



ABORTION LAWS IN INDIA: A REVIEW OF COURT CASES



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CENTRE FOR HEALTH LAW, ETHICS AND TECHNOLOGY
Jindal Global Law School

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Abortion Laws in India: A review of Court Cases

**Centre for Health Law, Ethics and Technology
Jindal Global Law School
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Centre for Health Law, Ethics and Technology

The Centre for Health Law, Ethics and Technology (CHLET) at Jindal Global Law School (JGLS) undertakes research on issues related to health care from a developing world perspective on social justice. CHLET adopts a multidisciplinary approach and focuses particularly on access to drugs, health and sexuality, reproductive rights, realization of a constitutional right to health, implication of advancement in technology on access to health care, and anti-discrimination law and policy relating to contagious diseases in India and abroad.

CHLET seeks to foster informed dialogue among various stakeholders including policymakers, lawyers and the medical industry and profession. Through this dialogue, CHLET is dedicated to advancing the entrenched constitutional right to health irrespective of race, ethnicity, national origin, disability, gender or poverty. Implementation of the right to health has a distinct ring and distinct challenges in the Indian context. In this and other areas, CHLET aims to use its position within JGLS to engage in global-domestic research, dialogue, negotiation and, when necessary, the judicial system to achieve systemic reforms that advance social justice and equity in the many dimensions of health care.

The HIV/AIDS pandemic and recent bio terrorist threats have stretched health care systems even in countries like the United States and Canada. In countries like India that grapple with inadequate delivery of basic health care, a response to these new challenges is hindered by systemic problems. Access to health-care in India is compromised by poor infrastructure, cultural attitudes and practices, poverty and low levels of education, deficient resources and equally importantly the lack of effective legislation and policies on health related issues.

CHLET is in a unique position to tackle these complexities because it bridges the Global North and the Global South. Alliances are already being drawn for collaborations with research centres in developed countries to conduct joint research projects, enabling a unique transnational conversation on an issue that is unmistakably transnational in nature.

Last, in order to find effective solutions to pressing health challenges, it is imperative to merge theory and practice. CHLET is in an exceptional position to focus on both theoretical as well as empirical study on global health law issues by building an academic as well as a civil society network.

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Glossary

Abortion: Termination of pregnancy. An abortion can occur either spontaneously (called a spontaneous abortion or miscarriage), or it can be brought about by intervention (called an induced abortion). It is with this last meaning that the word is generally used.

Antenatal care: Health care given to women during pregnancy, also referred to as prenatal care.

Birth control: Birth control is the use of any practice, method, or device to prevent pregnancy from occurring in a sexually active woman. Also referred to as family planning, pregnancy prevention, fertility control, or contraception; birth control methods are designed either to prevent fertilization of an egg or implantation of a fertilized egg in the uterus. Birth control may be irreversible or reversible. Birth control methods include hormonal, barrier, natural family planning, abstinence and abortion.

Conception/Conceive: The moment at which a sperm fertilizes an egg released from the ovaries.

Convention on the Rights of the Child (1989): International treaty upholding the human rights of children. It is the most widely ratified treaty in the world.

Convention on the Rights of the Persons with Disabilities: International treaty to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979): International treaty codifying states' duties to eliminate discrimination against women. It has provisions related to reproductive health and rights.

Dilation and Curettage (D&C): Most common abortion procedure. Also used for completing or checking miscarriage, it consists of scraping the walls of the uterus with a knife-edged, spoon-shaped instrument.

Embryo: Preborn baby in the early stages of development that are characterized by the laying down of fundamental tissues, cleavage, and the initial formation of organs and organ systems. Usually taken to mean the preborn child before eight weeks.

Fetus: The term referring to the preborn baby after eight weeks' gestation.

Gynecology: The branch of medicine dealing with diseases of the female reproductive system. Specialists in this field are referred to as gynecologists.

Hysterectomy: The surgical removal of the uterus.

Imminent Abortion: A threatened miscarriage, in which there may be profuse vaginal bleeding, cramps, and a softened and dilated cervix.

Incomplete Abortion: An abortion in which portions of the unborn child or the placenta, remain in the uterus for an appreciable period of time after miscarriage or abortion.

Induced Abortion: An intentional abortion caused by drugs, surgery, or other mechanical means.

International Covenant on Civil and Political Rights (ICCPR) (1966): International treaty protecting individuals' civil and political human rights.

International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966): This treaty, together with the Universal Declaration of Human Rights, 1948 and the International Covenant on Civil and Political Rights, constitute the International Bill of Human Rights. In accordance with the Universal Declaration, the Covenants recognize that the ideal of free human beings enjoying the civil and political freedom, and freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.

International Convention on the Elimination of All Forms of Racial Discrimination: International treaty upholding individual's human rights to be free of discrimination on the basis of race.

Miscarriage: The natural and unintentional loss of a preborn child. Miscarriage is also referred to as “natural” or “spontaneous” abortion.

Natal: Referring to anything having to do with birth.

Obstetrics: The branch of medicine dealing with pregnancy and childbirth. Specialists in this field are referred to as obstetricians.

Pregnancy: The state of carrying a developing embryo or fetus within the female body. This condition can be indicated by positive results on an over-the-counter urine test and confirmed through a blood test, ultrasound, detection of fetal heartbeat, or an X-ray. Pregnancy lasts for about nine months, measured from the date of the woman's last menstrual period (LMP).

Prenatal: The period before birth.

Reproductive health: Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health, therefore, implies that people are able to have a satisfying and safer sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the rights of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant.

Reproductive Rights: Reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.

Sex-Selective Abortion: An intentional abortion performed solely for the purpose of eliminating an unborn baby because of its gender, particularly female.

Sexual and Reproductive Health (SRH) Services: Defined as the constellation of methods, techniques and services that contribute to reproductive health and wellbeing through preventing and solving reproductive health problems. It also includes sexual health.

Sexual health: The integration of the somatic, emotional, intellectual and social aspects of sexual being, in ways that are positively enriching and that enhance personality, communication and love. Thus, the notion of sexual health implies a positive approach to human sexuality and the purpose of sexual health care should be the enhancement of life and personal relations and not merely counselling and care related to reproduction and sexually transmitted diseases.

Sexual rights: The right to have control over and decide freely and responsibly on matters related to one's sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behavior and its consequences.

Sterilization: A surgical or chemically-induced procedure that permanently or temporarily ends fertility in the male or female.

Threatened Abortion: An imminent spontaneous abortion (miscarriage) that usually takes place during the first twenty weeks of pregnancy.

Trimester: The division of pregnancy into three roughly equal time periods. The first trimester usually means up to 12 weeks, the second trimester usually means from 13 to 24 weeks, and the third trimester is usually from 25 weeks to the end of the pregnancy at birth.

Tubectomy: A removal of all or part of a Fallopian tube during the extraction of a tubal pregnancy or female sterilization.

Uterus: Muscular female organ within which the preborn child grows. Often referred to as the womb.

Vasectomy: Vasectomy is a permanent method of contraception for men. It is a simple operation that makes a man's semen free of sperm by blocking the tubes that normally carry sperm to mix with seminal fluid. Vasectomy is one of the few methods that allow men to take personal responsibility for contraception.

Executive Summary

“The right of a woman to choose to be a mother or not emerges from her human right to live with dignity which, falls within Article 21 of the Constitution.”

The Centre for Health, Law, Ethics and Technology at Jindal Global Law School presents this report on legal judgments and orders relating to medical termination of pregnancy. This report aims to clarify provisions of the Medical Termination of Pregnancy Act (MTP Act), to highlight contradictions and gaps in the MTP Act and related laws, and to examine the implications of the language and legal conclusions in abortion judgments. It presents findings from the Supreme Court, High Court, District Courts and Consumer Forums up to 2016. This report is divided into 4 segments. The first segment of this report deals with Supreme Court and High Court Judgements on abortion. The second segment deals with District Court decisions related to abortion. The third segment deals with consumer court cases and finally the last segment provides insight into India's international legal obligations regarding access to safe abortion services.

The segments are subdivided into sections according to the various aspects related to abortion laws in India. Section A of Segment I analyses the question of consent, specifically whose consent is necessary to terminate a pregnancy, in the case of married women, mentally disabled women, and minors. The law is clear that a guardian has to consent to medical termination of pregnancy in the case of minors or women with mental disabilities. However, even when a guardian consents, Courts have repeatedly reaffirmed the woman's or girl's wishes to continue the pregnancy; the language in these decisions frequently echoes anti-abortion rhetoric and perpetuates generalizations based on gender stereotypes. In all other cases, the position of law is that a provider requires the exclusive consent of the woman to terminate her pregnancy. Although, the Supreme Court has created confusion regarding this exclusive right by holding that termination of pregnancy without the husband's knowledge or consent is a ground for divorce. While such decisions do not create a mandatory requirement for spousal consent, the implication is that a woman's husband has a “right” to be involved in a woman's decisions regarding her bodily autonomy. Despite the discourse, the law on this subject remains that providers only require the consent of an adult woman to terminate her pregnancy.

Section B of this segment explains the confusion regarding emergency contraceptive pills. Anti-abortion activists view emergency contraception as a tool used for abortion; however, this confusion has now been settled by Indian Courts which stated that emergency contraceptives do not result in termination of pregnancy. Section C further deals with forced abortions and laws related to it.

Section D deals with Fundamental Rights. The Bombay High Court, very recently in the case of High Court on its Own Motion v. State of Maharashtra¹ has explicitly held that the right of a woman to choose to be a mother or not emerges from her human right to live with dignity which, falls within Article 21 of the Constitution. Courts have further taken steps to prevent maternal deaths resulting from a lack of access to safe abortion.

Section E of this segment discusses minors and pregnancy. The Protection of Children from Sexual Offenses Act, 2012 (POCSO) sets the age of consent at 18 years effectively rendering all pregnant girls under 18 survivors of criminal sexual activity. Additionally, POCSO requires providers to report all kinds of abuse to the appropriate authorities. This segment examines the contradiction between the strict privacy protections in the MTP Act and the mandatory reporting requirement under POCSO.

Section G of this segment addresses medical termination in the case of rape. Although the MTP Act allows the rape survivors to terminate unwanted pregnancies without

any court intervention, the doctors, survivors, and the police frequently petition the courts for permission, causing unnecessary delays that in some cases, make termination impossible. This section also discusses the increasing trend of permitting rape survivors to terminate their pregnancy even after the twenty-week limit established in the MTP Act. Section H of this segment lays down the general facility requirements for nursing homes and MTP centres under the MTP Rules and Regulations, 2003 and the National Health Mission service guarantees. The cases here highlight the repercussions providers face in failing to meet minimum standards.

Section I of this segment highlights the 20-week limit for medical termination of pregnancy in India. In 2015 and 2016, Courts throughout India allowed for post-20 week terminations where the pregnancy resulted from rape and where the pregnancy was not viable. Courts' interpretations of law in these decisions moves the MTP Act closer to the Amendments proposed in 2014.

Section J of this Segment discusses of cases of medical negligence under the MTP Act. This Segment highlights that doctors are not held liable for medical negligence when they follow standard medical procedures and practices for termination as laid down in MTP Act.

Section C of Segment I and Section A of Segment II of the report deal with forced abortions. The Indian Penal Code, 1860 (IPC) criminalizes “the causing of miscarriage without woman's consent.” An analysis of the judgements on this subject reveals that such cases mostly arise from abusive relationships; however, if the abortion providers fail to meet the requirements detailed under the Medical Termination of Pregnancy Rules or operate without maintaining minimum provider standards, courts may also hold them liable under the IPC. In such cases, the prosecution must prove their case beyond a reasonable doubt and the current trend reveals that a lack of corroborative evidence and unreliable statements have resulted in many acquittals.

Section F of Segment I and Section C of Segment II deal with sex determination of the fetus. To address India's skewed sex ratio, the Pre-Conception Pre-Natal Diagnostics Techniques Act (PCPNDT) prohibits revealing the sex of the fetus or using reproductive technology to choose the sex of the fetus. Many activists argue that strong legal action on PCPNDT cases has stigmatized medical termination of pregnancy generally, deterring doctors from providing abortion services. This section highlights the anti-abortion rhetoric throughout PCPNDT decisions.

Section B of Segment II deals with the issue of consent. Medical practitioners are bound by the MTP Act and hence, obtaining the pregnant woman's consent before performing an abortion is an indispensable requirement.

Section D of Segment II deals with medical negligence under the Indian Penal Code (IPC), 1860. Cases of medical negligence are also decided under the IPC, which prohibits causing death, by any rash or negligent act. Since the IPC places a high burden of proof on the prosecution, cases under the IPC are difficult to prove as compared to medical negligence cases before Consumer Forums.

In Segment III of this report, an analysis of the cases relating to medical negligence reveals that Courts have held a strict view in cases where a provider has failed to adhere to the MTP Rules. Many cases are filed in the District and the State Consumer Forums under the Consumer Protection Act on account of medical negligence during abortion procedures. In India, medical negligence falls under the Consumer Protection Act, as medical care is viewed as a service to a patient/consumer.

Introduction

The Medical Termination of Pregnancy Act 1971 (MTP Act), legalized abortion in India and the National Health Mission ensures access to safe abortion as part of a broader strategy to reduce maternal mortality in India.² Despite laws and policies, thousands of women die every year as a result of unsafe abortion and providers, the police, and NGOs remain in the dark on implementation of the Act, especially since newer laws, including the Pre-Conception Pre-Natal Diagnostic Techniques Act, 1994 (PCPNDT Act) and the Protection of Children from Sexual Offences Act, 2012 (POCSO Act), contradict protections in the MTP Act.³

When there is legal and policy confusion, the judicial system plays a key role in interpreting laws and providing clarity. Unfortunately, when it comes to abortion, Indian courts' interpretations of the MTP Act have failed to improve access to safe services, to clarify key provisions for providers or to outline a uniform interpretation of the MTP Act.⁴ Even worse, many judges echo stereotypes about women as born-mothers and exhibit a poor understanding of accepted medical norms.⁵

The good news is that courts' misunderstandings uncover key areas for advocacy and reform. For example, the substantial number of cases involving rape survivors who approach the court for permission to terminate in the first trimester illustrate a need for improved police and hospital education.⁶ Continued emphasis on spousal consent and stereotypes about women's roles as mothers underscore a need for intense gender equality campaigns. References to “the rights of the unborn,” the “inevitable” anguish following an abortion, and medically inaccurate descriptions of procedures and terms show that improved communication between providers and the judiciary should improve outcomes.

At the same time, it is important to recognize advances and judgments that respect women's bodily autonomy and equality. For instance, the Supreme Court's 2016⁷ ruling allowing a minor rape survivor to terminate post-20 weeks' signals space for the MTP Amendments and for providers' opinions in rape cases. Furthermore, there have been judges whose interpretations of the MTP Act champion women's rights to bodily integrity and equality.⁸ These opinions demonstrate that well-informed lawyers and gender sensitization can influence the judiciary and provide clarity.⁹

This report examines myriad MTP implementation issues and provides summaries of key Supreme Court, High Court and District Court judgments on each theme. Each chapter includes an introduction to the issue and outlines the implications the courts' decisions have on safe abortion services.

Finally, the compilation provides a very brief synopsis of how United Nations treaty monitoring bodies have interpreted obligations to provide access to safe abortion services and measured India's compliance.

Where possible, this compilation provides guidance on implementation of the MTP Act. Women, providers, hospitals, policy makers and activists can use this compilation in three ways:

1. To find answers to key MTP Act questions;
2. To explore spaces for future or increased advocacy;
3. To design education and training material.

“The Supreme Court's ruling allowed a minor rape survivor to terminate post-20 weeks' signals space for the MTP Amendments and for providers' opinions in rape cases.”

The research for this report was conducted using judgements and orders, retrieved from various sources, predominantly Manupatra (a legal database), the national consumer disputes redressal commission website (ncdrc.nic.in), and district court websites. In addition to this, various news articles and stories were also relied upon to get information about the names of parties or case names. The key terms used for this research were “abortion”, “section 312”, “section 313”, “medical negligence”, “consumer protection”, “forced miscarriage”, “consent”, “MTP Act”, “sex determination”, “sex-selective abortion” and “PCPNDT”. Some cases were first found by conducting legal research on cases related to abortion on indiankanoon.org and then downloaded from the district court website. One of the key limitations of this report is that many of the district court's judgements are not easily accessible and therefore a complete analysis of all the judgements across the country was not possible. This report has focused mainly on the cases available on the district court websites of the states of Delhi, Maharashtra, Tamil Nadu and Kerala in addition to Punjab and Andhra Pradesh. For other states, like Rajasthan and Gujarat, district court cases were not available on the case databases.



Supreme Court and High Court on Abortion

This segment of this report deals with Supreme Court and High Court Judgements on abortion laws in India. These judgments focus on issues of consent pertaining to termination of pregnancy of a married woman, minors, and mentally disabled women, forced abortions, sex determination of fetus, 20-week limit for termination, medical termination of pregnancy in the case of rape survivors, and abortion rights in the Fundamental rights framework. The impact of POCSO on the abortion rights of minors, emergency contraceptive pills and general facility requirements for nursing homes and MTP centers have also been analyzed through these judgments.

The questions pertaining to whether consent is required to terminate a pregnancy are covered by the MTP Act. Section 3 (4) of the MTP Act provides that consent of the pregnant women whether married or unmarried is required for termination except in the case of minors and mentally disabled women where the guardian has to consent to medical termination of pregnancy. Courts have recurrently honored the woman's or girl's wishes to continue a pregnancy and adult woman's exclusive right to consent to the abortion. For example, women under trial or serving sentences do not require jail authority consent to terminate a pregnancy. The MTP Act does not require rape survivors to obtain judicial approval for termination. Section 3(2) (b) of the MTP Act allows abortion up to 20 weeks of pregnancy. Courts have permitted rape survivors to terminate their pregnancy even after twenty-week limit established in the MTP Act.

The provisions related to forced abortions are provided under the Indian Penal Code. Courts have assessed forced abortion as violations of Section 313 IPC i.e. miscarriage without woman's consent, Section 314 i.e. death caused by act done with intent to cause miscarriage, and as violations of provisions of the MTP Act. The providers who do not register and meet the minimum requirements for qualification under the MTP Rules, 2003 are also punished under these criminal provisions while the registered providers are exempted in the event of a death or injury. On the other hand, conducting sex determination and sex selective abortions is prohibited under Pre-Conception Pre-Natal Diagnostic Techniques Act, 1994. Cases under this section suggest that strong legal action taken by Courts under the PCPNDT Act has enhanced the anti-abortion rhetoric. Another aspect analyzed under this section is the issue of medical negligence. Courts usually treat most medical termination of pregnancy negligence matters as other medical negligence cases except where the negligence occurred due to non-adherence to MTP guidelines.

