**ABORTION RIGHTS OF VICTIMS OF RAPE IN INDIA: NEED FOR LEGAL REFORM**

**By: Dr. Manika Kamthan**,

Assistant Professor,

Symbiosis Law School, Pune, Symbiosis International (Deemed University)

(+91) 9899337185, manika.kamthan@symlaw.ac.in

**Ms. Ruksana Akhtar**,

Researcher LLM,

Symbiosis Law School, Pune, Symbiosis International (Deemed University)

(+91) 9401259397, 19010143069@symlaw.ac.in

***Abstract***

*The right of women to abortion is celebrated as one of the most revolutionary rights of women. In India, abortion is allowed with reasonable restrictions. It does not reflect the women’s right to bodily integrity and although it rides on the third wave of feminism, but has patriarchal underpinnings. The right to abortion is overshadowed by the right to life of women as well as of the foetus. The right to abortion for victims of rape is not an exception and the victim has to go through mental as well as physical trauma to secure an abortion. Moreover, the non-criminalization of marital rape adds to the misery of married women who want to abort pregnancies out of forced sex. We argue that the MTP Amendment Bill, 2020 which allows abortion to be conducted till 24 weeks should be passed with special emphasis on the right of rape survivors.*

**Keywords:** right to abortion, rape, MTP Act, dignity, right to life, feminism, judiciary, safe abortions*.*

**Introduction**

In *Alakh Alok Srivastava v Union of India & Ors*[[1]](#endnote-1) the Supreme Court denied permitting a 10-year-old survivor of rape from Chandigarh because she was pregnant for more than 20 weeks. The victim was raped continuously for over seven months by her two maternal uncles. The parents were able to discover pregnancy only when the victim complained of stomach ache by when she was many weeks pregnant already. The doctors disclosed to the parents that the victim is already over 20 weeks pregnant and conducting abortion would mean serious danger to life and health of the victim and they can perform abortion only if they can procure a court order to the effect. The District Court of Chandigarh also ordered a medical report by a panel of doctors, which concluded that abortion will pose a serious threat to life and health of the victim. The District Court also denied an abortion. The victim’s parents appealed in Supreme Court, by when the victim was already 32 weeks pregnant. As already stated the Supreme Court also denied an abortion, but only after subjecting the victim to another round of medical examinations. The victim, and mind you a 10-year-old girl delivered and the baby was given to authorities for adoption. The Apex Court ordered immediate compensation amounting to 1 lakh and 9 lakh in the form of trust.

In 2017, 32339 cases with a crime rate of 5.2% were reported related to rape and 33356 cases in 2018 with a crime rate of 5.2%.[[2]](#endnote-2) In 2018, there were 3616 cases related to child rape victims who are 12 years of age and less than 16 years; and 4779 cases for 16 years but below 18years.2

**Legal framework**

**United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979**

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979 by the United Nations General Assembly has no specific provisions on abortion measures. But CEDAW plays a significant role in the standardization of a liberalized abortion law among nations. Prof. Gray in his published work emphasizes that “as CEDAW is recognized as a revolutionary treaty related to women’s rights, it binds its member states to implement legal provisions to protect and promote human rights of women and also act as a measure of globalization by spreading standardized human rights norms”.[[3]](#endnote-3) The ‘rights of women’ in relation to termination of pregnancy can be interpreted under some of the provisions laid in CEDAW. Article 12 (1) directs its state members to have “equality in health-care services”. The CEDAW Committee however, exhibits "refusal of medical services that only women require, such as abortion is a form of gender discrimination", proposing that “an absence of abortion rights establishes inconsistent health care services towards women”.[[4]](#endnote-4) In 2006, the Columbia’s Constitutional Court found the nation's criminal prohibition on all fetus removals to be an infringement of CEDAW especially Article 12 (1) so, they changed its premature birth laws along these lines.[[5]](#endnote-5) The CEDAW general recommendation number 24 to Article 12 provides for compliance to Article 12. It requires the signatory States to remove discrimination against women in their access to healthcare systems especially in family planning, pregnancy, and post-natal care. Moreover, it also provided for protecting the confidentiality of patients seeking treatment of sexual diseases, abortions; especially in cases where the patient has suffered sexual or physical violence.

