

# Compulsory Maternity for Child Rape Survivors: A Form of 'Rape by the State'?

**N. L Sajikumar, Assistant Professor, Government Law College, Thiruvananthapuram, State of Kerala, India**



## Background of the Discussion

The year 2012 had been nightmarish for women in India: It began with the rape of two year old toddler in January by a daily wage worker and ended with *NIRBHAYA* gang rape in December. On 16<sup>th</sup> December, 2012, the notorious Delhi gang rape case rocked the Nation. The brutality was such that the incident captured media headlines across the world. Raising eyebrows, the world asked: What was happening to India? Was life really so unsafe for young girls in India?

Five years later.....On 28<sup>th</sup> July, 2017, another incident sending tremors around the globe, shocked human conscience: The apex court of India denied abortion to a 10-year-old rape survivor. BBC reported: "The court order was a huge disappointment for the girl's family. Someone who interacts with the girl on a regular basis says: "She's very innocent and has no idea what's happened to her. Her parents couldn't imagine even in their wildest nightmares that their daughter could be pregnant at 10. She has been told that she has a big stone in her stomach and the bulge is because of that. The family is poor and lives in a cramped one-room flat. The father says he feels like his daughter has been murdered." She was born with a hole in her heart, which was plugged in 2013. Although doctors say it's unlikely to interfere with her pregnancy, the fact remains that she is too young to give birth. "Can a 10-year-old deliver a child? Could it be life threatening for her? We are praying that nothing bad happens to her," said a child rights worker."

After reading the report, it is quite natural to leave a comment as Luke Skywalker did: "What a brutal, uncivilized country, crammed with female hating barbarians. To be female in India is to serve a life time of penal servitude for simply to be born of that sex. How India aspires to be a modern country is surely delusional."

Despite the enactment of the Protection of Children from Sexual Offences Act (POCSO), 2012 and the New Anti-rape Law, 2013, as many as 10,854 cases of child rape were reported in India in 2015. A child under sixteen is raped every 155 minutes; and a child under ten every 13 hours. 53.22% of children reported some form of sexual abuse; and 50% of abusers are known to the child or are "persons in trust and care-givers," according to the National Crime Records Bureau and other official sources.

One of the glaring consequences of rape is unwanted pregnancy. It becomes more dreadful when the victim happens to be a child. The question of abortion in such cases is one of the most difficult and sensitive issues to address. In recent years, Indian courts are being frequently confronted with a number of pleas by child rape survivors seeking abortions where the pregnancies had gone beyond the legal limit of 20 weeks. (The Medical Termination of Pregnancy Act, 1971 allow terminations after 20 weeks only if doctors certify that the mother's life is in danger) In most cases, these pregnancies are discovered late because the children as well as parents are not aware of their condition.

For a fruitful discussion on the socio-psycho-legal implications of the present trends in India, excerpts from some of the recent media reports world across seems to be worth quoting:

**“India: Court Grants 10-year-old Girl Right to Abortion in Rape Case”** (CNN 16<sup>th</sup> May, 2017): After suspecting her child might be pregnant, the mother, a migrant laborer took the girl to a doctor. Once confirmed, the girl told her mother that her paternal uncle had been sexually assaulting her.

**“10-year old Rape Survivor Denied Abortion by India’s Supreme Court”** (CBC News 28<sup>th</sup> July, 2017): The victim, who was raped several times by her maternal uncle, was 30 weeks pregnant. The court based its decision on the assessment of a panel of eight doctors. "It is a ready-to-deliver baby inside her. An abortion at this stage would mean we deliver the child and kill it. How can we recommend that?" a doctor told.

**“Raped Girl aged 10 delivers baby after being denied abortion by Indian Supreme Court”**(INDEPENDENT 17<sup>th</sup> August, 2017): Victim does not know she has delivered a baby as parents told her she had a 'stone' in her stomach.

**“Parents of 10-year-old Rape Victim refuse to see their Daughter’s Newborn Baby”** (INDEPENDENT 19<sup>th</sup> August, 2017): The victim, who has not been named, has also not seen her baby who has reportedly been admitted to a neonatal intensive care unit.