The next important aspect which is analyzed is whether emergency contraceptive pills cause an abortion or not. The courts have also clarified that there is a clear distinction between emergency contraception and termination of pregnancy. The courts have progressively acknowledged a woman's right to decide whether or not she will continue a pregnancy within the framework of Article 21 of the Constitution. The right of a woman to choose to be a mother or not has been considered as part of her human right to live with dignity along with her right to terminate a pregnancy emphasized as a fundamental component of right to bodily integrity.

The Protection of Children from Sexual Offenses Act, 2012 establishes the age for consensual for sexual intercourse at 18. Therefore, POCSO treats all pregnant women under the age of 18 as rape survivors and mandates the provider to report the abuse. This obligation to report contradicts the confidentiality and privacy protections under

the MTP Act. This mandatory reporting requirement can act as a deterrent for those women under the age of 18 from accessing safe abortion services in situations where the pregnancy resulted from consensual marital or non-marital sex.

A. Consent

Section 3(4) of the MTP Act provides:

- “(a) *No pregnancy of a woman, who has not attained the age of 18 years, or, who, having attained the age of 18 years, is a mentally ill person, shall be terminated except with the consent in writing of her guardian.*
- (b) *Save as otherwise provided in (a), no pregnancy shall be terminated except with the consent of the pregnant woman.”*

A plain reading of Section 3(4)(a) makes it clear that a guardian has to consent to medical termination of pregnancy for minors or women with mental disabilities. Courts have been asked to interpret this language where a minor and her parent or a mentally disabled woman and her guardian disagree on abortion i.e., where minors and/or women want to continue pregnancies and their parents/guardians want them to terminate the pregnancy. In each instance, courts have reaffirmed the individual woman's or girl's wishes to continue a pregnancy. Safe abortion activists have argued that the language used in decisions like *Suchita Srivastava v. Chandigarh Administration*, as cited below, echo anti-abortion values and gender-based stereotypes about motherhood.

In all other cases, Section 3(4)(b) mandates that a provider obtains a woman's consent to terminate a pregnancy. Despite this clear language, courts throughout India have repeatedly heard cases where husbands, family members, police officials, and jail superintendents have been asked to consent as a requirement for a termination. In each instance, courts have reaffirmed an adult woman's exclusive right to consent to the abortion. The chapter on rape includes several judgments from the Punjab and Haryana High Court where judges express their frustration with police departments who continually force rape survivors to approach the courts for permission to terminate. Persistent cases on consent for medical termination illustrate important gaps in the provider, police, and women's knowledge of the MTP Act.

It is important to note that the Supreme Court's holding in *Samar Ghosh v. Jaya Ghosh*, as cited below, added confusion to consent requirements by determining that when a wife terminates a pregnancy without her husband's knowledge or consent, it may amount to mental cruelty, which is a ground for divorce. While this ruling does not change the consent required to perform an abortion, it does assume spousal “stake” in a woman's reproductive health. The nuances of this judgment have not translated into reality – providers routinely seek spousal consent. Furthermore, as judgments below show, men have also accused women of terminating non-existent pregnancies to substantiate fake cruelty charges in divorce matters. Ultimately, spousal consent requirements reflect patriarchal norms that rob women of bodily autonomy and equality.

“Spousal consent requirements reflect patriarchal norms that rob women of bodily autonomy and equality.”

“Courts in India have confirmed that providers only require consent from an adult woman for an abortion. Husbands, boyfriends, brothers, parents, and in-laws, have no right to consent to termination or to refuse to consent to an abortion.”

Spousal Consent

Courts in India have confirmed that providers *only* require consent from an adult woman for an abortion. Husbands, boyfriends, brothers, parents, and in-laws, have no right to consent to termination or to refuse to consent to an abortion. In 2011 the Supreme Court held that where a wife terminates a pregnancy without her husband's consent, the abortion might constitute cruelty grounds for a divorce. It is important to note that this decision does not create a requirement for a spousal consent. Again, the decisions consistently state that a provider requires consent from the woman undergoing the termination.

Focus Case: High Court of Punjab and Haryana, *Dr. Mangla Dogra & Others v. Anil Kumar Malhotra & Others*, 29 November 2011 (CR No. 6337/2011)

Issue: Whether a husband has to provide consent for abortion?

Court's Ruling: Section 3(4)(b) of the MTP Act requires consent from just one person: the woman undergoing a medical termination of pregnancy. A husband cannot force his wife to continue a pregnancy.

Arguments: In this case, the wife had started living with her parents after matrimonial disputes arose. They started living together after reconciliation efforts made by the Lok Adalat. Despite their living together, the differences between them persisted. The wife became pregnant during that time. She made the decision to terminate the pregnancy. Her husband refused to sign consent forms at the hospital and eventually he filed a court case to legally prohibit her from terminating her pregnancy without his consent. The husband withdrew this case when his wife underwent a termination at six weeks and four days. Subsequently, the husband filed suit against his wife, her parents, her brother, and the doctors who conducted her termination demanding Rs. 30 lakhs in compensation for mental pain and agony. The husband argued that a woman cannot obtain a termination unless the pregnancy endangers the woman's health. The doctors argued that they abided by the MTP Act and conducted the surgery in a registered facility.

The judgment: The Court uses several sections of the MTP Act to reach the conclusion that only one person, the woman undergoing termination, needs to provide consent. First, Section 3(4)(b) of the MTP Act clearly states that pregnant woman has the sole right to consent to an abortion. Furthermore, the judgment cites Explanation II to Section 3 (2) of the MTP Act, which states that a married woman can obtain a termination in the case of contraceptive failure because of the “grave injury to the mental health of the pregnant woman” (para. 5). Finally, the Court examines sections of the Act pertaining to MTP clinics and found that the doctors conducted the procedure in a safe and legal setting.

The Court examines the consent form in the MTP Act and states that the Act “nowhere provides for the express or implied consent of the husband. The wife is the best judge...” (para. 19) Ultimately, the Court concludes, “the husband cannot compel her to conceive and give birth to his child.” (para. 17)

In examining whether the husband has any recourse against the doctors who performed the termination, the Court looks to Section 8 of the MTP Act, which provides explicit protections to medical practitioners who provide services in “good faith” under the Act.

Analysis: This decision contains strong language about a woman's right to bodily integrity. The Court states, “It is the right of a woman to give birth to a child, but it is not the right of a husband to compel his wife to give birth to a child for the husband.” Famously, the Court held, “A woman is not a machine in which raw material is put and a finished product comes out. She should be mentally prepared to conceive, continue the same and give birth to a child. The unwanted pregnancy would naturally affect the mental health of the pregnant women.” This case is a cornerstone judgement for reaffirming a woman's right to decide whether or not she continues a pregnancy.

Related/similar judgments:

High Court of Gujarat, *Nirav v. State*, 23 September 2011 (SCR.A/1352/2008):

Here, a husband tried to prosecute his wife under the Indian Penal Code where she terminated a pregnancy without his consent. The High Court reaffirmed that only a woman's consent is necessary under the MTP Act and that doctors should not compel a husband to consent.

Focus Case: Supreme Court of India, *Samar Ghosh v. Jaya Ghosh*, 26 March 2011 (Appeal (C) 151/2004):

Issue: Does a woman's decision to terminate a pregnancy without her husband's knowledge or consent amount to mental cruelty, a ground for a divorce?

Court's Ruling: “If the wife undergoes vasectomy (*sic*) or abortion without medical reason or without the consent or knowledge of her husband, such an act may lead to mental cruelty.”

Arguments: Here, the parties had a generally unhappy marriage. The husband argued that his wife's “unilateral” decision to not have a child amounted to cruelty.

The judgment: The Court looked at British law from the 1950s to support its finding that withholding sex, unilateral usage of contraception, and a unilateral decision to terminate a pregnancy could amount to mental cruelty. The Court did note that individual facts ultimately determine whether one spouse has been cruel to another and that Courts should evaluate each party's health and circumstances before ruling. Here, the Court granted divorce on the ground of cruelty.

Analysis: While a disagreement about whether to have children may represent a totally understandable ground for divorce, the Court's holding that a unilateral decision to terminate a pregnancy amounts to *cruelty* perpetuates stereotypes about women's roles in marriage and society. The threshold in divorce matters should be spousal knowledge and not consent. This decision could deter women, especially women who may be in abusive relationships, from seeking abortion services. Providers may have a legitimate fear of legal repercussions if they support a termination that amounts to mental cruelty. In *Dr. Mangla Dogra*, the Punjab and Haryana High Court held that the providers had committed no crime in failing to obtain spousal consent. All the same, the doctors had to defend themselves in court. While this decision does not change the requirements in Section 3 of the MTP Act, it does chip away at a woman's autonomy by upholding a spousal interest in a woman's decisions regarding her body.

“It is the right of a woman to give birth to a child, but it is not the right of a husband to compel his wife to give birth to a child for the husband. A woman is not a machine in which raw material is put and a finished product comes out. She should be mentally prepared to conceive, continue the same and give birth to a child. The unwanted pregnancy would naturally affect the mental health of the pregnant women.”

Finally, it is troubling that the Court believes a woman can undergo vasectomy – language that illustrates the judges' limited understanding of reproductive health issues.

Related/similar judgments:

High Court of Punjab and Haryana, *Ashok Kumar v. Anupama Sharma*, 21 January 2015, (FAO-MNo. 29/2015):

The husband accused his wife of undergoing termination of pregnancy without his consent to establish cruelty in a divorce proceeding. While he had no proof of the abortion, the wife proved constant harassment and threats from the husband and his family. The court found that the husband was at fault in the dissolution of the marriage. While fortunately unsuccessful in this case, *Ashok Kumar* shows that husbands may allege unilateral termination where no abortion happened to absolve themselves of responsibility in a divorce proceeding. More troubling, husbands can allege unilateral termination in almost any case because proving spousal consent may be impossible.

Minors

Section 3(4)(a) of the MTP Act requires a guardian's consent where someone under 18 years requests a medical termination of pregnancy. The chapter on rape includes a variety of judgements where parents requested a termination on behalf of their minor daughter in the wake of a rape. The Act does not specify whose interests prevail when the minor does not consent to termination. A disastrous 1993 decision from the Madras High Court (discussed below) ignores widely accepted medical research, jurisprudence from around the world, and women's autonomy in upholding a minor's decision to continue her pregnancy.

An overall analysis of these judgments shows that where minors have been raped, courts are very consistent in ensuring access to abortion. Where a minor wanted to continue a pregnancy against her guardian's wishes, courts have upheld the pregnant girl or woman's choices.

Focus Case: Madras High Court, *V. Krishnan v. Rajan Alias Madipu Rajan & Another*, 2 December 1993:

Issue: Does a minor rape survivor have the right to continue her pregnancy against her parent's wishes?

Court Ruling: A minor rape survivor has the right to decide whether to continue a pregnancy or not.

Arguments: The 15-year old's father argues that continuing the pregnancy “will lead to many complications physically, physiologically, mentally, and socially” for his daughter. His daughter wants to continue the pregnancy.

The judgment: After making a strong case against abortion under any circumstances, the High Court held that women under 18 years have to consent to termination of pregnancy and that this case represents an exception to the presumption of mental anguish caused by pregnancy in Explanation 1, Section 3 of the MTP Act.

Analysis: While the outcome of this judgment upholds adolescents' rights to autonomy and bodily integrity, the court makes a strong case for banning abortion altogether through a selective exploration of medical, legal, and religious texts. The judgement endorses teenage marriage and pregnancy (“Smt. Kasturba Gandhi was married at the age of 13 and had her first child at the age of 15 and second child at the age of 17”) and discredits accepted medical facts.

In recent years, however, it has been shown that teenage mothers have no more risks during pregnancy and labor, and their babies fare just as well as their more mature sister's babies if they have had good prenatal care. While this judgment appears to be an anomaly without far-reaching ramifications, it legitimizes anti-abortion arguments and highlights the need for improved judicial training and general activism.

Women in judicial custody

Women under trial or serving sentences do not require jail authority consent to terminate a pregnancy.

Focus Case: High Court of Madhya Pradesh (Indore Bench), *Halo Bi v. State of Madhya Pradesh & Ors.*, 16 January 2013, WP(C) 7032/2012:

Issue: Does an incarcerated woman require consent from jail authorities to obtain a medical termination of pregnancy?

Court's Ruling: An incarcerated woman does not have to seek consent from jail authorities to terminate her pregnancy.

Arguments: Advocate Shanno Shagufta Khan argued on behalf of Halo Bi, an under-trial, who wanted to terminate her pregnancy. Halo Bi asked the jail authorities for permission and the Jail Authorities forwarded the request to the Chief Judicial Magistrate who rejected Halo Bi's request because the MTP Act did not mention a Magistrate's role in ruling on requests for termination.

The judgment: The Court examined the history of the MTP Act and noted that “large number(s) of women died attempting illegal abortions...”. The Court produces Section 3 of the MTP Act which includes exceptions to the prohibition of termination of pregnancy under the IPC. Here, Halo Bi reported that she was forced into prostitution and that the pregnancy resulted from rape and the Court finds that she qualifies for a termination under Section 3 clause (ii). The order concludes, “We cannot force a victim of violent rape/forced sex to give birth to a child of a rapist.” To bolster this point, the Court uses a Supreme Court case holding that women's reproductive choices are essential to their “personal liberty” under Article 21 of the Constitution. The Court orders the government to provide Halo Bi with immediate abortion services.

Analysis: This decision is important for strong language on rape survivors' right to access abortion services, for the Court's insistence that incarcerated women do not need permission for a termination from Jail Authorities when they qualify for termination

“We cannot force a victim of violent rape/forced sex to give birth to a child of a rapist.”

“It is really shocking that in our country every year almost 11 million abortions take place and 20,000 die every year due to abortion related complications.”

under the MTP Act, and for the Court's recognition of the link between women's liberty, women's health and access to abortion. The Court states, “It is really shocking that in our country every year almost 11 million abortions take place and 20,000 die every year due to abortion related complications.” Crucially, the Court underscores the pregnant woman's right to determine whether she continues her pregnancy.

Women in medical custody/ “wards of the state”

The Supreme Court has affirmed a “mildly retarded” woman's right to continue a pregnancy that resulted from rape even where the state, her legal guardian, consents to termination.

Focus Case: Supreme Court of India, *Suchita Srivastava & Another v. Chandigarh Administration*, 28 August 2009, SLP (C) 5845/2009:

Issue: Can the state consent to a termination as a guardian for a “mentally ill” woman who was raped in her state-run facility.

Court's Ruling: The Court must examine the facts. Where a woman is not a minor and has a “mild” mental illness, the Court has to ensure her reproductive rights, including the right to continue a pregnancy.

Arguments: The High Court of Punjab and Haryana ruled that as per the State's consent, a mentally retarded woman should undergo a termination after she became pregnant as a result of a rape at a state-run institution. The High Court constituted an expert committee to interview the woman, and while the committee report indicated that the woman wanted to continue the pregnancy, the Court ruled in favor of the State's decision to terminate the pregnancy. The Supreme Court details the expert committee's report and concluded that the woman has a right to continue the pregnancy.

The judgment: Looking at Section 3(4)(a) of the MTP Act on consent, the Court found that in most cases only the consent of the woman seeking termination is necessary. As per the Act, in the case of a “mentally ill” person, her guardian must provide consent. Despite this exception, the Court finds that although the woman resides in a state institution, she is over 18 and has “mild” mental retardation. Since the woman did not consent to the termination, the Court respects her decision to continue the pregnancy.

Analysis: This judgment contains excellent language on maintaining a woman's reproductive autonomy in order to preserve her rights to personal liberty under Article 21 of the Constitution. The Court holds unequivocally that a woman has a right to privacy, dignity, and bodily integrity. Despite this strong language, the Court rules against termination, a move reproductive rights advocates view as a victory for anti-abortion activists. Although this decision seems to uphold an individual woman's personal decision, courts use *Suchita Srivastava* to create an additional and unnecessary test for rape survivors who have to seek judicial permission for a termination. As the chapter on rape shows, as a result of the Supreme Court's ruling here judges took extra measures to ensure the rape survivor's consent to an abortion, often interviewing them in open court or in chambers. This is a potentially intimidating and humiliating requirement with no basis in the Act.

Focus Case: High Court of Gujarat, *Anand Manharlal Brahmhatt v. State of Gujarat*, 28 July 2015 (Special Crim. App. No. 4204/2015):

Issue: Can the state consent to termination on behalf of a mentally disabled woman who cannot care for herself?

Court's ruling: Yes. Where a medical expert determines that a woman cannot make decisions for herself or understand that she is pregnant, the state may consent to termination.

Arguments: Police picked up a “wandering mentally ill woman” and took her to the hospital for a check-up. Tests revealed that she was 14 weeks pregnant. The hospital attempted to ask her family members for permission to terminate the pregnancy, but they could not locate relatives. The court-ordered medical expert opinion found that the woman suffered from severe schizophrenia and could not care for herself. The medical team recommended termination of pregnancy. Accordingly, an Additional Chief Metropolitan Magistrate directed a government hospital to terminate the pregnancy. This High Court case challenged the lower court's order for failing to consult with additional experts and to determine whether the pregnancy resulted from rape.

The judgment: The High Court relied on the Supreme Court's decision in *Suchita Srivastava* and concluded:

1. The termination has already been completed;
2. The MTP Act aims to protect a woman's health. Here, the woman's mental health does not make it safe for her to continue the pregnancy;
3. Doctors have noted that the strong medication the woman requires would harm the fetus, further complicating delivery and the woman's health. The Court also distinguished the facts here from *Suchita Srivastava*, stating that a woman with mild mental retardation is better equipped to make decisions than a woman with severe schizophrenia.

Analysis: This decision is important because it prioritizes the woman's health as per the intent of the MTP Act and fundamental rights obligations. Increasingly, judgments from the High Court of Gujarat and the Supreme Court have relied on doctors to evaluate whether a termination is safe, regardless of the specific parameters of the MTP Act. While this is a generally positive step, anti-abortion doctors could create barriers to abortion in some cases.

B. Emergency Contraception

Emergency contraceptive pills do not cause an abortion. However, anti-abortion groups have attacked emergency contraceptives as part of a wider strategy to limit access to abortion. Fortunately, the Kerala High Court's judgment on this issue aligns with medical and government norms and clearly distinguishes emergency contraception and termination of pregnancy.

Focus Case: Kerala High Court, *Krupa Prolifers v. State of Kerala*, 24 September 2009, WP(C) 37462/2008:

“Emergency contraception does not cause termination of pregnancy and cannot be regulated by the MTP Act. It is not required to go into the morality aspect, but only [to] consider the medical consequences of the i-pill drug...whether it is a contraceptive tablet or it is a medicine for causing abortion.”

