

# LEGALFOXES LAW TIMES

## PROTECTION OF THE RIGHTS OF RAPE VICTIMS UNDER THE MEDICAL TERMINATION OF PREGNANCY (MTP) ACT- AN ANALYSIS

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### **Abstract**

Rape is considered as most aggravated form of sexual offence which almost takes the life of the victim if she survives this brutal incident. It is an undesirable and sudden attack on right to life of a woman and the survivor of the incident of rape should be provided with best care so that the victim can overcome the mental as well as the physical trauma. Pregnancy as a result of rape is one of the worst nightmares that a woman can face in her lifetime and it is very obvious that no woman whether is a major or a minor girl child would ever want to keep a child if she is a victim of rape. But in India aborting a child was a punishable offence under the Indian Penal Code, 1860 for which often the women or her relatives opted for unsafe abortion in unregistered clinics which might take the life of the victim. To give relief to these survivors of rape the Medical Termination of Pregnancy Act was enacted in 1971 so that that unwanted pregnancies as a result of rape can be safely aborted legally through qualified medical practitioners. The judiciary of India has also played a significant role for protection of the rights of rape victims.

Keywords: Rape Victim, Women and Girl Child, Medical Termination of Pregnancy

### Introduction

The law relating to medical termination of pregnancy has developed in India since the adoption of the Medical Termination of Pregnancy Act, 1971. Prior to this enactment, the various laws relating to abortion and miscarriage were dealt with under the provisions of the Indian Penal Code, 1860(Sections 312, 313 and 314). There was total ban on the practice of abortion and there was no provision for abortion in exceptional circumstances also. Hence, we can say that there was no concept of legal abortion in India prior to the Medical Termination of Pregnancy Act, 1971.

If we consider the condition of a rape victim who subsequently becomes pregnant as a result of this brutal crime, then it is obvious that there is no option left with the victim or the family members, but to opt for unsafe abortion by unregistered medical practitioner. Moreover, unsafe abortion leads to high Maternal Mortality Rate (MMR), which indicates non availability of the required equipments and qualified medical practitioners for aborting the fetus.

To have a proper resolution of the matter concerning unsafe abortion, the Government of India has appointed Shantilal Shah Committee in 1964. Upon the recommendations passed by the Committee, the Medical Termination of Pregnancy (MTP) Act, 1971 was passed.<sup>1</sup>

### Salient features of the Medical Termination of Pregnancy Act, 1971

The MTP Act empowered the women by legalizing induced abortion in India under certain conditions.<sup>2</sup> This Act came into existence to ensure women's access to safe abortion services by bringing medical termination of pregnancy into institutional setting where adequate equipment, medical supplies and specially trained personnel are available to assist the women in the whole process of abortion. The MTP Act allows any government run hospital, certified private facility or registered medical practitioner in India to perform abortions until twenty weeks of pregnancy. Through this Act protection is also provided to medical practitioners who

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<sup>1</sup> Shivani Goswami" Female Foeticide in India" Vol.XXXIX (2) Indian Bar Review 24 (2012)

<sup>2</sup> ibid

otherwise will be penalized under the Indian Penal Code.<sup>3</sup>The MTP Act, 1971 legalizes abortion only in certain circumstances-

- a) Danger to life of the mother in child birth,
- b) If the child is at risk of being handicapped, or
- c) If the women has conceived the child as a result of rape.<sup>4</sup>

The Medical Termination of Pregnancy Act, 1971 was amended in 2002. Under Section 3(2) and subject to the provisions of sub section (4) of this Act, a registered medical practitioner can terminate a pregnancy,

- 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 practitioners are of opinion, formed in good faith, that
  - 1) The continuance of pregnancy would involve a risk to the life of the pregnant women or of grave injury to her physical or mental health; or
  - 2) There is substantial risk that if the child is born, it would suffer from such physical and mental disabilities as to be seriously handicapped.<sup>5</sup>

Under this Act no pregnancy can be terminated without the consent of the pregnant women and if the women is below the age of 20 years and if the pregnant women although has attained majority but mentally ill, consent of the guardian is necessary.<sup>6</sup>

