
CRITICAL REFLECTION PAPER ON DENIAL OF ABORTION BY INDIAN COURTS TO MINOR RAPE VICTIMS

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Introduction

A woman's reproductive rights should lie solely in her hands and not anyone else's but sadly that's not the case in our country. Anti-abortion laws and judges who deny requests for abortions are more than just an offence to a girl's rights on her own body but they also indicate the surreptitious misogyny that is found in our society. A woman's right to her sexuality, reproductive health, and fertility should not be deprived in any situation, whatsoever. The topic of abortion has always been disputed with each country having different laws and opinions with respect to this matter. In this paper, the author will be discussing about the denial of abortion in India with specific reference to minor rape victims.

This paper will further argue on why a time limit for abortion is unfair and state some facts pertaining to abortion with specific reference to minor rape victims. In the first section, I will be discussing the MTP 2021 bill briefly, and then talk about pregnancy caused due to rape. In the second section, the author will discuss a brief case study involving a case of abortion, followed by the analysis of the same case. Further, the author will be state their arguments and opinions on woman's reproductive rights and autonomy and adoption of unsafe abortion techniques, and finally, end the essay with the conclusion.

In the year 2017, the Supreme Court of India denied an abortion to a 10-year-old rape victim who was sexually assaulted by her maternal uncle.¹ The reason behind the verdict was that the victim was too far into her pregnancy. The facts of the case will be discussed in this paper. A similar case was observed in the year 2019, the Madras High Court denied a minor rape victim's request for an abortion². The victim was 19-weeks pregnant when the doctor first

¹ (2017). 10-year-old rape survivor whose abortion plea was rejected by SC delivers baby girl [Online]. India News, The Indian Express. Available at: indianexpress.com/article/india/10-year-old-rape-survivor-whose-abortion-plea-was-rejected-delivers-baby-girl-4800586/ (Accessed: 3 December 2021).

² *Ibid.*

observed her and 20 weeks pregnant when her petition was heard in the court and was denied to abort. Both the victims had to deliver their babies and in addition to their already existing PTSD and mental trauma caused due to rape, the physical and emotional pain of childbirth was also added on.

The Medical Termination of Pregnancy (Amendment) Bill 2021

Although the Medical Termination of Pregnancy (Amendment) Bill 2021, has brought in some much-needed amendments, the Act still faces a lot of criticism with respect to its laws.

The law in the MTP act with specific reference to rape victims' states that-

- *pregnancy can be terminated between 20-24 weeks. A minimum of 2 doctors must be consulted*
- *For women who belong to special categories such as rape/incest victims, differently-abled women, and minors have been given an extension of the gestation period of up to 24 weeks.*
- *In case a woman who has exceeded the 24-week gestation period wants to get an abortion, the only manner would be through a writ petition.³*

This indicates that rape victims are allowed abortion within the 24-week time limit. In this paper, the author will argue as to why having a time limit is unfair and why a girl's rights over her body should not be time constraint. The author will also justify why it is wrong for the courts to have the final say in what a young girl wants to do with her body.

Rape and pregnancy

Rape comes with a lot of lifelong traumas and it is unfair to burden the rape survivors with more suffering by not giving them the abortion they wish for. Rape is a monstrous and abhorrent act of violence upon a woman. The survivors undergo emotional and physical stress throughout their entire life and if the rape leads to pregnancy, it is more scarring and devastating for the victim. Health risks are not the only side effects of teenage pregnancy. Teen mothers will also find it difficult to get proper prenatal care if they are not financially stable.

³ The Medical Termination of Pregnancy (Amendment) Bill, 2020 [Online]. Available at: prsindia.org/billtrack/the-medical-termination-of-pregnancy-amendment-bill-2020 (Accessed: 3 December 2021).

Psychological well-being can also be affected and often teen pregnancies are seen to lead to depression and ignorance towards infants. If the victim delivers the baby she does not want, the baby will constantly remind her of the violent experience she had undergone. This will lead to immense psychological problems and emotional stress, especially if the victim is a minor. The courts and medical boards in most cases deny abortion requests due to their anti-abortion views and not because of the victim's well-being like they claim.