**“India Supreme Court allows Rape Victim, 13, to Terminate Pregnancy”** (BBC NEWS 6<sup>th</sup> September, 2017): The pregnancy was discovered after her parents took her to a doctor to seek treatment for obesity. The girl alleges she was raped by her father's colleague. The girl was 32 weeks pregnant. The medical report prepared by a panel of doctors had suggested a wait for two weeks to allow the fetus to grow further, but the judges ordered an immediate termination to avoid further trauma to the girl.

**“India- 13-year-old Rape Victim's Baby Dies Two Days after Birth”** (BBC NEWS 11<sup>th</sup> September, 2017): The baby of a 13-year-old Indian rape victim, allowed by the Supreme Court to terminate her pregnancy, has died two days after he was born. A panel of five doctors carried out the Caesarean section. It's not clear what the baby died from, but a Times of India report quoting doctors said he had lung problems and severe breathing difficulties.

**“India Rape: Uncle did not Father Child's Baby - DNA Test”** (BBC NEWS 13<sup>th</sup> September 2017): Police in India have reopened the case of a 10-year-old girl after forensic tests revealed that her baby's DNA samples did not match those of her uncle who is charged with raping her. The accused is being tried in a special court dealing with crimes against children. He is in prison and has made no statement so far. The result of the DNA test has now led to questions over whether the girl was abused by others. Police said the uncle had admitted to the allegations. The girl had testified to the court on video conferencing and in her statement, she had very clearly named the uncle and revealed facts about her abuse. The police and counselors visited the family again. A senior police official told that they would ask for a re-check of the forensic tests to ensure there had been no error in the DNA report

## **Jurisprudential Framework**

The relationship between a pregnant woman and her fetus gives the mother and fetus a biological, psychological, moral, and legal connection that is unique: within the same body, there exist one person and one ‘potential person’ with both similar and/or separate interests (for the fetus, developing rights; and for the woman, right to decide whether to continue pregnancy).

Abortion serves as one example of maternal-fetal conflict which is complex. It is a typical conflict: *Law v/s Morality*. With regard to the question of legal regulation of abortion, two extreme views prevail:

- (i) The State has no business in the bedrooms of the nation; and hence, law should not compel an individual to carry an unwanted pregnancy.
- (ii) The child in the womb has the right to life; and no one has authority to deny it; and hence law should regulate abortion with iron hands.

Legal issues in this regard include: Does the State can intrude a woman's right to privacy- to decide whether or not to continue a pregnancy? Whether the State has an obligation to preserve fetus regardless the viability? (Viability is a stage where the fetus's life ``may be continued outside the womb by the natural or artificial life-supportive systems-“ *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 63--65 (1976))

## **Legal Regulation under Various Jurisdictions**

Vatican City, Chile, El Salvador, Nicaragua and Malta ban abortion exclusively. United States of America and many other States are having liberal attitude towards abortion and right of mother to choose her pregnancy. In US, the Supreme Court in *Roe v. Wade* 35 L Ed 2d at 184 (1973) held that, after viability, the State could regulate or prohibit abortion if it is "necessary, in appropriate medical judgment," to preserve the life or health of the woman. In *Doe v. Bolton* 35 L.Ed.2d 201(1973), court added, 'best clinical judgment "may be exercised in light of all factors- physical, emotional, psychological, familial, and the woman's age - relevant to the well-being of the patient.

In short, the twin cases in 1973- *Roe* and *Doe* give the woman:

- (1) A privacy interest that outweighs any rights which may be asserted on behalf of the fetus up to the point of viability, and
- (2) A broadly defined health interest which prevails over any interest asserted on behalf of the fetus throughout the term of pregnancy.

The Freedom of Choice Act (FOCA) also declares this US policy. North Carolina dates this prohibition at twenty weeks; Massachusetts, Nevada, and South Dakota impose it at twenty-four weeks. New York prohibits abortion after the twenty-fourth week unless the procedure is necessary to save the life of the pregnant woman.

In *Thornburgh v. American College of Obstetricians and Gynecologists*, 737 F.2d 283, 288-89 (3d Cir. 1984), it was held that, abortions destructive of the fetus must be permitted, even just before birth, if they promote what the Supreme Court calls "health." It is clear from the Supreme Court cases that 'health' is to be broadly defined. As the Court stated in *Doe*, the factors relating to health include those that are 'physical, emotional, psychological, familial, as well as the woman's age.' Hence, a law which punished post-viability abortions which were done to avoid the "potential psychological or emotional impact on the mother of the unborn child's survival" would be clearly unconstitutional.