Moreover, under the provisions of this Act, any pregnancy, which is carried out according to the provisions laid down by the MTP Act, 1971, will not be scrutinized or penalized under the IPC Sections relating to miscarriage.<sup>7</sup> But Section 5(2) also creates a specific act as an offence where an unregistered medical practitioner carries out the termination of pregnancy. Here the offence is penalized through the provisions of IPC. This clearly proves that any therapeutic expert who is not enrolled under the condition lay down by the MTP Act, 1971 have

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<sup>3</sup> ibid

<sup>4</sup> Tejswini Patil "Save Babies... Save Doctors" Volume XXXIX(4) Indian Bar Review 211 (2006)

<sup>5</sup> Dr. Manohar Agnani, Missing Girls, 135-136 (Books for Change, N-222 New Delhi, 2008)

<sup>6</sup> MTP Act, 1971 (Act No.34 of 1971), Section 3(4)

<sup>7</sup> id, Section 5(2)

clear chances to be punished under the IPC, if he or she performs any abortion. Similar is the case where the pregnant woman gets her abortion done through an unregistered Medical Practitioner is subject to criminal action under IPC.

On October 29, 2014, the Ministry of health and Family Welfare released a draft of MTP (Amendment) Bill 2014, which proposes changes that could initiate a shift in the focus of the Indian discourse from health care providers to women by including mid-level and non allopathic health care providers.<sup>8</sup> The bill proposes changes that clarify the legal status of medical and surgical abortions, and simultaneously attempt to improve the base of health care providers.<sup>9</sup>

Again in 2017 the Medical Termination of Pregnancy(Amendment) Bill, 2017 was introduced the bill intends to extend the permissible period of abortion from twenty weeks to twenty four weeks if doctors believe the pregnancy involves a substantial risk to the mother or the child or if there is substantial fetal abnormalities.<sup>10</sup>

Recently, on 24<sup>th</sup> September, 2021 the **Medical Termination of Pregnancy (MTP) (Amendment) Act, 2021 has been passed by the Parliament.** The amended Act seeks to extend the termination of pregnancy period from 20 weeks to 24 weeks, making it easier for women to safely and legally terminate an unwanted pregnancy.<sup>11</sup>

*The main features of the amended Act are-*

Firstly, the Bill proposes the requirement of the opinion of one registered medical practitioner (instead of two or more) for termination of pregnancy up to 20 weeks of gestation (fetal development period from the time of conception until birth).<sup>12</sup>

Secondly, it introduces the requirement of the opinion of two registered medical practitioners for termination of pregnancy of 20-24 weeks of gestation.<sup>13</sup>

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<sup>8</sup> Draft Medical Termination of Pregnancy (Amendment) Bill,2014.Available at <http://www.mohfy.nic.in/showfile.php?lid=2986> accessed on 6<sup>th</sup> September 2021

<sup>9</sup> ibid

<sup>10</sup> 164.100.24..219/billstext/rsbillstextMTP-4817.pdf accessed on 24/3/2020

<sup>11</sup> medical-termination-of-pregnancy-amendment-bill-2010, available at Drishtias.com/daily-updates/daily-news-editorial/ accessed on 24/3/2021

<sup>12</sup> supra, note 10

<sup>13</sup> ibid

Thirdly, it has also enhanced the gestation limit for ‘special categories’ of women which includes survivors of rape, victims of incest and other vulnerable women like differently-abled women and minors.<sup>14</sup>

Lastly, it also states that the “name and other particulars of a woman whose pregnancy has been terminated shall not be revealed”, except to a person authorized in any law that is currently in force.<sup>15</sup>

### **The Medical Termination of Pregnancy Rules 1975, amended in 2003**

For proper implementation of the Medical Termination of Pregnancy Act, 1971, first in 1975 rules were framed under the Act. These rules were amended in 2003. The main distinction between the original and amended rules under the Act is, under the amended version of the rules there is provision for composition of District Level Committee.<sup>16</sup> This Committee shall be constituted by one gynecologist/ surgeon or anesthetics from local medical professionals, nongovernmental organizations and Panchayati Raj provided that one member of the Committee should be a woman.<sup>17</sup> The tenure of the Committee shall be two years.<sup>18</sup>

There are altogether 10 rules under Medical Termination of Pregnancy Rules and these rules have provided for various functioning of the Committee. The Committee has the power to conduct proper investigation about the place in which the process for medical termination of pregnancy will be done.

