

NEED TO RAISE VOICE FOR THE FREEDOM OF RAPE VICTIM TO TERMINATE PREGNANCY

By: Dr. Rakhi Singh Chouhan, Associate Professor
Amity School of Law, Amity University, Gwalior

Abstract

Earlier the right to abortion was not permitted and it was strongly opposed by the society. The termination of pregnancy was termed to be a murder of the fetus. But due to the change in time and technology, nowadays this right has been legally sanctioned by most of the nations after the famous decision of Roe Vs Wade by the US Supreme Court. But the oppositions are still present and people do believe that it should be legally prohibited.

It is admirable that India was one of the first countries in world to legalize abortion to encourage family planning and population control. Well, to the extent it is to safeguard the girl child, that is a noble intent; but women who discover abnormalities or develop complications later in the pregnancy and rape victims, particularly underage ones, end up bearing the brunt of it. And because the Medical Termination Act 1971 is very much outdated and doesn't consider these eventualities, women are forced to move court in these circumstances. And in case of rape victims, this long court procedure and slow legal machinery makes it medically dangerous to safely terminate the pregnancy

LEGAL PERSPECTIVE

MEDICAL TERMINATION ACT 1971

The legality argument is impractical because the law is clear. In India, under the MTP Act, abortion is a *qualified* right. An abortion can't be performed based solely on a woman's request. And it can only be performed by a registered medical practitioner before 12 weeks of pregnancy. In case the woman had been pregnant for more than 12 weeks – but for less than 20 weeks – the opinions of two medical practitioners are required.

However, the underlying condition remains: an abortion is permitted only if continuing the pregnancy poses a 'substantial risk' to the woman's life or to her 'physical or mental health'. Alternatively, if the child that is yet to be born faces similar substantial risk – in that it would suffer from 'physical or mental abnormalities' or may be 'seriously handicapped' – an abortion may be allowed.

In case of pregnancies caused by rape, or a failure of birth control (for married women), the risk to their mental health is admissible grounds for abortion. The premise of keeping the window for abortion open only until 20 weeks is that, generally, abnormalities can be detected by that time.

However, some rare congenital diseases can be detected only after 20 weeks; this can potentially put both the lives of the mother and the child at risk.

Considering the lack of governmental support for persons with disabilities, the argument for the foetus's right to life needs to be rethought. Complications can drastically affect the child's lifespan and quality of life. The state's control should be minimal, as it is the woman and her family who will be responsible for taking care of the child. Moreover, the socio-economic conditions prevalent in India do not always promise a 'dignified life' for the child. Therefore, without legal recourse, pregnant women who find themselves in difficult situations may opt for illegal abortions. This can lead to infections and even death. As per MTP Act, the legally permissible limit of abortion is 20 weeks of pregnancy. There are number of reasons that rape victim doesn't even come to know that she has conceived specially in case of minors. Having a baby out of rape is no one's choice. And the effects of having such baby even are not very positive in Indian society. There has been a spate of several such cases at the Supreme Court level seeking directions to terminate pregnancy that are outcome of rape. The MTP Act sets conditions under which a doctor can provide abortion services, and pregnancy as an outcome of rape is one of them. The gestational age limit for providing MTP has been set at 20 weeks as per Section 3 and Section 4 of the MTP Act.

It is important to note that the MTP Act in itself does not ask for the opinion of any medical board for applying sections of the law, including Section 5, but empowers the treating doctor to take a decision in the best interest of the survivor. In fact, the opinions provided by medical boards in a number of cases in the past were well within the scope of the treating doctor and in keeping with their existing mandate of the MTP Act. The need is that Medical Board shall immediately comment on important factors like whether continuation of pregnancy pose any risk, the psychological impact of pregnancy on victim specially if she is a minor,

Criminal Procedure Code SECTION 357 (6)

'The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit.'

POCSOW Act

The registered medical practitioner rendering emergency medical care shall attend to the needs of the child, including –

- (i) Treatment for cuts, bruises, and other injuries including genital injuries, if any;
- (ii) Treatment for exposure to sexually transmitted diseases (STDs) including prophylaxis

For identified STDs;

(iii) Treatment for exposure to Human Immunodeficiency Virus (HIV), including prophylaxis for HIV after necessary consultation with infectious disease experts;

(iv) Possible pregnancy and emergency contraceptives should be discussed with the pubertal child and her parent or any other person in whom the child has trust and confidence; and,

(v) Wherever necessary, a referral or consultation for mental or psychological health or other counselling should be made.