Issue: Should emergency contraception be regulated under the MTP Act?

Court's Ruling: Emergency contraception does not cause termination of pregnancy and cannot be regulated by the MTP Act.

Arguments: Krupa Prolifers furthered three demands: First, the group asked the High Court to ban all advertisements for the i-pill brand of emergency contraception. Secondly, Krupa Prolifers argued that emergency contraceptive pills result in termination of pregnancy and therefore should not be available without a prescription. Thirdly, the Krupa Prolifers urged the Court to ban the sale and distribution of the i-pill brand of emergency contraception.

The Judgment: The Court notes that it is “not required to go into the morality aspect, but only [to] consider the medical consequences of the i-pill drug...whether it is a contraceptive tablet or it is a medicine for causing abortion.” (para 6). The Court notes that the MTP Act does not define pregnancy. The Court relies on 'undisputed medical science' in deciding that emergency contraception does not terminate a pregnancy.

The Court finds that the process of implantation takes place between 5 to 7 days after fertilization, hence in the first 72 hours, when the emergency contraceptive is to be taken, the fertilized egg has not yet been implanted. At this stage, the emergency contraceptive merely prevents the implantation from taking place, preventing the pregnancy. The Court also relies on the Report of the Consortium on National Emergency Contraception, which found that most women in India had little knowledge of emergency contraceptive pills. The Court was concerned that many women resort to “quacks or old women” for abortions, at great risk to their health and lives (para. 10).

Analysis: This judgment defines pregnancy under the MTP Act as the stage when a fertilized egg has implanted into the lining of the uterus five to seven days after fertilization (i.e., in the pre-embryonic stage). This case sets an important precedent of relying on science and not moral arguments to make determinations about contraception and abortion. In fact, the Court notes some people may have moral objections to contraception but that, “the courts cannot go into it.” (para. 12). Finally, this judgment acknowledges the link between access to emergency contraception and preventing unsafe abortion.

C. Forced Abortion and the Indian Penal Code

Section 313 of the Indian Penal Code prohibits “miscarriage without woman's consent” while Section 314 criminalizes “death caused by act done with intent to cause miscarriage.” Courts evaluate forced abortion as violations of Sections 313-314 of the Indian Penal Code and as violations of provisions of the Medical Termination of Pregnancy Act. Such cases arise most frequently in the context of abusive relationships, however, providers who do not meet the minimum requirements for qualification under the MTP Rules and/or operate out of unregistered facilities will also be charged under Section 313 of the IPC. The Medical Termination of Pregnancy Rules, 2003 detail the requirements to register as an abortion provider and the minimum facility standards for facility registration.

IPC

Where a medical termination of pregnancy center has complied with registration and safety norms under the MTP Act and the individual provider follows the determinants established in the Act and Rules, Section 3(1) should preclude criminal charges under Sections 313-314 of the IPC in the event of a death or injury. Section 3(1) states:

“Notwithstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.”

Focus Case: Calcutta High Court, *Murari Mohan Koley v. State of West Bengal & Another*, 30 June 2004 (3 CALLT 609 HC):

Issue: Does Section 3(1) of the MTP Act shield registered providers from being charged under Sections 313-314 of the IPC?

Court's ruling: To get the protection of Sub-section 1 of Section 3 of the MTP, petitioner as a medical practitioner has to prove that he has done (the termination) in good faith but it is required to be left to be decided by the trial judge.

Arguments: A prominent doctor performed a medical termination of pregnancy surgery that resulted in death. The doctor asks the High Court to quash the charge under Section 314 of the IPC because as a trained provider working at a registered facility he has the protections of Section 3 of the MTP Act.

Judgment: The High Court finds that a trial judge will have to determine whether a provider acted in good faith per the MTP Act.

Analysis: Although the more recent Delhi High Court decision in *Dr. Usha Sharma* below provides protection for providers at registered facilities, this judgment underscores providers' obligation to adhere to the requirements of the MTP Act and Rules to ensure protection from criminal charges. As long as (1) the provider's facility registers per the Act, (2) the provider is qualified under the Act, and (3) the provider performs the termination in good faith, the provider will not be subject to criminal prosecution under the IPC. The MTP Act does not define “good faith,” but section 3(2) requires that a provider has a good faith opinion that the pregnancy would harm the mental or physical health of the woman or a good faith opinion that the fetus would have serious abnormalities. Section 5 demands that a provider has a good faith opinion that a termination will immediately save a woman's life if the pregnancy is more than 20 weeks. For showing of good faith, a provider should document the reason for the termination.

Focus Case: Supreme Court of India, *Dr Jacob George v. State of Kerala*, 13 April 1994 (SCC (3) 430):

Issue: Can a homoeopathic doctor who negligently performs a termination resulting in death be charged and sentenced under IPC Section 314?

“As long as (1) the provider's facility registers per the Act, (2) the provider is qualified under the Act, and (3) the provider performs the termination in good faith, the provider will not be subject to criminal prosecution under the IPC.”

Court's ruling: Yes, where a doctor is not trained in medical termination of pregnancy conducts the surgery, he or she can be charged under IPC Section 314.

Arguments: Here, a homoeopathic doctor performed an unsafe abortion on a woman who eventually died of hemorrhage related to the surgery. The doctor argues that the woman arrived at his clinic with wounds from an attempted self-inflicted abortion. The state presents arguments proving that the doctor caused the injuries that resulted in the woman's death.

Judgment: If a trained surgeon had made the same surgical errors, the Court would examine this as a negligence case. Here, where the provider knew he did not have the skills to conduct a medical termination of pregnancy, the Court sentences him to imprisonment and imposed a fine of Rs. 1 lakh.

Analysis: Courts impose criminal sanctions on negligent providers who are not trained in abortion care and who perform terminations in unregistered facilities. A qualified and registered provider would have faced a medical negligence case, but not criminal charges. Here, the Court reduced the provider's original sentence of four years' rigorous imprisonment and a fine of Rs. 5000 down to two months' rigorous imprisonment and a fine of Rs. 1 lakh.

Focus Case: Delhi High Court, *State v. Riyazuddin & Others*, 3 December 2014 (CRL.A. 577/2013):

Issue: Does an unregistered, unqualified provider have to intend the harm to be convicted under IPC Section 314?

Court's ruling: No. Regardless of intent to harm, an unqualified provider knows that unskilled surgery can result in serious injury and death.

Arguments: While working at a health clinic as a compounder, Riyazuddin performed an unsafe surgical medical termination of pregnancy, causing deadly perforations in the survivor's uterus. Riyazuddin argued that he did not act as the doctor at the clinic and that he had no intent to harm the patient. The state presented medical records, the stock register, and documents to show that the clinic compounder acted as the doctor and performed surgeries.

Judgment: The Court held that Riyazuddin did perform the surgery and that even if he had no intent to harm the patient, “the knowledge that as an unqualified person he was performing surgery which was likely to cause the death of Sushmita is clearly attributable to Riyazuddin. Hence ingredients of Section 314 IPC are fully satisfied.” The trial court sentenced Riyazuddin to five years' imprisonment and a fee of Rs. 1 lakh for violations of IPC Section 314 and to an additional three years' imprisonment for violations of the MTP Act.

Analysis: Unqualified providers who operate out of unregistered facilities do not have the protection of Section 3(1) of the MTP Act or of general medical negligence claims. Abortion providers with no medical training receive severe sentences.

Related/similar judgments:

Delhi High Court, *Dr. Usha Sharma v. State*, 17 November 2006:

In this negligence case against a registered MTP center, the High Court held that Section 3(1) of the MTP Act automatically shields the provider from criminal charges under IPC Sections 313 and 314. It is important to note that providers are still answerable to medical negligence charges and could face criminal charges under other IPC sections.

Divorce and intimate partner abuse

Focus Case: Delhi High Court, *Mohit Gupta & Others v. State of NCT of Delhi & Another*, 16 October 2006:

Issue: Can a woman frame IPC Section 313 charges against her partner where a consent form has her signature per the MTP Act?

Court's ruling: A woman can frame IPC Section 313 charges against her husband even if her signature is on the consent form because facts may show that her partner forged her signature or that her partner coerced her consent.

Arguments: A woman who underwent a termination of pregnancy at 19 weeks wanted to charge her partner under IPC Section 313 because she did not consent to a termination. She stated that she was unconscious and never saw the consent form. Her partner stated that she willingly had the termination.

Judgment: The High Court examines the alleged facts on both sides and acknowledges that someone has signed the consent forms. The Court also notes that at 19 weeks' termination can be complicated and questions why the woman would wait until just under the legal limit if she were a willing participant. On the other hand, her partner, had “a million reasons” to push for an abortion. The High Court rules, “there is sufficient material on record to give rise to a grave suspicion with regard to the commission of such an offense.”

Analysis: Indian jurisprudence is full of cases where partners have forced or coerced their partners to terminate pregnancies. It can be difficult for women to prove that they did not provide consent, especially where they sign forms and may appear to be a willing participant at the facility. The MTP Act requires providers to ensure consent from the pregnant woman. To ensure women's autonomy and safety, providers should ensure that their patients have not been forced or coerced into termination.

Related/similar judgment:

Chhattisgarh High Court, *Shri Bhagwan Katariya & Ors. v. State of Madhya Pradesh*, 22 November 2000 (M.Cr.C. No 7340/2000):

A pregnant woman's in-laws forced her to undergo a medical termination of pregnancy. Her husband's family argued that the requirement to obtain consent from the pregnant woman under Section 3(4) of the MTP Act creates a presumption of consent. The High Court examined the facts and evidence and determined that the woman at the heart of this case did not consent to the termination.

“According to international human rights law, a person is vested with human rights only at birth; an unborn fetus is not an entity with human rights. The pregnancy takes place within the body of a woman and has profound effects on her health, mental well-being and life. The right to control their own body and fertility and motherhood choices should be left to the women alone.”

D. Fundamental Rights

Indian courts have increasingly recognized a woman's right to decide whether or not she will continue a pregnancy. Most recently, in September 2016, the Bombay High Court held:

“According to international human rights law, a person is vested with human rights only at birth; an unborn fetus is not an entity with human rights. The pregnancy takes place within the body of a woman and has profound effects on her health, mental well-being and life. Thus, how she wants to deal with this pregnancy must be a decision she and she alone can make. The right to control their own body and fertility and motherhood choices should be left to the women alone. Let us not lose sight of the basic civil right of women: the right to autonomy and to decide what to do with their own bodies, including whether or not to get pregnant and stay pregnant.” (Suo Moto PIL No. 1 of 2016, 19 September 2016, para. 15).

In recognizing the right to terminate a pregnancy as a fundamental component of bodily integrity, the Bombay High Court underscored the fact that every woman, whether a “working woman or homemaker or prisoner, owns her body and has right over it.” (para. 20).

Beyond holding that a woman has the right to determine whether to continue a pregnancy, courts have not discussed the barriers to safe abortion services which represent a violation of Article 21.

They have come very close and recent jurisprudence recognized abortion as a fundamental component of a woman's right to personal liberty under Article 21 of the Constitution. For example, High Courts have routinely held that forcing rape survivors to carry pregnancies to term violates their Article 21 rights to life and dignity.

Anti-abortion activists have challenged the validity of the MTP Act, arguing that it violates Article 21.

Additionally, Indian courts have remained totally silent on linking access to safe abortion and discrimination based on sex. None of the hundreds of judgments reviewed for this compilation mentions Article 14 or 15 of the Constitution of India.

Abortion as a fundamental right

In *Suchita Srivastava and V. Krishnanan*, the Supreme Court and the High Court of Madras have respectively affirmed women's rights to choose in the context of continuing a pregnancy. In *Suchita Srivastava*, the Supreme Court clearly held that the state has an obligation to ensure a woman's reproductive rights as a component of her Article 21 rights to personal liberty, dignity, and privacy.

In *Laxmi Mandal v. Deen Dayal Hari Nagar Hospital*, the Delhi High Court ruled that preventable maternal death represents a violation of Article 21 of the Constitution. The High Court required the NCT of Delhi to implement the service guarantees in the

National Rural Health Mission, including safe abortion services, to prevent maternal deaths. This landmark judgment created a state obligation to take steps to end preventable maternal death, including deaths caused as a result of inadequate access to safe abortion.

Challenges to the MTP Act

Focus Case: Rajasthan High Court, *Kishore Sharma & Others, v. Union of India & Another*, 22 October 2005:

Issue: Does the MTP Act violate the right to life enshrined in Article 21 of the Constitution of India?

Court's ruling: The MTP Act aims to “save the life of the pregnant woman or relieve her of any injury to her physical and mental health, and no other thing, [so] it would appear that the Act is rather in consonance with Art. 21 than in conflict.”

Arguments: The Petitioner argues that the MTP Act authorizes killing unborn children who have an Article 21 right to life. The State argued that the MTP Act protects women's health and lives.

Judgment: The Court examined the Act and found that it aims to save women's lives and to protect their mental and physical health. The Court recognized that there may be a debate about when a fetus “comes to life so as to attract Article 21,” but concludes that a woman's life and health trump any concern for the fetus.

Analysis: Crucially, this judgment prioritizes the health and life of women in India. The Court states that there can be no question of “weighing” the rights of the unborn and the woman: “There cannot be two opinions that where continuance of pregnancy is likely to involve risk to the life of the pregnant woman or cause grave injury to her physical and mental health, it would be in her interest to terminate the pregnancy.”

E. Minors (MTP Act, 1971 Section 3(4)(a))

The Protection of Children from Sexual Offenses Act (2012) establishes the age of consent for sex at 18. Accordingly, under POCSO, any pregnant woman under the age of 18 has been raped, and the provider has an obligation to report the abuse. This obligation contradicts the strict confidentiality guidelines in the MTP Rules and could deter women under 18 from seeking terminations where the pregnancy resulted from consensual sex. Moreover, the law is problematic in a country where millions of girls marry before the age of 18 every year. The High Court of Madras has confirmed that providers have an immediate obligation to inform the police when they discover a pregnancy in anyone under 18.

As stated in the section on rape, courts unanimously allow minor rape survivors to terminate and even express their frustration with doctors, police, and magistrate judges who create unnecessary delays. Where a rape survivor's pregnancy has passed the 20-week limit established under the MTP Act, courts traditionally split. However, in 2015 the Supreme Court allowed termination post-20 weeks where a team of doctors determined that the pregnancy would harm the girl's mental and physical health setting. It is an important precedent paving the way for increased access to safe abortion services for minor rape survivors.

“The Supreme Court allowed termination post-20 weeks where a team of doctors determined that the pregnancy would harm the girl's mental and physical health setting.”

Protection of Children from Sexual Offences Act, 2012

(See also, Rape, minor rape survivors and Rape, minor survivors with 20+ week pregnancies)

Focus Case: High Court of Punjab and Haryana, *Bashir Khan v. State of Punjab & Another*, 2 August 2014 WP (C) 14058/2014

Issue: In a POCSO case, does the state have to apply to a court before performing an abortion?

Court's ruling: “The State need not have applied to the magistrate...the State could have assisted the victim to secure the necessary certification and admitted her in a government hospital...for carrying out the procedure necessary for such termination.”

Arguments: After a 14-year-old lodged a POCSO complaint, she discovered that she was pregnant. Her parents approached the judicial magistrate for permission to terminate the pregnancy. The magistrate denied the request for a termination because the MTP Act does not expressly grant magistrates the power to determine whether a woman or girl can undergo the termination.

Judgment: The High Court finds that while the magistrate's decision was technically correct, “a little more resourcefulness” on his part would have saved the 10 days. The Court states, “in a matter relating to termination of pregnancy of a minor who is a victim of rape, there needs to be a greater sense of urgency that has been lost in this case.” Frustrated with the magistrate's reluctance to act and to ensure speedy abortion services to minor rape survivors the Court orders “instructions given by the Director General of Police to all the police stations who register cases of rape and who come by information that the victim has become pregnant to render all assistance to secure appropriate medical opinions and also provide assistance for admission in government hospitals and render medical assistance as a measure of support to the traumatized victim.”

Analysis: This decision underscores the need for increased police and magistrate training on POCSO and the MTP Act. It is heartening to see the judge prioritizing the health and well-being of the rape survivor and expressing sensitivity for the urgency in abortion cases. While affirming minor rape survivor's right to access abortion without judicial oversight, the Court does note that a judicial intervention would be necessary “only in a situation where there is a conflict of whether the pregnancy must be terminated or not or when the opinions of two medical practitioners themselves differ.”

Focus Case: Madras High Court, *M. Kala v. The Inspector of Police*, 24 March 2015 (WP 8750/2015):

Issue: Under POCSO, do doctors have an obligation to inform the police when a minor requests an abortion?

Court's Ruling: Under POCSO, doctors have an immediate obligation to inform the police when a pregnant minor requests a medical termination of pregnancy.

Arguments: Here a 14-year-old girl approached a government hospital for an abortion. The doctors did not perform the surgery. Her parents challenged the hospital's refusal in the High Court.

Judgment: The High Court initially notes that under POCSO, the doctors had an immediate obligation to report the minor's case to the police. The High Court also orders the hospital to perform the termination in this clear rape case where the minor and her parents have provided consent.

Analysis: Requiring doctors to immediately report pregnant minors as POCSO cases violate girls' privacy and may deter young women in consensual relationships from seeking safe abortion services. Young women may also fear for their safety or that a relative could be prosecuted under POCSO. The MTP Rules include strict privacy protections for women and girls undergoing abortions. POCSO obligates providers to violate patient confidentiality and to risk their patient's trust. Until the government has corrected these contradictions, it is important to immediately report any POCSO case to the police to avoid criminal liability under POCSO.

F. Pre-conception Pre-Natal Diagnostic Techniques Act, 1994 (PCPNDT Act)

India's sex ratio at birth, or the number of girls born compared to the number of boys born, has sharply decreased with each census. The PCPNDT Act aims to prevent medical termination of female fetuses by making it illegal to reveal the sex of the fetus through ultra-sonography or fertility treatments. The law obligates ultra-sonography centers to register with the state government, to fill out extensive paperwork for each patient, and to allow government authorities to inspect their clinics. In addition to the PCPNDT Act, Rule 7.6 of the Code of Ethics Regulations, 2002 issued by the Medical Council of India also states that sex determination and any act of termination of pregnancy of normal female fetus amounting to female feticide shall be regarded as professional misconduct on the part of the physician. Although the PCPNDT Act does not address medical termination of pregnancy, PCPNDT activists have targeted abortion providers who they believe perform sex-selective abortions. In some cases, journalists have published photographs of patients in MTP clinics. In this context, some providers fear repercussions and cease to provide abortion services. Many women's rights activists argue that this law has failed to chip away at the underlying beliefs and norms that fuel son preference while it restricts women's access to safe abortion services. The PCPNDT Act has done little to improve the sex ratio, which continues to fall in some states.