According to rule 5, the government will not approve a place for medical termination unless the government is satisfied that the place is safe and all the termination of pregnancy is done under the supervision of qualified medical practitioner. Pregnancy can be terminated before 12 weeks of pregnancy if there are any anomalies as provided under the Act.<sup>19</sup>

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<sup>14</sup> *ibid*

<sup>15</sup> *supra*, note 11

<sup>16</sup> .Medical termination of Pregnancy Rules, 2003, rule 3

<sup>17</sup> *ibid*, rule 3(1)

<sup>18</sup> *id*, rule 3(2)

<sup>19</sup> Medical Termination of Pregnancy Rules, 2003, rule 5(ii)

Every application for approval of a place shall be made to the Chief Medical Officer of the District and the Officer after proper enquiry and if necessary after consulting the matter with the District Level Committee can approve a place for termination of pregnancy.<sup>20</sup>

If death occurs to a pregnant lady in a place approved by the Chief Medical Officer, he has power to seize any article, register, document and other necessary things which are needed for conducting proper enquiry.<sup>21</sup>

The Chief Medical Officer has power to cancel or suspend a certificate of approval if in his opinion, the required facilities as provided under rule 5 are not being properly maintained and the termination of pregnancy at such place cannot be made under safe and hygienic conditions.<sup>22</sup> The Chief Medical Officer shall make a report of the fact to the Committee giving the detail of the deficiencies or defects found at the place and the committee may, if it is satisfied, suspend or cancel the approval provided that the committee shall give an opportunity of making representation to the owner of the place before the certificate issued under rule 5 is cancelled.<sup>23</sup>

### **Analysis of the Medical Termination of Pregnancy Act and Rules**

#### **Positive aspects**

In order to understand the basis on which the MTP Act is premised, it is necessary to understand the two main driving forces behind the Act. Those factors were-

- Those who were proponents of family planning and population control and saw the legislation of abortion as a potential way of lowering the birth rate;<sup>24</sup>
- Those who were concerned with abortions being conducted by non-qualified, untrained and ill-equipped medical practitioners under unhygienic conditions and therefore were concerned with the health factor.<sup>25</sup>

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<sup>20</sup> id, rule 5(5) & (6)

<sup>21</sup> id, rule 6(2)

<sup>22</sup> id, rule 7(1)

<sup>23</sup> ibid

<sup>24</sup> Atreyee Benarjee "Female Foeticide and Medical Termination of Pregnancy Act, 1971-A Critical Evaluation" Volume3, July to September The All India High Court Cases 99(2006)

<sup>25</sup> S. Sudha & S.I.Ranjan "Female Demographic Disadvantages in India 1981-1991: Sex Selective Abortion and Female Infanticide" (Volume 30 No.3) Development and Change 106-114(1999, 3 July)

For the first time in India, the MTP Act has provided for a legal institutional basis through which unwanted pregnancy can be terminated if the special conditions under the Act are fulfilled. Because of this Act the rape victims and the differently abled women now can get rid of the fetus which was considered illegal before the commencement of this Act. This Act has reduced the possibility of unsafe abortions and hence contributed towards decrease in Maternal Mortality rate. The Act put emphasis on consent of the pregnant woman, which is a very welcoming step by the legislature as there are exceptional cases where the pregnant woman who is a rape victim and able to form a valid opinion regarding continuance of pregnancy, may want to continue the pregnancy. If it is so then the judiciary has to respect the decision of the rape victim and cannot force her for abortion. The judiciary of India can exercise wide discretionary power regarding termination of pregnancy under this Act. Here the opinions of the Committee constituted according to Medical Termination of Pregnancy rules are also given importance while taking any decision under this Act.

