of privacy, which includes the right to,

i) Space and limit pregnancies (i.e., whether or not to bear children); and

ii) Decide about her own body.  

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 of failure of a contraceptive device resulting in pregnancy of the woman besides many other grounds.

Thus in August 1971 Parliament passed the Medical Termination of Pregnancy Act (here in after referred to as the MTPA). It seems that MTPA was passed for the purpose of reducing illegal abortion slowing down the growth of population.

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61 H.L. V. Matheson, 450 U.S. 398 (1980)

and emancipating women was a bold step by the government. The MTPA apart from liberalized the law of abortion, deals with the aspect of public health relating to physical, mental and emotional health of the women. According to the new law abortions are no longer illegal if they are performed for one of the several specified reasons within a limited period after conception by a specially designated specialist and under prescribed conditions.

a. Grounds of Termination of Pregnancy

The Medical Termination of Pregnancy Act, passed in 1971 was modeled upon the British Abortion Act of 1967. It permits the termination of pregnancies by registered medical practitioners, who possesses qualifications defined in Clause (h) of Section 2 of the Indian Medical Council Act of 1956, whose names are entered in the State Medical Register and who have the required gynaecological and obstetrics background.

The MTPA modified the provisions of the Indian Penal Code relating to abortion by permitting previously illegal abortions under certain specified and limited conditions i.e., Section 3 of MTPA, which is the operative Section has modified the strict provision of law of abortion as contained under section 312 of the Indian Penal Code by permitting termination of pregnancy in a number of situations.

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64 Section 2(d). Medical Termination of Pregnancy Act, 1971
In section 3(1) of MTPA, it is provided that the termination of a pregnancy by a registered medical practitioner is no longer to be an offence under the Indian Penal Code, where there is a medical opinion:

(i) that the continuance of pregnancy will involve a risk to the life of the pregnant woman or a risk of grave injury to her physical or mental health, or

(ii) that there exists a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities so as to be seriously handicapped;

The Section 3 of Medical Termination of Pregnancy Act also provides guidance for medical practitioners in the form of two explanations. The Indian version in the form of these two explanations expand upon the British law in that included the definition of “grave injury” to the mental health of the pregnant woman are those situations where pregnancy was caused by rape or by the failure of contraceptive device used by a married woman or her husband. It is almost impossible to prove that the pregnancy

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65 Section 2(d) MTPA, 1971, provides, “Registered Medical Practitioner” means a medical practitioner who possess any recognized medical qualification as defined in Clause (b) 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 a Gynaecology and Obstetrics as may be prescribed by rules made under this Act.

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

Explanation 2- Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.
did not result from the failure of a contraceptive device; the law allows abortion virtually on demand to all married women.

The MTPA is one of the few statutes of the world providing the failure of contraceptive as an additional ground for the termination of pregnancy and it has been reported to be the most common reasons given for termination of pregnancy. Unlike the first Explanation of Section 3 MTPA, the expression “shall presume” has not been used in Explanation 2. Here the expression “may presume” has been used. According to this, the medical practitioner is not bound to act on the allegation of the pregnant woman, and is entitled, under the law, to call for the evidence to substantiate that the pregnancy was caused by the failure of contraceptive device, or the method used either by the pregnant woman or her husband for the purpose of family planning. This Explanation specially assists the married couples who have taken recourse to various family planning methods for the purpose of limiting the number of their children.

There is no doubt that MTPA has been passed to emancipate women by giving them a choice about having a child and is intended to end the illegal and unsafe abortions that are affecting the health and life of a large number of married and unmarried women. At the same time family limitation through abortion is a concept that is neither officially propounded nor accepted under the liberalized abortion law. However, in practice, it has remained

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Thomas, John M. Supra note 63 p.513
more of a family planning measure than a law merely to safeguard the health of the women and children. One finds an express though unemphasized intention of the MTPA to promote the policy of Planned Parenthood by making abortions available if contraceptive fails. Therefore, keeping in view, Explanation 2 in subsection (2) of Section 3 of MTPA, it is a measure for limiting the family size.

The MTPA also provides in Section 3(3) that in determining whether there is the relevant risk of injury to health, account may be taken of the woman's actual or reasonably foreseeable environment. Wide discretion is thus given to the attending physicians.

