



ISSN Print: 2394-7500  
ISSN Online: 2394-5869  
Impact Factor: 5.2  
IJAR 2017; 3(10): 111-117  
www.allresearchjournal.com  
Received: 18-08-2017  
Accepted: 19-09-2017

**Krishna Kumar**  
Assistant Professor, NUSRL,  
Ranchi, Jharkhand, India

## Law of abortion: Critical study from the perspective of women's right to privacy

**Krishna Kumar**

### Abstract

Abortion often invites exuberant debates amongst intelligentsia. This paper will be a sincere endeavor to highlight the broader contours of law of privacy of women with respect to carrying a foetus in her womb. Once the women became pregnant society became silent observant to this development and even the Law has to take its own recourse on the issue of women's pregnancy. The right to take decision over her body seems to have been lost into wilderness, she doesn't have even right to privacy. Though in past as well as in recent judicial pronouncements the emphasis has been laid down in rendering recognition to the Right to Privacy as Fundamental Right enshrined in the Constitution. The subsidiary legislation referred here as Pre-Natal Detection Test Act 1994 (PNDT) and Medical Termination of Pregnancy Act 1971 (MTPA), and other International Legal scenario have been critically discussed in the light of women's right. The question which is raised through this paper is whether the existing laws safeguarding the interest of foetus more vis-a-vis Right to Privacy of women objectively.

**Keywords:** Abortion, right to privacy, pregnancy, foetus, women, society, birth, constitution, pre-natal detection test Act (PNDT) and medical termination of pregnancy act (MTPA)

### Introduction

Abortion often invites exuberant debates amongst intelligentsia. The general question around which the discourse revolves is of morality, women's right, life of foetus and state's authoritative role in regulating the women's reproductive right. The sacrosanct notion of family is prevalent in our society from time immemorial. In such institution women distinctly play a contributory role. The evolution of human life takes place in the womb of mother. A fact which is disputed by many feminist i.e – when women become pregnant the strong essence of being women is over – powered by the fragile emotive entity of being mother. Once a woman becomes a mother her identity is dispersed into the intricate complexities. In such peculiar scenario she sees herself being subdued by those who are either directly or even remotely attached to the foetus of the womb. The hidden or latent forces conspicuously make their sudden abrupt appearance. Prominent force among these are father of 'to be born', 'society' in which he or she will takes birth, 'state' imposes itself the custodian and protector of the right of to be born. Amidst all these deliberative development, the inherent right of women over her body unwantedly seems to languish in shrouds of obscurity.

Abortion is derived from the Latin word 'aborir' which means, "to get detached from the proper site <sup>[1]</sup>. It is defined as intentional removal of a foetus from mother's womb other than for the purpose of producing a live-birth removing a dead fetus. Neither accidental premature birth nor spontaneous expulsion of the foetus due to disease, malfunction, or trauma of mother is normally considered on abortion. The World Health Organisation places abortion within the category of fertility regulation <sup>[2]</sup>.

Abortion may be either spontaneous or induced. An induced abortion are divided into legal or illegal, a spontaneous abortion is one that occurs naturally as a result of certain pathological condition often beyond the control of the pregnant women and physician <sup>[3]</sup>. An induced abortion is the deliberate interruption of pregnancy by artificially inducing less of

### Correspondence

**Krishna Kumar**  
Assistant Professor, NUSRL,  
Ranchi, Jharkhand, India

<sup>1</sup> Webster's New Dictionary and Thesaurus, DS-Max Inc.

<sup>2</sup> Edwar Lawson, Encyclopedia of the USA 2000 Human Rights

<sup>3</sup> S. Chandrashekar, Abortion in crowded world 1, (George Allen & Wnwin, Ltd. London, 1979)

the foetus. The legality of an induced abortion depends on the particular law in force in a country. In some countries only a therapeutic abortion carried out to save the life of mother, is legal. In some other countries an induced abortion may be permitted not only to safe-guard the mothers physical and mental health but also on humanitarian, demographic, economic, eugenic and social ground <sup>[4]</sup>.

Debate centering around the morality and public policy of abortion invariably galvanizes the public discourse. Those who discussed the morality of abortion can be divided into two groups <sup>[5]</sup>.