Along with Act, the rules which were initially framed in 1975 and amended in 2003 are providing a stringent implementation procedure to give full effect to the provisions of the MTP Act. As a wide range of powers are conferred upon the District Committee, the Committee can protect the rights of all women belonging to “special category” under the provisions of this Act. As through these rules registration has been made mandatory under this Act for performing abortion and other genetic treatment, the appropriate authority under this Act can keep a check upon the activities of these establishments and in case of violation, there is also provision for cancellation and suspension of registration certificate. Hence it can be assured that as far as possible the government is trying to protect the rights of every woman in the country.

If we analyze the recent Medical Termination of Pregnancy (Amendment) Act, 2021 we can find certain positive aspects which are-

A number of foetus abnormalities are detected after the 20<sup>th</sup> week, often turning pregnancy into an unwanted one. Through this amendment, after the expiry of the 20<sup>th</sup> week also, the woman can opt for termination of pregnancy.<sup>26</sup>

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<sup>26</sup> ibid

The law will help the rape victims, ill and under-age women to terminate the unwanted pregnancy lawfully.<sup>27</sup>

Significantly, the Bill also applies to unmarried women and therefore allowing unmarried women to medically terminate pregnancies and a provision to protect the privacy of the person seeking an abortion will preserve reproductive rights to the women.<sup>28</sup>

### *Negative aspects*

In India, a majority of the girl child has to face the evil consequences of female foeticide which is the contribution of the modern technological development regarding genetic treatment. Through this developed technology the sex of the fetus can be determined prior to its birth and if the fetus happen to be a female fetus, then there is every possibility of abortion of the fetus in the mother's womb itself. In India the cases regarding sex selective abortion got momentum from 1980 and after that there are lot instances of this practice, which adversely affected the male-female sex ratio of the country.

When the MTP Act was enacted, female foeticide was not considered as an issue at all, which justifies the fact that not a single section of the Act deals specifically and expressly with the problem.<sup>29</sup> The objective of the Act, as given at the onset of the Act itself, is essentially confined to the termination of certain pregnancies by registered medical practitioners and matters relating to identical nature. The clauses under the Act which may be misinterpreted by doctors or the parents are as follow-

Firstly, according to Section 3 of the Act, if atleast two medical practitioners are of the opinion formed in good faith, that the continuance of pregnancy would involve a risk to the life or grave injury to the mental and physical health of the pregnant woman as well as the child, the pregnancy can be terminated. Moreover, consent of the major women and in other cases consent of the guardian is needed. The concept of "good faith" is a very vague concept and no number of legislations can guarantee that a doctor is acting in good faith. Most of the doctors do not realize

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<sup>27</sup> supra, note24

<sup>28</sup> ibid

<sup>29</sup> ibid



that their patient's well being is their top priority and whatever they do is to be done for the maximum benefit of his patients, often do not act in good faith.<sup>30</sup>

Secondly, in case of crime of rape, women in India are raped by the outsiders as well as in the hands of family members and near relatives. However, very few cases dealing with the second category have been reported so far. Under such circumstances girls are often taken to shady hospitals, using unhygienic conditions to abort child. Sometimes a particular family may frame up such an incident in order to get a female fetus aborted.<sup>31</sup>

Thirdly, a couple already have a girl child and the women have conceived another female fetus, they may use this clause to get the fetus aborted as their action cannot be questioned by police authorities or doctors for it is exclusively their decision whether to increase their family or not.<sup>32</sup>

Fourthly, under this Act female foeticide was not declared as an offence. At that time, various sex selective techniques were not known to the people and that part was not dealt under this Act. This led to tremendous increase in the number of cases of female foeticide.<sup>33</sup>

Lastly, doctors reckon that that these conditions are more aggravated because the MTP Act, which was brought into protect a women's right, is being misused by society and the concerned parents. They often opt to do the abortions in hospitals or registered clinics where the reason for abortion is not questioned.