An important feature of the Act is that it does not permit termination of pregnancy after twenty weeks. One provision of the Act which is the pertinent clause on the subject states:

[A] Pregnancy may be terminated by a registered medical practitioner:

(a) where the length of pregnancy does not exceed twelve weeks, if such medical practitioner is, or
(b) where the length of 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-

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69 Sub section (2) of Section 3 of MTP Act, 1971
(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 substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

No pregnancy can be terminated without the consent of the woman and in the case of a woman who has not attained the age of eighteen, or if she is a lunatic, without the consent in writing of her guardian.\(^7^0\)

The MTPA, however, is not so generous about the physical conditions under which an abortion may take place. Section 4\(^7^1\) of the Act stipulates that the termination of pregnancy must take place according to provisions of the Act and, that the operation must be performed in a hospital established or maintained by the government or in a place approved for the purpose by the government.

However, exceptions are made for emergencies. Section 5(1) of MTPA, states that a single registered medical practitioner may terminate a pregnancy if it is immediately necessary in order to save the life of the pregnant woman and in such a case the

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\(^7^0\) Section 3(4) MTP Act, 1971 "(a) No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a lunatic, shall be terminated except with the consent in writing of her guardian. (b) Save as otherwise provided in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman.

\(^7^1\) 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 the Government, or (b) a place for the time being approved for the purpose of this Act by Government
requirements relating to the length of the pregnancy, the need for two medical practitioner’s opinions and restrictions (Section 4 MTPA, relating to place of termination of pregnancy) as to place of operation do not apply.\textsuperscript{72}

Somewhat surprisingly, however, one aspect of this emergency provision tends to restrict rather than liberalize the old law. Section 312 of the Indian Penal Code permitted termination of pregnancies by any one with the object of saving the life of the pregnant woman,\textsuperscript{73} but section 5(2) of the MTPA provides that only a registered medical practitioner can terminate pregnancies in such cases. It is true that such a medical practitioner need not be a person trained in gynaecology and obstetrics. Nevertheless, the effect is to make illegal any emergency abortion by the pregnant woman herself or any other layman.\textsuperscript{74}

Section 8 of the Act\textsuperscript{75} gives legal protection to the doctors for any damage caused or likely to be caused by anything done or intended to be done in good faith for the purpose of termination of pregnancy. In other words, a doctor is exempted from liability for causing miscarriage if it is proved that he acted in good faith to procure the termination of pregnancy.\textsuperscript{76}

\begin{footnotes}
\item[72] Medical Termination of Pregnancy Act, 1971, Section 5(1)
\item[73] Section 312 Indian Penal Code, supra note 17
\item[74] Medical Termination of Pregnancy Act, 1971, Section 5(2)
\item[75] Protection of action taken in good faith—No suit or other legal proceedings shall lie against any registered medical practitioner for any damage caused or likely to be caused by anything which is in good faith done or intended to be done under this Act.
\item[76] Rex \textit{v} Bourne, [1938] 3 All E.R. p-615
\end{footnotes}
However, if the medical practitioner found to be negligent he will be held guilty of criminal negligence.

b. The MTPA and its implementation

Though Section 3 of MTPA as explained earlier, has legalized termination of an unwanted pregnancy in a number of situations, there are many difficulties in the successful implementation of the provisions of the Act on various counts. In a way the MTPA has made the law more strict by stipulating that no termination of pregnancy shall be made 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 the MTPA by the government.

The MTPA read with the Indian Penal Code still makes several categories of abortions, offences under the Penal Code which are as follows:

(1) Abortion conducted by persons other than registered medical practitioner as defined in Section 2(d) of the MTPA or in places other than those prescribed for the purpose under the MTPA are illegal. A woman causing herself to miscarry is within the criminal prohibition unless she is herself a registered medical practitioner of the above description. Unless abortion services including trained personnel, anesthesia and blood transfusion facilities are made available even in the
primary health centers and the infrastructure of basic health services are built up, the MTPA is not going to have any decisive impact on maternal health, illegal abortions or population control.\footnote{Madhava Menon, N. R. Population policy, Law Enforcement and Liberalization of Abortion: A Socio-Legal Enquiry Into the Implementation of The Abortion Law in India. 16 JILI, No. 4 (1974) p. 640}

(2) Another group of abortions, which are still punishable offences under the Indian Penal Code, are those that are performed when pregnancy has already run for more than 20 weeks. The only exception in this regard is those cases where the life of the mother is in danger.

(3) Any other abortion is a criminal offence if it does not fit within the parameters laid down by Section 3(2) of the MTPA, that is

(a) to save the life or to avoid serious injury to the physical or mental health of the pregnant woman.