- i) Restrictive or conservatives, or pro-life.
- ii) Permissive or liberals or pro-choice

Restrictive regard fetus as full moral person from the very early conception, henceforth, entitled to moral protection that post-fetal person enjoys. Permissive recognizes the female equality which requires acknowledgement of substantive reproductive rights including women right to decide whether or not her pregnancy will be brought to terms. Permissive focuses more on the issue of personal autonomy or self-determination. According to them foetus lacks psychological and effective properties that is essential to moral personhood permissive regards the fetus as less a person than pregnant woman. They held the view, that although abortion involves the termination of foetal life, it does not involve the killing of full moral person. Article 3 of universal declaration of human rights <sup>[6]</sup>, and article 6 (1) of the International Covenant on civil and Political Right <sup>[7]</sup> speaks for protection of the life of unborn child, without mentioning of the phrase 'from the moment of conception'. Thus even these international declaration and convention do implicitly evince the predilection towards the permissible abortion. Since they do not vouch for the notion of life from the moment of conception.

Human dignity is closely linked with control over reproduction and sexuality. Human dignity has implications as to how human being ought to be treated. The principle of dignity of person as understood in contemporary human rights law enables individual to realize a chosen life i.e. to be free to make decisions about one's reproductive destiny without coercion from the government. Against this background access to legal abortion has been considered to be of immense importance to women, as how reproduction is managed and controlled is inseparable from how women are managed and controlled <sup>[8]</sup>. Abortion is an issue that fundamentally affects the life, the well being of women and condition of her social status. Thus, the welfare of woman can be used as justification for their legal right to abortion. Women must decide on procreation matters, they will then be aware of benefit regarding their health education or employment and their role in family and public life.

### Right to Privacy an Overview

An inherent right to every individual is right to privacy. It is a violable human right that is carved out from right to life. The quest for privacy is natural instant of human being. Individual erects some indivisible boundaries of seclusion

and he loves to live in such confined domain where individuality grows without any external interference. This right to privacy needs to be safeguarded against wrongful intrusion into person's private activities by other individual or government. It is virtually impossible to define 'privacy' in strict legal terms. It varies with time, the historical context, the state of culture and prevailing judicial philosophy. Privacy is sometimes related to anonymity, wish to remain unnoticed or unidentified in public realm. In the words of Edward Shils, 'privacy is the rightful claim of individual to determine the context to which he wishes to share himself with others and his control over time, place and circumstance to communicate with others <sup>[9]</sup>. He emphasised upon self-confinement and dissemination of selective information.

The concept of privacy has been intertwined with itself the three broad concept i.e. intimacy, identity, and autonomy which are the basic amenities of any individual in any society <sup>[10]</sup>. Privacy thus comprised or contains these vital inherent aspects of human life. In an attempt to draw the relationship between privacy and autonomy, Raymond Wacks says, 'when privacy embraces some aspect of autonomy, it is defined as control over intimacies of personal identity. Privacy is considered to be the measure of the extent to which an individual is afforded the social and legal space to develop the emotions, cognitive, spiritual and moral power of an autonomous agent <sup>[11]</sup>. The need for respect of this as right brings forth the idea of cult of privacy for bringing unbridled individualism <sup>[12]</sup>. For such protection requires the parliament and court not only to remain neutral but also to play supportive role. Neutrality of state and court is expected to avert the marital injury one suffers due to unnecessary intrusion into private domain. To put it differently law has recognised the spiritual and intellectual needs of man, the intensity and complexity of life, attendant upon advancing civilization have rendered necessary some retreat from the world and man under the refining influence of culture has become more sensitive to publicity so that solitude and privacy have become more essential to individual and invasion upon his privacy, subjected him to mental pain and distress for greater than could be inflicted by mere bodily injury <sup>[13]</sup>. Such mental pain could adversely affect the holistic growth of a personality. Certain aspect of an individual's personality is sub-divided into series of layers out of which inner layer prescribes the ultimate secret, hopes and aspiration of one's life. Against these backdrop law of privacy was evolved to protect such emotion. Any interference in one's emotional life would strictly be an intrusion upon a person's solitude and seclusion.