Courts have issued strong judgments on the implementation of the PCPNDT Act acknowledging the falling sex ratio, but rarely mentioning the rampant sexism faced by already born female children. Additionally, these judgments frequently employ language prescribing rights on “unborn girls,” stigmatizing abortion generally. It is also interesting to note that although thousands of women die each year as a result of unsafe abortion, Indian courts have not issued sweeping orders on adequate implementation of the PCPNDT Act.

“Although thousands of women die each year as a result of unsafe abortion, Indian courts have not issued sweeping orders on adequate implementation of the PCPNDT Act.”

Implementation of the PCPNDT Act

Focus Case: Supreme Court of India, *Voluntary Health Association of India (VHAP) v. Union of India & Others*, Pending (WP (C) 349/2006):

Issue: Activists filed this PIL as a result of the persistent decline in India's child sex ratio. The PIL argues that the Union of India and states have failed to take meaningful action to implement the PCPNDT.

Court's Ruling: This PIL is still pending before the Supreme Court. Since 2015, the Supreme Court has ordered representatives from each state to meet with civil society and the Union of India to address specific PCPNDT implementation issues in each state. In its *VHAP* orders, the Supreme Court had taken a very strong stance against sex-selective abortion and directed the states to establish supervisory committees, conduct clinic raids, and expedite litigation under the Act.

Analysis: The most significant order, in this case, comes from April 2013 where the Court rules that doctors “misuse the MTP Act” to eliminate female fetuses. While the order does not directly confer rights to the fetus, the Court states, “All involved in female foeticide deliberately forget to realize that when the fetus of a girl child is destroyed, a woman of future is crucified. To put it differently, the present generation invites the suffering on its own and sows the seeds of suffering for the future generation, as in the ultimate eventuate, the sex ratio gets affected and leads to manifold social problems.” (para. 5)

This order is rich with anti-abortion language supported by century-old quotes from European men (including Charles Dickens, Alexis de Tocqueville, and John Milton). The language demonises abortion and clings to gender stereotypes. The Court stated, “When a female foeticide takes place, every woman who mothers the child must remember that she is killing her own child despite being a mother. That is what abortion would mean in social terms. Abortion of a female child in its conceptual eventuality leads to the killing of a woman. The law prohibits it; scriptures forbid it; philosophy condemns it; ethics deprecate it, morality decries it and social science abhors it.”

The Court's analysis assumes that women should not abort female fetuses because women are destined to become wives and mothers to future generations. This language does not consider the well-being of women of the present who have a right to safe abortion services under the MTP Act and the National Health Mission. The language and ideology stigmatize abortion, underscoring an urgent need to educate judges and the general public on abortion and sex selection.

Focus Case: Delhi High Court, *Indian Radiological and Imaging Association v. Union of India & Another*, 17 February 2016 (WP (C) 6968/2011):

Issue: Does the Union of India have a right to establish qualifications for sonologist under the PCPNDT Act?

Court's Ruling: The Court held that the Centre Government (through the PCPNDT Act) does not have the power to determine qualifications/education for people who may operate an ultrasound machine or open an ultrasound center. Accordingly, the definition of a sonologist in the Act cannot stand. The Court did not provide a better

definition but left it to the Medical Council of India to determine who can conduct ultrasounds (like an MBBS or MRD).

Arguments: The radiological and imaging association argues that the PCPNDT Act establishes arbitrary qualifications for sonologist without authority.

Judgment: Only the Medical Council of India can outline requirements for medical professionals. The Court also rules that all ultrasound machines capable of sex determination have to be registered with a monitoring device, a “silent observer.” If ultrasound operators who do not provide prenatal ultrasounds, make a declaration and install the monitoring device then they do not have to abide by all the other rules in the PCPNDT. The Court did not establish any procedure for these new requirements or establish who will review silent observer images and verify the declarations.

Analysis: This judgment will impact sonologists who are qualified under the arbitrary requirements outlined in the PCPNDT Act. Additionally, the silent observer may infringe on women's rights to privacy. The administrative impacts of the review process may create additional hurdles for ultrasound clinics and technicians.

Focus Case: High Court of Punjab and Haryana, *Dr. Arvind Pal Singh v. State of Punjab & Another*, 3 July 2012 (Crm No. M-335959-M/2008):

Issue: Can the police investigate a PCPNDT complaint?

Court's ruling: Yes. The police have a right to investigate offenses alleged under the PCPNDT Act.

Arguments: Based on a tip, the police conducted a raid of a medical termination of the pregnancy center. A woman on the operating table at the clinic told the authorities that she decided to undergo an abortion because she was pregnant with a girl. The police charged the doctor under Sections 25 and 26 of the PCPNDT Act and launched an investigation into his practice. The doctor argued that Section 28 of the PCPNDT established an accountability mechanism that does not include a police investigation.

Judgment: The Court looked at the Supreme Court decision in *CEHAT v. Union of India* and Section 27 of the PCPNDT Act and held that the police have broad powers to investigate violations of the PCPNDT Act.

Analysis: Ultrasound technicians and abortion providers fear police raids and criminal prosecutions. Section 27 of the Act states, “*Every offence under this Act shall be cognizable, non-bailable, and non-compoundable.*” Under Section 28, a court can take cognizance of a PCPNDT offense where the Appropriate Authority has made the complaint or where an individual has lodged a complaint with the Appropriate Authority and 15 days have passed. This case provided the police with sweeping powers to circumvent the Act and conduct raids without the knowledge of the Appropriate Authority.

Focus Case: Bombay High Court: *Dr. Mrs. Uma Shankarrao Rachewad v. Appropriate Authority*, 19 April 2012 (WP (Crim) 407/2011):

Issue: Can clinic owners face criminal charges for errors in form F?

Court's Ruling: Clinic owners have a right to review reports on their clinics and to correct shortcomings before facing criminal charges under the PCPNDT Act.

Arguments: Here, a clinic faced charges under Sections 4(3), 5, 23, 29, and 30 of the PCPNDT Act. During an inspection, the Appropriate Authorities found that “N/A” had been used on F forms, that the clinic did not display the PCPNDT Act in English and Marathi, and that F forms had minor errors.

Judgment: The Court looks to Sections 4 and 5 of the PCPNDT and underscores the importance of F forms. At the same time, the Court holds that “N/A” is an acceptable answer to questions on the F form when necessary. Moreover, the Court concludes that the forms are due on the 5th of every month and that this inspection occurred on the 1st, had the clinic had more time, it could have completed the forms before the 5th.

The clinic had a PCPNDT signboard in English, but not in Marathi as a result of a simple misunderstanding of the Act. Finally, in reviewing the facts, the Court finds a minor violation of Section 4 of the Act because the clinic did not have all records on site. The Court concluded that this “rather insignificant contravention” does not justify criminal charges or the clinic closure. According to the Court, clinic operators have a right to inspection reports and a right to make changes before facing serious charges.

Analysis: Courts generally distinguish between administrative failures under the PCPNDT Act (failures to complete forms, failure to comply with all regulations) and actual sex determination or selection. For administrative failures, Courts usually allow clinics and providers with an opportunity to improve conditions before facing serious charges.

Related/similar judgements:

Supreme Court of India, *Centre for Enquiry into Health and Allied Themes (CEHAT) v. Union of India* (AIR 2003 SC 3309):

The pre-cursor to the *VHAP* case, the Supreme Court's final decision in *CEHAT* included sweeping orders obligating states to immediately improve PCPNDT implementation.

Orissa High Court, *Hemanta Rath v. Union of India & Others*, 14 February 2008:

Activists filed this PIL when journalists reported that “children's bones (were) uncovered across the state.” The police arrested doctors at several nursing homes and ultrasound clinics. Further investigation revealed that these bones were medical waste from surgeries performed on adults. With this information, the High Court disposed of the petition with a broad order to implement the Supreme Court direction in *CEHAT*.

High Court of Jharkhand at Ranchi, *Suo Moto PIL No. 3504/2014*:

The High Court judges took up implementation of the PCPNDT Act after reading articles about Jharkhand's falling sex ratio. The Court did not pursue this case because of the on-going Supreme Court litigation in *VHAP v. The Union of India*.

Joint MTP Act/PCPNDT Act violations

Raids throughout Haryana have “cracked down” on clinics that do not comply with the requirements in the MTP Rules. In February 2016 authorities arrested the owner of a private clinic in Panchkula, Haryana. With the assistance of decoys, authorities found that the abortion provider did not have a medical degree.

The District now has a system where anyone can leave an anonymous tip about a violation of the MTP Act or the PCPNDT Act and receive Rs. 1 lakh for the information. Officials had conducted raids at two additional Haryana clinics in February 2016.

Generally, where providers violate administrative components of either the MTP Act or the PCPNDT Act, courts will grant leeway for clinics to make adjustments. However, where providers have been accused of performing illegal services, courts will refuse bail and impose substantial sentences.

Focus Case: Bombay High Court, *Dr. Saraswati v. State of Maharashtra*, 11 September 2013 (CRLAPP No. 3350/2013):

Issue: Bail application after charges under IPC, MTP Act, and PCPNDT Act in relation to alleged sex-selective abortions in Beed District, Maharashtra.

Court's Ruling: Bail is denied for non-bailable offenses and where doctors continued to practice after authorities cancelled their MTP clinic registration.

Arguments: Here, the doctor faced charges under the MTP Act, the PCPNDT Act, and the IPC. The PCPNDT Appropriate Authority seized her sonography machine and cancelled the clinic's MTP registration. According to the charges, Dr. Saraswati's clinic performed a sex-selective abortion in the hospital. The woman died as a result of complications related to the surgery.

Judgment: Offenses under the IPC constitute non-bailable offenses and the fact that the doctor operated on a woman even after the cancellation of her MTP Act registration makes it likely that she might continue to treat patients. The Court evaluated each PCPNDT failure and weighs it against cancellation. For example, it holds that failure to make the bare acts available should not result in a cancellation of the clinic's registration. The Court held that a clinic needs to repeat the same violation multiple times before facing penalties.

Analysis: The Court found that minor violations of the PCPNDT Act (i.e. failing to provide copies of the bare acts) did not warrant extreme measures. However, because this doctor actually performed terminations without a registration under the MTP Act, the Court determined that bail cannot be granted.

Focus Case: Delhi High Court, *Abhilasha Garg & Another v. The Appropriate Authority*, 9 August 2010 (WP (C) 182/2010):

Issue: Does a violation of administrative sections of the PCPNDT Act justify a clinic closure? Does verbally agreeing to abort a fetus because it is female constitute a violation of Section 3(2) of the MTP Act?

“The Court found that minor violations of the PCPNDT Act (i.e. failing to provide copies of the bare acts) did not warrant extreme measures.”

Court's ruling: Clinic owners must be given a chance to reply to inspection findings and to make improvements before facing closure. Penalties for PCPNDT violations must be proportionate to the violation. A verbal agreement to terminate a pregnancy does not amount to a violation of the MTP Act. “The mere agreement to do an act which may constitute a violation of Section 3(2) by itself is not punishable even under the MTP Act. There has to be an actual act of terminating the pregnancy and not an agreement to terminate such pregnancy.”

Arguments: The respondents' clinic had been suspended under the MTP and PCPNDT Acts. The Appropriate Authorities found that the clinic failed to display copies of the Acts and to provide hygienic care in a separate room in violation of the PCPNDT Act. The clinic owners reported that they were out of town during the inspection. The Appropriate Authorities also reported that the clinic owners had agreed to terminate a pregnancy where a woman did not want to give birth to a girl.

Judgment: The Court concluded that “a one-time violation of Section 19(4) of the PCNDT Act should not visit the doctor concerned with the extreme penalty of cancellation of the registration itself. A warning followed by another chance to rectify such defect would have been appropriate.” Section 20 of the PCPNDT Act guarantees establishments the right “to be heard.” Accordingly, practitioners should have access to all inspection reports and minutes to prepare an adequate reply. Here, the decision to cancel the clinic's registration is quashed because the clinic owners did not have an opportunity to be heard or to review the inspection reports. The Court examined the MTP Act and concluded that the Act only criminalizes illegal abortion and not a promise to abort.

Analysis: Providers have rights to inspection records and the time to fix administrative failures to implement the PCPNDT. Moreover, this judgment is important for its narrow reading of the MTP Act. Promising to abort a female fetus does not amount to a violation of the Act. The provider has to perform the termination solely on the grounds of sex to constitute a violation of Section 3 of the MTP Act. However, the High Court in Allahabad ruled the opposite way, concluding that a promise to terminate a female fetus amounts to a criminal offense. The Supreme Court has not clarified the dispute. While the doctor in Allahabad failed to register under the MTP Act, providers should abstain from promises to provide sex-selective abortion to avoid prosecution.

Focus Case: High Court at Allahabad, *Dr. Varsha Gautam w/o Dr. Rajesh v. State of Uttar Pradesh*, 26 May 2006:

Issue: Can a PCPNDT Act violation investigation begin where the Appropriate Authority has not filed a complaint? Does agreeing to perform a sex-selective abortion amount to a criminal offense?

Court's Ruling: The Appropriate Authority does not have to file a complaint to launch an investigation. Agreeing to perform a sex-selective abortion is a punishable offense given the gravity of the skewed sex ratio in India.

Arguments: During a sting operation by TV journalists, a doctor agreed to perform a sex-selective abortion. The government filed an FIR against the doctor. The clinic is

not registered under the MTP Act or the PCPNDT Act. The doctor argued that Section 28 of the PCPNDT Act only allows for judicial intervention when the Appropriate Authority has filed a complaint. The doctor also argued that agreeing to the abortion is not the same as actually performing it.

Judgment: The Court examines Section 6(c) of the PCPNDT Act and concludes that “all aspects of sex selection, starting from the initial activity of determination of the sex by pre-natal diagnostic procedures and thereafter all the steps taken by any person or specialist for facilitating a selection before or after conception would be brought under the ambit of this amendment.” The Court sentences the doctor to 1.5 years' imprisonment for the attempted sex-selective abortion. The Court orders this harsh sentence because of the “grave social consequences” of sex selection that have created entire villages where “there are no eligible females for marriages.” The Court also notes “laxity in implementing” the Act and noted the Supreme Court's orders in *CEHAT* in justifying its sentence.

Analysis: The Court held that an agreement to perform a sex-selective abortion is a punishable offense; this is in direct conflict with the more recent Delhi High Court judgment mentioned above. The Delhi High Court may have been more forgiving where the clinic was duly registered under both the MTP Act and the PCPNDT Act, where the clinic owners were out of town during the inspection, and where the Appropriate Authorities did not follow the reporting procedures mandated in the PCPNDT Act. Additionally, in this case, a TV news crew caught the doctor's conversation with the patient on film.

The Court sentenced the doctor as a result of the gravity of the social issue. Unfortunately, the Court sees sex determination as a problem for men who cannot find women to marry in the local village.

Related/similar judgments:

Bombay High Court, *Dr. Shrihari Limbaji Lahane v. State of Maharashtra*, 5 December 2013 (Crim App. 5016/2013):

The Court quashed the MTP Act and PCPNDT Act charges against a doctor who provided emergency post-abortion care. The doctor had nothing to do with the initial surgery or with the illegal disposal of the fetuses and cannot be held accountable for violations of the Acts.

Privacy and fundamental Rights

Focus Case: High Court of Gujarat, *Umesh v. District*, 26 February 2010 (Special Civil Application No. 11531/2006):

Issue: Several ultrasound clinics filed petitions to have their machines unsealed under the PCPNDT.

Court's Ruling: Sex-selection represents a form of discrimination against women and requires immediate action. The Court passes specific directions to ensure better implementation of the PCPNDT Act, increased awareness about the laws, and monitoring of pregnant women. The Court also unseals the ultrasound machines.

“A prospective mother who does not want to bear a child of a particular sex cannot be equated with a mother who wants to terminate the pregnancy because of other circumstances laid down under the MTP Act.”

Judgment: To curb sex-selection, the High Court orders every woman to register her pregnancy and to obtain a unique number. Women who do not have a Mamta card will be barred from accessing sonography services. If a woman wants or needs to terminate the pregnancy after a sonography, she must obtain permission from the District Health Officer (DHO). The High Court gives the state officials one year to allow for electronic filing of F forms but warns that women's private details should not be disclosed.

Analysis: Women's groups have consistently protested programs and policies that “track” pregnant women and police women who undergo a medical termination. Tracking policies assume that women cannot make decisions about their own bodies and destinies. They also stigmatize women who seek abortions. Moreover, while the MTP Act requires permission to terminate from one or two doctors, this direction adds a new requirement (or barrier) – permission from the DHO. These judgments that tie the PCPNDT Act and abortion together create an environment where there is a presumption that women seeking abortions are seeking sex-selective abortions. In this context, abortion becomes stigmatized, policed and inaccessible. The High Court of Gujarat does not have more recent decisions to show whether this decision has been fully implemented.

Focus Case: Bombay High Court, *Vijay Sharma v. Union of India & Others* (WP (C) 2777/2005):

Issue: Does the PCPNDT Act violate Article 14 of the Constitution of India because it bars couples from using available technology to plan their families?

Court's Ruling: The PCPNDT Act does not violate Article 14 of the Constitution of India. Sex-selection cannot be justified under any current Act or right.

Arguments: Here, a couple with two girls wanted to use reproductive technology to conceive a boy. They argue that many couples that already have boys or girls have a right to have children of different biological sexes and that allowing couples to determine the sex of their children will actually balance out the sex ratio. They also argued that forcing women to have all boys or all girls will cause the mental anguish the MTP Act aims to prevent. Finally, the couple argued that choosing the sex of embryo would halt all sex-selective abortion either way because the pregnancy would always be wanted.

Judgment: The Court appreciated the couple's arguments, but acknowledges that in the current social climate technology will not be used to balance the sex ratio. The PCPNDT Act clearly states that misuse of pre-natal technology reflects discriminatory attitudes against girls. Next, the Court examines the MTP Act and finds that its primary goal is to protect women's mental and physical health. Section 3 does not recognize having children of one sex as a presumed injury to women's health. Accordingly, “a prospective mother who does not want to bear a child of a particular sex cannot be equated with a mother who wants to terminate the pregnancy because of other circumstances laid down under the MTP Act.” The Court cannot legitimize sex determination or selection in any context.

