

## MISCARRIAGE UNDER IPC: REALISING THE NEED FOR CHANGE

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### INTRODUCTION

The work of the LCI has been revolving around ensuring criminal justice to all. One of the major works has been in the field of Indian Penal Code. The reason is obvious as the Code is more than a century old and is based on British Era. The merits of the Code cannot be overlooked for it has stood the test of time for this long. However, certain Sections require a revisit by the Legislature for they need to adhere to the dynamism in the society. Under Chapter-XVI 'Of Offences Relating to Human Body' the part dealing with offences 'Of the Causing of Miscarriage, of Injuries to Unborn Children, of the Exposure of Infants, and of the Concealment of Births', is one of those Parts which require some modifications. The part is supplemented with other legislation, The Medical Termination of Pregnancy Act, 1971. This legislation if permits an abortion, the IPC provisions cannot hold the person liable for the same act for there would be a direct conflict between them. Consequently, it can be said that any change in this Act must also be reflected in the provisions of IPC. This work analyses changes reflected by the international NGOs, various Law Commission Reports, mainly 42<sup>nd</sup> Report and 156<sup>th</sup> Report, related case laws, the Medical Termination of Pregnancy Act, 1971 and related amendments. At the end, the author reflects few suggestions that could be concluded after the discussion.

### INTERNATIONAL PERSPECTIVES

In India, a woman dies in childbirth every eight minutes, and one out of every one hundred seventy women will die from pregnancy-related causes.<sup>2</sup> Though India's national health policies and programs guarantee women access to the full range of contraceptive methods at no cost in a manner that emphasizes voluntary use and a target-free approach, government

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<sup>2</sup> A. Gogoi & R. Motihar, Maternal Health in India: Where We Are Today, Huffington Post, June 6, 2013 (calculated from Office of Registrar General, India), Special Bulletin on Maternal Mortality in India 2007-09, June 2011; The World Bank, Lifetime risk of maternal death (1 in: India), available at [https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/haryana\\_fs\\_4.6.15\\_updated.pdf](https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/haryana_fs_4.6.15_updated.pdf) (last visited on June 12, 2017)

studies in Haryana show that both the unmet need for contraceptives and pregnancy related deaths have risen in the past decade.<sup>3</sup>

India signed the Convention on 30 July 1980 and ratified it on 9 July 1993.<sup>4</sup> The nation's party to the Convention must submit national reports, at least every four years, on measures they have taken to comply with their treaty obligations.<sup>5</sup> India submitted its latest report in 2012.<sup>6</sup> The report was accompanied with a supplementary letter by two International NGOs: Centre for Reproductive Rights and Human Rights Law Network, in which they stated their own findings. In the letter submitted by Centre for Reproductive Rights and the Human Rights Law Network for the Pre-Sessional Working Group for reviewing India's fourth periodic **Report to Committee on Elimination of Discrimination Against Women** (dt. October 1, 2013), an empathetic view was taken on the fact of India amounts to highest number of maternal deaths in the world.<sup>7</sup> A reference to the WHO Report was made highlighting the plight of Indian women especially due to poor reproductive health. It was reported that as many as 56,000 women and girls died due to maternal causes in 2010.<sup>8</sup> One of the major reasons attributed to such high number of deaths was "unsafe abortions" and "barriers to access contraception".<sup>9</sup>

<sup>3</sup> Central Statistical Organization, Ministry of Statistics and Programme Implementation, Gov't of India, Millennium Development Goals in India Country Report (2011); Gov't of India, Ministry of Health and Family Welfare & Int'l Institute for Population Sciences, District Level Household and Facility Survey (DLHS-3) (2007-2008) available at [http://mospi.nic.in/sites/default/files/publication\\_reports/mdg\\_2july15\\_1.pdf](http://mospi.nic.in/sites/default/files/publication_reports/mdg_2july15_1.pdf) (last visited on June 12, 2017)

<sup>4</sup> Amnesty International, "INDIA SUBMISSION TO THE UN COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, 58TH SESSION JUNE 2014", available at [http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/Ind/INT\\_CEDAW\\_NGO\\_Ind\\_17515\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/Ind/INT_CEDAW_NGO_Ind_17515_E.pdf) (last visited on June 12, 2017)