There is fundamental belief that under the privacy law every person has right to strict his private life, unless it is repugnant to any moral, public or legal norm. The right also encompasses right to make choices and decisions.

<sup>4</sup> Ibid.

<sup>5</sup> Lawrence C Becker and Charlotte B Becker, 'Encyclopedia of ethics 1381, (Ganland Publishing, New York).

<sup>6</sup> Hereinafter UNDHR

<sup>7</sup> Hereinafter ICCPR

<sup>8</sup> S Atkin and B.Hoggest, Women and Law 83, (Oxford University, Press, New York 1984.)

<sup>9</sup> Edward Shils, "Privacy: Its constitution and vicissitudes", Law and contemporary problems 31, vol. 2 (spring publication New York 1966)

<sup>10</sup> Samuel Dworkin and Louis D Brandies "'The right to privacy'", (1980) 4 Harvard law Review, 133.

<sup>11</sup> Raymond Wacks, "The Poverty of Privacy", 96 London Quarterly review 1873.

<sup>12</sup> How Arndt "'The cult of privacy" XXXI: 3 Australian Quarterly 69 (September 1949)

<sup>13</sup> Raymond Wacks 'The Protection of Privacy (Sweet and Maxwell, London 1580)

The right to make choices under privacy was decided by Supreme court of United States in the landmark case *Grishold V. Connecticut* <sup>[14]</sup>, in which court ruled that constitution protects right to privacy. The case challenged a Connecticut law that prohibited the use of contraceptives the supreme court invalidated the law on the ground that it violated the right to marital privacy.

Seven years after *Griswold* the United States Supreme court expanded the right to privacy in *Eisen Stadt vs. Baird* <sup>[15]</sup>. In this case Baird was convicted under a Massachusetts law prohibiting distribution of contraceptive to unmarried person. The court followed an equal protection approach and held that the statutory distinction between married and unmarried person violated equal protection. Court extended the protection of right to privacy to all individual regard less of marital status. The court observed, 'It is true right to privacy in question inherent in marital relationship. If right of privacy means anything it is right of individual, married or single to be free from unwarranted governmental intrusion into matter so fundamentally affecting a person as the decision whether to bear or beget a child <sup>[16]</sup>. Thus right to privacy was given broader connotation by court in United States, in number of cases <sup>[17]</sup>.

### Right to Privacy in India

Right to privacy has been carved out from the provision of Article 21. Extensive interpretation of personal liberty led, 'right to privacy' as its tangential off shoot. There is plethora of cases in India where right to privacy was taken into consideration. In landmark judgment of Kharag Singh's case <sup>[18]</sup>. The Article 21 of the Constitution was given wider interpretation to include right to privacy as a part of the right to protection of life and liberty, again the issue of right to privacy came before court in Govind's case <sup>[19]</sup>. In *People's Union for civil liberties V. Union of India and others* <sup>[20]</sup>, telephone tapping was seen as the infringement of right of privacy.

In *R. Rajagopal Alia R.R. Gopal Vs. State of Tamil Nadu* <sup>[21]</sup>. Jeevan Reddy J. speaking for the court observed that in recent times right to privacy has acquired constitutional status. The right to privacy is implicit in the right to life and liberty guaranteed to the citizen of this country by article 21. It is a 'right to be let alone'. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood child – bearing education among other matters <sup>[22]</sup>. In *State of Punjab vs. Ramdev Singh* <sup>[23]</sup> court observed sexual violence apart from being a dehumanizing act is an unlawful intrusion on the right to privacy and sanctity of female. In *Radha vs. state of UP* <sup>[24]</sup>. The court held that even prostitutes are entitled to live a life of dignity under the right to privacy. Any law interfering with personal liberty of a person must satisfy triple text <sup>[25]</sup> i.e.