Analysis: On a positive note, this decision sees son preference as part of a wider continuum of discrimination against women and does not personify or romanticize

“girl children” (i.e., female fetuses). Additionally, the judgment attempts to maintain a clear distance between the broad protections for women's health and lives in the MTP Act and sex determination. This judgment shows that where there is a serious social concern like sex determination, the government can infringe upon individual rights and regulate use of technology.

Focus Case: Bombay High Court, *Imaging Association of India v. Union of India*, 26 August 2011 (WP(C) 797/2011):

Issue: Do form F requirements and “silent observers” on ultrasound machines violate a woman's fundamental right to privacy?

Court's ruling: Silent observers and form F requirements do not violate the right to privacy as the Appropriate Authority already has the right to seize information and records.

Arguments: The government found it impossible to adequately review thousands of form Fs every month. Online submissions have substantially improved reporting and monitoring, but the government requires additional monitoring mechanisms to keep the sex ratio in check.

The Imaging Association of India argues that photographic evidence of each sonography violates a woman's right to privacy. The Government argued that a woman's right to privacy has to be balanced against the right of the unborn child to be born.

Judgment: The Court examined the provisions of PCPNDT Act pertaining to maintaining of clinic records. Rule 9(6) required clinics to maintain all images and form Fs for two years. Section 20 provides the Appropriate Authority with the right to search, seize, and seal records. Section 32 allows the Central Government to determine how the documents and records will be seized. Rule 12 outlines the procedures for search and seizure:

“Appropriate Authority or any officer authorized in this behalf may enter and search at all reasonable times any Genetic Counseling Centre, Genetic Laboratory, Genetic Clinic, Imaging Centre or Ultrasound Clinic in the presence of two or more independent witnesses, for the purposes of search and examination of any record, register, document, book, pamphlet, advertisement, or any other material object found therein and seal and seize the same if there is reason to believe that it may furnish evidence of commission of an offense punishable under the Act.”

The Court found that because the Act already requires clinics to keep information that the Appropriate Authority can seize at any time, allowing for e-filing of form F and for silent observer records does not constitute an additional invasion of privacy. Finally, the Court noted that personal liberty is not an absolute right. Here, where the government had a legitimate interest in improving the sex ratio, it had the right to restrict individual liberties. The Court was careful to weigh a potential violation of a woman's right to privacy under the PCPNDT against the state's interest in improving the sex ratio and not against the unborn child's right to be born.

Analysis: As per this judgment, the government has the right to restrict personal freedoms to improve the sex ratio which allows for tracking of pregnant women, questioning women who undergo an abortion, and trampling patient-doctor confidentiality. This judgment also failed to acknowledge the MTP Act privacy protections or to discuss doctor-patient confidentiality generally. However, this judgment does not acknowledge any rights of the fetus.

Related/similar judgments:

Rajasthan High Court, *SK Gupta v. Union of India & Others*, 23 May 2012 (PIL No. 3270/2012):

The High Court in Rajasthan echoes the Bombay High Court's judgments and found that form F and silent observers do not violate women's right to privacy. Unlike the Bombay High Court, the judges in Rajasthan found that the "compelling interest in saving the girl child" outweighs the woman's right to privacy and states that all "conceived children" must be treated with dignity. The government planned to install silent observers in six months whereas the Court ordered them to do it in four months.

Sex selective abortion – joint PCPNDT/IPC charges

Focus Case: High Court of Punjab and Haryana, *Sadhu Ram Kulsa v. Ranjit Kaur & Others*, 23 March 2009 (Crim. Misc. No. 337 of 2007):

Issue: Can authorities assume that a woman with a healthy pregnancy will only undergo termination for sex selection?

Court's Ruling: There can be no legal presumption that a woman aborted only because she was pregnant with a female fetus. Likewise, conducting an ultrasound prior to termination does not create a legal presumption that the doctor disclosed the sex of the fetus.

Arguments: Here, a woman and her husband faced charges under IPC Section 312 because the woman decided to terminate her pregnancy at 14 weeks. The doctor advised the woman to have an ultrasound before the termination. After surgery, she and her husband were accused of aborting to eliminate a female fetus. The woman argued that she did not know the sex of the fetus. The government argued that because the fetus was "normal" it must have been a female fetus.

Judgment: The High Court examines the facts and finds that the trial court "rightly held that mere fact that Ultrasonography was conducted by Dr. Kamlesh Jinda, *ipso-facto*, does not establish that she had detected and disclosed the sex of the fetus." For an IPC charge, there has to be evidence that a provider revealed the sex of the fetus.

Analysis: Although both the Trial Court and High Court came to just conclusions, this judgment illustrates the impact created by oppressive implementation of the PCPNDT Act and by overly vigilant policing of women's bodies in the name of saving the girl child. Here, the authorities operated with the assumption that any woman who has had an ultrasound and aborts a healthy pregnancy is guilty of sex-determination.

The couple and their doctors had to suffer through two years of litigation and scrutiny for serious criminal charges before the High Court quashed the charges.

G. Rape (MTPACT, 1971 §3)

Courts have consistently ensured that rape survivors, especially minors, have unfettered access to abortion services. Most recently, the Supreme Court has allowed for an exception to the 20-week abortion limit in Section 3(2)(b) of the MTP Act for a minor rape survivor. Courts seem less inclined to make exceptions for adult rape survivors.

Judicial approval for Termination

The MTP Act does not require rape survivors to obtain judicial approval for termination. However, hospitals, the police, and magistrates routinely block rape survivors' access to abortion. As a result, High Courts across India consistently hear these cases, delaying access to abortion services.

Focus Case: High Court of Gujarat, *Aastanaben Sattarbhai Jumabhai v. State of Gujarat*, 24 February 2016 (R.SCR.A 1084/2016):

Issue: Can a 19-year-old rape survivor obtain a medical termination of pregnancy?

Court's ruling: The Court determined that the rape survivor can obtain an abortion.

Arguments: The rape survivor wants an abortion under Section 3(2)(i) Explanation 1 of the MTP Act.

Judgment: The Court evaluates medical opinion and weighs the societal circumstances per the “victim's best interest” test developed by the Supreme Court in *Chandrakant Jayantilal Suthar* (below). Per the Supreme Court's *Srivastava* judgment, the Court ensured that the survivor here consented to the abortion. Satisfied on all counts, the Court found that this pregnancy would cause mental anguish for the survivor per Section 3 of the MTP Act and ordered a government hospital to terminate the pregnancy.

Analysis: The MTP Act does not require judicial review where an abortion survivor requests a termination. The Supreme Court ordered in *Chandrakant Jayantilal Suthar* and *Srivastava* that rape survivors should have immediate access to services under Section 3 of the Act while using the “best interest” test.

Preserving evidence

In some rape cases, hospitals refused to terminate pregnancies because of “ongoing criminal investigations” High Courts will often order hospitals to preserve the products of conception for a DNA confirmation. Rape survivors can also request hospitals to preserve evidence.

Focus Case: Delhi High Court, *Km. Mahima v. State & Others*, 28 August 2003 (VIAD Delhi 510, 106 (2003) DLT 143):

Issue: Does a rape survivor have to petition the court for a termination and/or to preserve evidence for a criminal investigation?

Court's ruling: Under the MTP Act, rape survivors do not have to petition for permission to terminate their pregnancies. If a woman approaches a court to preserve

“The time wasted in not giving such direction by the Courts below may cause a situation resulting in injury to the mental health of the complainant as the termination of the pregnancy exceeding 20 weeks may prove dangerous to her life as a consequence of which she would suffer the mental agony and torture of giving birth to a child of rape.”

evidence, the court should hear the petition on an urgent basis to ensure that a rape survivor can access safe abortion services before the 20-week limit imposed in the MTP Act.

Arguments: An adult rape survivor petitioned a magistrate judge for permission to terminate her pregnancy and for an order compelling the hospital to preserve the products of conception for the criminal investigation. The Magistrate dismissed the petition stating that the MTP Act arms the woman with the power to determine whether she wants to continue her pregnancy.

Judgment: The High Court agreed with the Magistrate's decision regarding “permission” for an abortion. However, the High Court found fault with the Magistrate's refusal to hear the woman's arguments regarding preservation of evidence. The Court stated, “merely by saying that the petitioner has an independent right of getting her pregnancy terminated was not sufficient as her main object was not only to get her pregnancy terminated but also preserve the fetus for conducting DNA test. The time wasted in not giving such direction by the Courts below may cause a situation resulting in injury to the mental health of the complainant as the termination of the pregnancy exceeding 20 weeks may prove dangerous to her life as a consequence of which she would suffer the mental agony and torture of giving birth to a child of rape.” The Court also ordered the government to provide a copy of this judgment to AIIMS to ensure that all rape survivors have access to timely services and evidence preservation.

Analysis: This judgment affirms rape survivors' rights to access abortion services without judicial approval. Moreover, the judgment prioritized women's health and underscores the importance of urgency in abortion matters. The Supreme Court decision establishing the survivor's interest test post-dates this decision and creates a role for courts in determining whether individual rape survivors can access abortion services. However, the test in *Chandrakant* was used for a minor who was more than 20 weeks pregnant and may not apply to adult women who wish to terminate before the 20-week limit.

Consent and consent of accused

The Supreme Court's ruling in *Srivastava* establishes that a rape survivor has to consent to termination. Shockingly, the Delhi High Court has requested consent for termination from the accused in *X v. State of NCT of Delhi & Others*, 22 March 2013 (WP (CRL) 449/2013). In this case, a rape survivor petitioned the Court for an abortion and to compel the hospital to save the products of conception as evidence. The Court obtained consent from the survivor, ensured that the procedure could be performed safely, and then asked for the accused person's consent. He “had no objection.” This judgment appears to be an anomaly and the Court did not have to weigh the survivor's wish to terminate the pregnancy against the accused person's desire to become a parent. The fact that the High Court requested permission clings to stereotypes that prioritize men's desires over the choices women make about their bodies.

Minor rape survivors, general

Like with adult rape survivors, courts are quick to ensure access to abortion services for minor rape survivors.

Focus Case: High Court of Punjab and Haryana, *Kamla Devi v. State of Haryana & Others*, 9 February 2015 (WP (C) 2007/2015)

Issue: Does a minor rape survivor who is less than 20 weeks pregnant have to petition the Court for a medical termination of pregnancy?

Court's ruling: No. This Court has repeatedly stated that minor rape survivors do not need judicial approval for abortion.

Arguments: After a government hospital refused to perform an MTP on a minor because of an ongoing police investigation, the girl appealed to the High Court.

Judgment: The High Court expresses its extreme frustration with the state authorities for repeatedly forcing minor rape survivors to petition the High Court for termination. The Court stated, “Even apart from a direction that the order of this Court should be circulated to all the jurisdictional police to assist a victim of rape in securing an immediate attention for medical termination of pregnancy, if a petition seeking for termination of pregnancy is filed, the matter does not appear to have sunk in the manner that it should have been done. There is an urgent call to the police operating within the State of Punjab and Haryana to sensitize the investigating officers to play a positive role and secure full emotional support to relieve the trauma for a rape survivor victim.

The exhortation of Court falls on deaf ears and this is yet another case which spells out utter insensitivity to respond to the wailings of a woman who is already traumatized by the act of rape on her.”

Analysis: Positively, the Court attempts to clear barriers to safe abortion. On the other hand, the overwhelming number of these cases illustrates the urgent need for improved MTP Act training at the police, provider, and magistrate level.

Focus Case: High Court of Gujarat, *Janak Ramsang Hanzariya v. State of Gujarat*, 7 May 2010 (Crim. App. 702/2010):

Issue: Can a minor rape survivor obtain a termination under the MTP where she and her parents have consented to termination?

Court's Ruling: The minor rape survivor can obtain a medical termination of pregnancy.

Arguments: Here, a 13-year old girl became pregnant as a result of a rape. When her family approached a doctor for a termination, the doctor, taking note “of the pending criminal case” sought permission from the Court. In the lower court, an Additional Sessions Judge rejected the 13-year-old petitioner's request to terminate her pregnancy because “petitioner-victim failed to provide the child to be born is likely to suffer any physical or mental disability.” The petitioner and her family argued that continuing the pregnancy would result in grave injury to the petitioner per Sections 3,4, and 5 of the MTP Act. In the High Court the Government lawyer relied on the Supreme Court's decision in *Srivastava* to argue that where a rape survivor expresses a desire to continue the pregnancy, the Court should respect that decision.

The judgment: The High Court examined the MTP Act and jurisprudence and held that to preserve the “right to life and liberty which includes right to live with dignity

“A woman's fundamental right to make reproductive choices is an essential component of their rights to privacy, dignity, and bodily integrity.”

under Article 21 of the Constitution,” the Sessions Judges' order refusing the termination should be set aside because “the Court below failed to appreciate the fact about continuance of pregnancy would cause and constitute a grave injury to the mental health of the pregnant woman coupled with the fact that bearing and rearing of a child in the womb would create a great mental agony of the victim for her entire life and may invite other socio-economic problems.” Furthermore, the High Court distinguished the facts in the current case from *Srivastava* because here the rape survivor wanted a termination. The High Court ordered a government hospital to conduct the testing and termination as per the MTP Act. The High Court held that a women's fundamental right to make reproductive choices is an essential component of their rights to privacy, dignity, and bodily integrity.

Analysis: This judgment also highlighted the need for improved understanding of the MTP Act – the Act clearly provided rape survivors with access to the termination. In this case, where the survivor consented to a termination, she clearly met the requirements of the MTP Act. Still, the Court questioned her on “the pros and cons of pregnancy, about certain factual aspects related to the incident.” Again, the MTP Act does not require an interview with a rape survivor who has requested a termination. Given the time sensitive nature of termination and the sensitivity required with some rape survivors, requiring multiple court hearings can be detrimental to a woman's mental and physical health.

Focus Case: Madras High Court, *D. Rajeswari v. State of Tamil Nadu & Others*, 24 May 1996 (Crl.O.P. No. 1862/1996):

Issue: Can a minor rape survivor obtain a medical termination of pregnancy?

Court's Ruling: A minor rape survivor who satisfies the requirements of Section 3 of the MTP Act can obtain a termination.

Arguments: The survivor argued that continuing the pregnancy will cause “great anguish in her mind, which would result in grave injury to her mental health since the pregnancy was caused by rape.”

The judgment: The High Court initially ordered a medical investigation of the petitioner. Doctors concluded that her pregnancy had reached 18 weeks. The Court examined Section 3 of the MTP Act which provides for rape survivors' access termination because of the presumption of mental anguish. The Court did a “plain reading” of the MTP Act and then examined whether the petitioner's case met the requirements under Section 3. The Judge reviewed the “Petitioner's affidavit, copies of complaints, other records, and the counter filed by the respondents” to conclude that the petitioner has satisfied the requirements of the MTP Act for rape survivors. The Court ordered a government hospital to conduct the termination.

Analysis: Here, the High Court created new burdens on rape survivors seeking terminations. The MTP Act does not require rape survivors to prove a rape or potential harms in a court of law. However, the judge here requires substantial documentation before concluding that the survivor satisfies the requirements established in Section 3.

Related/similar judgments:

High Court of Gujarat, *Bhagiben v. State of Gujarat*, 8 February 2011 (Crim App. 116/2011):

The High Court confirmed that Section 3 of the MTP Act allowed for termination where a pregnancy has been caused by rape. Additionally, the Court examined the “innumerable” problems that would result if the minor rape survivor continued the pregnancy; the Court ordered a government hospital to conduct the termination.

Focus Case: High Court of Punjab and Haryana, *Vijender v. State of Haryana & Others*, 7 October 2014 (WP (C) 20783/2014):

The court stated that “It was, no doubt, not necessary for the petitioner to apply to the Court for permission. All the law requires in a case where a person is a victim of rape is to secure the decision of two doctors committee if the pregnancy is more than 12 weeks.” Further, it held that “A rape victim shall not be further traumatized by putting through a needless process of approaching courts for taking permission. The Medical Termination of Pregnancy Act does not contemplate such a procedure at all and the medical personnel before whom the person shows up is bound to respond to an information regarding the complaint of rape...the medical personnel will take the decision regarding the termination and carry out the procedure.”

Minor rape survivors with 20+ week pregnancies

Focus Case: Supreme Court of India, *Chandrakant Jayantilal Suthar & Another v. State of Gujarat* (Special Leave Crm. 6013/2015):

Issue: Can a minor rape survivor who is 24 weeks' pregnant access medical termination of pregnancy?

Court's Ruling: Yes. The Court held that “Looking at the peculiar facts of the case, we direct that Ms. Maitri Chandrakant Suthar be examined by three senior most available Gynecologists of the Civil Hospital...” and other doctors “shall decide whether there is a serious threat to her life if the child is not aborted. If the team of the afore-stated doctors is of the view that termination of the pregnancy is immediately necessary to save life of Ms. Maitri, the concerned doctor of the Civil Hospital shall perform necessary surgery, if the petitioner and Ms. Maitri desire to go through to such abortion, without taking any permission from this Court.”

Arguments: Here, a minor became pregnant after her doctor raped her. The High Court of Gujarat rejected her family's application for termination. A doctor on the medical team found that the rape survivor was “psychologically devastated” and “physically too weak to deliver a child.” On this basis, the medical team concluded that the pregnancy posed a “serious threat to her life.” The medical team also noted that termination of pregnancy at 24 weeks is still safe and that the procedure would not harm the girl's health.

Judgment: The Supreme Court reviewed the medical opinion and allowed for termination if the girl consented. However, the Court noted that this was a particularly difficult decision because “Whatever be the circumstances in which the child was conceived, whatever the trauma of the young mother, the fact remains that the child is also not to blame for being conceived.”

“A rape victim shall not be further traumatized by putting through a needless process of approaching courts for taking permission.”

Analysis: This judgment represented major progress on abortion rights in India. It is important to note that the Court relied on medical – and not religious or moral – grounds to determine that this minor rape survivor can access abortion. Since the Supreme Court handed down this decision, High Courts have allowed other minor rape survivors to undergo termination of pregnancy post-twenty weeks using the survivor's best interests" test established in this decision. This test requires a court to consider medical opinion and social circumstances to find the solution that would best serve the girl or woman. Although the judgment does personify the fetus, it ultimately prioritizes women's health – and represents a positive step forward in abortion jurisprudence.

Focus Case: High Court of Punjab and Haryana, *Kavita v. State of Haryana & Others*, 8 April 2015 (Letters Patent Appeal No. 538/2015):

Issue: Can a 12-year-old rape survivor terminate her 34-week pregnancy?

Court's Ruling: No, the termination is illegal under the MTP Act where the abortion would pose health risks to the minor.

