

## NEED FOR FAVOR OF SUPREME COURT FOR THE RAPE VICTIMS AND ASSAULTED WOMEN

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### ABORTION LAWS FOR RAPE VICTIMS IN INDIA

The Indian abortion laws fall under the Medical Termination of Pregnancy (MTP) Act, and came into effect from 1 April 1972, thereby amended in the years 1975 and 2002. As per the Section 5 of the Abortion Act, no offence under the Infant Life (Preservation) Act 1929 shall be committed by a registered medical practitioner who terminates a pregnancy in accordance with the provisions of this Act. Pregnancies of rape victims and assaulted women not exceeding 12 weeks may be terminated based on a single opinion formed in good faith. In case of pregnancies exceeding 12 weeks but less than 20 weeks, termination needs opinion of two doctors. Abortion in India is legal only up to twenty weeks of pregnancy under specific conditions and situations, which are broadly defined as:

- The continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury of physical or mental health, or
- There is a substantial risk that if the child was born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Recently, the Supreme Court permitted a rape survivor to terminate her pregnancy at 24 weeks, which is beyond the permissible 20-week limit prescribed under the Medical Termination of Pregnancy Act, 1971. It is estimated that in India, a woman dies every hour because of unsafe abortions. Just 10 percent of the estimated 70 lakh abortions that happen in India every year are documented, the rest are assumed to take place in shady clinics, often run by quacks.

In many parts of India, daughters are not preferred and hence sex-selective abortion is commonly practiced, resulting in an unnatural male to female population sex ratio due to millions of developing girls selectively being targeted for termination before birth.

In India, the matter of termination of pregnancy of rape victims is often not based on the perceptions of the woman herself, rather cultural, religious, socioeconomic and societal pressures play a significant role in influencing her decision.<sup>1</sup> The **Pre Natal Diagnostic Techniques Act of 1994** and the **Medical Termination of Pregnancy Act of 1971** were

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<sup>1</sup> Admin Lawnn, *Abortion Laws In India: Laws Punishment & Cases* (June,1,2017)  
<http://lawnn.com/abortion-laws-india-laws-punishments-cases/>

enacted by the Government of India with the object of reduction in the incidence of illegal abortion and consequent maternal mortality and morbidity.

**The Indian Penal Code (Act No. 45 of 1860)** provides an exception and permits abortion only when it is justified for the good faith purpose of saving the life of the assaulted woman. **Section 312 to 316** of the Penal Code provides that any person performing an illegal abortion was subject to imprisonment for **three years and/or payment of a fine**; if the woman was “**quick with child**”, the punishment was imprisonment for up to **seven years and payment of a fine**. The same penalty applied to a woman who induced her own miscarriage.

In a landmark case a girl filed a case in Supreme Court for child abortion after she was raped. In this case, the Supreme Court allowed the 13-year old rape victim in Mumbai to terminate her 31-week pregnancy due to her life being in danger. However, the same court ruled that a 10-year old raped child could not be allowed to abort at 28 weeks, since usually the termination period of a pregnancy is in 20 weeks.

Irrespective of the marital status of women, access to safe abortion services and quality post-abortion care, including counseling, need to be legally guaranteed. On February 28, 2017, the Supreme Court refused to allow a woman to abort her 26-week-old foetus that would be born with Down syndrome, a congenital disorder that postpones the onset of developmental and intellectual features. Admitting that the child may suffer from physical and mental abnormalities, the bench said that their hands are tied by law.<sup>2</sup>

In May 2017, the apex court denied to abort another 26-week-old foetus, made by a 35-year-old HIV-positive woman who had been sexually assaulted. The court cited a report prepared by a doctor at the All India Institute of Medical Sciences (AIIMS). The report claimed that an abortion at such a stage could endanger the mother's life. The court noted that the cumbersome legal battle had resulted in delaying the relief that the 35-year-old woman had sought.

**The law in question is the Medical Termination of Pregnancy (MTP) Act, 1971, which is awaiting amendment.**

Abortion leads to legal, moral and ethical dilemmas. Multifarious issues crop up relating to genetics, medicine, sexuality, jurisprudence, reproductive rights, as well as the fetus's right to life. The battle is between pro-life supporters – who condemn abortions considering the death of an unborn child a social death – and pro-choice supporters, who believe that women should be in total control of her reproductive life and nobody, not even the state, has the right to tell her what to do.