- i) It must prescribe a procedure
- ii) The procedure must withstand the test of one–or more fundamental rights conferred under Article 19 which may be applicable in given situation.
- iii) It must be liable to be tested with reference to Article 14 of constitution Intrusion of Privacy <sup>[26]</sup> may be by
  - Legislative provision
  - Administrative/Executive order
  - Judicial Order

So, to say the intrusion (legislative, administrative, judicial), must be tested on the touch stone of reasonableness as guaranteed by the constitution. Hence, relaying on the plethora of judicial pronouncements, the right to privacy by itself has not been identified under constitution, as a concept it is too broad and moralistic to define, whether right to privacy has been infringed in a given case would depend on the fact of the said case and the court can determine the proportionality of intrusion vis-à-vis the purpose sought to be achieved. Status of women is in exclusively linked with her sexuality and reproductive rights, the state intrusion into their life can be analysed vis-à-vis its affect on their status, educational level, and position in family and finally their right to privacy.

### Right of privacy vis-à-vis law of Abortion

Law of abortion and privacy are not exclusive but mutually intertwined. With the vast expansion of concept of personal liberty, the right to privacy has also been accepted to be comprised therein. Right to privacy would include the right to or not to bear or beget a child, the right to be or not to be a parent, the right to use or not to use contraceptive. The right accordingly has been held to include the right to stoppage of motherhood in transit, i.e. to right to terminate the pregnancy prematurely by aborting the foetus. The grant of the right to personal liberty of a women includes her right to terminate pregnancy depend on whether or not, the exercise of such right would affect the right to life of unborn child. The answer to this question would obviously depend on the answer to the following question.

- i) Whether or not unborn child is person within the meaning of life or liberty clause in Article 21 <sup>[27]</sup>.
- ii) Whether or not the life begins, because some believe that life begins immediately after the conceiving and some believe life begins only after completion of first trimesters.

Hence these are the few questions which imposes restrain upon the right to privacy vis-à-vis abortion.

So far as the right of women over her body is concerned, the views expressed by leading liberal feminists, Wendy Williams <sup>[28]</sup>, who prefers equal differential treatment of women on the ground that the treatment results in more inequality. After analysing the law relating to pregnancy she concludes that there are two choices available to women to claim equality either on the ground of similarity to men or to seek special treatment on the basis of their essential difference. Hence the conflict between right of women and

<sup>14</sup> 381 U.S. 479 (1985)

<sup>15</sup> 405 US 438 (1972)

<sup>16</sup> Id at 448

<sup>17</sup> *Munn V. Illinois* (1876) 44 US 113, 143, *Woolf v. Colorado* (1948) 338 US 25.

<sup>18</sup> AIR 1963 SC 1295.

<sup>19</sup> AIR 1975 SC 1378.

<sup>20</sup> Writ Petition (C) No. 256 of 1931.

<sup>21</sup> AIR 1994 SCW 4420.

<sup>22</sup> Id at 4424.

<sup>23</sup> (204) I SSC 421

<sup>24</sup> AIR 2004 NOC 19 (ALL)

<sup>25</sup> *Registrar and Collector V. Canara Bank SSC* 524.

<sup>26</sup> Id.at 525.

<sup>27</sup> Under section 15 of Hindu succession Act 1956; the right of urban is recognised, the penal provision of Indian Penal Code 1860 under section 312-16 protects the interest of unborn.

<sup>28</sup> W. Williams, 'The Equality crisis: some reflection on culture, court and feminism, (Oxford University Press, London, 2004)

life of foetus will remain in discourse of feminist. Low status of women, cultural barrier hinders the recognition of abortion as a part of women's right. Some countries of the world have adopted more liberal law that allowed abortion when requested by concerned women, before completion of ten weeks their pregnancy. Countries like Austria, Canada, China, Cuba, Denmark, South Africa, Portugal have liberal approach while framing law of abortion to greater extent they permit abortion on demand. It is quite unfortunate that right to help with planning and prevailing the birth of a child has been denied to women. Sooner this right was recognized and United State became the leading nation to give recognition to such right.

In United States the supreme court has cited right to privacy in several rulings protecting access to sexual health care, most notably in *Roe v. Wade* <sup>[29]</sup> where the court ruled that women's choice to have an abortion was protected as private decision between her and doctor. Hence, women's choice to have an abortion during first two trimester of pregnancy was recognised by court. It was held that several constitutional provision are violated by the Texas state law prohibiting abortion. The US supreme Court struck down all laws in every state that in any way had protected the lives of unborn child. It created a new, basic constitutional right of women in the right to privacy which supreme court had created in *Griswold* <sup>[30]</sup> case. Now it was held, that ambit of right to privacy was expanded enough to encompass a women's right to terminate her pregnancy. In June 1992, the US supreme court in *Planned parent hood of south east Pennsylvania vs. Casey* <sup>[31]</sup> court reversed its own decision. It ruled certain reasonable regulations of abortion could be enacted. It clearly reaffirmed *Roe's* judgement, in doing so slight modification was done, it rejected the trimester scheme and spoke to a dividing line at viability.