The negative aspect of the new amended MTP Act is the 'viability of the fetuses. Viability implies the period from which a foetus is capable of living outside the womb.<sup>34</sup> Currently, viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks. Thus, late termination of pregnancy may get in conflict with the viability of the foetus.<sup>35</sup>

### **Role of Indian judiciary for protection of the rights of rape victims under the MTP Act**

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<sup>30</sup> P. Bardhan "Little girls and death in India", Economic and Political Weekly 23(1982, September 4)

<sup>31</sup> A. Clark "Social demography of excess female mortality in India: New Directions" Social and Political Weekly 56(1987, April 25)

<sup>32</sup> M. Dasgupta "Selective discrimination against girl children in rural Punjab" vol. 13(1) Population and Development Review 90-95(1987)

<sup>33</sup> Sangeeta Cheeru "Growing Menace of Female Foeticide in India" Indian Socio Legal Journal 17(1991)

<sup>34</sup> Oxford Advanced Dictionary, 23<sup>rd</sup> edition, 2017

<sup>35</sup> supra, note 32

Apart from the legislative measures that are taken for the protection of the rights of rape victims, the judiciary of India has delivered certain significant judgments for protection of the rights of rape victims under the Medical Termination of Pregnancy Act. Some of the important judgments that are delivered by the Indian judiciary are-

In the case of *R and another Vs. State of Haryana and others*<sup>36</sup>, before the Punjab and Haryana High Court the question for consideration was late termination of pregnancy resulting from the alleged rape and a brief reference to other ancillary issues which are intricately connected with this complex issue.

The court was of the opinion that according to Section 3 of MTP Act, 1971 permission of one doctor if pregnancy is less than 12 weeks and permission of minimum of 2 doctors if the pregnancy is more than 12 weeks but less than 20 weeks gestation period; to opine and carry out termination of pregnancy. Section 5 of the MTP Act carves out an exception for carrying out termination of pregnancy required immediately to save the life of a pregnant woman irrespective of the length of pregnancy.

It was also opined during argument before the court that the provisions of MTP Act do not contemplate authorization or approval from any court. In fact, whenever a matter concerning medical termination of pregnancy on any ground whatsoever comes before the courts, the courts have invariably based their decision on the opinion of the medical board. There is not a single instance found where the Courts have given directions against the conclusions drawn by the medical board. In fact, the very exercise of approaching the courts in such situations results in unnecessary wastage of time and, many a times, renders the remedy sought unavailable to the victim. Similarly, the decision rendered by Supreme Court of USA in *Roe vs. Wade's*<sup>37</sup> case . made the abortions legal in United States of America. In India, MTP Act has been enacted on the lines of U.K. Abortion Act, 1967.

The court referred the leading case *Suchitra Srivastava and another Vs. Chandigarh Administration*<sup>38</sup>. In this case, the Supreme Court held that it was in the best interests of a

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<sup>36</sup> Civil Writ Petition No. 6733 of 2016, decided on 30<sup>th</sup> May, 2016

<sup>37</sup> 35 L Ed 2d 147 : 410 US 113 (1973)

<sup>38</sup> CIVIL APPEAL NO.5845 OF 2009 (Arising out of S.L.P. (C) No. 17985 of 2009)

mentally retarded woman to undergo an abortion. The victim had become pregnant as a result of an alleged rape that took place while she was an inmate at a government-run welfare institution located in Chandigarh. After the discovery of her pregnancy, the Chandigarh Administration, had approached the High Court seeking approval for the termination of her pregnancy, keeping in mind that in addition to being mentally retarded she was also an orphan who did not have any parent or guardian to look after her or her prospective child. The High Court had the opportunity to peruse a preliminary medical opinion and chose to constitute an Expert Body consisting of medical experts and a judicial officer for the purpose of a more thorough inquiry into the facts. The High Court directed the termination of the pregnancy in spite of the Expert Body's findings which show that the victim had expressed her willingness to bear a child.

The rationale behind the decision hinges on two broad considerations. The first consideration is whether it was correct on part of the High Court to direct the termination of pregnancy without the consent of the woman in question. This was the foremost issue since a plain reading of the relevant provision in the [Medical Termination of Pregnancy Act, 1971](#) clearly indicates that consent is an essential condition for performing an abortion on a woman who has attained the age of majority and does not suffer from any 'mental illness'. The second consideration before the court was that even if the said woman was assumed to be mentally incapable of making an informed decision, what are the appropriate standards for a Court to exercise 'Parens Patriae' jurisdiction? Of special importance is the fact that at the time of hearing, the woman had already been pregnant for more than 19 weeks and there is a medico-legal consensus that a late-term abortion can endanger the health of the woman who undergoes the same. The Expert Body was of the opinion that the victim was suffering from mild to moderate mental retardation and not capable of understanding the consequence of the decision taken by her. The High court allowed for the abortion of the fetus although the victim was willing to keep the same.