<sup>5</sup> United Nations Entity for Gender Equality and the Empowerment of Women, "Convention on Elimination of All Forms of Discrimination Against Women", available at: <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (last visited on June 12, 2017)

<sup>6</sup> Government of India, Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women: Combined 4th and 5th periodic reports of States. parties: India, U.N. Doc. CEDAW/C/IND/4-5 (2012) available at [https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKewjVkJ8a62N3UAhUeT48KHetLD\\_oYQFgnMAA&url=http%3A%2F%2Fdocstore.ohchr.org%2FSelfServices%2FFilesHandler.ashx%3Fenc%3DdtYoAzPhJ4NMv4Lu1TOebN2i0R1onUPLRIJxsQBAMbY6T92DRardR73DQrJQdZpmgrDW9naxSlIiivZB4j75fMChNNnPW%252FWgqp97Y8VRPe0%253D&usq=AFOjCNGyfhw-Og\\_NNgWKEvIbD7uNYXWkWw](https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKewjVkJ8a62N3UAhUeT48KHetLD_oYQFgnMAA&url=http%3A%2F%2Fdocstore.ohchr.org%2FSelfServices%2FFilesHandler.ashx%3Fenc%3DdtYoAzPhJ4NMv4Lu1TOebN2i0R1onUPLRIJxsQBAMbY6T92DRardR73DQrJQdZpmgrDW9naxSlIiivZB4j75fMChNNnPW%252FWgqp97Y8VRPe0%253D&usq=AFOjCNGyfhw-Og_NNgWKEvIbD7uNYXWkWw) (last visited on June 12, 2017)

<sup>7</sup> CEDAW India Pre-Session Letter, 2013, available at: [http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/Ind/INT\\_CEDAW\\_NGO\\_Ind\\_17512\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/Ind/INT_CEDAW_NGO_Ind_17512_E.pdf) (last visited on June 5, 2016)

<sup>8</sup> WHO, UNICEF, UNFPA AND THE WORLD BANK, TRENDS IN MATERNAL MORTALITY: 1990 to 2010 1 (2012) available at <http://www.who.int/reproductivehealth/publications/monitoring/9789241503631/en/> (last visited on June 12, 2017)

<sup>9</sup> ibid

India was to achieve its **Millennium Development Goal** to reduce its Maternal Mortality Rate by 2015.<sup>10</sup> The deadline was however missed but the Government had significantly reduced the Maternal Mortality Rate by 5.7% in the period 2011-2013 and one of the many schemes undertaken by the Government were operationalization of Safe Abortion Services at health care institutions.<sup>11</sup> Its surprising how more than a century after IPC provisions came into effect and decades old special legislation on the subject, maternal health remains a concern for India. India has been brought under the radar of international criticism also because of the same.

## INDIVIDUAL SECTIONS

### Section 312:

*“312. Causing Miscarriage.- Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with 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.*

*Explanation.- A woman who causes herself to miscarry, is within the meaning of this section.”*

**Report 42<sup>nd</sup>** for the first time dealt with Section 312. It evaluated the Medical Termination of Pregnancy Bill which was then pending in the Rajya Sabha.<sup>12</sup> In light of the existing provision, the then pending Bill and evaluation of prevailing laws in other countries (such as that in England<sup>13</sup>, Sweden<sup>14</sup>, Russia<sup>15</sup>, Japan<sup>16</sup> and U.S.A<sup>17</sup>), the LCI recommended an additional proviso as follows:

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<sup>10</sup> UNDP in India, available at <http://www.in.undp.org/content/india/en/home/post-2015/mdgoverview.html> (last visited on June 12, 2017)

<sup>11</sup> Shushmi Dey, “India records 5.7% dip in maternal mortality ratio since 2009”, *Times of India*, May 10, 2016, available at: <http://timesofindia.indiatimes.com/India/India-records-5-7-dip-in-maternal-mortality-ratio-since-2009/articleshow/52211202.cms> (last visited on June 12, 2017)

<sup>12</sup> Law Commission of India Report, 42nd Report on Indian Penal Code (June, 1971), Para 16.38, available at <http://lawcommissionofindia.nic.in/> (last visited on June 12, 2017)

<sup>13</sup> *Ibid* Para 16.40

<sup>14</sup> *Ibid*, Para 16.41

<sup>15</sup> *Ibid*, Para 16.42

<sup>16</sup> *Ibid*, Para 16.43

*“Provided that it shall not be an offence under this section if the miscarriage is caused within three months of the commencement of the pregnancy by a registered medical practitioner with the consent of the women.”*<sup>18</sup>

And a further consequential amendment to the *Explanation* was suggested by insertion of words *“when she has been pregnant for more than three months”*<sup>19</sup>.