The Indian judiciary as per its wont plays a crucial role in giving recognition to right of privacy a constitutional status with in Article 21. But the Bombay High Court was confronted with a peculiar situation where right to privacy was in question over the statutory provisions in *Nikita Mehta v. State of Bombay* <sup>[32]</sup> Court averted the contentious issue, it remained committed to the statutory provisions of law while delivering the judgements. Right to privacy was always in question before judiciary. The concept of privacy differs from nation to nation in terms of impact and culture on interpersonal relations. Indeed, the law of nation reflects and recognizes its fundamental norms. Obviously the right to privacy has been developing in many countries of the world to meet the needs to protect the individual from unreasonable intrusion into area of intimate concern. The affirmation of fundamental human rights by UNDHR adopted by General Assembly of United Nation in December 1948, has motivated dependent states to guarantee fundamental rights in their constitutions, among other fundamental human rights, the UNDHR guaranteed the right to privacy.

### Law of Abortion in India: A critical Analysis

The Indian Penal Code <sup>[33]</sup> 1860, keeping in view the religious, moral, social and ethical back-ground of Indian

community, made induced abortion a criminal offence under section 312 to 316 of the code.

Section 312 reads: Causing miscarriage – whoever voluntarily causes a women with child to miscarry shall, if such miscarriage be not caused in good faith for the purpose of saving the life the woman, be punished with imprisonment of either description for a term which may extend to three years or with fine or with both; and if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine explanation – a woman who causes herself to miscarry, is within the meaning of this section.

Section 312 of code permits abortion only on therapeutic ground in order to protect the life of mother. In *Rex V Bourme* <sup>[34]</sup> a girl under fifteen became pregnant as she was criminally assaulted in the most revolting circumstances. A gynecologist who terminated the pregnancy was charged under section 58 of the offence against the person Act 1861 <sup>[35]</sup> for causing abortion against law. Justice Macnaghten observed that if the operation was done bonafide to save the life of the mother, the defendant was entitled to an acquittal, that the bonafide object of avoiding physical a mental breakdown of the mother will afford a excuse, that if a doctor in good faith thinks it necessary for the purpose of preserving the life of the mother, not only is be entitled to perform the operation but it is his duty to do so. The jury gave the verdict of acquittal. The judgement of this case was path breaking in buttressing the cause of legal abortion. The legal provisions prevalent prior to the passing of Medical Termination of Pregnancy Act <sup>[36]</sup> 1971 was very strict. These strict provisions were honoured more in breach than in observance. A survey of 208 countries by International Planned paranthood Federation in 1971 revealed, that more than fifty-five million women terminated their pregnancies legal a illegal giving a rate of 40 abortions per hundred live-birth an a world-wide basis. The corresponding induced abortion, for India estimated to be 4 to 6 million per – year <sup>[37]</sup>. Before the enactment of there were more than three millions of illegal abortion were carried out, interestingly not even one percent prosecution and successful convictions have been taken no far <sup>[38]</sup>.

It is said approximately one-seventh of women who become pregnant in India every year resort to back-street abortion in the hands of inexperienced and unqualified persons as quacks. The rigidity of legal provisions in seeking abortions was responsible to great extent for crimes as suicide by pregnant mothers, infanticides, abandonment of and cruelty to children. Hence the provision relating to abortions contains in section 312 to 316 of codes has been in existence in the statue book for more than a century but were hardly effective to curb the menace of illegal abortion killing innocent women.

The enlighten public opinion of doctors, social workers and social scientists advocated for reform in abortion law. The response of government of India was quite passive rational behind this was imminent fear of firm opposition by fanatics

<sup>34</sup> (1938) 3AII E.R. 615 at 621.