When the case came before the Supreme Court, the Supreme Court was of the opinion that the victim's pregnancy cannot be terminated without her consent and proceeding with the same would not have served her 'best interests'. The Court emphasized upon the language of the MTP Act, which clearly respects the personal autonomy of mentally retarded persons who are above the age of majority.

The Apex Court also held that proceeding with an abortion at such a late stage (19-20 weeks of gestation period) poses significant risks to the physical health of the victim. The Court directed that the best medical facilities be made available so as to ensure proper care and supervision during the period of pregnancy as well as for post-natal care.

If we make analysis of the abovementioned cases, we can see that there was an important issue raised before the Supreme Court both in *R and another Vs. State of Haryana and others* and in *Suchitra Srivastava and another Vs. Chandigarh Administration*. The Supreme Court in both the cases wanted to emphasize upon the provisions of 'best interest of the rape victim' and protection of her 'personal liberty'. Although under the MTP Act, pregnancy cannot be terminated after 20<sup>th</sup> week of gestation, if the survival of the child would result in severe mental suffering of the rape victim, the Supreme Court can give direction for termination of pregnancy under registered medical practitioner. Otherwise, the victim or her family members can resort to unsafe abortions by unregistered medical practitioners. Under these circumstances the judiciary has to take some liberalizes views regarding the termination of pregnancy

In the second case, although the rape victim was not fully mentally capable of forming a valid opinion regarding the continuation of her pregnancy as a result of rape, as she was a major and wanted to keep the child, the supreme court was of the opinion that if the Medical Board is of the opinion that there is no danger to the life of the mother and the child to be born, then even if the mother is mentally incapable, the Apex Court can not order for termination of pregnancy. However, with regard to the proper upbringing of the new born child, the Supreme Court has the power to frame certain principles as the welfare of the child is the paramount consideration.

The analysis of these abovementioned cases shows the intention of the judiciary to protect the rights of women as well as prevent the cases of female foeticide. As every woman has the right to safe abortion through registered medical practitioner, the rape victims are generally permitted for termination of pregnancy so that she might not be a victim of unsafe abortion. Moreover, no one is allowed to take the plea of insanity of the pregnant woman as a ground of termination pregnancy. As the law does not permit for termination of pregnancy, there might be incidents where the women herself or her family members can justify commission of the crime of female foeticide on the ground of 'mental incapacity of the mother to form a valid opinion

regarding her pregnancy'. Here the Apex Court put emphasis on the opinion of the Medical Board which is considered to be a neutral body for the welfare of the women fraternity.

Another important case referred by the Court was *Bashir Khan vs. State of Punjab and Another*<sup>39</sup>. In this case writ petition was filed by the parents of the victim, who was a minor girl and reported to have been raped as a consequence of which, she has become pregnant. The petitioner has approached the SDJM, Balachaur, through an application under [Section 3](#) for termination of her pregnancy. It has been stated in the petition that the victim is only 14 years of age and that she had been illegally abducted and raped. The victim is in fragile health and she did not want to retain the foetus. It was claimed on her behalf by the parent that continuance of pregnancy would involve risk to the life of the victim and cause grave injury to physical and mental health. A statement had been recorded from the victim's mother that she does not want to carry foetus and that she wanted to terminate the pregnancy. The Magistrate has recorded the statement of the victim herself that she had been raped and that she did not want the pregnancy.

There can be no two opinions that the conditions necessary for terminating the pregnancy do exist. There is prima facie case material available through lodging of FIR for offences under [Section 376](#) and other related provisions. [Section 3](#) of the Medical Termination of Pregnancy Act, 1971 sets out the circumstances when pregnancy may be terminated by registered medical practitioner.