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<sup>2</sup> Saumya Rai & Sajid Sheikh, *India's Abortion Law Need To Change And In The Pro Choice Direction*, (May, 11, 2017) <https://thewire.in/134182/abortion-pregnancy-law-india/>

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## THE PRESENT LAW FOR ABORTION<sup>3</sup>

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In its current form, the MTP Act permits abortion after consultation with one doctor up to 12 weeks. Between 12 to 20 weeks, a woman seeking abortion needs the medical opinion of at least two doctors. Exceptions are made to the 20-week ceiling if continuing the pregnancy poses a threat to either the mother or the baby's life, but only after approval from courts. 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 <sup>4</sup>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.

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## ABORTION LAW AND RIGHT TO LIFE AND PERSONAL LIBERTY UNDER ARTICLE 21 OF CONSTITUTION OF INDIA

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Abortion is act of terminating a child's life before even its existence. The law has to strike a balance between a mother's mental and physical state to bring the child to life and the life of child which is at stake. This is a big dilemma which Courts have to resolve within the four corners of law with a humanitarian approach to bring justice to both mother's and child's life. The Constitution of India recognizes right to life and personal liberty under Article 21 to every person which includes both man and woman. Right to abortion is the fundamental right which every woman has among the various other rights she possesses as this right is directly a matter of privacy which very recently is accepted by our apex court as an integral part of fundamental right under Article 21 of the Indian Constitution. The bone of contention is to bridge the gap between right to life of pregnant women and right of life of an unborn child. The Medical Termination of Pregnancy Act, 1971, as if now, has not been able to solve the conflict of life of mother versus life of child effectively.

In the case of *R and Anr v Haryana* too, the petitioner was a minor. She was pregnant as a result of rape and was in the 24th week of her pregnancy. The *amicus curiae* in this case

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<sup>3</sup> *Why's India Abortion Law Failing Its Women On So Many Fronts* (August,5,2017,12:12pm) [http://www.huffingtonpost.in/2017/08/04/why-is-india-s-abortion-law-failing-its-women-on-so-many-fronts\\_a\\_23063014/](http://www.huffingtonpost.in/2017/08/04/why-is-india-s-abortion-law-failing-its-women-on-so-many-fronts_a_23063014/)

<sup>4</sup> Anubhav Pandey, *Abortion Law- Policy & Legal Framework In India* (October,8,2017) <https://blog.ipleaders.in/abortion-law-policy-legal-framework-india/>

contended before the <sup>5</sup>high court that the protection of the rights of an unborn child is an obligation cast upon the state under constitutional provisions, and in view of simple understanding of the provision of Section 5 of the MTP Act,, a conflict between the right to life of the pregnant woman and the right to life of an unborn child would yield in favor of the woman.

It is to be noted to force a woman to continue with a pregnancy that she does not want to have is an infringement on the right to privacy and dignity of the woman as well as an infringement of the right to a healthy and dignified life of the nascent life in her womb. Article 21 guarantees right to live a dignified life to every person and is a constitutional right which cannot be taken away from the victim in the present case.

Thus, the Courts in abortion case ought to examine the plea of abortions of pregnant women from two standpoints, firstly protecting the life of pregnant women and secondly the rights of unborn child whose life could be taken away by the said abortion.

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### ABORTION LAWS IN CASE OF JUVENILE RAPE VICTIMS

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The juvenile rape victims are the victims of abortion law and facing the brunt of Section 3 of Medical Termination of Pregnancy Act, 1971 as mostly in cases of juvenile rapes, the pregnancy is detected at a very later stage adding to the misery is the social stigma attached to it which silences the juvenile rape victim to come out and speak about it. The provisions of Medical Termination of Pregnancy Act, 1971 leaves no recourse in case of juvenile rape victims also, they too have to seek consent from the Courts before aborting the child in their womb if their pregnancy exceeds 20 week. There is only little protection given in case of juvenile rape cases where they are allowed to abort their child if the anguish caused by the unwanted pregnancy constitutes as a grave injury to the mental health of pregnant women or there is a danger to their life as provided in Section 5 of the Act. But as in most unfortunate cases, the under-aged rape victims have to keep the unwanted pregnancies birthed out of rape and sexual assaults. The most recent case of rejection of plea of abortion of juvenile rape victim by District Court in Chandigarh which shocked our consciousness blatantly was “when a 10-year-old rape survivor was denied permission to terminate the pregnancy resulting from the rape. The child was allegedly raped continuously over a period of time by her maternal uncle. The plea for abortion was rejected after it was confirmed that the minor was 26 weeks pregnant. According to the Medical Termination of Pregnancy (MTP) Act of 1971, the legal ceiling for abortions in India is 20 weeks. In more advanced pregnancies, exceptions are made by the courts if the foetus is proved to be genetically unviable or if the pregnancy poses a grave threat to the mother’s life.”