## Indian Legal Framework

**The Indian Penal Code, 1860 (IPC):** Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. A woman who causes herself to miscarry, is covered under this provision. (Section 312)

**The Medical Termination of Pregnancy Act, 1971 (MTPA):** This Act overrides the Indian Penal Code by allowing a woman to get an abortion through a registered medical practitioner within the first 12 weeks of pregnancy; and if the fetus is between 12 and 20 weeks old, with the permission of two medical practitioners; provided an opinion has been formed in good faith, that:-

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

Where any, pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman. In determining whether the continuance of pregnancy would involve such risk of injury to the health, account may be taken of the pregnant woman's actual or reasonable foreseeable environment. No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a lunatic, shall be terminated except with the consent in writing of her guardian. (Section 3) Abortion beyond 20 weeks is also legal if a registered medical practitioner, in good faith, thinks that emergency termination is necessary to save a pregnant woman's life. (Section 5) No suit for other legal proceedings shall lie against any registered medical practitioner for any damage caused or likely to be caused by anything which is in good faith done or intended to be done under this Act. (Section 8)

**Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (PNDTA):** It prohibits sex-selection and prescribes strict punishment for both – the party seeking prenatal sex determination as well as the medical practitioner conducting the test. (Chapter VII, Sections 22-28)

**Constitution of India:** Constitution contains no express provision in this regard; but activist interpretations of the courts provide that:

- **'Right to Privacy' is an aspect of 'Right to Life' under Article 21:** In *Madhukar Narayan Mardikar* AIR 1991 SC 207, the apex court held, "even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes." In *Justice K.S. Puttaswami (Rtd.) v. Union of India*, (W.P (C) NO.000372/2017) Chelameswar, J. also touched upon a woman's freedom of choice on whether to terminate pregnancy. "Concerns of privacy arise when the State seeks to intrude into the body of subjects," he observed.
- **Rape violates 'right to live with human dignity' under Article 21:** In *Bodhisatwa v. Subdhra Chakroborty* (1996) 1 SCC 490, the Court observed, "Rape is a crime not only against the person of a woman, it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis."
- **Compensation can be allowed for having been raped; and anyone can espouse the cause of a rape survivor or child rape survivors in any court of law** (*Chairman, Railway Board v. Chandrima Das* AIR 2000 SC 988)



- **Mediation and compromise in rape case is thoroughly and completely without legal permissibility** (*State of M.P. v. Madanlal*, Criminal Appeal No. 231 of 2015)

## **Present State of Affairs in India**

### **Judiciary: ‘Sympathetic;’ but ‘Helpless’**

In *Chandrakant Jayantilal Suthar* 2015 (6) R.C.R. (Criminal) 83, a 14-year-old Class X student was raped by a doctor who gave sedatives and warned her not to tell the parents. When permission was sought to terminate pregnancy after 24 weeks, the Supreme Court issued a “flexible” order, leaving it for a team of doctors and a psychologist to decide whether termination of pregnancy was in the interest of the girl’s life. Anil R Dave & Kurian Joseph, JJ. expressed their concern as well as helplessness thus: “We understand her life has been ruined and there will be social stigma. We can acknowledge her pain and agony and we want to help her. But we cannot do it in violation of the law.”

In *R v Haryana* (CWP-6733/2016) the High Court did not grant permission to terminate pregnancy as the medical report did not agree. However, by way of abundant caution, the court requested doctors to reassess so as to take decision in good faith in the best interest of the petitioner. However, the petitioner delivered a healthy baby over the course of these lengthy proceedings. Interestingly, the court also directed the Centre to make necessary amendments to the MTPA – to clearly stipulate that doctors will not be unnecessarily prosecuted if they act in good faith.

In, *Alakh Alok Srivastava* (W.P (Civil) No(s).565/2017) where a 10-year-old child was denied abortion in an advanced stage of pregnancy, the Supreme Court bench of then Chief Justice J.S. Khehar and Justice D.Y. Chandrachud expressed their empathy, and examined the feasibility of setting up permanent medical boards at the State level to examine such cases till the law is amended.