IPC - SECTION 166B - Punishment for non-treatment of victim

Whoever, being in charge of a hospital, public or private, whether run by the Central Government, the State Government, local bodies or any other person, contravenes the provisions of section 357C of the Code of Criminal Procedure, 1973 (2 of 1974), shall be punished with imprisonment for a term which may extend to one year or with fine or with both.

Although recent amendments to the rape laws have made it mandatory for all hospitals to provide immediate treatment to survivors of rape. An abortion is an essential element of such care. The recent amendments to the rape laws – Section 357C CrPC and Rule 5 of the Protection of Children from Sexual Offences Act – make it mandatory for all public and private hospitals to provide immediate treatment to rape survivors. Abortion, therefore, is an essential element of this immediate treatment. However, law enforcement authorities have not questioned the denial of such treatment by first-contact doctors. The continuation of pregnancy prolongs the trauma of a rape survivor and also impedes her path to recovery. To ask a rape survivor to continue with a pregnancy and suggest giving the child up for adoption is inflicting grave injury to the survivor's physical and mental health. Not treating a rape survivor is punishable under Section 166B of the Indian Penal Code. However, as per the MTP Act, there is no offence if a doctor denies an abortion. Doctors can be punished if they carry out an abortion if they are not registered medical practitioners or if they carry it out in a facility not approved as per the MTP Act.

CASES

The Indian supreme court has ruled that a 13-year-old rape victim in Mumbai who was left pregnant after the attack can have a termination. It follows a landmark ruling last month that said doctors should make greater effort to support victims of sexual assault regardless of the country's abortion laws.

On 25 August, the court ruled that precious time was lost, and added distress caused, to girls and their families when they were forced to bring their individual cases to court. Doctors have been criticised as being far too fearful when dealing with the victims of child rape.

The girl in Mumbai is eight months pregnant, but her condition was only discovered last month, when her parents took her to a doctor.

The court ruling was accompanied by an order instructing hospitals to establish a medical board to investigate and determine such cases, avoiding the need for legal hearings.

“The inference is clearly that the judges are saying that to decide these cases, they have to consult doctors for their opinion – so why can’t hospitals with doctors take the decision themselves?” said senior lawyer Indira Jaising, who welcomed the order but said its success would depend on effective implementation.

“The law as it stands isn’t understood properly by doctors. They are afraid to help victims for fear of criminal prosecution. But it is a given that a minor girl’s pregnancy is life-threatening because her body simply isn’t ready to give birth, so doctors don’t need to worry about interpretations of the law and don’t need court orders to carry out a termination.”

Police have arrested the girl’s father’s business partner on suspicion of rape. The parents tried to arrange an abortion but doctors told them it was illegal. India does not allow terminations after 20 weeks unless there is a threat to the mother’s life.

“They were absolutely shattered when I told them,” said the family’s GP, Dr Nikhil Datar in Mumbai. “She had been complaining of nausea, sleepiness, inability to concentrate and pain but they assumed the symptoms, along with her weight gain, were the result of some thyroid issue.

“They had no idea she could be pregnant. They didn’t want to tell her but it was my duty to inform the police and obviously, in the course of being questioned, she realised that she was pregnant,” Datar said.

After she was denied an abortion, the family went to the supreme court where, after hearing the opinion of doctors, judges said on Wednesday that the pregnancy could be terminated.

In July, the supreme court intervened in a similar case in Chandigarh, where the parents of a 10-year-old girl who had been raped by her uncle sought a termination. In this case, the court accepted medical opinion that the procedure would be too risky for such a young child so far into a pregnancy.

Doctors are worried that someone may challenge their decision to terminate and they are not prepared to take that risk

The girl has since given birth by caesarean section. She was not told she was pregnant. Her parents said to her that a stone in her stomach had to be removed. The baby was taken away for adoption.

But in May, the court allowed a 10-year-old rape victim in Haryana to abort her foetus at 21 weeks.

Sangeeta Rege of the Society for Nutrition, Education and Health Action, a Mumbai-based NGO that works with rape survivors, is critical of what she calls the “defensive practices” of doctors.

She said medics fear that if they perform abortions, they will be jailed under a law that says anyone who causes a woman to miscarry in bad faith, or for any other reason except to save her life, will be punished. Yet the clause on miscarriage only applies to women, not girls.