<sup>35</sup> Section 58 makes an attempt to procure abortion by administering drugs or using instrument to procure abortion

<sup>36</sup> Hereinafter as MTPA.

<sup>37</sup> K.P. Bahadur, Population crisis in India 165-169 (1977).

<sup>38</sup> N.R. Madhava Menon "Population policy, Law enforcement and Liberalisation of Abortion: A Socio-Legal Inquiry into the implementation of the Abortion law in India", 16 JILI 626.

<sup>29</sup> 410 US 113 (1973)

<sup>30</sup> Supra at 14

<sup>31</sup> 744 US 902 (1992)

<sup>32</sup> Civil appeal NO. 5845/2009.

<sup>33</sup> Hereinafter referred as the code

and conservative religious leaders against any move to liberalise the existing abortion provisions. Religion in traditionally bound and conservative society play dominant role and commands a major influence upon the social developments and value orientation of mothers.

The government of India was much concerned with unprecedented rise in population. The population increase has adversely affected the economic growth of country thereby checking the pace of development. Against these backdrops the government of India in 1964 constituted a committee under the chairmanship of Shantilal Shah to study the question of liberalisation of then existing law of abortion.

After careful study of entire issue and taking a pragmatic approach of socio-legal problem involved in cases of unwanted pregnancies. It is observed that whatever may be the moral and ethical feelings that are proposed by society as a whole on the question of induced abortion, it is incontrovertible fact that a number of mothers are prepared to risk their lives by undergoing an illegal abortion rather than carrying that particular child to terms. The committee submitted a comprehensive report suggesting various situations justifying termination of pregnancy under law. The government of India accepted the recommendation of the committee and brought forth in 1970 in Parliament the Medical Termination of Pregnancy Bill, which eventually passed in August 1971.

The medical termination of Pregnancy Act <sup>[39]</sup> 1971 is modeled on the British (law of) Abortion Act of 1968. It is important to note that though the idea of liberalising the strict law of abortion came from the family planners the government while introducing the bill in Parliament, cautiously denied its having any connection with family planning so as to avoid opposition from conservatives. As per the official statements the Act envisaged following objectives: <sup>[40]</sup>

Pregnancy is permitted on following grounds:

- Humanitarian grounds, such as when pregnancy is caused as a result of a sex crime a inter-course with a lunatic women.
- Health Measures, when there is danger to the life or risk to physical or mental health of the women.
- Eugenic grounds when then is a substantial risk that the child if born would suffer from deformities and diseases.

India is one of the few countries in the world to legalise abortion by passing the MTP Act in 1972. Though the abortions are legalised in India yet the right to abortion is not recognised in absolute terms. As we discussed earlier autonomy and independence of women is related to her ability to decide for herself whether she bear and rear the child or not. The act confers on the women the right to privacy in restricted and regulated manner.

### Grounds of termination of pregnancy

Section 3 of the Act, which is the operative part, lays down the conditions under which a pregnancy may be terminated by registered medical practitioners. This section is modified version of the strict provisions of the law of abortion contained under section 312 of code permitting abortion in number of situations. The section *inter-alia*, envisages that

termination of pregnancy by registered practitioners <sup>[41]</sup> is not an offence if pregnancy involves.

- i. A risk to the life of a pregnant woman
- ii. A risk of grave injury to her physical or mental health
- iii. If pregnancy is caused by rape
- iv. There exist a substantial risk that, if child were born, it would suffer from some physical or mental abnormalities so as to be seriously handicapped.
- v. Failure of any device a method used by the married couple for the purpose of limiting the number of children;
- vi. Risk to the health of pregnant common by reason of her actual or reasonably foreseeable environment.

The Act envisages that the permission for termination of pregnancy within twelve weeks require the opinion formed in good faith by one registered medical practitioner but when the pregnancy exceeds twelve weeks but does not exceed twenty weeks then it requires the opinion of not less than two registered medical practitioner <sup>[42]</sup>.