A Brief Case Study:

In 2017, a 10-year-old minor rape victim who got pregnant after being raped by her maternal uncle several times went to the Chandigarh district court seeking permission for abortion⁴. Although this should have been granted without any delay, the court ordered the medical board to examine the girl and further submit a report on the practicality of an abortion. According to some sources, the medical board made some wrong remarks and were inaccurate. Due to the remarks of the medical board, the judge came to the verdict to refuse the abortion.⁵ Some remarks of the judge appeared to be anti-abortion, due to which the request to abortion was denied. This case was then taken to the Supreme Court of India and the court-ordered another medical examination on the victim. By the time all these processes got over, the girl was 32-weeks pregnant and was claimed to be 'too far along' and that the foetus has a heartbeat and the Supreme Court ruled against an abortion. She then gave birth to a baby girl at term through C-section and the baby was then put up for adoption.

Analysis of the Case:

What happened to this girl is unacceptable and unfair on all grounds. The girl now has to not only live with the psychological effects of the sexual abuse but also the mental and physical trauma caused by childbirth.

The minor victim had undergone multiple complications during the delivery through caesarean as she was too young. The bones around her pelvic region were not strong and did not have

⁴ (2017). Chandigarh: 10-yr-old rape survivor denied abortion by SC gives birth [Online]. Available at: www.deccanchronicle.com/nation/current-affairs/170817/chandigarh-10-yr-old-rape-survivor-denied-abortion-by-sc-gives-birth.html (Accessed: 3 December 2021).

⁵ Safeabortionwomensright.org. 2021. [online] Available at: <<https://www.safeabortionwomensright.org/wp-content/uploads/2016/06/Sexual-abuse-of-girls-followed-by-refusal-of-safe-abortions-adding-insult-to-injury-updated-4-August-2017.pdf>> [Accessed 4 December 2021].

enough stamina.⁶ All of these complications associated with her delivery caused a grave danger to her life could have been avoided if they had granted the abortion to her in the first place without any delay.

According to WHO⁷, first and second-trimester abortions are very simple procedures and are associated with low risks or mostly no risk at all and require fewer follow-ups. The third-trimester abortions are usually tricky but with experienced doctors, it is as safe as delivery at term, or in most cases for minors they can even be safer than delivery at term⁸.

So, there is no reason why a court would deny an abortion due to health issues, the only reason behind the denial of an abortion to a minor rape victim is because of their own personal views over abortion, which is unfair to the victim. The doctor should *advise* (not deny) against abortion only if it would truly cause grave danger to the mother's life and not otherwise. This is also stated in the MTP Act 2021, that says that the opinion of medical practitioners is required, it does not state anywhere that the medical board can completely deny/refuse the abortion appeal itself.⁹

Instead of having two medical practitioners decide if a girl can get an abortion or not, which is mentioned in the MTP Act 2021, the law should be to make at least two medical practitioners' reason why the girl cannot get the requested abortion with sufficient and valid medical reasons to support it, in case the request to abortion is denied.

The 24-week gestation limit is not sufficient for minor rape victims because majority of them do not realize that they are pregnant in the earlier stages of pregnancy as they are young and unaware. By the time the victim and her family process the situation and come to a decision, the time limit is exceeded.

⁶ (2017). Chandigarh: DNA of 10-year-old rape victim's daughter doesn't match 'rapist' [Online]. NewsBytes. Available at: www.newsbytesapp.com/news/india/unexpected-development-in-chandigarh-10yo-rape-victim-case/story (Accessed: 3 December 2021).

⁷ World Health Organization. 2021. Safe abortion: technical and policy guidance for health systems. [online] Available at: https://www.who.int/reproductivehealth/publications/unsafe_abortion/9789241548434/en/ [Accessed 3 December 2021].

⁸ R. Downs, (2019). Debunking three myths about third trimester abortions [Online]. Available at: www.liveaction.org/news/three-myths-third-trimester-abortions/ (Accessed: 3 December 2021).