Arguments: The rape survivor and her family wanted to terminate the pregnancy. The Court constituted two panels of doctors to examine whether a termination at 34 weeks constituted an emergency life-saving measure under Section 5 of the MTP Act. The medical team reported that the pregnancy did not pose an imminent danger to the girl's life and that at 34 weeks the abortion would be riskier than delivery. The Court also states that termination at this stage would likely result in a live baby.

Judgment: The Court did not allow for the abortion, but did express its great sympathy for the rape survivor. In the light of this forced pregnancy, the Court ordered the hospital to provide her with a private room, free health care, mental health care services, and Rs. 2 lakhs to support her child.

Analysis: This decision may have been different after the Supreme Court's holding in *Chandrakant*. However, at 34 weeks, few courts in the world would allow for termination except as an emergency measure to save a woman's life.

Just days before the Supreme Court's order, the High Court of Punjab-Haryana similarly refused a 14-year old's application for termination at 25 weeks in *Shewata v. State of Haryana & Others* 16 September 2015 (CWP 19343/2015).

Related/similar judgments:

High Court of Rajasthan, *Jamana Suthar v. State of Rajasthan & Others*, 6 August 2009 (WP(C) 6683/2009):

Here the High Court denied abortion to a minor rape survivor who was 25 weeks pregnant. A doctor reported that the pregnancy did not pose a threat to her health and that the fetus could be viable at 25 weeks. Additionally, the Court questioned the minor's rape allegations. Finally, the Court here specifically stated that the mental and physical health protections in Section 3 of the MTP Act cannot be used to justify a Section 5 abortion. The new Supreme Court decision in *Chandrakant* should make this type of decision impossible today. Furthermore, the MTP Act only says that a woman has to allege rape to justify a termination under Section 3. A woman does not have to prove that she has been raped to justify a termination.

H. Registration of MTP Centres

Like in many PCPNDT compliance cases, courts generally give providers who make “good faith” efforts to comply with laws and regulations leeway to improve conditions before the state can cancel registrations or close facilities.

Nursing homes that have registered under the MTP Act also have an obligation to comply with general facility requirements under the National Health Mission as well as environmental and safety statutes (Delhi High Court, *Delhi Medical Association & Others v. Union of India & Others*, 24 April 2009 (WP (C) 4233/1993).

Focus Case: Rajasthan High Court, *Mahaveer Hospital, Udaipur v. State of Rajasthan*, 23 April 2015 (DC Civ. Sp. App 1149/2015):

Issue: Can the Chief Medical Officer (CMO) cancel an MTP registration based on an inspection alone?

Court's ruling: No, the CMO must follow the procedures outlined in the MTP Act Rules, 2003.

Arguments: The CMO cancelled the Petitioner's MTP registration after an inspection. The Petitioner argued that the government did not adhere to the registration cancellation procedures under Rule 7(1) of the MTP Rules. They argued that the CMO does not have the power to cancel a certificate without consulting with a committee and providing the facility owner with an opportunity to make a representation.

The Government argued that the CMO can cancel a registration where he or she is satisfied that the conditions are not safe for medical care.

Judgment: The Court examined Rule 5 and determined that a facility will be approved under the MTP Act when “(1) The Government is satisfied that the termination of pregnancy may be done therein under safe and hygienic conditions, and (2) [the facility] has certain facilities given under the Rules.” Moreover, Rules 6-7 allow the CMO to inspect facilities and to report findings to a committee. Rule 7 confers the power to cancel certificates to the committee. Rule 8 allows the owner to appeal and the government can confirm, modify or reverse the cancellation order.

Here, the petitioner never received a copy of the CMO's inspection report. The CMO's report does not describe the deficiencies uncovered during the inspection. The committee did not review the CMO's report under Rule 6 because the government of Rajasthan never constituted a committee per the 2003 rules. The Court found, “If the committee was not existing, then there was no occasion for the Chief Medical Officer to usurp the powers of the committee. The Rules of 2003 nowhere empowers him to do so. The order impugned as such is without jurisdiction.” The Court ruled that the cancellation has to be lifted, but leaves room for the competent authorities to pursue an action against the facility owners in accordance with the MTP Rules 2003.

Analysis: The Court finds that the procedural requirements in the MTP Rules are not mere formalities. Accordingly, prior to cancellation or legal action, providers have opportunities to make improvements to their facilities and to defend themselves following a CMO inspection.

Related/similar judgments:

High Court of Chhattisgarh, *National Alliance for Maternal Health and Human Rights v. State of Chhattisgarh & Others*, pending (WP (C) 32/2014):

This PIL uses information obtained through Right to Information requests to show that the government of Chhattisgarh failed to establish District Level Committees as per Section 4 of the MTP Act and the 2003 Rules. The PIL also highlights key barriers to safe abortions services throughout the state.

Focus Case: High Court of Punjab and Haryana, *Vandana Malik v. State of Haryana*, 18 September 2014 (CRM-M No. 15860/2014):

Issue: Does the presence of “maternal health” medical equipment create a presumption that a facility conducts medical termination of pregnancy?

Court's Ruling: No, possession of the instruments does not create a legal presumption of terminations.

Arguments: Here, a couple owned a small clinic. Based on an anonymous tip district authorities raided the clinic and found equipment that could be used in medical termination of pregnancy surgeries. The authorities filed an FIR alleging violations of Sections 3, 4, and 5 of the MTP Act. The couple argued that they employ this equipment for general maternal and prenatal care, including delivery. They have not registered their facility under the MTP Act because they do not perform abortions.

Judgment: The Court examined the facts and founds no evidence that the couple's facility has ever conducted a termination and states, “Counsel for the State of Haryana otherwise failed to cite any provision in law or a precedent that if instruments which may be used for termination of pregnancy are found in a hospital, it raises a legal presumption against the doctor running that hospital or the owner of the place that the said hospital is being used for termination of pregnancy or any person has terminated the pregnancy.” Accordingly, the Court quashed all the charges under the MTP Act.

Analysis: Unless there are grave violations of negligence or sex selection, courts frequently give doctors' arguments deference and provide them with opportunities to adjust where the state finds violations of the MTP Act.

I. Twenty-week Limit for Termination (MTPACT §3(2)(b))

Section 3(2)(b) of the MTP Act allows abortion up to 20 weeks of pregnancy. Until the Supreme Court's 2015 decision permitting a minor rape survivor to access abortion services at 24 weeks, courts had held to a strict interpretation of this section even in the face of mounting medical and legal pressure to amend the Act. Judgements following the Supreme Court's 2015 decision in *Chandrakant Jayantilal Suthar*, (see the section on minors) requested medical professionals to examine the pregnant minors and to issue an opinion on the safety and necessity of termination. In some cases, this provided the rape survivor access to abortion. In other cases, this delayed action, making abortion impossible. The current MTP amendments would extend the time limits for legal abortion; it is now up to the Ministry of Health and Family Welfare to take action.

Fetal abnormalities and informed consent

In July 2016, in *Ms. X vs. Union of India*, (WP (C) 593/2016, the Supreme Court of India declared a woman could terminate her pregnancy at 24 weeks where “there is a danger to the health of the mother.” In fact, the Court, “advised the petitioner to terminate the pregnancy.” In this case, the petitioner argued that because the fetus suffered from anencephaly, a serious abnormality, continuing the pregnancy would have drastic impacts on her mental and physical health.

Focus Case: Supreme Court of India, *Ms. X v. Union of India & Others*, 25 July 2016 (WP(C) 593/2016):

Issue: Can a woman terminate her pregnancy post-20 weeks where the fetus has severe abnormalities?

Court's Ruling: Based on the medical board's determination that continuing the pregnancy would pose a grave threat to the woman's mental and physical health, the woman may undergo termination under Section 5 of the MTP Act.

Argument: Ms. X's pregnancy presented serious abnormalities including exencephaly, a condition where the fetus does not have a skull, omphalocele, a condition where the fetus' liver, intestines, and stomach form outside the abdomen, heart problems, and kyphoscoliosis, a condition of the spine. These conditions would make delivery dangerous for Ms. X and virtually guarantee that the fetus would not survive labor and delivery. Ms. X sought permission to terminate past the 20-week limit established in the MTP Act in the Bombay High Court. When the High Court refused her application, Ms. X filed a petition in the Supreme Court.

Judgment: The Supreme Court convened a Medical Board to examine the petitioner and determine whether continuing the pregnancy or performing the termination would be a threat to her mental and physical health. The Board reported that the pregnancy was “not compatible with extra-uterine life” and that continuing the pregnancy could “gravely endanger [the petitioner's] physical and mental health.” The Board advised a termination and the Supreme Court found that although Section 3 limits termination at 20 weeks, Section 5 creates an exception to save the life of the pregnant woman. Given the medically established grave risk to the Petitioner's health, the Court allowed the termination under Section 5 of the Act.

Analysis: On one hand, this judgment is a crucial victory for access to abortion activists. It represents a growing trend of allowing access to abortion services post-20-week limit outlined in Section 3 of the MTP Act. On the other hand, women with similar conditions have been denied access to safe abortion services. Absent amendments in the statute, every woman who receives a diagnosis of severe fetal abnormalities will have to petition a court if she wants to terminate the pregnancy post-20 weeks. Many serious fetal abnormalities cannot be diagnosed until after 20 weeks and in India, many women do not have ready access to the diagnostic tools necessary to check for abnormalities. If the Central Government considered and passed the 2014 proposed MTP Act amendments, women like Ms. X would not have to fight to terminate non-viable pregnancies in High Courts and the Supreme Court.

“A woman could terminate her pregnancy at 24 weeks where there is a danger to the health of the mother.”

“Many serious fetal abnormalities cannot be diagnosed until after 20 weeks and in India, many women do not have ready access to the diagnostic tools necessary to check for abnormalities.”

Focus Case: Delhi High Court, *Dr. Raj Rokaria v. Medical Council of India & Another*, 25 November 2010 (WP (C) 7905/2010):

Issue: Is a doctor negligent if she performs a medical termination post-20 weeks when there is not an urgent risk to the woman's life?

Court's ruling: Failure to complete MTP Act paperwork is enough to demonstrate negligence.

Argument: Here, the doctor's patient was pregnant with an anencephalic fetus. The doctor determined that delivery could harm woman's health and she performed a medical termination of pregnancy post-20 weeks. Just after the surgery, the woman had a severe asthma attack and died. The Delhi Medical Council decided not to take action against the doctor because the termination was clearly in the best interest of the patient.

Judgment: The Court found that the abortion violated the 20-week ban in the MTP Act and was, therefore, illegal. The Court was not convinced by the doctor's argument that she operated to save the woman's life as per Section 5 of the Act. Moreover, the doctor did not accurately complete the MTP paperwork – a fatal flaw in the Court's eyes. “There can be no excuse whatsoever for a medical practitioner seeking to defend herself with reference to Section 5 of the MTP Act not maintaining any record of the formation of the opinion in terms of Section 5(1) read with the Regulations of 2003. In the considered view of this Court, the above factor alone is enough to demonstrate the gross negligence on the part of the petitioner.”

Analysis: Prior to the Supreme Court's 2015 ruling, Court strictly followed the 20-week limit in the MTP Act imposing strong sanctions for procedures conducted post-20 weeks. Here, the Court sent a strong message to providers to accurately and completely fill out all MTP Act paperwork to avoid negligence sanctions. This case highlights the gulf between the medical and legal community's view on termination. Here, the Delhi Medical Council concluded that the doctor acted in her patient's best interests in terminating the pregnancy and did not pursue a case. The Court, on the other hand, adheres to time restraints the 1971 MTP Act in finding the doctor negligent.

Focus Case: Supreme Court of India, *Dr. Nikhil Datar v. Union of India & Others and Mrs. X and Mrs. Y v. Union of India & Others*, Pending (WP (C) 7702/2014):

Issue: Does the 20-week limit on abortion violate women's rights to life and health under the Constitution of India especially in the case of severe fetal abnormalities or inconclusive tests?

Court's ruling: This case is currently pending before the Supreme Court. The Court has provided the Union of India with a final opportunity to reply. The government's initial filings argue that a change to the 20-week limit would spur sex selection.

Arguments: Niketa Mehta was 22 weeks pregnant when she discovered that her fetus had severe abnormalities and would not survive. Along with her doctor, she appealed to the Bombay High Court to request permission to terminate the pregnancy. The High Court said that the MTP Act does not make exceptions. She had a miscarriage one

week after the High Court's decision. Dr. Datar filed this case to challenge the 20-week limit in the MTP Act in that it violates women's fundamental rights and is medically unnecessary. Mrs. X and Mrs. Y faced similar experiences; Mrs. Y was forced to deliver a baby she knew would not survive, while Mrs. X was unable to provide full and informed consent for her medical termination of pregnancy because detailed test results were only available after 20 weeks. These women filed a separate writ petition in the Supreme Court because their fundamental rights to life, health, and equality have been violated by the arbitrary 20-week cut off in the MTP Act.

Analysis: These cases illustrate High Courts' narrow interpretation of Section 5 of the MTP Act. Until the recent Supreme Court decision allowing a minor rape survivor to terminate her pregnancy at 24 weeks, courts throughout India found that Section 5 of the Act only allowed for termination where the pregnancy constituted an immediate threat to the pregnant woman's life. Accordingly, even in cases of extreme fetal abnormalities and rape, women could not access abortion post-twenty weeks. The government had argued that extending the limit would increase sex-selective abortions, illustrating the impact sex selection discourse has on women's rights to bodily integrity and health.

The Supreme Court's recent decision has created a space where a pregnancy can be terminated post-20 weeks where doctors agree that that the pregnancy threatens the woman's health. The Supreme Court's analysis corresponds to laws in countries that allow abortion up to 24 or 26 weeks. The proposed MTP Act amendments would bring India's law in line with contemporary legal and medical norms.

Rape (See also, minor rape survivors with 20+ week pregnancies)

Focus Case: Gujarat High Court, *Ashaben w/o Dineshbhai Jasubhai Talsaniya v. State of Gujarat & Others*, 16 April 2015 (Spl. Crim. App. No. 1919/2015):

Issue: Is a fetus a human being with a right to life? Does a woman have a right to choose whether or not to have an abortion? Can a rape survivor access termination post-20 weeks?

Court's ruling: Where a rape survivor is more than 20 weeks pregnant, she cannot access abortion because: (1) Rape has not been proved and (2) The MTP Act has an absolute ban at 20 weeks.

Arguments: Ashaben who has two living children was kidnapped and raped repeatedly for almost a year. She finally escaped, returned to her family, and launched a criminal complaint against the kidnappers and rapists. As a result of constantly forced sex, she became pregnant, but the pregnancy could only be measured after she escaped. A hospital determined that she was 23 weeks and three days pregnant and refused her request to terminate the pregnancy. By the time her case reached the High Court she was 27 weeks pregnant. Ashaben wanted the termination to preserve her mental and physical health. The Court articulated myriad arguments in support of the 20-week ban.

Judgment: The Court finds that the MTP Act “guarantees the right of women in India to terminate an unintended pregnancy. However, Section 5 nowhere speaks of any right of a pregnant woman to terminate the pregnancy beyond 20 weeks on the ground

“The Court held that it is conscious of the fact that to carry a child in her womb by a woman as a result of conception through an act of rape is not only extremely traumatic for her but humiliating, frightening and psychologically devastating and as a human being, more particularly in the Indian society she becomes an object of scorn and ostracization. This is very unfortunate”

of having conceived on account of rape.” The judge stated, “I am conscious of the fact that to carry a child in her womb by a woman as a result of conception through an act of rape is not only extremely traumatic for her but humiliating, frightening and psychologically devastating and as a human being, more particularly in the Indian society she becomes an object of scorn and ostracization. This is very unfortunate”

Analysis: Fortunately, post the 2015 Supreme Court cases allowing a pregnant minor rape survivor to terminate at 24 weeks, this High Court has allowed post-20 weeks' abortions (see below). However, this judgment is important to show that courts can selectively use case law and examples from other countries to make an argument. Here, the Court cites a 1975 case from West Germany (a country that no longer exists) that says “everyone” includes an “unborn being and an embryo after the 14th day of conception.” The court also incorrectly referred to an American case, *Roe v. Wade* (1973) to show that the state has an interest in regulating access to abortion. Interestingly, under *Roe*, the rape survivor may have been able to access an abortion. Like other judgments, this decision relies on religious texts and extreme anti-choice literature to support the restriction.

Focus Case: High Court of Gujarat, *Bhavikaben v. State of Gujarat*, 3 and 19 February 2016 (Special Crim App 1155/2016) :

Issue: Can an adult rape survivor undergo medical termination of pregnancy when she is more than 20 weeks pregnant?

Court's ruling: Yes. Applying the survivor's best interests test in *Chandrakant*, the Court finds that where medical experts agree that the woman's mental or physical health will be severely impacted by the pregnancy, she has a right to terminate.

Arguments: An 18-year-old rape survivor attempted to kill herself when she discovered she was pregnant. She requires surgery for her oesophagus, but she cannot get the operation while she is 24 weeks pregnant.

Judgment: Following the Supreme Court's decision, the High Court asked for a medical opinion. The Committee reported that the pregnancy would impact the rape survivor's mental health, but not her physical health. Underscoring the importance of the petitioner's health, the Court looks to *Chandrakant* where the Supreme Court “has laid down the theory of best interest test to hold that the Court is required to ascertain the course of action which would serve the best interests of the person in question.” Here, even though this woman could carry the pregnancy to term and deliver a healthy baby, the Court decided that the potential grave harm to her mental health necessitates a termination.

Analysis: This case represents an important advance in abortion jurisprudence in India. Building from the Supreme Court's decision regarding a pregnant minor rape survivor, this case prioritizes the woman's mental and physical health and medical opinion in allowing the rape survivor to terminate post 20 weeks. Advocates can apply these cases to a broader array of termination cases post 20 weeks.

Focus Case: High Court of Punjab and Haryana, *R and Another v. State of Haryana & Others*, 20 May 2016 (WPC 6733/2016):

Issue: Can a rape survivor obtain a medical termination of pregnancy at 21 weeks?

Court's Ruling: During the course of litigation, R's pregnancy advanced to 25 weeks and doctors recommended against termination. Following the medical expert opinion, the Court denies a termination while asking the head of AIIMS to explore options for termination at 25 weeks.