This is the most heartbreaking reality come out of provisions of Medical Termination of Pregnancy Act, 1971 that how a 10-year old victim who already is devastated by the rape done by her maternal uncle will also now have to go through the unwanted pregnancy

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<sup>5</sup> Ibid P .No. 5

which will be detrimental for her well-being and life of the child she will be forced to give birth to.

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## ABORTION LAWS IN INDIA – A STEP FORWARD

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The liberalization of abortion laws is the only way forward to empower the Indian women to exercise their reproductive rights and the making informed decisions in giving birth to a new life in a safe, healthy and productive environment. The unsafe abortions are widely prevalent even after 46 years of the act coming into force and thus making it imperative for the legislators to amend the Medical Termination of Pregnancy Act, 1971 in order to remove the roadblocks of abortions not being legally permitted after the gestational age of 20 weeks of Pregnancy<sup>6</sup>.

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## REASONS FOR ABORTION

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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 fetus'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.

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## THE FAILURE OF THE LAW

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The failure of abortion laws in this country in dispensing justice to the women for whom the law was made and how it stands can be understood by witnessing the plight faced by these under aged rape girls who are the biggest victims of this 20 week mark provided in the Medical Termination of Pregnancy Act, 1971 as the pregnancies in this act are discovered very late and the stigma attached to rape survivors in this country silences them in such a way that they are left with no option other than to plead before the court to seek permission to terminate the unwanted or unintended pregnancy but in most cases they have to forcibly deliver the child as they are pregnant with the child for more than 20 weeks.

The qualified legal status of abortion in India questions the right Indian women possess on the reproductive life and the restrictive abortion laws in India attacks the very sanctity of

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<sup>6</sup> Saumya Rai & Sajid Sheikh, *India's Abortion Law Need To Change And In The Pro Choice Direction*, (May, 11, 2017) <https://thewire.in/134182/abortion-pregnancy-law-india/>

gender neutrality which the constitution of this country guarantees to provide its women. The abortion laws of this country are failing its women in many fronts as we as a society has witnessed time and again that this restrictive abortion practices has only continued to jeopardizes women's reproductive rights <sup>7</sup>and played with their life and health and increasing to their plight the slow legal machinery of this country which makes the whole law futile as after hitting the 20 week mark of their pregnancy they are not allowed to medically abort the child and in some cases can also cost the life of mother due to unsafe deliveries in complicated cases.

It is worth mentioning here that a report published in case of a 35-year-old HIV+ woman from Bihar was forced to have a baby because her paperwork got stuck at a government hospital for 4 weeks and she crossed the 20-week mark. A long legal battle ensued, which ended with both Bihar's high court and the Supreme Court rejected her abortion plea in. The reason cited by the court cast light on the failure of abortion laws in the country which are so rigid in law and fails to empathize with the sufferings of women. She was already 26 weeks pregnant by then and due to this she was not permitted to abort her child as it seemed a risky proposition to the courts.

It is worth applauding that there has been change of heart in some cases by Supreme Courts where they have on humanitarian grounds permitted women and under aged rape girl child to abort pregnancies off the 20-week mark as provided in Medical Termination of Pregnancy Act, 1971. (MTP) Act.

But still we need in light of compelling circumstances, a stronger law which can empower its women rather than leaving them alone to be victimized by the hands of outdated MTP Act, 1971.

According to a World Health Organisation report, in India, the access to safe abortion through the public health system is mainly restricted to cities. Despite a mandate to provide abortion services, less than 20% of primary health care centres provide such facilities in most of the states. Many centres occasionally provide the service either because of a shortage of trained doctors or poorly functioning equipment.

In 2014, the Ministry of Health and Family Welfare released a draft of the MTP (Amendment) Bill 2014 with an objective to shift the focus of the Indian abortion discourse from health care providers <sup>8</sup>to women. Another welcomed step in the Bill is the explicit inclusion of abortion care to unmarried women in the case of unwarranted pregnancies. The gestational limit for abortion has been proposed to be extended to 24-weeks subject to exclusion of specific fetal anomalies after this period. There has been the criticism for allowing non-allopathic and mid-level healthcare providers to perform abortions which I believe is the subject of discussion. There is also the requirement for the formation of permanent bodies dealing specifically with the access to abortion. Recently, the Apex Court

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<sup>7</sup> Ibid P. No. 7

<sup>8</sup> Anubhav Pandey, *Abortion Law- Realities in India*, (October.8,2017)<https://blog.ipleaders.in/abortion-law-policy-legal-framework-india/>

has urged the government to set up permanent medical boards across the country for expedient access to abortion care to women, especially child rape survivors.