Article 14 (2)(a) & (b) states that women from rural areas, in particular, shall have the ‘right to health-care services’ and get appropriate benefits from any developments. Article 16 (1)(e) mandates women to have legitimate and access to facilities to regulate their reproduction. Hence, this Article is often interpreted to recognise ‘right to abortion’ implicitly. A few states have explicitly set reservations for Article 16 (1)(e) to exclude them from liberalizing abortion laws in their nations.[[6]](#endnote-6) The CEDAW Committee interprets the CEDAW document as a ‘supporting document’ for the ‘right to abortion’ for women. Looking forth to the published work of the 2013 General Recommendation No. 30 on ‘women in conflict and post-conflict situations,’ the Committee recommended that all state parties shall guarantee safe abortion access and post-abortion care.6

**The Medical Termination of Pregnancy (MTP) Act, 1971**

In India, abortions cases are governed by the Medical Termination of Pregnancy (MTP) Act, 1971. Section 3 of the Act provides when abortion can be legally performed. However, the law is more medical practitioner centric and contributes less to acknowledging and protecting women’s bodily autonomy. Section 3(1) of the Act safeguarding the medical practitioner says that ‘a medical practitioner can legally perform an abortion in accordance with the provisions of the Act’. If the pregnancy is not more than 12 weeks, then it can be terminated by a single medical practitioner, and if the pregnancy is not more than 20 weeks, then it can be terminated by two medical practitioners. However, the medical practitioner should “in good faith” believe that the continuation of the pregnancy involves risk to the health of a pregnant woman or the child born out of such pregnancy will be born with physical or mental abnormalities or will be seriously handicapped. The explanation clause (1) of sub-section (2) of Section 3 further elaborates that where the pregnancy is caused by rape it “shall be presumed to constitute a grave injury to the mental health of the pregnant woman”.

The MTP Act, 1971 however, fails to make any special provision for victims of rape and doesn’t acknowledge it as a gross violation of women’s right to bodily autonomy and dignity, and reduces it to grave injury. It lacks in addressing the severity of the pregnancy of a rape victim especially in cases of child rape victims where the rape victim is immature to the incidence. Moreover, victims of rape also need to get the nod from two medical practitioners if the foetus is more than 20 weeks old and even if the foetus is less than 20 weeks old, the medical practitioner should believe that there is no risk to the life and health and life of the victim. Thus, if the foetus is more than 20 weeks old, the law prohibits abortion in all cases. It can be said that the right to abortion is a restrictive right, as a matter of fact, it can be said that the law lacks the rights-based approach.

The Act also fails to address the issue of delayed hearings of the rape cases. In cases such as *Marimuthu v. Inspector of Police*,[[7]](#endnote-7) delayed hearings have confused the petitioners. Here the petitioner was the father of a child rape victim, during the pendency of the case the victim turned 18years and the naive victim wanted to continue the pregnancy. Whereby the Court held that the pregnancy cannot be terminated as the victim didn’t give the consent. In the case of *Ms. Z v. the State of Bihar*,[[8]](#endnote-8) the abortion petition of the rape victim was rejected as the pregnancy had crossed 35 weeks so, the Supreme Court held the state and the High Court to pay compensation of 10 lakh rupees to the petitioner. There are many cases related to exceeding the gestation period of 20 weeks due to delay in hearings of the case, later resulting in the rejection of the MTP petition defeating justice to those women, especially rape victims.

The MTP Act under clause (a) & (b) of sub-section 4 of Section 3 states about the “consent of the guardian” in case of the victim below 18years or lunatic; and of the pregnant women above 18years which is a just provision. But the Act fails to set down the ethical norms relating to the matter of confidentiality of particulars between the women and the medical practitioner. The provision related to confidentiality is however proposed under Section 5A of the MTP (Amendment) Bill, 2020.