Section 4 prescribes that the termination of pregnancy must take place according to the provision of the Act and, it must be performed in (i) a hospital established a maintained by the government; (ii) a place for the time being approved for the purpose of the Act by the government. In case of emergency where the termination of pregnancy is according to medical opinion, immediately necessary to save life of the pregnant women literal compliance of the provisions of the Sub-section (2) of section 3 and section 4 would not apply <sup>[43]</sup>. Section 6 of the Act empowers the Central government to make rules to carry out the provisions of the Act for its implementation. Section 7 (3) of the Act made by the governmental in respect of implementation of the Act punishable with fine which many extend up to one thousand rupees.

Thus the MTPA approves of abortions only under certain circumstances/condition, it can be seen as fairly liberal enactment. The medical practitioner can take into account the pregnant woman's actual or reasonable foreseeable environment in order to determine whether the continuance of the pregnancy would involve a risk to the life of the pregnant woman a of grave injury to her physical or mental health. In theory, the law recognises women's right, as the medical practitioner has to consider only the women's environment. The matter is thus purely between the doctor and women, under the law the consent of husband becomes immaterial. In reality however a women's right to abortion is very restricted and in most of the cases it is invariably family's decision. However, legally even though the women has an unrestricted right under the statue, various decisions <sup>[44]</sup> have held that aborting foetus without the consent of husband would amount to cruelty under section 13 (1) (ia) of Hindu Marriage Act, and hence ground for divorce. Court have thus chosen to restrict the right so conferred under the Act; and tend to view abortion from patriarchal perspective. The myopic view of judiciary in the recent cases evinces a total role – reversal, in cases of *Nand Kishore Sharma V. Union of India* <sup>[45]</sup>, the court had to decide the validity of the

<sup>41</sup> See MTPA 1971 S.3.

<sup>42</sup> Section 2 (a), 2 (b) of MTPA 1971

<sup>43</sup> Section 5 of MTPA 1971

<sup>44</sup> *Satya v Sri ram* AIR 1983 Punjab & Haryana P. 252 *Shushil Kumar Varma V. Usha* AIR 1987 Delhi p. 6.

<sup>45</sup> 2005 INDLAW RAJ 142.

<sup>39</sup> Herein after as MTPA

<sup>40</sup> Statement of object of MTPA 1971

MTPA. It was argued that the particular section 3 (2) (a) and (b) and explanation I and II of section 3 of the Act as being unethical and violative of Article 21 of constitution of India. The court in the case had to determine when the foetus comes to life and hence if his right to life is violated by the said provisions. The court in this case refused to comment on the attribution of status of a 'person' to the fetus, however it declared that the Act is valid. Apex court in *Suchita Srivastava and others v. Chandigarh administration* [46], interpreted the abortion law with respect to personal autonomy. For an abortion, though the guardian's consent is required in case of minor's pregnancy, but consent of pregnant mother is of utmost importance and it should be taken into consideration [47] Abortion is thus perfectly legal in India, and the legislation does not rise any moral or religious issue. MTPA even does not confer or recognise any right to perform an abortion or terminate pregnancy. Even the pregnant women cannot terminate the pregnancy except under certain circumstance mentioned in the Act. MTPA is not outrightly enabling rather it is regulatory in nature. The general spirit of the Act appears to be that of controlling than facilitating abortion services. Though the abortion law allows for termination of pregnancy for a wide range of reason construed to affect the mental and physical health of the women, it remains with the doctor and not the women to opine in good faith, the need for termination. The MTPA permits women seek legal termination of an unwanted pregnancy for a wide range of reason, the clause about contraceptive failure applies only to married women. This discrepancy needs to be corrected. The abortion policy allows for monitoring of quality of abortion case in private sector its recognition of all public health institutions as abortion facilities by default exempts the public sector from certification. This default recognition raises a potential moral hazard as they are not constrained to adhere to the physical standards and quality of abortion care expected of private sector.

It does not specify the measures or redress mechanisms if certification procedures are not completed with in the stipulated time frame-work. MTPA defines person and place requirement, but don't refer to any national or international technical guidelines for safe abortion care. The scope of abortion policy needs to be broad enough to internalise emerging advances in reproductive technology and newer practice within legal framework. The Act ensures the confidentiality and anonymity in provision of safe abortion services. However there is not guidelines for ensuring the privacy and dignity of the woman.