Unfortunately, the amendment Bill has been in the cold storage for the past three years. This is distressing that the crucial issue like the amendment to MTP Act has been the subject to such ignorance. The access to safe abortion is the basic human right of a woman. The law must be changed with an immediate effect to give the bodily autonomy to women and decrease their vulnerability from subjective interpretations by medical practitioners and courts. Robust laws without any discrimination are the need of the hour to save women from the danger lifelong distress of carrying unwarranted pregnancies and opting for unsafe and illegal abortion.

**It is admirable that India was one of the first countries in the world to legalize abortion to encourage family planning and population control.** Ostensibly, the reason for the relatively low time frame was to safeguard the girl child by preventing sex-selective abortions. While that is a noble intent, women who discover abnormalities in the fetus or develop complications later in their pregnancies, and rape victims, particularly underage ones, end up bearing the brunt of it.

**The court was forced to note that due to advancements in medical technology, pre-natal defects could be revealed even after 20 weeks.**

And because the MTP Act is outdated and doesn't consider these eventualities, women are forced to move court. Consequently, judgments that are doled out vary drastically due to individual interpretations of law.

**<sup>9</sup>India's Supreme Court has given permission to a 13-year-old rape victim from the city of Mumbai to terminate her pregnancy.**

The girl, who is 32 weeks pregnant, needed the court's assent since Indian law allows terminations after 20 weeks only if the mother's life is in danger.

Indian girl allowed abortion amid claims doctors 'afraid to help' child rape victims Supreme court approves termination for 13-year-old who fell pregnant after assault but case highlights concerns that medics do not understand relevant law

### **Rape Survivors' Right to Abortion: Are Doctors Listening?**

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.

<sup>10</sup>The news of rape survivors, especially children, being denied abortion has been in the public eye for some time. First it was a ten-year-old rape survivor, 28 weeks pregnant, and the second was a 13-year-old child, 26 weeks pregnant, both reaching medical

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<sup>9</sup> Ibid P. No. 9

<sup>10</sup> Padma D. & Sangeeta R., *Rape Survivors' Right To Abortion: Are Doctors Listening*, (September, 8, 2017) <https://thewire.in/175257/rape-survivors-right-to-abortion/>

institutions/doctors but being turned away by the medical system owing to the advanced stages of pregnancy. Both appealed to the Supreme Court to seek permission for abortion. The court did not allow an abortion for the ten-year-old child, compelling her to proceed with the pregnancy, while the 13-year-old child has been allowed to terminate the pregnancy.

There has been a spate of several such cases at the Supreme Court-level seeking directions to terminate pregnancies that are an outcome of rape. A number of questions have arisen based on such news: What are the reasons for delay in reaching the medical system? Why couldn't the family bring these survivors earlier? It is important to consider that a child may not realize that she is being sexually abused and that such abuse can lead to pregnancy. The child might also think that she will not be believed or she may fear a threat to her life and to her loved ones. In many situations, pregnancy is detected only when the child complains of nausea, abdominal pain and/or when an abdominal bulge is visible. Section 357 C of the Code of Criminal Procedure (CrPC) casts doctors with the duty of providing immediate treatment to survivors of rape. But on the ground, pregnancies due to rape are not addressed as a health concern. Doctors distance themselves from providing the required care if the pregnancy is beyond 20 weeks and advise the families to go to court. There is no doubt that these reported cases are just the tip of the iceberg and many more such cases remain unknown – their pleas may not even reach the courts due to social and economic barriers, and they may be compelled to continue unwanted pregnancies. Such cases have been consistently heard in the Supreme Court and high courts, and the courts have routinely referred the matter to the medical boards. The court verdict itself is based on the opinion of the medical board. Despite several such cases reaching the court, its orders are restricted to specific case scenarios without dwelling on the need to remedy the situation on the ground. The only exception to this is in the case of the ten-year-old survivor, where the Supreme Court expressed concern over survivors having to come to courts seeking remedy in the form of termination of pregnancy. It recommended that medical boards be set up at the state level to make decisions on these matters so that the process is not delayed by sending survivors to the courts.

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## CONCLUSION-

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From above discussion it can be concluded that the MTP act needs to be amended according the requirements and related conditions of the victims. In the case of sexually assaulted women's the limit of 20 weeks must be exceeded. It's time for the 46 year-old Indian abortion laws to be amended. The last decision of SC was the favorable step for the women regarding the need of women's consent only, for the abortion.