(b) To avoid danger of serious abnormalities in case the child was born.

While the above circumstances may appear to be questions of fact to be determined in each case by the physician according to his medical knowledge, other provisions seem to require the doctors to take non-medical factors into consideration in making those determinations. In cases of error in judgment, the doctor is only protected if he formed the opinion in good faith. This is said to be unfair in actual practice to the doctor as well as to the
prosecution (society). Several doctors have expressed concern at leaving such grave responsibility placed on them when they are neither equipped to make vital decisions involving serious legal implications nor have the necessary know how.  

According to the Explanation clause 1 to sub-section (2) to Section 3 to the MTP Act, abortion is not permitted if the pregnancy is caused as a result of an illegal sexual connection other than rape. Hence termination of a pregnancy in such a case would be criminal and punishable under Section 312 of Indian Penal Code.

Section 375 of the Indian Penal Code enumerates six circumstances under which sexual intercourse by a man with a woman would amount to rape. The essentials of the offence consist in having sexual intercourse with a woman:

(i) against her will;

(ii) without her consent; or

(iii) with her consent, when the consent was obtained by putting her or any person in whom she is interested into fear of death or physical hurt; or

(iv) 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 believes herself to be lawfully married, i.e., when consent was

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78 Ibid
79 Medical Termination of Pregnancy Act, 1971, Section 3 (2), Explanation 1, supra note 66.
procured under a mistaken fact that the man was her husband; or

(v) with her consent, when, by reason of unsoundness of mind or intoxication etc, she is unable to understand the nature and consequences of that to which the consent was given; or

(vi) with or without consent when she is under sixteen years of age and is incapable of giving consent in law.

According to the principle of criminal jurisprudence, a man is presumed to be innocent, until his guilt is established in a court of law beyond reasonable doubt.\textsuperscript{80} Hence the question arises, as to whether the woman subjected to rape should postpone the termination of her pregnancy till the charge of rape is established in a court of law and the accused is found guilty, or get the pregnancy terminated during the pendency of trial? In the latter case, if the man is charged of rape is acquitted of the offence; the woman would be liable to punishment under Section 312, IPC for causing illegal abortion.\textsuperscript{81} Because the woman themselves come to know of pregnancy much later and by that time any evidence possible on the question of rape would have vanished.\textsuperscript{82} And if the former course is adopted, no abortion could be possible, because a case would take a minimum of three to four year, in general, before it is finally disposed of by a court of law.

\textsuperscript{80} Indian Evidence Act, 1872, Section 105

\textsuperscript{81} In such a situation the doctor procuring the abortion would also be guilty of causing miscarriage under S-312 IPC

\textsuperscript{82} Madhava Menon, N. R. Supra note, 77.
Accordingly Sections 376B\textsuperscript{83}, 376 C\textsuperscript{84} and 376 D\textsuperscript{85} of IPC (added vide Criminal Law (Amendment) Act 43 of 1983) comprise a group of Sections that create a new category of sexual offences which do not amount to rape, because the consent of the victim is given in such cases under compelling circumstances. In fact, these offences are committed by those persons who happen to occupy a supervisory position and powers in the institution under their control and they take undue advantage of their authority and position and obtain consent of the woman by inducing or seducing her for sexual intercourse. For instance, if a senior officer has sexual intercourse with his junior taking advantage of his authority, the case will fall under Section 376-B of IPC. Likewise, if a sexual intercourse is committed by a superintendent of a jail, or remand home on a lady inmate or by a management staff of a hospital on a woman in the hospital staff, Sections 376-C and Section 376-D are attracted.\textsuperscript{86}

Thus if a pregnancy is caused as a result of sexual intercourse falling under Section 376-B, 376 C and 376-D of Indian Penal Code, it will not amount to have been caused by rape and that would entitle the woman to get the pregnancy terminated under Section 3 of MTP Act, 1971. Since consent of the woman for intercourse is implicit in the act.

\textsuperscript{83} Section 376 B, IPC provides punishment for intercourse by a public servant with a woman in his custody

\textsuperscript{84} Section 376 C, IPC deals with intercourse by the superintendent of a jail and remand home, etc., with any female inmate of such institutions

\textsuperscript{85} Section 376 D, IPC makes intercourse by any member of the management staff of a hospital with a woman in that hospital punishable

Similarly, Section 376-A IPC fails to take note of special situation where the husband and wife are living separately under a decree of judicial separation by mutual consent. In such a case marriage subsists in law, and if the husband has sexual intercourse with his wife without her consent, the wife can not go for termination of pregnancy, should she become pregnant because sexual intercourse under such circumstances would not be rape within the meaning of Section 375 of Indian Penal Code to justify termination of pregnancy under Section 3(2) of MTPA.