But in *Murugan Nayyakkar* (W.P CIVIL NO. 749/2017), the Supreme Court comprising Misra, Amitava Roy and A.M. Khanvilkar JJ. while deciding the abortion plea of a minor girl in an advanced stage of pregnancy (31 weeks) issued a “rigid” order: The doctors had suggested a wait for two weeks to allow the fetus to grow further, but the judges ordered an immediate termination to avoid further trauma to the girl. “How can a 13-year-old become a mother?” Chief Justice Deepak Misra observed.

### **Medical Practitioners: ‘Empowered;’ but ‘Frightened’**

The medical practitioners themselves admit that the risk of pregnant girls under the age of fifteen years dying is two-and-a-half times higher than that for women above twenty. The risk is even higher for someone who is only ten. 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. (See, *Suchita Srivastava v. Chandigarh* AIR 2010 SC 235; *Kavita v. Haryana* 2015 (2) RCR (Crl) 606 (P & H); *Minor daughter of Sh. Rudharpal v. Haryana* 2015 (4) R.C.R. (Crl) 423; *Bashir Khan v. Punjab* 2014 (4) R.C.R. (Crl) 148; *Vijender v. Haryana* 2015 (1) R.C.R. (Civil) 163; *Chandrakant Jayantilal Suthar v. Gujarat* 2015 (6) R.C.R. (Crl) 83; *Bhavikaben v. Gujarat*, Criminal Application No.1155 of 2016, decided on 19.02.2016; *D. Rajeswari v. T.N* 1996 CrL.J. 3795; *Dr. Nikhil v. Union of India* 2008(110) Bom. LR3293; *Ashaben v. Gujarat* 2015 (4) 9 of 87 CWP-6733-2016)

The medical judgment may be exercised in light of all factors-- physical, emotional, psychological, familial, and the woman's age--relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman. Recently in Ireland, which bans abortion completely, a teenager pregnant due to rape was helped by the doctors during the 26<sup>th</sup> week of gestation period by delivering the child prematurely through C-Section, and relieving her of the burden of carrying the pregnancy to its full term.

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

### **Legislature: ‘Competent,’ but ‘Lethargic’**

“Viability” occurs at different points in different pregnancies and requires medical expertise to diagnose. Except in the very last stages of pregnancy, no one other than a physician could be expected to know the fetus is viable. The statutory fixation of the point of viability rather than leaving the determination to the physician is arbitrary. In countries like Canada, China, and North Korea, there is no upper limit of gestation period within which the termination of pregnancy can be legally sought by a woman.

The statute appears to be unconstitutional because it prevents post viability abortions necessary for the mother's ‘health’ (that includes emotional, psychological and familial factors) which is an aspect of right to live with human dignity covered under Article 21 of the Constitution of India guaranteeing right to life. In the case of rape, if a woman is forced to carry pregnancy, it would cause further psychological harm and clear violation of her right to dignity, right to privacy and right to health.

Moreover, a child born of rape is stigmatized and is treated as illegitimate both by the society and the law. In socio- legal parlance, the child born to parents who are not legally married was called a “*bastard*.” However, in polite societies, terms such as “*natural child*” or “*non-marital child*” or “*child born outside wedlock*” are preferred. In India, till date the term “*illegitimate child*” remains in statutory provisions. In the absence of

Uniform Civil Code, matters relating to maintenance, inheritance, custody, guardianship etc. are governed by the personal law of the parties; and the personal laws unreasonably discriminate such children.

### **Executive- ‘Decisive;’ but ‘Digressive’**

Nothing is more important to a Nation than its public health. A responsible administration is expected to use resources and expertise to bring about outcomes that are ‘in the public interest,’ which predominantly include the health of the people. India made phenomenal economic gains in the last three decades, but has failed to improve the health status of its population on similar terms. Infant mortality, under-five mortality and maternal mortality rates of the country are still comparable with statistics coming out from other south Asian nations or countries from sub-Saharan Africa. India may be growing as fast as the other BRICS economies, but its spending on healthcare is much lower. All this shows that in the complex prioritization matrix of the government, health is accorded a lower priority. Moreover, public spending on health is typically enjoyed more by the non-poor. The high level of corruption in India has been widely perceived as a major obstacle in improving the quality of governance.