Policy need to clearly demarcate the purpose and domain of the Pre-Natal Detection Test Act [48] (1994) and MTPA. The PNDT Act and MTPA don't conflict or contradict but co-exist. The belief that restrictive abortion policy will prevent sex-selective abortion is unfounded. Policies needs to ensure that measures for preventing sex-selective do not affect access to safe-abortion care for genuine abortion seekers. Public-private partnerships in the areas of policy formulation research, training and practice and strengthening of safe-abortion care needs to be promoted.

<sup>46</sup> Civil appeal No. 5845 of 2009.

<sup>47</sup> V. Krishnan v. G Rajan, H.C. M.P. No. 264 of 1993.

<sup>48</sup> Hereinafter PNDT

## Conclusion

If abortion is not allowed on demand, then the alternative available to women is to either carry it or look for illegal abortion. The former is less preferred than latter. In case if she carries the foetus to term, after giving birth to the child she may abandon the new born child, ultimately creating a new burden for the society. In society lesser evil is promoted in the larger societal interest. Here comes the law as supreme saviour, it must be pragmatic and generally acceptable to the useful part of society. Laws on sexual practices are quite often least realistic, the most restrictive and considered least necessary for proper functioning of society. Very few countries refer to reproductive rights on equal footing with constitutional rights even though they are vital to women as an individual as well as group. Countries across the world today are witnessing plethora of cases with reproductive issue as abortion, but are not specifically denominated. These are preferably categorised as criminal offence a bracketed under any strict regulatory measures, in such circumstances the 'women' resort to more generalised right to challenge their constitutionality. In the absence of abortion rights, women are forced to turn to a broad and diverse range of rights to sustain women's entitlement to control their own bodies including security of person, liberty, equality, privacy, free development of one's personality, physical integrity, human dignity and freedom of thought and belief. The alternative rights conceptualising 'abortion claims' brings forth more question than solutions. These are how successfully abortion claim would be addressed in garb of certain alternative rights.

What consequences they have for women's reproductive right?

What is the proper justification for such conceptual arrangements?

These are the few quarries which will often look for its appropriate answers.

## References

1. Chnadrsekhar S. Abortion in crowded world, George Allen and Unwin Ltd. London. 1974.
2. Daniel Callahan. Abortion: Law Choice and Morality, Collier-MacMillan Ltd. London, 1970.
3. Ronald Dworkin. Life's Dominion, Vintage Books, New York, 1993.
4. Nivedita Menon. Recovering Subversion Feminist Politics beyond law, University of Illinios Press, Chicago, 2007.
5. Mason JK, Mecall Smith RA. Butter warths Medico legal for Encyclopaedia, J.K. Butter wroth and Company Publishers Ltd; London, 1987.
6. Peter Cane, Joanne Conaghar. The new Oxford Companion of Law, Oxford University Press, London, 2005.
7. Peter Cane, Mark Tushret. The Oxford Hand Book of legal studies, Oxford University Press, London, 2003.
8. Mccall RA, Smith Masav JK. Law of Medical ethics, Butter worth and Co. Publisher, London, 1991.
9. Jaiswal. Legal Aspect of Pregnancy, delivery and abortion, Eastern Book Company, Lucknow 2009.
10. Singh SK, Raizade RK. Abortion law in India past and present, Chandigarh: Family Planning Association of India, 1976.
11. Chida nanda Reddy. Restoring Sanctity of life, 6 Lex ET Juris, 1990, 32.

12. Geeta Ramasehan. Abortions are not for Asking, 9 Lawyer's collective, 1994, 26.
13. Gaur KD. Abortion and the law in countries of Indian sub-continent, Asean Region, UK, and USA, 37 JILI, 1995.
14. Sheldon Leader. The right to privacy, the enforcement of Morals and judicial function an argument", 43 Current legal problems 1990.
15. Margaret Bsaiier, Liberty, Responsibility and Maternity, 52 curent legal problem, 1993.
16. David Feldonn. Secrecy, Dignity, a Autonomy views of privacy as a civil liberty. 47 current legal problems, 1994.
17. The Medical Termination of Pregnancy Act-Act NO. 34 of, 1971.
18. Prenatal Detection Test Act, 1994.
19. Lok Sabha debates, 5<sup>th</sup> series, 7:160-2.