Rege said: “The silence of doctors on this is total. It is well within their power, under the law, to help minor girls and spare them the trauma of running around the courts – and don’t forget there are many who cannot afford to go to the courts – but refuse to do so out of baseless fears of prosecution.”

Datar echoed that view: “They are worried that someone may challenge their decision to terminate and they are not prepared to take that risk.”

The 13-year-old Mumbai girl will have her pregnancy terminated on Friday.

D. Rajeswari vs State Of Tamil Nadu And Others

The case, is of an unmarried girl of 18 years who is praying for issue of a direction to terminate the pregnancy of the child in her womb, on the ground that bearing the unwanted pregnancy of the child of three months made her to become mentally ill and the continuance of pregnancy has caused great anguish in her mind, which would result in a grave injury to her mental health, since the pregnancy was caused by rape. The Court granted the permission to terminate the pregnancy.

Dr. Nisha Malviya and Anr. Vs. State of M.P:

The accused had committed rape on minor girl aged about 12 years and made her pregnant. The allegations are that two other co-accused took this girl, and they terminated her pregnancy. So the charge on them is firstly causing miscarriage without consent of girl. The Court held all the three accused guilty of termination of pregnancy which was not consented by the mother or the girl.

Murari Mohan Koley vs The State 2003

In this case, a woman wanted to have abortion on the ground that she has a 6 months old daughter. She approached the petitioner for an abortion. And the petitioner agreed to it for a consideration. But somehow the condition of the woman worsened in the hospital and she was shifted to another hospital. But it resulted in her death. The abortion was not done.

The petitioner who was a registered medical practitioner had to establish that his action was done in good faith (includes omission as well) so that he can get exemption from any criminal liability under section 3 of the MTP Act, 1971.

Shri Bhagwan Katariya And Others vs State of M.P:

Abortion without mothers consent 2000.

The woman was married to Navneet. Applicants are younger brothers of said Navneet while Bhagwan Katariya was the father of said Navneet. After the complainant conceived pregnancy, the husband and the other family members took an exception to it, took her for abortion and without her consent got the abortion done.

The Court opined that if we refer Section 3 of the Medical Termination of Pregnancy Act, 1971, a doctor is entitled to terminate the pregnancy under particular circumstances and if the pregnancy was terminated in accordance with the provisions of law, it must be presumed that without the consent of the woman it could not be done. Present is a case where a permanent scar has been carved on the heart and soul of the woman by depriving her of her child. And the Doctor will be liable.

Thus, the case laws show that a woman has an absolute right to abortion and no one can take away this right from her. The Judiciary has been playing a vital role in securing these rights to women. Right to abortion is a fundamental right of privacy.

A woman has a right to abortion if:

The continuance of the pregnancy would involve risk to the life of the pregnant woman greater than if the pregnancy were terminated

The termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman

The continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman

The continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, or injury to the physical or mental health of any existing child of the family of the pregnant woman

There is substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Or in emergency, certified by the operating practitioner as immediately necessary: to save the life of the pregnant woman or to prevent grave permanent injury to the physical or mental health of the pregnant woman.

The first argument is of Bodily Sovereignty. Each woman has the sole right to make decisions about what happens to her body - no one should force her either to carry or terminate a pregnancy against her will.· Most abortions are carried out on the grounds of safeguarding the woman's mental health.

· Other are situations where abortions is done to safeguard the life of a fetus, as it would involve risk if pregnancy is carried, it might damage the fetus resulting in danger to the life of the mother.

· If abortion is banned, or just more restricted, we would return to the days of 'back-street abortions'. In the past this has been accompanied by wild claims of the risk to women's health from these procedures. The women resort to some unhygienic measures to abort the fetus.

· Act of performing an abortion to save the mother's life when occurs, however, the rationale is not that the fetus is seen to have less value than the mother, but that if no action is taken both will die. Aborting the fetus at least saves the mother's life.

· If suppose abortion is banned, a woman does not want to carry her pregnancy, she would carry it and then abandon the new born child. This would be more dangerous to the life of the baby. Thus, it is better to terminate the pregnancy at an earlier stage.

There is an urgent need to create more awareness about the right to healthcare for rape survivors. This requires doctors to build a strong opinion on access to safe abortions and work with the health ministry to issue directives in order to operationalise the right to treatment and to prevent the denial of such care to survivors of sexual violence. A rape victim need freedom in this regard. The situation of an ordinary woman and a rape victim shall be treated as two different cases. If traditional practice of law and practice will be followed in these cases, it will definitely infringe the right of a rape victim.

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