In an over-burdened public health system where the average gynecologist has no training in conducting medical examinations and is often reluctant to do so for fear of criminal prosecution, victims get little remedy. The need for a permanent medical board to deal with abortion cases in each district in the country also remains unaddressed. To avoid undue strain of the family, the court should have the option to approach the medical board rather searching for new experts or hospitals each time. The absence of comprehensive Ministry of Health-approved guidelines to prevent pregnancy after rape is the biggest issue faced by the providers of health care to victims of sexual violence. In addition, the victims face numerous challenges: reporting the rape to hostile police, unsympathetic forensic examinations, lack of counseling, shoddy police investigations and weak prosecutions.

### **Society: ‘Idealistic;’ but ‘Insensitive’**

Fearing society’s reaction, usually the victims hesitate to reveal the family or relatives about the rape. The sense of guilt and shame, in addition to the rapist’s threat reinforce the decision to remain silent. Subsequently, the society assumes the position of moral arbiter and pregnancy police, so that women become defined by their reproductive roles and are reduced to what George J. Annas called “fetal containers;” or as Johnsen stated, transformed into ideal ‘baby-making machines.’

Finally, the same society regards such children born outside wedlock as ‘virtual outlaws:’ “the bastard, like the prostitute, thief and beggar, belongs to that motley crowd of disreputable social types which society has generally resented, always endured. He is a living symbol of social irregularity;” and “illegitimacy is a way of life—a second class way of life.”



## **Media: 'Sensational;' not 'Sentimental'**

The response to NIRBHAYA gang rape and murder case has highlighted the power of media to stimulate debate and change attitudes. However, with regard to the recent incidents, BBC portrays a different picture: "What has made their situation worse is that, ever since the news of the rape and pregnancy hit the headlines, they have been hounded by journalists." "When the girl's father came to see me, he told me his biggest problem was the press. He said there were reporters outside his home all the time and his privacy was being infringed upon." The unwanted publicity is causing the family immense grief. Many of the reporters went to their house when the father was at work and gained entry claiming to be child workers. Since the alleged rapist was the mother's cousin, some even questioned if she was aware of the abuse and, maybe, even approved of it. "How come she didn't know that her daughter was pregnant for seven months?" they asked.

This has been very troubling for the family, and the girl's father is angry and bitter. He asks: "Why are you advertising my daughter's case? The press has turned this into a business enterprise." His anger is justified - even though there are laws that expressly forbid journalists from revealing identities of rape survivors and child victims of crimes, many people have been able to join the dots and identify the family because the alleged rapist's name was extensively reported in the press. Now their neighbors and his work colleagues know. Possibly the child's school friends know too."

## **Suggestions/Future options**

- In view of the *AADHAR judgment* (2017) recognizing the right to privacy, Supreme Court may declare the provisions of the MTPA unconstitutional and void.
- A proposal for amendment to MTPA to increase gestation limit to 24 weeks for women in special category, including rape survivors and incest, single women (unmarried/divorced/widowed) and other vulnerable women (women with disabilities), is still pending. Parliament may amend the MTPA so that the termination of pregnancy is allowed in certain cases, keeping the safety of minors in mind.
- Registered medical officers are required to understand the spirit behind the MTPA lifting the embargo on termination of pregnancy beyond 20 weeks. The opinion mentioned therein can be formed by a single doctor also. The expertise of the doctors is to take precedence even over the decision of the Court. The provisions of the Act do not contemplate authorization or approval from any court. Therefore, it is well within their power to help minor girls and spare them the trauma of running around the courts. Always keep in mind that there are many who cannot afford to go to the courts; but refuse to do so out of baseless fears of prosecution.
- Media would do well to remember not only the legal code (especially, Sections 228-A of the Indian Penal Code, 1860; and 327(3) of the Code of Criminal Procedure, 1973) but also the ethical responsibility they have when reporting on rapes and incidents of sexual violence.

If abortion is banned, or more restricted, victims would return to the days of 'back-street abortions' that obviously cause health risks. At least in rape cases involving children, Edward Abbey's quote: "abolition of right to abortion, when and if she wants it, amounts to compulsory maternity: a form of rape by the State," seems to be true.

Many decades ago, Nehru who compared children to roses, remarked: "The ambition of the greatest man of our generation has been to wipe every tear from every eye. That may be beyond us, but as long as there are tears and suffering, so long our work will not be over." Today, many of our children are "red roses"-reddened by blood stains....hence the ambition of a greatest INDIAN shall be to wipe blood stains, not tears....so long as there are blood stains and sufferings, so long our work will not be over....