[8] Indiankanoon.org. 2021. Article 21 in The Constitution Of India 1949. [online] Available at: <https://indiankanoon.org/doc/1199182/> [Accessed 3 December 2021].

⁹ The Medical Termination of Pregnancy (Amendment) Bill, 2020 [Online]. Available at: prsindia.org/billtrack/the-medical-termination-of-pregnancy-amendment-bill-2020 (Accessed: 3 December 2021).

The Medical Termination of Pregnancy is legally permitted after 24 weeks on a condition that the pregnancy leads to grave injury to physical and mental health, a rape victim satisfies both the conditions and yet courts and medical boards question the feasibility of the abortion and in some cases deny the petitioner's (the victim) request to abort the baby as well.

Not everyone's going to have the same view and mindset but, in such cases, where the life of a person depends on one verdict, one must not let their personal belief and opinions blind them. Their anti-abortion views should not be the mere reason why they deny abortion. Every doctor and judge are obviously allowed to have their own morals and beliefs, but such views should not obstruct or disallow or even cause delay to the care that each patient and client deserves, to protect her health.

When a pregnant woman is made to approach the court to decide whether she can abort the baby or not, the courts will not have the expertise to give a verdict as to whether the abortion would be medically safe or not. In my opinion, the court should not even be involved in this decision. It is only the victim's and the registered medical practitioner's opinions that should matter in this. Medical practitioners should be unbiased and should be made well-aware of the situation the minor rape victim is in. Most medical practitioners nullify the rights guaranteed to woman under the MTP Act, by asking for parental consent.¹⁰ Thus, it's very important to set up an open-minded and unprejudiced medical board who can advise for/against the abortion taking *only* the victim's health and well-being into consideration and no other factors.

Another flaw in the MTP amendment we can observe is that, in the MTP 2020 Act it states that

*"In case a woman who has exceeded the 24-week gestation period wants to get an abortion, the only manner would be through a writ petition"*¹¹. But the court should realise that filing a writ petition can take a reasonable amount of time. In such cases where time plays a valuable factor, it is unfair to impose such a law on women that state that women can get an abortion only if they go through a time-consuming process of filing a writ.¹² It is also not very easy for common people to go up and file writs when they want to. Thus, it's important that courts make

¹⁰ Barua, A. and Apte, H., 2021. Quality of Abortion Care: Perspectives of Clients and Providers in Jharkhand. [online] Economic and Political Weekly. Available at: <<https://www.epw.in/journal/2007/48/reproductive-health-among-youth-bihar-and-jharkhand-special-issues-specials/quality>> [Accessed 4 December 2021].

¹¹ The Medical Termination of Pregnancy (Amendment) Bill, 2020 [Online]. Available at: prindia.org/billtrack/the-medical-termination-of-pregnancy-amendment-bill-2020 (Accessed: 3 December 2021).

¹² Asthana, S., 2021. Writ: A Detailed Explanation of Writs and Procedures under Constitution. [online] iPleaders. Available at: <https://blog.ipleaders.in/writ/#Who_may_apply> [Accessed 4 December 2021].

laws that don't involve a time-consuming process when it comes to abortion as time plays the most important factor in this.

Under Article 21¹³ i.e., the Right to Life which includes the right to good health and right to a dignified existence. When referring to abortion, both of these rights are violated when a woman is denied abortion with no valid medical reason and is compelled to carry and deliver the baby at term. Denial of safe abortion to women is a form of violence against them as they are deprived of their basic human right that is to let them decide what they can do with their bodies without any restrictions.¹⁴ This compromises her health and can affect her family's financial well-being and welfare.

Understanding a Woman's Reproductive Autonomy

The insidious misogyny and patriarchy that has been a part of our culture for a long time now have given rise to the concept of reproductive rights and autonomy. Reproductive rights are important for understanding and comprehending all human rights. This notion aims to provide women the liberty to decide what they can do with their bodies. This idea transferred the rights over a woman's body from men and society to women themselves. This idea would permit and authorize women to control their fertility. In simple words, reproductive autonomy is the right given to women to decide if they want to give birth or not without letting anyone interfere in their decision. It also gives women the liberty to decide how many children they want, and the freedom to choose whom they want it with¹⁵.