To remove such a difficulty an explanation clause may be added\(^7\) to Section 3 of MTPA which would entitle a woman to get her pregnancy terminated in the circumstances falling under Section 376-A, 376-B, 376-C and 376-D of Indian Penal Code.

Another important point with respect to interpretation of MTPA arises as to whether termination of pregnancy is permissible only in those cases of rape that are reported to the police, or in all cases, whether reported or not? In India because of the conservative and traditional social set up more than 90 percent of pregnancy cases occurring as a result of rape go unreported to the police because of fear of social-stigma.

In the first above-mentioned situation, it would be practically impossible to take advantage of the Act and get pregnancy terminated. Since rarely a case of rape is reported to the

\(^7\) Where any pregnancy is alleged by the pregnant woman to have been caused by sexual intercourse not amounting to rape but as a result of sexual intercourse falling under Section 376-A, 376-B, 376-C and 376-D Indian Penal Code, the anguish caused by such pregnancy shall be presumed to constitute grave injury to the mental health of the pregnant woman.
police. In the second situation, the provisions are liberally interpreted any woman can get her pregnancy terminated merely on making the statement to the doctor that it was caused as a result of rape. This would leave the matter entirely within the discretion of the woman to the above noted situations.

Likewise Sections 493 and 496 of Indian Penal Code where woman consents to a sexual intercourse under an impression that-

(i) She is lawfully married to the man, though the man having sexual intercourse with the woman in question, by means of deceit, causes the woman to believe that she is lawfully married to him, under the belief of being that man’s wife, she submits herself for cohabitation or sexual intercourse and the man cohabits with her,

(ii) She is lawfully married, because she happens to go through a marriage ceremony but the man knows that even though they have gone through a marriage ceremony but still not lawfully married, consequent upon a belief of being a lawfully married wife she consents for sexual intercourse and the man cohabits with her.

Thus if a pregnancy is caused as a result of intercourse falling under Sections 493 and 496 of the Indian Penal Code will not amount to have been caused by the offence of rap and that would not entitle the woman to get the pregnancy terminated under Section 3 of MTPA because the woman has consented for the act of sexual intercourse.
Sections 494 and 495\textsuperscript{88} of Indian Penal Code comprise yet another group of sections that create a new category of sexual offence, which do not amount to the offence of rape.

In the offence of bigamy, the accused a married person, happens to contract another marriage. However, the wife from the first marriage being alive and the previous valid marriage was subsisting.

Another important offence is adultery\textsuperscript{89}, where the accused have sexual intercourse knowingly that the woman is the wife of another person, though with her consent but without the consent or connivance of her husband, such sexual intercourse do not amount to the offence of rape.

Thus if the pregnancy is caused due to the sexual intercourse falling under Sections 494, 495 and 497 of Indian Penal Code, since in such sexual intercourse, the woman have consented, consequently the same can not be said to have been caused due to the offence of rape. Therefore, the pregnant woman will not be entitled to get her pregnancy terminated under Section 3 of MTPA.

Accordingly, to meet out such a circumstance an explanation clause\textsuperscript{90} (as explanation IV) may be added in Section 3 of the

\textsuperscript{88} Indian Penal Code Sections 494 and 495
\textsuperscript{89} Indian Penal Code, Section 497 prescribes punishment of adultery which may extend to imprisonment of either description for a term of five years, or with fine or with both. In such a case the wife shall not be punishable as an abettor.
\textsuperscript{90} Where any pregnancy is alleged by the pregnant woman to have been caused by deceiving her into believing that she is legally married to the man concerned and makes her to live as wife and husband is either by adultery or by bigamy, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.
Legal Issues and Legislation in India

Medical Termination of Pregnancy Act, legalizing abortions caused as a result of sexual intercourse other than rape.

The Government of India, by a notification, on 10 October 1975, revised the rules relating to MTPA on the recommendation of the workshop held in New Delhi on the implementation of programme of medical termination of pregnancies at the district hospitals and at block levels organized by the World Health Organisation.