**The 156<sup>th</sup> Report** recommended no change in this Section.

In the case of *Meeru Bhatia Prasad vs. State*<sup>20</sup> the Delhi High Court had taken the view that ‘good faith’ in itself is not enough. It should be for the purpose of saving the life of the child and the mother, and not otherwise. Therefore, when the Doctor, in the instant case, had inserted the needles twice where the woman had consented for one insertion, causing forced abortion of the child, it was held that the Doctor was liable under this Section.

### **Section 313:**

*“313. Causing miscarriage without woman’s consent.- Whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not, shall be punished with [imprisonment for life]<sup>21</sup>, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”*

In the **42<sup>nd</sup> Report** of the LCI, the Commission suggested that the term of punishment is correct but the type of imprisonment should be revised from “simple” to “rigorous imprisonment”. The suggestion was correct owing to the circumstances prevailing then with rampant illegal abortion cases being reported of. Under the **156<sup>th</sup> Report**, the Commission hasn’t specifically dealt with this provision. In the case of *Pranab Kanti Sen vs. State of West Bengal*<sup>22</sup>, where evidence were shown that a husband had been administering a pill to his wife with sufficient knowledge as a doctor that the pill would cause miscarriage, there was a prima-facie case against the husband under Section 313, IPC.

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<sup>17</sup> *Ibid*, Para 16.44

<sup>18</sup> *Ibid*, Para 16.46

<sup>19</sup> *Ibid*

<sup>20</sup> 2002 Cr LJ 1674 (Del), available at <https://indiankanoon.org/doc/163552/> (last visited on June 12, 2017)

<sup>21</sup> Subs. by Act 26 of 1955, sec. 117 and Sch., for “transportation for life” (w.e.f. 1-1-1956)

<sup>22</sup> WP No. 1337 of 2009, available at <https://indiankanoon.org/doc/158899200/> (last visited on June 12, 2017)

**Section 314:**

*“314. Death caused by act done with intent to cause miscarriage. Whoever, with intent to cause the miscarriage of a woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine;*

*If act done without 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 punishment above mentioned.*

*Explanation.- It is not essential to this offence that the offender should know that the act is likely to cause death.”*

**The 42<sup>nd</sup> Report and the 156<sup>TH</sup> Report** recommended no change in this Section.

In the case of *Mahesh Govindbhai Barot vs. State of Gujarat*,<sup>23</sup> the Gujarat High Court rightly held that charges under Section 313 and 314 cannot be pressed against a person for the same offence for they are ‘contraindicative’.

**Section 315:**

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

**The 42<sup>nd</sup> Report and the 156<sup>th</sup> Report** recommended no change in this Section.

**Section 316:**

*“316. Causing death of quick unborn child by act amounting to culpable homicide.- Whoever does any act under such circumstances, that if he thereby caused death he would be*

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<sup>23</sup> Criminal Appeal No. 15 of 2010, available at <https://indiankanoon.org/doc/79975933/> (last visited on June 12, 2017)

*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.”*

**The 42<sup>nd</sup> Report and the 156<sup>TH</sup> Report** recommended no change in this Section.

The Supreme Court is of the opinion that when the case is of a dowry death of a pregnant woman, there need not be a separate conviction under section 316 if it was not intended separately.<sup>24</sup>

### **Section 317:**

**“317. Exposure and abandonment of child under twelve years, by parent or person having care of it.—***Whoever being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.*

*Explanation.—This section is not intended to prevent the trial of the offender for murder or culpable homicide, as the case may be, if the child dies in consequence of the exposure.”*

**The 42<sup>nd</sup> Report** suggested that the Section needed to be modified as follows:

**“317. Exposure and abandonment of child under five years by parents or person having care of it-** Whoever being the father or mother of a child under the age of five years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall, if such act endangers, or is likely to endanger, the life of the child, be punished with imprisonment for a term which may extend to seven years, or with fine, or with both.”<sup>25</sup>

This change was suggested in light of the already existing statute Children Act, 1960 (60 of 1960). The Report also suggested omission of the *Explanation*.

