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COMMENTARY

Right to abortion of survivors of rape in India

MANIKA KAMTHAN, RUKSANA AKHTAR

Abstract

The Medical Termination of Pregnancy (MTP) Amendment Act, 2021, contains some progressive changes. However, survivors of rape will continue to go through mental as well as physical trauma to secure an abortion. We argue that the MTP Amendment Act, 2021, fails to address the rights of rape survivors adequately.

Keywords: *right to abortion, rape, MTP Act, right to life, autonomy.*

The Medical Termination of Pregnancy (MTP) Amendment Act, 2021 [1] is viewed as reformative, which attempts to address the limitations of the MTP Act, 1971[2] which governs abortions in India.

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One of the key changes is Section 3, which extends the time limit for termination of pregnancy *in certain circumstances*, from the earlier 20 weeks to 24 weeks. Abortions between 20 and 24 weeks require the recommendations of two medical practitioners. These medical practitioners should "in good faith" believe that the continuation of the pregnancy involves a risk to the pregnant woman's life or a risk of grave injury to her physical or mental health, or that there is a substantial risk that if the child were born, it would suffer from a serious physical or mental abnormality [1].

Rule 3B of the MTP Act 2021 recognises seven categories of women whose pregnancies between 20 and 24 weeks can be terminated under Section 3(2) (b) of the MTP Act 2021[2]. These are: (i) survivors of sexual assault, rape, or incest; (ii) minors; (iii) women whose marital status changes during the ongoing pregnancy through widowhood or divorce; (iv) women with physical disabilities; (v) mentally ill women including women with mental retardation; (vi) women whose foetus has a malformation that has a substantial risk of being incompatible with life; or, if the child is born, it may suffer from physical or mental abnormalities and will be seriously handicapped; and (vii) women who are pregnant in humanitarian settings, or disaster or emergency situations.

A major gap in the amended Act is its treatment of abortion in cases of pregnancy caused by rape. Under the Act, a pregnancy beyond 24 weeks may be terminated only where such termination is necessitated by "the diagnosis of any of the substantial fetal abnormalities" by a Medical Board. In

instances where there is a significant threat to the mother's life post 24 weeks, the courts have permitted abortions in specific cases. For instance, the Bombay High Court, in *Shaikh Ayesha Khatoon v Union of India* [3], in 2018, allowed the petitioner to undergo MTP at her own risk, in a case of severe foetal abnormalities causing anguish to the pregnant woman. In another case, *XYZ v State of Maharashtra* [4], an unmarried minor was allowed to undergo MTP in the 26th week of pregnancy — setting aside the Medical Board's advice — on the ground that for "a girl of tender age, to have an unwanted child may lead to disastrous consequences for the rest of her life, not only for the petitioner but for the entire family." [4: para 20].

However, if a rape survivor seeks termination of a pregnancy that has extended beyond 24 weeks, her only recourse is to go to court.

This is contrary to the spirit of the amended Section 3(2), Explanation 2, which makes a clear statement about the impact of rape on the survivor's mental health: where if any pregnancy is alleged to have been caused by rape, it "shall be presumed to constitute a grave injury to the mental health of the pregnant woman".

In several cases, the Indian courts have upheld the bodily autonomy of women in the context of their reproductive rights. In the landmark Supreme Court (SC) case of *KS Puttaswamy v Union of India* [5], the right to bodily autonomy is held to be part and parcel of the right to privacy. In *High Court on its own motion v State of Maharashtra* [6], the Bombay High Court held that compelling a woman to continue an unwanted pregnancy violates her bodily autonomy and has an adverse impact on her mental health. This upheld the position taken in the landmark 2009 case of *Suchita Srivastava & Anr v Chandigarh Administration* [7], where the SC had asserted that reproductive choices are part of the right to privacy, dignity and bodily integrity.

However, despite this increasingly rights-based approach, as pointed out above, the law still maintains the status quo with regard to restrictions on abortion in pregnancies of over 24 weeks' duration.