According to the revised rules, a woman desiring to abort an unwanted pregnancy can walk into a hospital or recognized institution offering the facility and after filling in a form, get the pregnancy terminated even without her husband's consent. The hospital has to give to the woman a registration number and keep the form in an envelop marked 'Secret' and the doctor who performs the operation is under no obligation to consult or notify her husband and shall be bound by the duty of confidentiality to his patient and need not inform her spouse against her wishes.

The implementation of the MTPA is dependent upon the ability and willingness of the state governments which are empowered to make regulations for the purpose. The implementation has negative and positive aspects. Positive action by the state government will be required to ensure availability of medically safe abortion services in the countryside. Only if that is done will the utilization of liberalized provisions become possible by the large body of the poor rural people. Unless the doctors in
every primary health center are trained in abortion practices and unless necessary facilities including anesthesia, blood transfusion and hospital beds are provided, the positive benefits of the MTPA will not reach to every rural people willing for a termination of pregnancy. The large majority of people who live in the villages will neither have the knowledge of the new law nor the means to procure abortions under it.

The negative aspect of the implementation of the MTPA is also fraught with difficulties. The problems involved in detection, prosecution and proof of criminal abortions are, if anything, worse under the liberalized conditions of the MTPA than they were under the old law. In the absence of complaining victim and in view of the lack of power on the part of police to initiate action on their own, there is only a remote possibility of involving the criminal process to put down criminal abortions. The confidentiality of information relating to the termination of pregnancy which is ensured by the rules framed by the Central government further complicates the task of prosecution even where there are public-spirited people available who desire to cooperate with law enforcement authorities. The greater the difficulties of prosecutions, the easier it is for unscrupulous men to corrupt the legal process and evade the law at all costs. Only if there is rigorous enforcement of higher professional standards by the Medical Council of India and by the medical associations, will it be possible to keep illegal abortions down at moderate levels.
Thus, the Indian law on abortion, the Medical Termination of Pregnancy Act, 1971, came into force on April 1, 1972. The MTPA modifies the provisions of the Indian Penal Code relating to abortion.

The oft-argued following justifications in favour of permissive abortions are found in the Indian law.

(i) **Therapeutic:** The old restrictive Indian Abortion law had permitted abortion to save the life of the mother. In addition, the reformed law, as seen above, allows abortion when the mother’s life is not threatened, but when continued pregnancy will cause damage to her mental and physical health.

(ii) **Eugenic:** The basis of eugenic abortion is that there is a justification for abortion when it is known before birth that the child will be born mentally or physically deformed. The unborn child should be relieved a life of misery.

(iii) **Pregnancy caused by rape:** The problem of a pregnancy caused by rape may affect the mental health of the mother. It is assumed that the victim mother does not want to bear the continuing results of a crime for which she was not culpable.

(iv) **Social and Economic Considerations:** A popular argument in favour of abortion is based on the absolute right of the women to control the use of her body. She has a right to
an abortion on demand to terminate any pregnancy which she decided she does not wants. Admittedly, the right to control the use of one's body is founded on ideas of liberty, and restrictions thereon may amount to an invasion of privacy.

The economic status of the family or parent's inability to provide for a child is also given as a valid reason for adoption. Under this category falls the use of adoption as a means of population control. It is beneficial to society in helping to reduce the burdens of overpopulation. Though the Indian government's formal view is that liberalized abortion law is a health measure and will not normally be used for birth control, yet the demographic needs of the country loom large as one of the underlying objectives of the legislation.

Thus the MTPA is a landmark legislation in the history of social legislations in India and will go a long way in encouraging a woman to decide for herself whether she wished to bear and rear the child or not. The Act along with the raising the age of consent for marriage, now 18 years for girls and 21 for boys, has done much for family planning and curbing population growth. Abortion of late is becoming increasingly popular. The reason for this were increased facilities for termination of pregnancy in the rural areas, and growing awareness in the rural community that abortion is ostensibly a health measure. An important feature of the Act is that since that abortion has been made legal in a fairly wide range
of circumstances, it has resulted in ‘squeezing out’ of “back street abortions” with resultant higher standard of regulations and safety as abortions are increasingly performed by qualified personnel in properly qualified hospitals.

In fact, the Act is a milestone in the modernization of the Indian society through the instrumentality of law. It has a direct impact on population control and an achieving economic and social development. In other words, the Act has played a vital role in emancipation of women from the age-old fear of abortion being considered as a sinful and criminal act.