Clause 2 states that where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if, not less than two registered medical practitioners are of the opinion, formed in good faith, that the continuance of pregnancy would involve a risk to the life of the pregnant woman or of grave injury physical or mental health, medical termination of pregnancy could be performed. In this case, although birth certificate of the girl is not available and basing upon the statement given by her mother, the court believed her age as 14 years. The court also opined that although regarding the age of the girl, there is no adequate proof, the court has to order for termination of pregnancy, as it is the consequence of rape and continuance of pregnancy will harm the physical and mental health of the victim. There is also a direction to

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<sup>39</sup> Civil Writ Petition No.14058 of 2014

take appropriate samples of the foetus for DNA testing that could be used, if necessary at an appropriate time.

The same view was taken in the case of *D. Rajeshwari vs. State of Tamil Nadu and others*<sup>40</sup>, where also the girl was a minor and was a victim of rape.

Similar were the circumstances where the victim of rape was a major in *Vijender vs. State of Haryana and others*.<sup>41</sup>, in this case also, the court can not reject the application for termination of pregnancy as this would adversely affect the mental condition of the victim

Basing upon the decision of the abovementioned cases, the author can come to the conclusion that if a girl becomes pregnant as consequence of rape, irrespective of the age of the victim, if the victim does not want to continue her pregnancy, the court can order for termination of pregnancy as it will be appropriate to maintain physical and mental health of the offender. If the victim wants to keep the child, the court has to decide the matter keeping in view of different facts and circumstances of each case.

Moreover, in the cases of *(Minor) Priyanka Girishkumar Patel through father Girishkumar vs. Principal Secretary*<sup>42</sup>, where although the victim who was a 12 year old girl, wanted to continue her pregnancy and was physically fit, the High Court of Gujarat ordered for termination of pregnancy as the victim was not able to understand the consequences of the child birth and the social stigma she has to bear.

But the general opinion regarding victim of rape was however altered by the Gujarat High Court in the case of *xxxx vs. State of Gujarat*<sup>43</sup>, where a 14 year old girl was rapped by a doctor and she became pregnant in consequence. The minor girl who was very frightened about the incident, concealed about the matter and when the case was filed before the Additional Session Judge, the application for termination of pregnancy was rejected. The guardians of the minor girl preferred an appeal to the Gujarat High Court for seeking permission to abort the fetus

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<sup>40</sup> 1996 CriLJ 3795

<sup>41</sup> CWP No.20783 of 2014

<sup>42</sup> Special Civil Application No. 93 of 2013

<sup>43</sup> R/SCR.A/4255/2015

as the continuance of pregnancy would result into severe physical and mental harm to the minor girl.

As opined by the Public Prosecutor of this case, section 3 of the MTP Act is very clear that permission to terminate a pregnancy can only be granted if length of the pregnancy does not exceed 12 weeks, and even though it exceeds, there can be termination of pregnancy, if the length of pregnancy is between 12-20 weeks and if two medical practitioners are of the view that the continuance of pregnancy would result into serious mental injury to the pregnant woman along with threat to the life of the woman and to the child. In the instant case, the pregnancy is beyond 20 weeks, although the girl is a rape victim, the court could not pass a decree for termination of pregnancy.

The High Court was of the opinions that if the plain and simple meaning of a statute is clear and unambiguous, the court has to give effect to that meaning. There is nothing in Section 3 of the MTP Act which provides for the termination of pregnancy beyond 20 weeks and if the intention of the legislature had intended so, it would have been so enacted. The duty of the court is only to interpret the laws enacted by the legislature; it does not have the authority to enact. Another relevant in the case was there was no opinion from any registered medical practitioner about the risk of life both to the mother and the child. The court opined that under no circumstance the court can order for termination of pregnancy though the victim is a minor and after child birth she may face atrocities from the society. The judiciary cannot order for something which is not expressly legislated by a competent legislature.

However, the position regarding the conditions for medical termination of pregnancy is changing to great extent in the recent years. In the case of *Jyotsna Shingwani vs. Union of India and others*<sup>44</sup>, the question before the court was whether the petitioners petition for termination of pregnancy after 21<sup>st</sup> week is maintainable by the court or not. The learned council for the petitioner contended that the Report suggests that immediately after its birth, the baby would have to undergo a major surgery and that there are 30% chances of it not surviving the surgery. He also submits that the mother (the petitioner) is highly stressed and not in a mental frame of mind to carry on with the pregnancy. It was also contended that the Legislature has decided to

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<sup>44</sup> Writ Petition (civil) No. 2967/2020 & Criminal Appeal. 10300/2020

amend the MTP Act and the Medical Termination of Pregnancy Bill, 2020 has been introduced wherein, the period of 20 weeks as stipulated in [Section 3\(2\) \(b\)](#), has been extended to 24 weeks.