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<sup>24</sup> *R.K Chouthmal vs. State of Maharashtra*, (1996) 4 SCC 148, available at <https://indiankanoon.org/doc/1822033/> (last visited on June 12, 2017)

<sup>25</sup> *Supra* note 11, Para 16.51

The offence is complete notwithstanding that no actual danger or risk of danger arises to the child's life.<sup>26</sup>

**The 156<sup>TH</sup> Report** recommended no change in this Section.

### **Section 318:**

*“318. Concealment of birth by secret disposal of dead body.—Whoever, by secretly burying or otherwise disposing of the death body of a child whether such child die before or after or during its birth, intentionally conceals or endeavours to conceal the birth of such child, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”*

**The 42<sup>nd</sup> Report** rightly suggested the complete omission of the Section 318 and suggested the following insertion:

*“318. Failure to provide necessities of life—Whoever, being legally bound to provide the necessities of life to any person, fails without lawful excuse to do so, knowing that such failure will endanger the life or seriously impair the health of that person, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.”<sup>27</sup>*

**The 156<sup>TH</sup> Report** recommended no change in this Section.

### **MEDICAL TERMINATION OF PREGNANCY ACT, 1971**

In the year 1964, a **Committee<sup>28</sup>** was set-up under the chairmanship of Mr. Shanti Lal Shah<sup>29</sup> to study the liberalisation of abortion laws which were prevailing then. The major concern of the Committee was to protect women from the ill-effects of illegal abortions.<sup>30</sup> Consequently, a report was submitted on December 30, 1966 and this led to the adoption of the **Medical Termination of Pregnancy Act, 1971**.

<sup>26</sup> Ratanlal & Dheerajlal, *The Indian Penal Code 34<sup>th</sup> Edition* 749 (Lexis Nexis, Gurgaon, 2014)

<sup>27</sup> *Supra* note 11, Para 16.53

<sup>28</sup> The Committee was set-up by Ministry of Health on the recommendation of Central Family Planning Board (at their sixteenth meeting) to study the legislation relating to abortion.

<sup>29</sup> The then Minister of Health, Law and Judiciary, Government of Maharashtra

<sup>30</sup> Sarosh Framroze Jalnawalla (the then Deputy Director, Department of Family Planning in Ministry of Health and Family Planning, New Delhi), 588 “Medical Termination of Pregnancy Act A preliminary Report of the First twenty Months of Implementation”, *JOURNAL OF OBSTETRICS AND GYNAECOLOGY OF INDIA*, available at [http://www.jogi.co.in/articles/files/filebase/Archives/1975/oct/1975\\_588\\_592\\_Oct.pdf](http://www.jogi.co.in/articles/files/filebase/Archives/1975/oct/1975_588_592_Oct.pdf) (last visited on June 12, 2017)

The Department-related Parliamentary Standing Committee on Health and Family Welfare in its Ninety- second Report of the Committee on the Functioning of Medical Council of India (MCI), realizing the importance of these legislations in the area of protection of maternal health and the dire need of the hour, observed:

*“.....[F]ormulation of treatment guidelines for various health conditions and disseminating them widely through publicity and media is imperative for protection of patient interests and rights. The Clinical Establishment (Registration and Regulation) Act, 2010 can provide an umbrella legislation in this regard as it has the power to prescribe guidelines for all healthcare facilities. In the absence of a unified legislation, there are a few different legislations that regulate some healthcare services such as the Pre- Conception and Pre-Natal diagnostics Technologies Act, 1994 enacted to stop female foeticide and arrest the declining sex ratio and the Medical Termination of Pregnancy (MPT) Act, 1971 which lays down the conditions under which pregnancies can be terminated. Other health services are not governed by any standards of treatment and pricing guidelines or reporting frameworks.”<sup>31</sup>*

**The Medical Termination of Pregnancy Rules, 1975<sup>32</sup>:** On 10 October 1975, the Government of India, by a notification revised the rules under the Act on the recommendation of a workshop on the Implementations of the Programme of Medical Termination of Pregnancies at District Hospitals and at Block Levels, organised by the World Health Organisation in Delhi. By the new notification, a woman can terminate the pregnancy without the consent of the husband, far less his relations, when the pregnancy is terminated on the grounds covered under Section 3 of the Act.