Arguments: R's family has requested the termination because the pregnancy would cause her grave injury and threaten her life. R's family also asked to preserve the products of conception for a future police investigation. After R went missing from her friend's house, her family found that she had been kidnapped and raped. During the first medical exam, the doctors at SHKM Government Medical College, Nalhar failed to conduct a pregnancy test “in spite of the fact that the doctor of Civil Hospital-cum-SHKM Government Medical College, Nalhar was made aware of the alleged rape.” R's family also alleges that the police colluded with the accused rapist to avoid justice. The doctors' failure to perform a pregnancy test and delays in the investigation left R with no choice but to seek termination after 20 weeks. R told her lawyer that she would kill herself if forced to continue the pregnancy. R's advocate also cited the Supreme Court's 2015 decision in *Chandrakant Jayantilal Suthar* and the Gujarat High Court decision in *Bhavikaben vs. State of Gujarat*, where termination was allowed post-20 weeks in similar circumstances. R's advocate Tanu Bedi relied on these decisions and Section 5 of the MTP Act to argue that a single doctor can approve a termination under Section 5, that medical expert opinion should trump a judicial decision, that courts have increasingly relied on medical opinions in abortion judgments, and that “approaching the courts in such situations results in unnecessary wastage of time, and many times, renders the remedy sought unavailable to the survivor victim.”

The government “vehemently” insisted that the pregnancy had reached 21 weeks, past the upper limit in the MTP Act. The government also argues that R “voluntarily [went] with the accused-Mubarak at her sweet will.”

The Judgment: Following the Supreme Court's example, the High Court requested an examination to determine “whether pregnancy can be terminated without any harm to the life of R.” The doctors' report found that at 22 weeks, a termination of pregnancy would “harm the life” of R and that the MTP Act only allows termination up to 20 weeks. Relying on the Supreme Court's decision in *Chandrakant Jayantilal*, R's advocate prayed for a second medical opinion. The High Court ordered an examination by three senior-most gynecologists, a clinical psychologist and a psychiatrist to determine whether the termination would harm R. The Court found that if the board decides to carry out a termination, it could proceed without additional orders.

The Board of medical experts found that the pregnancy had reached 23 weeks and R's oscillation age is 18-20 years. They observed that a termination would violate the MTP Act, and that R could be harmed 'due to the social and emotional consequences of the continuation of pregnancy.' The Court ordered a third medical investigation and report from the doctors to determine whether continuing the pregnancy might really

result in R's suicide. The next report from the board found that the pregnancy advanced to 25 weeks, making the fetus viable. The board concluded that termination should not be carried out.

The judgment couches abortion in a complex web of issues including "the right to life, health and abortion (which includes the survivor mother and fetus), human rights and issues of social and religious concerns." The Court reviews abortion jurisprudence, history, and the 2014 proposed MTP Amendments and finds that "The MTP Act is an inadequate Act and only appears to have been designed to serve the interest of the family planning program."

The Court attempts to determine when the fetus becomes an individual in its own right. While maintaining that "the woman has an exclusive and inalienable right over her body and her reproduction and that cannot be transferred to her family or the State", the Court concludes that "no law or person can ethically compel a woman to carry on a pregnancy she does not want." However, when the fetus is viable, the Court has to balance the woman's wishes against the rights of the "potential child."

The Court also examines the long-term psychological impacts rape survivors in India experience, stating that the daughters of India are "falling prey to a deeply misogynistic society." The Court notes the necessity of counselling and support for rape survivors concluding, "paradoxically, both the rape and abortion are violations and infringement (sic) of the right to life."

Ultimately, the Court finds that the doctors could have terminated R's pregnancy after her first examination, but they feared criminal prosecution. The Court urged providers to lose this fear of prosecution where Section 8 provides protections for doctors who act in good faith and in the best interests of their patients. The Court will not order a termination where the board of investigating doctors decided against the termination. Given the potential of grave injury to R, the Court ordered the Director of AIIMS to "explore the possibility of termination."

The Court ordered the government to deposit Rs. 5000/month into R's account for one year, the Chief Medical Officer to provide medical care to R, the Medical Superintendent of AIIMS to provide medical aid to R, and the state to deposit Rs. 5 lakh into an account for R. The Court urged the Central Government to pass the 2014 amendments to the MTP Act and seminars and refresher courses for investigating agencies, doctors, lawyers, and judicial officers. Additionally, the Court ordered the Advocate Generals of Punjab and Haryana to ensure that when cases reach the Court for orders under the MTP Act, the cases should be determined on the same day with immediate action from a medical board.

Analysis: While the court agonizes about the rights of the viable fetus, it is important to remember that R's pregnancy advanced to this stage *because the state authorities, including the Court, delayed medical exams, ordered multiple board hearings, and delayed action.* R was at 21 weeks, just seven days over the MTP limit when she filed the petition. As the Court notes, the medical board could have performed a termination at this point. Instead, the case bounced around for an additional *four* weeks. This case highlights the myriad obstacles women have to face to obtain a termination. While the pregnancy continued to advance, R had to undergo multiple invasive exams, discuss her rape with strangers, and appear in court multiple times while people argued about

her kidnapping and rape. The decision does highlight the urgent need for doctors, police, and judges to understand abortion and to issue timely decisions under the protections of Section 8 of the Act. Finally, the Court's strong suggestion that the Government should take action on the 2014 MTP Act amendments, signals a positive step in furthering access to abortion.

Like most abortion judgments, this decision is rife with stereotype-laden language. The fetus is repeatedly referred to as a child. Although the Court states that “protection of the right of the unborn child is an obligation cast upon the State under the Constitutional provisions,” it finds that per Section 5 of the MTP Act, the right to life of the unborn will “yield in favor of the right to life of the mother.” The judgment also discusses abortion for the purposes of sex selection citing judgments that state “feticide of a girl child is a sin.” This language seems obligatory in any abortion judgment whether sex determination is an issue or not.

Related/similar judgments:

Gujarat High Court, *Madhuben Arvindbhai Nimavat v. State of Gujarat & Others*, 8 June 2016 (Special Criminal Application 3679/2016):

Here, the High Court examined whether a minor rape survivor can obtain a termination at 22 weeks. The Court concluded that where the pregnancy threatens the mental health of the rape survivor and serves her best interests, termination at 22 weeks is permitted. The Court relied on the 2015 Supreme Court case allowing a termination of pregnancy for a minor rape survivor, its own 2016 order allowing abortion post 20 weeks, and the “best interests” test outlined in the Supreme Court’s *Suchita Srivastava* decision.

The best interests test required “that the Court must undertake a careful inquiry of the medical opinion on the feasibility of the pregnancy as well as social circumstances faced by the victim.” The Court found that given the circumstances here, a termination would be in the petitioner’s best interests. The Court ordered termination.

Madhya Pradesh High Court (Indore), *Sunita v. Home Department*, 17 June 2016 (WP3870/2016):

Here, a woman attempts to obtain an abortion for her pregnant minor daughter, a rape survivor. The High Court noted that the respondents refused to perform the termination because the pregnancy had advanced beyond 20 weeks. The High Court constituted a committee of five doctors to examine the girl and “proceed for the termination of the pregnancy” if it will not be dangerous to her life. The court records do not state whether the petitioner’s daughter underwent a termination.

Gujarat High Court, *Naynaben Kantilal Shah v. Secretary & Others*, 2 August 2016 (Special Criminal Application 5579/2016):

A staff person at the Deaf and Dumb School, Ahmedabad, raped a 12-year-old deaf student who became pregnant. An employee discovered the pregnancy at five months. In this judgment, the Gujarat High Court follows the Supreme Court’s precedent of establishing a medical panel to investigate the pregnant woman and to report back to the court on whether the pregnancy constitutes a risk to the woman’s life.

The petitioner ultimately decided to continue the pregnancy.

“A doctor is not guilty of negligence where she acts in accordance with a practice accepted as proper by a reasonable body of medical men skilled in that particular art.”

J. Medical Negligence and the MTPACT

Courts address most medical termination of pregnancy negligence matters like they would any other medical negligence case except in cases where a provider has failed to adhere to the MTP Act.

Focus Case: Supreme Court of India, *Smt. Vinitha Ashok v. Lakshmi Hospital & Others*, 25 September 2001 (Appeal (C) 2977/1992):

Issue: Is a doctor negligent for performing a hysterectomy for an ectopic pregnancy?

Court's ruling: “A doctor is not guilty of negligence where she acts in accordance with a practice accepted as proper by a reasonable body of medical men skilled in that particular art.”

Arguments: A woman approached the doctor for termination of pregnancy. During the course of the surgery, the doctor discovered that the woman had an ectopic pregnancy and heavy bleeding. The doctor performed an emergency hysterectomy. The woman argued that the doctor was negligent to start surgery without performing an ultrasound first and that the doctor erred in dilating the woman's cervix with laminaria instead of dilapan.

Judgment: The Court evaluated standard medical practices and found that although an ultrasound may have alerted the doctor to the ectopic pregnancy, the result would have ultimately been the same. The court also concludes that laminaria are widely used to dilate women's cervixes. The doctor was not negligent.

Analysis: When doctors use standard medical practices for termination, they are not guilty of medical negligence. In a Delhi High Court case, *Dr. R.R. Rana v. State*, 31 May 2012 (Crl. Rev. 64/2006), the Court found that a massively perforated uterus showed evidence of negligence because no skilled or professional person would ever cause similar injuries during an abortion surgery.



District Courts on Abortion



This report has focused mainly on the cases available on the district court websites of the states of Delhi, Maharashtra, Tamil Nadu and Kerala in addition to Punjab and Andhra Pradesh.

This part specifically deals with forced abortions, consent, sex determination and medical negligence in District Courts in India. Forced abortions are punishable under the Indian Penal Code as per Section 312 and Section 313. There are specific provisions which punish causing a miscarriage and also causing the death of a woman with the intent of causing a miscarriage. These provisions are also supported by other provisions under the MTP Act. Section 90 has been interpreted so as to cover cases where consent is obtained on a false promise of marriage. This usually attracts criminal liability under Section 376 of the IPC i.e., rape in several cases. The next important aspect which is looked at is consent. Since consent of a pregnant woman is required for conducting an abortion it is necessary to ensure that this consent is freely obtained and the woman is not denied an opportunity to decide against an abortion.

Conducting sex determination and sex selective abortions is prohibited under the Pre-Conception Pre-Natal Diagnostic Techniques Act, 1994. The courts have usually maintained a very strict view on this in all the discussed cases which reflect the intention of the court to tackle wider social issues through stricter implementation of the law.

The Indian Penal Code covers cases of medical negligence under Section 304A, which deals with unqualified doctors who conduct abortions that lead to a patient's death. For criminal liability in the District court the guilt of the accused has to be proved 'beyond reasonable doubt'. The proximate link between the act of the doctor and the death of the patient by virtue of negligence can be difficult to prove.

A. Forced Abortion

Section 313 of the Indian Penal Code (IPC) prohibits causing a miscarriage without a woman's consent. Section 312 makes it punishable to cause a woman with child to miscarry if such miscarriage is not done in good faith for the purpose of saving the life of the woman. Section 314 makes it punishable to do any act done with the intent to cause miscarriage, which causes the death of a woman. The medical practitioner is also liable to be punished if they have not adhered to the conditions under Section 3(2) of the MTP Act, which includes the consent of the women. The courts have emphasized this prerequisite. It is pertinent to mention that MTP limits the operation of the IPC as Section 3(1) of the MTP states that:

“(1) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.”

Under this theme, we also discuss cases where the complainant has alleged that the accused has engaged in sexual intercourse with the complainant on a false promise and pretext of marriage. Section 90 of the IPC states that consent given under fear of injury or under a misconception of fact is not treated as a valid consent. Courts have interpreted this Section to cover cases where consent for sexual intercourse is obtained on the promise or pretext of marriage. Consent given under the misconception of fact does not constitute valid consent and hence sexual intercourse on the false pretext of marriage amounts to rape. Recently the Supreme Court in the case of *State of UP v. Naushad* (2014 Cr.L.J. 540) reaffirmed this interpretation of Section 90 of the IPC and upheld the conviction of the accused for rape.

The court does not take into consideration only the testimony of the survivor in deciding cases where miscarriage is caused without her consent, but also requires corroborative evidence to support the testimony. Corroborative evidence is evidence which is not admissible by itself but becomes admissible to support substantive evidence.

In criminal cases, the prosecution must prove the case beyond reasonable doubt. In many cases, the complainants themselves have weakened the prosecution's case by altering their statements, or even stating that the accused is innocent. Where complainants fail to adduce evidence or change their statements, the court is forced to acquit the accused due to lack of evidence.

A court will convict the accused only if the miscarriage has been a direct effect of the act of the perpetrator and there is proof beyond a reasonable doubt.

Cases:

State v. Rahul Verma, SC. No. 51/2015, Dwarka District Courts, Delhi:

The complainant alleged that the accused engaged in sexual intercourse with her on the pretext of marriage and that when she got pregnant, he forced her to have an abortion. She said that since she was three months 14 days pregnant, most of the doctors refused to conduct the abortion, but the accused found a doctor who agreed. The court did not find any merit in the complainant's story, as she did not adduce any evidence, and it was unclear how she did not know about her pregnancy until the fourth month. Hence, the accused was acquitted.

State v. Dimple Panchal, SC. No. 129/2014, Tis Hazari District Courts, Delhi:

The complainant alleged that the accused had engaged in sexual intercourse with her on the pretext of marriage and forced her to undergo an abortion. The complainant, who was the sole material witness, retracted her statement and allegations during cross and chief examination. The complainant said that the statements against the accused were made at the instance of the well-wishers. Therefore, the court acquitted the accused of the charges.

State v. Pawan Kumar Morya, SC. No. 25 of 2015, Tis Hazari District Courts, Delhi:

The complainant, in this case, alleged that the accused had developed sexual relations with her on the pretext of marriage and also caused her to abort her child. The complainant, however, turned hostile, and during cross-examination by the Additional Public Prosecutor, the complainant deposed that she was ill-advised by relatives and had therefore filed the complaint. She also produced a marriage certificate showing she and the accused were married. She also admitted that the accused was innocent. Therefore, the accused was acquitted.

Lt. Cdr. Ritesh Suri v. The State, CR. 169/12, Saket District Courts, Delhi:

The complainant husband alleged that his wife had undergone an abortion without his consent, and further stated that he was compelled to sign some medical papers on the pretext of medical treatment but later found out they used those papers for the abortion procedure. The complainant was vague about the facts of the abortion, and at one point

also stated that his wife had informed him about the abortion. The court also stated that it appeared as this complaint had been filed as a reaction to the proceedings initiated by the wife alleging domestic violence. Thus, the court held that no charge was made under Section 312 of the IPC.

***State of Andhra Pradesh v. Sonti Rambabu*, SC No.114/1996, Vijaywada District Courts, Andhra Pradesh:**

The complainant alleged that the accused, on the pretext of marriage, engaged in sexual intercourse with her. She became pregnant and after she informed the accused, he mixed some pills for abortion in a soda and asked her to drink it. When she refused, he threatened to call off the marriage. The accused was held guilty of the offence under section 313 and 417 IPC beyond reasonable doubt and also under Section 109 read with Section 417 IPC beyond reasonable doubt and accordingly, the accused was convicted to undergo rigorous imprisonment for a period of one year and to pay a fine of Rs.5000/- , out of which Rs.3,000/- was to be paid as compensation to the survivor woman. However, in appeal, the court acquitted the accused for the offence under Section 313 of the IPC but confirmed the sentence under Section 417 read with Section 109.

***State v. Sanjay Makwana*, SC No. 3/1/2015, Tis Hazari District Courts, Delhi:**

The complainant alleged that, on the pretext of marriage, the accused engaged in sexual intercourse with her, due to which she conceived. She claimed that the accused gave her abortion pills, which did not work, and then took her to many doctors, who refused to perform an abortion, as the pregnancy was at an advanced stage. At trial, the complainant turned hostile and denied the allegations during cross-examination, and therefore the accused was acquitted.

***Inspector of Police v. Selvam*, SC No. 286/05, Salem District Courts, Madras:**

It was alleged that the accused raped the deceased. Thereafter, when she conceived, he took her to the hospital and, without her knowledge and against her will, terminated the pregnancy. It was further alleged that he threw acid on her and that she succumbed to the injuries. Charges were framed under IPC Sections 376 for rape, 302 for murder, and 312 for causing miscarriage for purposes other than to save the life of the woman. The doctor who terminated her pregnancy also stated that she had vaginal bleeding, and the accused was convicted under the aforementioned sections.

***State v. Balbir*, SC No.134/2013, Tis Hazari District Courts, Delhi:**

A complaint was filed under Section 376, Section 420 and Section 313 of the IPC. The complainant stated that she was in a relationship with the accused willfully and she had filed the complaint under some misunderstanding. She did not produce any evidence to prove forced miscarriage or rape; hence, the accused was acquitted of all the above charges.

***State v. Raju*, SC No. 147/13, Rohini District Courts, Delhi:**

A complaint was filed under Section 376 and Section 313 of the IPC. It was alleged that the accused, on the pretext of marriage, raped her, and when she conceived, had beaten her up, causing miscarriage. The court, after looking at the circumstances and evidence presented, found the accused guilty under Section 376 for rape and Section 313 of the IPC for causing miscarriage.

***State v. Nurul Islam*, SC No. 93/2013, Rohini District Courts, Delhi:**

The complainant alleged that the accused had raped her and, when she informed him about her pregnancy, he and his mother took her to the hospital for an abortion. She was forced to have some tea, after which she lost consciousness. When she regained consciousness, she learnt that the pregnancy was terminated. During the trial, the complainant herself denied all the allegations. Therefore, the accused was acquitted.

***State v. Shishpal*, SC. No. 21/2015, Dwarka District Courts, Delhi:**

The complainant and the accused were divorcees and subsequently married. However, the accused forced the complainant to agree for a mutual consent divorce. The accused continued to visit her and engage in sexual intercourse with her. The complainant conceived three times, and each time the accused forced her to have an abortion. The court dismissed the complaint, as the testimony of the complainant did not inspire confidence and she did not specify any details of the incidents nor adduce any evidence to prove the charges under Section 313 of the IPC.

***State v. Mahender Singh*, SC. No. 391/1/2011, Tis Hazari District Courts, Delhi:**

A complaint was registered under Sections 498A, 312 and 313 of the IPC. The complainant alleged that she was forced to undergo an abortion by her husband and the doctor had operated on her without her consent. After examining the evidence on record in the form of medical reports and the surrounding circumstances of violence and dowry demands, the court stated that it could be easily inferred that the accused forcefully got the pregnancy of the complainant terminated. The Court held that in the absence of clear consent and danger to the mother's life and to the child, the offence under Section 312 was proved beyond reasonable doubt against both the accused.

***State v. Ajaj Ahmed*, SC. No. 1004/2009, Rohini District Courts, Delhi:**

The complainant alleged that the accused raped the complainant and compelled her to undergo an abortion when she conceived. The accused pleaded guilty and was convicted under Section 376 and 312 of the IPC.