The sub-section (2) of Section 7 of the 1971 Act, to give effect to clause (b) of sub-section (1) of Section 7 directs the medical practitioner to intimate information to the Chief Medical Officer of the State. The Act doesn’t state about the constitution of a Medical Board which would help to speed up the cases especially for rape victims where the delay or rejection of the MTP petition would result in “grave injury to physical and mental health”. This provision is also addressed by the Amendment Bill of 2020 for the constitution of a Medical Board.

Section 8 of the Act mentions that, “no legal action can be brought against a medical practitioner for any damage caused or likely to be caused by anything which is done in good faith as per the provisions of the Act.” However, the practical implementation of the Act paints a different picture altogether. Several studies and reports[[9]](#endnote-9) point towards the fear among medical practitioners to be prosecuted for performing abortions.[[10]](#endnote-10) As a matter of fact, the Indian healthcare system mistreats rape survivors.10 A study conducted by the Centre for Enquiry into Health and Allied Themes (CEHAT),[[11]](#endnote-11) Mumbai, India documented experiences of 74 women who sought an abortion. None of the women which included 2 girl children were allowed for abortion merely on the ground that the foetus was over 20 weeks old, despite of the fact that they followed due process to obtain permission from the High Court. Out of 55 women who were less than 20 weeks pregnant, only 36 were allowed to undergo abortions.10 As per the findings of the study, doctors ask for judicial orders even in cases where it is not required at all. Adding to the misery, doctors also tend to ask for the consent of the spouses, even when it is not required under the law. The patriarchal interpretations of the law lead to this unjustified demand from the doctors.9 In 2012, CEDAW recommended extending the time limit to undergo and decriminalize abortion in cases of incest, and where the health of the pregnant woman or girl is in danger, authorize women to undertake abortion without the consent of their husband, and provide safe abortion and post-abortion services

The MTP Act 1971 unlike other laws elsewhere in the world was not guided by the women’s right to bodily autonomy. Rather it was preceded by growing number of mortalities due to unsafe abortions and also as one of the methods to control the population. Doctors came across frequent cases where women were found to be severely ill or were dying because of using unsafe methods of abortion. It was also observed that many of the women were happily married and the couples were struggling with unwanted pregnancies.[[12]](#endnote-12) The Shantilal Shah Committee was constituted in 1964 to look into the mechanisms to ensure safe abortions made very progressive statement advocating women’s right to abortion, “*When the woman, (with or without the concurrence of her partner) feels that a particular pregnancy is intolerable and does not desire to bear the child she should be the master of her own body and decide the question of motherhood for herself*”*.*[[13]](#endnote-13)However, even a cursory reading of the Act will clarify that right of women to abortion is nowhere highlighted in it. It is a law that proclaims to protect women’s health and life. As per Amnesty International, “*There is no generally accepted right to abortion in international human rights law*”.[[14]](#endnote-14)India also provided only for the procedure for safe abortions but it cannot be demanded by women as a matter of right.

Moreover, India has not yet criminalized marital rape and thus, pregnancies borne out of forced sex in marriages, are also forced to continue if they are over 20 weeks. If they are unable to produce consent of the spouse or judicial order to the effect, they are seldom permitted to abort In *Planned Parenthood of Central Missouri v. Danforth,*[[15]](#endnote-15)the Supreme Court of the U.S. evaluated the need for husband’s consent for abortions. It acknowledged the husband’s deep interest in his wife’s pregnancy but observed that he cannot be allowed to have veto power which the State itself is not exercising. Many a time, medical practitioners might also refrain from performing abortions even if the pregnancy is not over 20 weeks because of the mandatory requirement under the POCSO Act to report the cases of sexual offences against children. The pregnancies out of rape also highlight the failure of the institutional support to provide pregnancy kits to rape victims.9

**Judicial Interventions**

There is no consensus among Courts to clarify or lay down a streamlined procedure for undergoing abortion when the pregnancy is over 20 weeks or whether the abortion can be allowed at all or not. Although the law does not provide for it through a series of cases, courts have laid down a procedure which relies on the reports of medical boards for allowing or disallowing abortions. In *Ms. Chanchala Kumari v. Union of India**& Anr*.,[[16]](#endnote-16) a 13 years old victim of rape was denied abortion only after getting examined by 11 AIIMS doctors.