The right to reproductive autonomy is a right granted by the Indian courts and is considered a fundamental right¹⁶ and yet the courts themselves do not abide by it and deny abortion appeals. Despite India being one of the first countries in administering and developing a good

¹³ Joshi, M., 2021. Article 21: Right To Life And Personal Liberty of Indian Constitution. [online] The Indian Constitution. Available at: <<https://theindianconstitution.com/article-21-life-personal-liberty-right/>> [Accessed 4 December 2021].

¹⁴ Thappa, S., 2021. DENIAL OF ACCESS TO SAFE ABORTION IS A FORM OF VIOLENCE AGAINST WOMEN. [online] The ASAP Blog. Available at: <<https://asap-asia.org/blog/denial-of-access-to-safe-abortion-is-a-form-of-violence-against-women/>>

Reproductiverights.org. 2021. [online] Available at: <<https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Substantive%20Equality,%20Autonomy%20and%20Reproductive%20Rights.pdf>> [Accessed 4 December 2021].¹⁵

¹⁶ Reproductiverights.org. 2021. [online] Available at: <<https://reproductiverights.org/sites/default/files/documents/Reproductive-Rights-In-Indian-Courts.pdf>> [Accessed 4 December 2021].

framework and laws that guarantee access to abortion¹⁷, a huge number of women still face hurdles with respect to enjoying their rights fully. The hurdles faced are old enough to be removed easily and hence take a lot of time. When a court refuses an abortion it not only disregards the concept of reproductive autonomy but also constitutes to a great deal of humiliation to the girl as she is being deprived of her basic right and freedom to do what she wants with her body. The fact that a woman has to go to a court and let someone else decide what she can and cannot do with her body itself overlooks the fundamental right of reproductive autonomy. The reproductive rights of a girl should not be violated and these legal rights should be protected to ensure gender equality and justice for women.

The *K.S. Puttuswamy vs. Union of India*'s judgment claims and recognizes that it is the constitutional right of women to make their own reproductive decisions, as it comes within personal liberty under the Right to life¹⁸. Taking all this into consideration, it is unfair for courts to deny abortion to a minor rape victim and every woman must freely be able to responsibly make decisions when it comes to her body and health. The right to abort must be given to every woman without considering time as a barrier i.e., they should not be denied an abortion just because they exceeded the 24-week time limit.

Adoption of Unsafe Abortion methods

When a court denies an abortion appeal, most women adopt illegal unsafe abortion methods¹⁹ which can be harmful to the child-bearer and the baby, and this, in turn, can kill both the mother and the child.²⁰ Unsafe abortions result in very severe health risks. According to statistics, unsafe abortions results in almost 13% of the total cases of maternal deaths that occur every year.²¹ Due to restrictive abortion laws in our country, we can observe that women choose

¹⁷ Ghosh, A. and Khaitan, N., 2021. A Womb of One's Own: Privacy and Reproductive Rights. [online] Vidhi Centre for Legal Policy. Available at: <<https://vidhilegalpolicy.in/blog/2017-11-2-a-womb-of-ones-own-privacy-and-reproductive-rights/>> [Accessed 4 December 2021].

¹⁸ Rai, D., 2021. Abortion under the Medical Termination of Pregnancy Act. [online] iPleaders. Available at: <<https://blog.ipleaders.in/abortion-under-the-medical-termination-of-pregnancy->> [Accessed 4 December 2021].

¹⁹ Ghosh, A., 2021. The Denial Of Abortion Services In India: In Quotes From Doctors & Patients. [online] Feminism In India. Available at: <<https://feminisminindia.com/2019/06/22/denial-abortion-services-quotes-doctors/>> [Accessed 4 December 2021].

²⁰ Lisa B Haddad, N., 2021. Unsafe Abortion: Unnecessary Maternal Mortality. [online] PubMed Central (PMC). Available at: <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2709326/>> [Accessed 4 December 2021].