In the case of *Dr. Mangla Dogra and Others v. Anil Kumar Malhotra and Others*, [C.R.No. 6337 of 2011, para 21] the Punjab and Haryana High Court held, “A woman is not a machine in which raw material is put and a finished product comes out. She should be mentally prepared to conceive, continue the same and give birth to a child. The unwanted pregnancy would naturally affect the mental health of the pregnant women. It is a personal right of a woman to give birth to a child. Nobody can interfere in the personal decision of the wife to carry on or abort her pregnancy.”

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<sup>31</sup> *Ibid*, para 9.26

<sup>32</sup> Issued by Ministry of Health and Family Welfare (Department of Family Planning)



Thus, seeking a liberalised approach of the Medical Termination of Pregnancy Act, 1971.

**Draft Bill of 2014:** The amendment Medical Termination of Pregnancy (Amendment) Bill, 2014 the Ministry of Health and Family Welfare provides for substitution of “registered medical practitioners” with” registered medical health care providers”.<sup>33</sup> The major amendment suggested was that irrespective of the length of the pregnancy, the pregnancy would be terminated when there is any substantial abnormalities in the foetus.<sup>34</sup> However, the Bill has not yet been passed by either of the Houses.

## CONCLUSION

The Act, although a special legislation, has failed to recognise all the factors when a pregnancy can be terminated under Section 3. Section 3 can be seen as a defence to the Section 312 where the woman can undergo abortion. One of the many grounds enlisted is that of rape. But it overlooks pregnancy as a result of offences of fraudulent conduct of marriage, bigamy, adultery, etc. The Act directly impacts the application of the provisions of the Code. Some people had criticised the Act on the grounds that the Act tries to interfere with the rights of family planning of the citizens. Therefore, any amendment or modification in the Act or related IPC provisions, even in future, would attract a violent response from the public at large for it shall interfere with their rights. On July 21, 2016 the Supreme Court had allowed the twenty-four week old pregnancy of a rape victim to be terminated when there was ‘grave-danger’ to the life of the victim, challenging the Section 3(2)(b) of the Act.<sup>35</sup>

Following this judgement, there was a huge outcry for decriminalising abortion in all cases of rape. This judgement acted like a hope to many and activists aired their long hidden grievance of treating ‘abortion’ as a ‘right of treatment’ in all cases of rape, for often there is delay due to lengthy procedures or in reporting of rape cases, making the abortion illegal.<sup>36</sup>

The needs of the citizens are evident and the hour of reformations has come. It is also the time that recommendations of the Law Commission are also incorporated with necessary changes of time, like punishments and penalties.

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<sup>33</sup> Section 2, Medical Termination of Pregnancy (Amendment) Bill, 2014

<sup>34</sup> Section 4 (ii), Medical Termination of Pregnancy (Amendment) Bill, 2014

<sup>35</sup> *Ms. X vs. Union of India and Ors.*, AIR 2016 SC 3525 [Civil W.P No. 593 of 2016], available at [http://supremecourt.gov.in/pdf/cir/2016-07-25\\_1469453114.pdf](http://supremecourt.gov.in/pdf/cir/2016-07-25_1469453114.pdf) (last visited on June 6, 2017)

<sup>36</sup> Roli Srivastava, “In rape-induced pregnancies abortion should be seen as treatment: Activists”, *THE HINDU*, August 20, 2016, available at: <http://www.thehindu.com/news/cities/mumbai/news/In-rape-induced-pregnancies-abortion-should-be-seen-as-treatment-activists/article14578884.ece> (last visited on June 6, 2017)