Rape is a gross violation of a woman's right to bodily autonomy and dignity. Thus, pregnancy as a result of rape cannot be seen as similar to normal pregnancies, and forcing a survivor to continue with such a pregnancy amounts to a violation of her right to a life with dignity. The amended MTP Act fails to address the circumstantial factors revolving around pregnancy caused by rape, particularly where the survivor is a minor or is cognitively not capable of understanding the gravity of the situation.

Furthermore, rape survivors are often traumatised by the abuse and the social stigma attached to rape, and this results in delay "in disclosing the incident to family members, making a decision to report, challenges in getting a complaint registered" [8]. For all these reasons, the entire process may go on beyond 24 weeks. Forcing the survivor to go through the additional process of approaching the Court, or going through with an unwanted pregnancy, would only add to the trauma.

This is illustrated in the case of *Alakh Alok Srivastava v Union of India & Ors* [9], where a 10-year-old rape survivor from Chandigarh, whose pregnancy had crossed the 20-week permitted timeline in 2018, approached the court (through her parents) for permission for an abortion. The survivor had been raped continuously for over seven months by her two maternal uncles. The parents were able to discover the pregnancy only when the survivor complained of stomach ache when she was already many weeks pregnant. It is another matter that the Supreme Court denied permission, and the survivor failed to get justice even after this extended trauma.

A pregnancy out of a consensual relationship cannot be equated with a pregnancy resulting from rape. Rape survivors should not be subjected to the same restrictions for undergoing an abortion. Rape, besides causing physical and mental trauma, impacts the survivors' socio-economic condition. The scope of the Act should be widened to establish the doctrine of *"parens patriae",* where the State acts as a protector of the vulnerable survivor [10].

The amended MTP Act, 2021, can integrate the Bombay High Court's directives in *XYZ (Minor) through her father v State of Maharashtra* [11] when the survivor, who was 25 weeks pregnant, was permitted to abort. The State was then directed to provide all the necessary medical support and allow rape survivors to undergo abortions even beyond 24 weeks, if the medical reports certify that the survivor's life will not be endangered. Thus, the Act should incorporate specific provisions facilitating easier abortions for rape survivors in order to ensure a rights-based healthcare framework. These reforms pertaining to survivors of rape would ease their difficulties in exercising the right to abortion and relieve some of their trauma.

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COMMENTARY

The Consumer Protection Act, 2019: A critical analysis from a medical practitioner's perspective

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Abstract

The landmark judgment in the case of Indian Medical Association v VP Shantha in 1995 brought the medical profession under the ambit of the Consumer Protection Act, 1986. The Consumer Protection Act, 1986, was later repealed and replaced by the Consumer Protection Act, 2019. This article delves into the implications of the 2019 Act, highlighting significant changes in its scope, including the expansion of the definition of "consumer" and the incorporation of telemarketing and e-commerce within its ambit. Moreover, the amendments affect pecuniary jurisdiction, grounds for litigation, and introduce mediation cells, and the Central Consumer Protection Authority (CCPA). This article underscores concerns related to an increase in frivolous cases against medical practitioners and in defensive practice, ultimately impacting the overall quality of patient care. Recommendations for timely redressal and safeguards against unwarranted litigation are proposed to mitigate the adverse implications of the amended Act and ensure the well-being of both healthcare providers and patients.

Keywords: *Consumer Protection Act, medical profession, doctors, medical practitioner, compensation, service provider*

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Introduction

The doctor-patient relationship, which forms the cornerstone of healthcare, has swung from the idealisation of doctors to their devaluation. Violence against doctors has made newspaper headlines several times in the last two decades [1]. This has led to insecurity on the part of doctors who have worked hard to earn their licence to practise. The Consumer Protection Act (CPA) was first passed in India in1986 [2]. For several years it was not clear whether the medical profession came under the ambit of the Act [3]. The matter was settled when the Honourable Supreme Court held, in the case of *Indian Medical Association v VP Shantha,* that medical services would be treated as services under the CPA 1986 [4]. This landmark decision declared the doctor-patient relationship to be "contractual" in nature [4,5].

With rapidly evolving technology and the need for a more comprehensive Act, CPA 2019 received the assent of the President on August 9, 2019, and was made effective from July 20, 2020 [6]. The amendments in the CPA 2019 include changes in pecuniary jurisdiction, the introduction of alternative dispute resolution mechanisms, new provisions