²¹ Infographics, M., 2021. 24 Incredible Unsafe Abortion Statistics - HRF. [online] HRF. Available at: <<https://healthresearchfunding.org/24-incredible-unsafe-abortion-statistics/>> [Accessed 4 December 2021].

to go with unsafe abortions which is a leading cause of maternal deaths. Unsafe abortions can lead to multiple physical and mental complications.²²

Forced pregnancy at any age is horrifying and especially in minors, it's scarier as they are completely unaware of what's happening to their body. The mental trauma that comes with them being forced to carry a pregnancy to term is unimaginable.²³

Even if the baby is to be put up for adoption after the delivery, the girl still goes through a lot of physical pain with respect to the delivery and child-birth which can be avoided by getting an abortion. The fact that an unborn and not even completely formed foetus' life is taken into account but not a girl who went through massive torment of sexual abuse speaks a lot about the world we live in. The rights of the mother should be given precedence over a foetus who may/may not be an entity before the law. Numerous people claim that the unborn baby has a legal right to live, but in my opinion, a foetus can be treated as a person only after its born and the concept of a person revolves around possession of rights and capacity to discharge duties, therefore living beings can only be considered as legal entities and not unborn foetus.

Conclusion:

There are a lot of issues and criticism pertaining to the MTP Act even after the new amendments. The laws in India are indeed better than the ones other countries impose on girls when it comes to abortion but the whole idea of a girl being able to decide what and what she cannot do with her body is being decided by a group of legal authorities is just ridiculous and unacceptable.

The MTP should make it legal for a woman to get an abortion no matter how far along she is, the only factor that should come into play when considering the feasibility of abortion is if the mother's life will be put in danger if an abortion is carried out and not how much the baby has developed. After all, the foetus' whole existence is a mistake and not planned, so the foetus' condition should not play a deciding factor in this process at all. The court should not even be involved in this procedure. Even if the courts are involved, during the first two trimesters the judge should immediately grant the request to abortion without any delay. For pregnant victims

²² Who.int. 2021. Abortion. [online] Available at: <<https://www.who.int/news-room/fact-sheets/detail/abortion>> [Accessed 4 December 2021].

²³ Equalitynow.org. 2021. Forced Pregnancy – Equality Now. [online] Available at: <https://www.equalitynow.org/forced_pregnancy/> [Accessed 4 December 2021].

in the third trimester, it should set up a legitimate group of doctors who should thoroughly examine the girl and advice if the abortion will cause danger to her life or not. The decision should be given as soon as possible to make sure the minor victim does not undergo anymore emotional/physical stress associated with the pregnancy. A minor bearing a child is associated with a higher risk of pregnancy and childbirth complications. Most minors do not have the maturity and mental and physical capacity to deal with pregnancy, childbirth, and childcare. Hence, abortion would be the most suitable and best option for girls of this age.²⁴

Our country still has a long way to go when it comes to girls' reproductive rights or in fact girls' rights in general. With the changing world and modernization, it is important for people especially judges to be more open-minded and give verdicts purely based on logic and proper reasoning and not personal views/opinions. The media can play also play an important role. Cases of girl children being sexually abused should be reported in the media with the legal and medical issues pertaining to it to increase awareness amongst the society. A minor rape victim should not have to be burdened for life by being forced to carry the pregnancy to term and held responsible for the child of her sexual abuser for the rest of her life. The minor has to not only suffer from carrying an unwanted pregnancy, in mot cases there is a probable loss of education and job opportunities. Even if the baby is going to be put up for adoption post-delivery, the victim still has to bear the emotional and physical trauma of childbirth which can be completely avoided by getting an abortion. There should be absolutely no limitation on a girl's decision-making in this matter.

²⁴ Joseph, d., 2021. 8 Major Consequences Of Teenage Pregnancy And Risk Involved. [online] MomJunction. Available at: <https://www.momjunction.com/articles/health-risks-of-teenage-pregnancy_00377831/> [Accessed 4 December 2021].