In *Ms.Z v. the State of Bihar & Ors*,8 Supreme Court once again denied an abortion to a rape victim who was over 20 weeks pregnant. However, the Court observed that the High Court was grossly mistaken in not allowing abortion because the medical report mentioned that the termination can be carried out with special arrangements. Justice Dipak Misra observed that although reproductive rights of women can be regarded as an offshoot of the “personal liberty” under Article 21 of the Indian Constitution and woman’s right to privacy, bodily integrity and dignity, but State is compelled to choose between women’s freedom and right to life of the unborn. Thus, MTP Act works as “reasonable restrictions” on reproductive rights of women.

The judgment clearly mentions that the State is torn between the State dilemma to protect the life of the unborn or to protect the ‘right to life’ with dignity of the appellant. This is another facet of the debate on the right to abortion of rape survivors. The Convention on Child Rights, 1989 recognizes “family” as a fundamental unit of the society which is a sine qua non for the growth and wellbeing of children. It recognizes every child’s right to a family. India ratified CRC in 1992. The Courts need to understand that by not allowing abortions in cases where it can be safely performed, they are violating the right to family of the unborn child, especially in case of rape survivors.

**MTP Amendment Bill 2020**

The MTP Amendment Bill 2020 was introduced in Lok Sabha by Minister of Health and Family Welfare, Dr. Harsh Wardhan on March 2, 2020. The Bill proposes to amend Section 3 by allowing for termination of pregnancy up to 20 weeks by a single medical practitioner and by allowing for termination of pregnancy up to 24 weeks with the approval of two medical practitioners. The Bill also recognizes live-in relationships by substituting “women or her partner” in place of “married woman or her husband” in case of pregnancies occurring out of the failure of the birth control mechanism used.

The Act has progressively filled the gap in the parent Act of 1971. The Act proposes the insertion of Section 5A by laying down the provision determining the “protection of privacy of a woman”. Putting medical advancements in mind amendment is proposed to the definition of “termination of pregnancy” under clause (e) of Section 2.

The Amendment Bill of 2020 proposes for the insertion of sub-clause (aa) after clause (a) of Section 2 defining the Medical Board; and Section 2C and 2D about its constitution. However, the Bill lacks in determining explicit functions of the Board. In *Kottaichamy v. The Superintendent of Police*,[[17]](#endnote-17) we see the rape of a minor whose medical examination was conducted in the 19th week of pregnancy but the MTP was not carried out by the doctor and no reason was provided by them, the petition filed later was rejected due to lapse of 20 weeks. So, the Bill shall state about the functions, role, and speedy redressal mechanisms for termination of pregnancy especially in cases of rape victims to prevent the miscarriage of justice. The accountability of the failure to perform duty by the medical practitioner shall also be addressed.

However, even the proposed Bill fails to exclusively address the cause of rape victims and also skips to specifically prohibit third party authorizations for conducting abortion.

**Conclusion**

In Brazil, a rape survivor needs to submit only a signed consent for undergoing an abortion.[[18]](#endnote-18) India also needs to acknowledge women’s reproductive rights and the right to bodily autonomy. Especially in the case of rape survivors, forcing them to continue with unwanted pregnancies amounts to causing gross mental injury to survivors. The State should reform law for addressing rape survivors. Moreover, there is an urgent need to create awareness about the MTP Act itself. The unfounded fear among medical practitioners also needs to be addressed by the State. Further, third party authorizations including those by husbands, family, police, courts should be specifically prohibited by law, to do away with confusion and to give liberal interpretation to the law of abortion in India. Lastly, keeping in mind the above analysis of the MTP Amendment Bill, 2020, the Bill should be passed by Rajya Sabha without further delay.