Although under the provisions of the Medical Termination of Pregnancy Act, 1971, termination of pregnancy is permissible if the length of pregnancy is in between 20<sup>th</sup> week. But in this case, although there is no risk to the life of the petitioner, the lack of compatibility of the foetus with a healthy and normal life was the main concern for the court.

In view of the above, the court was of the opinion that keeping in mind of the medical condition of the foetus, the restrictions imposed by [Section 3\(2\)](#) of the Act ought to be relaxed and the request of the petitioner for termination of her pregnancy beyond the gestation period of 20 weeks ought to be acceding. This view was taken by the court after receiving the report of the Multi- Disciplinary Medical Board which stated that there was no risk involved to the petitioner if the foetus is aborted and the medical termination of the pregnancy performed at that stage.

In a recent case *Minor M Thr Sisters vs. State of Delhi and NCT and another*<sup>45</sup> decided by the Delhi High Court, the victim of sexual assault who was a minor girl of 17 years of age was permitted for termination of pregnancy although she was 24 week pregnant. Here also the judiciary was of the opinion that as the victim is a minor girl it is obvious that she is physically and mentally not ready for proper upbringing of a child. As the Medical Board constituted under the MTP Act was also of the opinion that there is no risk to the health of the minor girl, the Delhi High Court ordered AIIMS, Delhi for termination of the fetus.

### Conclusion

After analysis of both the statutory measures as well as the judicial initiatives for the protection of the rights of rape victims, it can be concluded that as long as there is proper implementation of the provisions of the MTP Act, every rape victim who subsequently becomes pregnant can fight for her right to abort the unwanted child and in each similar kind of case the judiciary will try to protect the physical and mental well being of the victim of this heinous crime.

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<sup>45</sup> Writ petition (criminal) No.2136/2021



Here, the author also wants to take into consideration few other aspects. Under the Medical Termination of Pregnancy Act although there are specific provisions for termination of pregnancy of rape victims but there are instances where minor rape victim was forced to give birth to the child of her rapist after the Madras High Court denied her request for abortion under the [Medical Termination of Pregnancy \(MTP\) Act](#) of 1971. The victim was first examined by a doctor at 19 weeks, who declined to perform an abortion, even though it was permitted under the law. By the time her petition was heard, her pregnancy had crossed the 20-week limit beyond which abortion is prohibited under the MTP Act.<sup>46</sup>

It has been found by the author that Courts refused to allow minor rape victims an abortion in 17% of 82 cases between April 2016 and July 2019.<sup>47</sup> Even though the MTP Act allows abortion until 20 weeks, 40 petitions seeking to terminate pregnancies under 20 weeks had to be filed in courts around the country between April 2016 and July 2019 because doctors refused to perform them. Here, 33 of these cases were filed by the rape victims.<sup>48</sup>

The main reasons for these situations are the lack of clarity in the outdated MTP Act, along with lack of awareness of the law among women and doctors and limits women's access to safe abortions. Further, doctors refuse abortions citing the law preventing sex-selective abortion, and legal processes in the case of child sexual abuse, even though neither of these laws restricts abortion. Delays in court decisions on abortions and the stigma around abortion also endanger women's health. As a result, 56% of abortions performed in India are unsafe, with 10 women dying of unsafe abortions each day.<sup>49</sup> After the enactment of the Medical Termination of Pregnancy (Amendment) Act, 2021 we can hope that now there will be change in the overall scenario regarding termination of unwanted pregnancy and a victim of rape will be given proper justice within reasonable time.

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Medical Termination of Pregnancy Act Failing Women Who Need It The Most available at

<https://www.indiaspend.com/medical-termination-of-pregnancy-act-failing-women-who-need-it-the-most/>

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<sup>47</sup> ibid

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