1. Supreme Court of India. Alakh Alok Srivastava v Union of India & Ors. WP (C) No. 565 of 2017. Access at <https://indiankanoon.org/doc/173765963/> [↑](#endnote-ref-1)
2. Crime in India. (2018) National Crime Records Bureau. Vol. 1. pp 33. 212. Access at <https://ncrb.gov.in/sites/default/files/Crime%20in%20India%202018%20-%20Volume%201.pdf> [↑](#endnote-ref-2)
3. Gray, M., Kittilson, M., & Sandholtz, W. (2006). Women and Globalization: A Study of 180 Countries. 1975–2000. International Organization. 60(2). 293-333. doi:10.1017/S0020818306060176 [↑](#endnote-ref-3)
4. Cook, R., Dickens, B., & Fathalla, M. (2003-04-17). Reproductive Health and Human Rights: Integrating Medicine, Ethics, and Law. Oxford University Press. Access at <https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199241323.001.0001/acprof-9780199241323> [↑](#endnote-ref-4)
5. Annual Report of 2008-2009. United Nations Development Fund for Women. UNIFEM. Access at <https://reliefweb.int/sites/reliefweb.int/files/resources/B1B6DC7183614F83492575ED000D4ABB-unifem-jun2009.pdf> [↑](#endnote-ref-5)
6. Hunt, K., Gruszczynski, M. (2019). The Ratification of CEDAW and the Liberalization of Abortion Laws. Politics & Gender. 15(4). 722-745. doi:10.1017/S1743923X18000442 [↑](#endnote-ref-6)
7. High Court of Madras. Marimuthu v. Inspector of Police. Writ Petition (MD) No. 12212 of 2016. Access at <https://indiankanoon.org/doc/56767229/> [↑](#endnote-ref-7)
8. Supreme Court of India. Ms. Z v. State of Bihar. Supreme Court. Civil Appeal No.10463 of 2017. Access at <https://indiankanoon.org/doc/172163761/> [↑](#endnote-ref-8)
9. The World’s Abortion Laws. Centre of Reproductive Rights. (2018). Pp.14. access at <https://reproductiverights.org/worldabortionlaws> [↑](#endnote-ref-9)
10. Rege S, Bhate-Deosthali P. Denial of Safe Abortion to Survivors of Rape in India. HHR. 2019 Dec.21(2).189-198. 190. PMID: 31885448. PMCID: PMC6927364. [↑](#endnote-ref-10)
11. Visit at <http://www.cehat.org/> [↑](#endnote-ref-11)
12. Siddhivinayak, Hirve. (2004). Abortion Law, Policy and Services in India: A Critical Review. RHM. 12. 114-21. 10.1016/S0968-8080(04)24017-4. [↑](#endnote-ref-12)
13. Suchitra S, Dalvie. Second Trimester Abortions in India. RHM (Supplement). Vol. 16. No. 31. pp. 37-45. May 2008. Access at <https://ssrn.com/abstract=1348104> [↑](#endnote-ref-13)
14. Piero, Tozzi. International Law and the Right to Abortion. International Organizations Law Group Legal Studies Series - No. 1. (2010). Access at <https://ssrn.com/abstract=1567128> [↑](#endnote-ref-14)
15. U.S. Supreme Court. Planned Parenthood v. Danforth. 428 U.S. 52 (1976). Access at <https://supreme.justia.com/cases/federal/us/428/52/> [↑](#endnote-ref-15)
16. Supreme Court of India. Ms. Chanchala Kumari v. Union of India& Anr. Writ Petition (Civil) No. 871 (2017). Access at <https://indiankanoon.org/doc/191372922/> [↑](#endnote-ref-16)
17. High Court of Madras. Kottaichamy v. The Superintendent of Police. Writ Petition (MD) No. 4889 of 2017. Access at <https://indiankanoon.org/doc/84189148/> [↑](#endnote-ref-17)
18. Diniz,Alberto & Rosas, Cristiao,Debora & Madeiro. Conscientious Objection, Barriers, & Abortion in the Case of Rape: A Study among Physicians in Brazil. RHM. Vol. 22. No. 43. May 2014. pp 141-148. Access at <https://ssrn.com/abstract=2472947> [↑](#endnote-ref-18)