***State v. Bunt*, SC. No. 161/2013, Rohini District Courts, Delhi:**

The complainant alleged that the accused had caused grievous injury to her and also, due to the kicks and blows on her abdomen, caused a miscarriage. The court held the accused Bunt, Vinay, and Vimal guilty under Section 313 (causing miscarriage without consent) read with 325 (grievous hurt) and 34 (common intention) of the IPC, as there was a direct causation between the injuries inflicted and the complete abortion. The medical evidence, in the form of expert testimonies given by two doctors, clearly stated that the injuries sustained were grievous in nature and had led to the miscarriage.

***State v. Kamlesh*, SC. No. 35/1/2014, Rohini District Courts, Delhi:**

The complainant alleged that she had suffered a miscarriage because of the physical abuse inflicted upon her by the accused. The court acquitted the accused, as the prosecution had failed to prove the charges beyond reasonable doubt. The medical evidence did not prove a direct causation between the alleged injuries inflicted upon the complainant and the miscarriage. The doctor deposed that there was not enough

medical evidence to prove that it was an unnatural miscarriage, as the complainant's pregnancy was safe for 6 days after the alleged incident had taken place and therefore the abortion could have occurred naturally. Further, there was no sign of physical injury on the complainant when she was admitted to the hospital and examined for the abortion. Thus, the accused was acquitted.

***State v. Ashish Aggarwal*, SC. No. 181/2013, Karkardooma District Courts, Delhi:**

The complainant alleged that the accused compelled her to undergo an abortion by telling her that he would not marry her if she did not abort her pregnancy. The complainant, however, turned hostile, changed her statement and stated that the accused had neither forced her to get an abortion nor gave her medication to terminate the pregnancy. She also stated that she had never become pregnant due to any relationship with the accused. Therefore, the accused was acquitted of the charges under Sections 312 and 313 of the IPC.

***State v. Deen Dayal*, SC No. 137/2013, Tis Hazari District Courts, Delhi:**

The complainant alleged that the accused engaged in sexual intercourse with her on the pretext of marriage. The complainant alleged that she got pregnant and the accused got the pregnancy terminated at a clinic against her consent. The Court found the complainant's testimony to be inconsistent. Further, no documents regarding her pregnancy and subsequent abortion were produced. The onus is always on the prosecution to prove, and the accused is given the benefit of reasonable doubt. The Sessions Court held that she had consented to the sexual relationship and therefore acquitted the accused.

***State v. Asgar Ali*, SC. No. 103/2013, Tis Hazari District Courts, Delhi:**

The complainant alleged that the accused had sexual intercourse with her several times under the pretext of marriage and also gave her pills to terminate her pregnancy. The complainant later stated that she had taken the abortion pills herself and did not testify against the accused; hence, he was acquitted of the charges under Section 313 of the IPC.

***State v. Inderpreet Singh*, SC No. 1218/2010, Rohini District Courts, Delhi:**

The accused married the complainant after getting to know about her pregnancy. The complainant was subjected to cruelty to coerce her to meet his unlawful demands of dowry. The accused's family members forced her to undergo an abortion. It was also alleged that, before the marriage, the accused had been continuously raping her while she was under the age of 15 years. The court sentenced the accused to rigorous imprisonment under Sections 376, 357, 498-A and 323 of the IPC but acquitted him under Section 312 for lack of evidence.

***State v. Accused*, SC No. 37/2013, Karkardooma District Courts, Delhi:**

The complainant alleged that the accused concealed his true identity, and had forced her to miscarry three times. However, the court held that the complainant could not create a convincing timeline of events and there was no other evidence to prove the offences. The case was not proven beyond a reasonable doubt and therefore the accused was acquitted of all charges, including under Section 312 of the IPC.

***State v. Pradeep Kumar*, SC. No. 349/2013, Tis Hazari District Courts, Delhi:**

The complainant alleged that the accused had raped her several times and also caused her to miscarry without her consent and without good faith. The Court held that the case of the prosecution has to be proven beyond a reasonable doubt, which is more than a mere possibility of guilt, particularly when the offence is of such a grave nature. Several inconsistencies in complainant's statements and the unreasonable delay in filing the FIR undermined the prosecution's case and hence the accused was acquitted.

***State v. Nirav*, SC. No. 57 of 2014, Tis Hazari District Courts, Delhi:**

The complainant alleged that the accused engaged in sexual intercourse with her on the pretext of marriage and, when she became pregnant, convinced her to consume pills by stating that they were good for the baby. There was no material adduced to support the claims of the complainant, and the complainant turned hostile and deposed that the accused was innocent. Therefore, the accused was acquitted of all charges for the offences under section 376 read with section 417 of the IPC and section 313 and 506 of the IPC.

***State v. Pappu*, SC. No. 21/2014, Tis Hazari District Courts, Delhi:**

The accused allegedly engaged in sexual intercourse with the complainant on the pretext of marriage and she got pregnant. He then forced her to consume five tablets, due to which the pregnancy was aborted. The accused was charged under Sections 376 and 313 of the IPC. However, the Court found no medical evidence to support her claim of causing miscarriage, contrasting statements from the complainant and thus the charge under Section 313 of the IPC did not stand proven.

***State v. Ansar Ahmed*, SC. No. 91/14, Karkardooma District Courts, Delhi:**

The complainant claimed that the accused took advantage of her weak financial condition and had forcefully been in a physical relationship with her for 5 years, during which she became pregnant. She alleged that the accused got her pregnancy terminated.

He had also threatened to kill her if she refused to undergo an abortion. However, during the trial, the complainant deposed that she had consumed tablets for termination of pregnancy of her own will and turned hostile. Therefore, the accused was acquitted of the charge under Section 313 of the IPC.

***State v. Ram Saini*, SC. No. 133/2012, Rohini District Courts, Delhi:**

The accused subjected his wife to harassment, compelled her to abort, and caused the death of his wife within seven years of marriage. He compelled her to abort her pregnancy, claiming that the child was not his, and threatened that if she did not terminate the pregnancy, he would not allow her entry in their matrimonial home. The post-mortem report showed that the wife had committed suicide. She also left a suicide note, which showed that she had taken her life because she was being pressured to undergo an abortion. The Court held that one of the purposes of marriage is procreation and compelling his wife to terminate her pregnancy is a criminal offence under Sections 312 and 313 of the IPC and falls within the ambit of cruelty under Section 498-A. The charge was not filed under Sections 312 and 313 but the

court stated that it would take the forceful termination of pregnancy into account for the purposes of sentencing. Hence, he was convicted under Section 498-A, but acquitted on dowry charges under section 304-B.

State v. Pawan Gupta, SC. No. 25 of 2015, Saket District Courts, Delhi:

The complainant alleged that the accused engaged in sexual intercourse with her on the pretext of marriage. Further, when she got pregnant, she alleged that the accused's mother had put a condition before her that if she wanted to marry her son, she would have to terminate the pregnancy. Pursuant to this, the mother of the accused took her to a clinic for termination. Later, promises of marriage began to be ignored. However, during the trial, the complainant denied all the allegations set out in the complaint and said that she, herself, got the pregnancy aborted. Since the complainant denied all the allegations, the Court acquitted the accused.

Sumit Kumar v. Garima, Sessions Case No. 167/2013, Dwarka District Courts, Delhi:

The present case was a Criminal Revision Petition filed by Sumit Kumar. He married the Respondent, and after returning from their honeymoon, the Respondent informed the accused that she was pregnant. An ultrasound showed that the pregnancy was of 10 weeks, although only six weeks had passed since their marriage. The Respondent alleged that the accused's family caused her to miscarry by administering medicines to her the day after the ultrasound report had come in.

The accused contended that the Respondent had conspired to cheat him and had caused herself to miscarry under Section 312 IPC without his consent or knowledge. From the material on record, the Sessions Court held that the trial Court erred in its judgement in convicting Sumit Kumar, and summoned the Respondent for the offence of cheating under Section 417 of the IPC and under Section 312 of the IPC for causing herself to miscarry.

State v. Raqibul, Sessions Case No. 56/2011, Karkardooma District Courts, Delhi:

The accused persons allegedly kicked the complainant in her lower abdomen, after which she was rushed to GTB hospital where she miscarried. The accused pleaded innocence and claimed to be falsely implicated. The Court held that due to the delay in lodging the FIR, contradictions in the witnesses' statements, and the complainant's husband testifying in the witness box that she had consumed abortion pills herself, the court gave the accused the benefit of the doubt and acquitted them.

State v. Nijathan, CC. No. 83/2011, Madurai District Courts, Tamil Nadu:

The present case was a revision petition filed by the accused who was facing charges under Section 4 of the MTP Act, the TN Women Harassment Act, and Section 506 IPC. The Complainant, who was 8 months pregnant at the time of the complaint, claimed that the accused, who would be the father, insisted that she undergo an abortion. This case is still pending in the Trial court. However, a revision petition was filed by the accused for the transfer of the case to the Juvenile Justice Board. The High Court of Madras held that there was no reason to transfer the case to the Juvenile Justice Board and the lower court was directed to dispose of the same.

B. Consent

The medical practitioners are bound by the conditions mentioned under Section 3(4) of the MTP Act. The MTP Act mandates that the consent of the pregnant women is required before medical termination of pregnancy unless she is a minor or suffering from unsoundness of mind, where consent can be given by the guardian. However, as noted by the Court in *State v. Pankaj Mittal* (SC. No. 65/2010, Rohini District Courts, Delhi) there is an abject lack of awareness amongst the medical practitioners regarding the conditions of consent set by the MTP Act. The Court requested the concerned authorities to conduct awareness programs to improve this situation. Thus, courts require strict adherence to the consent requirement before performing an abortion, but the medical providers have evaded conviction in many cases due to lack of corroborative evidence to prove noncompliance.

Cases:

***State v. Pankaj Mittal*, SC. No. 65/2010, Rohini District Courts, Delhi:**

The complainant alleged that the accused raped her and forced her to terminate the pregnancy. Even the doctor who performed the abortion did not take the consent of the complainant and continued with the termination merely on the ground of it being an 'unwanted pregnancy', violating the MTP Act. The court stated that consent of an adult is not a mere formality, but a mandatory statutory requirement. The doctor stated that the abortion was done with the consent of the complainant and yet there was no signature of the complainant in the Out Patient Department register. The doctor later deposed that only the consent of the accused was taken and the consent of the complainant was not taken. The court convicted the accused under Section 313 of the IPC.

***State v. Saleem*, SC. No. 99/2008, Karkardooma District Courts, Delhi:**

The complainant alleged that the accused had raped her and further alleged that the co-accused doctor conducted an abortion without the consent of the complainant. All three were acquitted, as the court held that there was insufficient evidence to convict. The doctor could not be held liable under Section 3 of the MTP Act, as there was evidence in the form of medical reports produced by the doctor showing that the MTP was done in good faith for the purposes of saving the complainant's life.

***State v. Archana Gupta*, SC No. 109/09, Karkardooma District Courts, Delhi:**

The complainant alleged that the abortion was done without her consent by the doctor. The court noted that medical termination of pregnancy can be done if consent is given by a patient who has attained the age of 18 years. In this case, the consent was proven in terms of the complainant's thumbprint on the consent form and her age was also shown to be around 18–19 years. Therefore, the doctor was acquitted of the charges.

***State v. Riyazuddin*, SC No. 119/06, Saket District Courts, Delhi:**

The accused carried out an abortion for the deceased, who was then 22-weeks pregnant. Section 3 of the MTP Act allows the termination of pregnancy till 20 weeks of pregnancy only in cases where two medical practitioners are of the opinion that continuance of the pregnancy would involve a risk to the life of the pregnant woman or

of grave injury to her physical or mental health, or would result in the child being born with mental or physical disabilities.

The post-mortem report revealed that the deceased had died due to hemorrhagic shock caused by perforation of the uterus and no efforts were made for recovery and resuscitation. Moreover, the accused was not competent to conduct abortion under Section 3 of the MTP Act, as their nursing home was not registered, which is a requirement under the MTP Act. There was no evidence that the abortion was carried out in good faith or to save the life of the deceased. Therefore, the court found the accused guilty under Sections 314 and 34 of the IPC. He was also held guilty under Sections 3 & 4 of the MTP Act, punishable under section 5(2) & 5(3) of the MTP Act.

Additional Analysis and Implications: As mentioned earlier, the courts have focused on compliance with the MTP Act in most of the cases; therefore, providers have to adhere to conditions specified under the MTP Act, such as, being a registered medical practitioner and forming an opinion in good faith. Failing to adhere to the conditions set out under the MTP Act will attract criminal liability under the Indian Penal Code. Although in the case of *State v. Archana Gupta* (SC No. 109/09, Karkardooma District Courts, Delhi), the prosecution argued that the doctor has to comply with Section 3(2)(i)(ii) of the MTP Act, the judge stated that, “I am not in agreement with the contention of Ld. Addl. PP for the state that doctor has to satisfy on the ground as mentioned in clause 1 and 2 of subsection (B) of subsection (2) of section (3) of MTP Act as discussed above,” and therefore acquitted the doctor. This shows the lack of understanding of the Act leading to the weak implementation of the provisions of the MTP Act.

In some cases, the courts tend to look at other social factors such as the economic and educational background of the parties while deciding a case. In the case of *State v. Rahul Verma* (SC. No. 51/2015, Dwarka District Courts, Delhi), the judge, while dismissing the case under Section 313 of the Indian Penal Code, emphasized the educational background of the survivor who stated that she did not know about her pregnancy till a later stage, the judge stated that it was not possible that a post graduate in microbiology would not know what changes occur during pregnancy and she would have been aware since the first month. Following this conclusion, he assumed that because there was an ultrasound slip proving the pregnancy adduced as evidence, the survivor herself was never pregnant and she sent some other pregnant lady for the ultrasound who disappeared afterwards. This was a far-stretched assumption only on the ground of lack of evidence.

In cases where the court had acquitted the accused on the basis of lack of evidence, the court presumes it to be a false allegation. At times, courts appear overly sympathetic to the accused especially when there was rape under the pretext of marriage and forced abortion. For example, in *State v. Dimple* (SC. No. 129/2014, Tis Hazari District Courts, Delhi), after acquitting the accused, the judge stated that if rape victims are referred to as rape survivors, an accused who is acquitted of rape charges should be called a “rape case survivor.”

In many cases, the woman turned hostile by stating that she was ill-advised to file the complaint; retracting her statements; stating that she had the abortion done at her own will and was not forced by the accused; or not producing any evidence at all. The

reason for this is unknown; one could only assume that some of the reasons include societal/family pressure or settlement between the parties outside court.

Some of the cases which have been successfully prosecuted and have convicted the accused are where evidence other than the statement of the survivor has been adduced. Doctors do play an important role as corroborative witnesses to substantiate the survivor's testimony. Expert testimony does constitute substantive evidence. For example, in the case of *Inspector of Police v. Selvam* (SC No. 286/05, Salem District Courts, Madras), the court relied on the doctor's testimony besides other witnesses and convicted the accused. Further, in the case of *State v. Buntly* (SC. No. 161/2013, Rohini District Courts, Delhi), the court again relied on expert testimonies to establish the nature of injuries and the direct nexus with the miscarriage to convict the accused. Also, in the case of *State v. Riyazuddin* (SC No. 119/06, Saket District Courts, Delhi), where the accused was a doctor and was charged under the MTP Act and under IPC Sections 304 and 314, the court relied upon the testimony of the doctor who conducted the post-mortem and the doctors who tried to revive the deceased to convict the accused.

Compilation under this Section is helpful in understanding how cases under Section 312, 313 and 314 of the Indian Penal Code are prosecuted and what kind of evidence courts look at. These cases also highlight the requirements of the MTP Act and what behavior by medical providers will violate the Act. This summary also highlights the need for additional research on why so many cases under these criminal provisions lead to acquittals and why many women retract their statements and turn hostile.

C. Pre-conception Pre-natal Diagnostic Techniques Act, 1994

Only a few cases highlighting the issues of sex determination in violation of the PCPNDT Act were found. The accused in all of the cases below were allegedly conducting sex determination and sex selective abortions. In one of the cases, there were no records maintained of the abortions or the consent forms. The courts in all these cases have come down heavily on those conducting sex-selective abortions.

Cases:

Fakay v. State, CR No. 4&5/2014, Rohini District Courts, Delhi:

An NGO, Beti Bachao Samiti, alleged violations of the PCPNDT Act and the MTP Act by Urvashi Fakay and Dr. Sunil Fakay, who were involved in sex determination and abortion of female fetuses. The accused alleged that the cognizance of the case was not taken in accordance with the relevant Sections under the PCPNDT Act, and therefore the complaint could not stand. The Court dismissed the criminal revision petition of the accused and highlighted the importance of preventing sex determination and sex-selective abortion, as enshrined in the Act.

Dr. Anil Grover v. Aruna Jain, CR No. 12/2015, Tis Hazari District Courts, Delhi:

A revision petition was filed by the accused doctor, challenging the order of the Trial Court convicting the accused under Section 23 of the PCPNDT Act. The evidence showed non-compliance with various rules of the PCPNDT Act. Consent forms were not completed, reasons for the termination of pregnancy were not mentioned, and

reasons for the ultrasound were not stated in the forms. Other records, such as the number of abortions or deliveries conducted, were also not available. Hence, the court confirmed the order of the lower court.

***State v. Dr. Saraswati*, Misc. CA. No. 145/2013, Beed District Courts Maharashtra:**

The appeal arose on account of bail granted to an accused charged under the PCPNDT Act and the MTP Act. The doctors used to conduct sex determination and abortions of female fetuses. Sonography machines were seized earlier and permission to conduct medical terminations was also revoked. Even after the seizure, the accused conducted an abortion of a fetus of 18–20 weeks for monetary gain. During the pendency of the trial, the accused filed an application for bail. Considering the seriousness of the offence and the object of the PCPNDT Act, the court did not grant the bail application during the trial.

***Dr. Mitu Khurana v. Jaipur Golden Hospital*, C.C. No.:327/01/08, Rohini District Courts, Delhi:**

The case was filed by Dr. Mitu Khurana alleging the violations of the PCPNDT Act by the accused. During her pregnancy, it came to the family's knowledge that she was carrying twins; the family started pressurizing her to get a sex determination done. She was manipulated into getting an ultrasound at the onset of an abdominal pain and it was done at the respondent hospital without the consent and the knowledge of the complainant.

She was also pressured to undergo an abortion, as the fetuses were female. However, she resisted the same. The court dismissed the case due to lack of evidence and also took pendency of matrimonial proceedings and the complainant's doctoral qualification as relevant factors. The court stated that as a doctor, it was highly improbable for a doctor not to check her discharge summary and realize later that an ultrasound for sex determination had been conducted. This case has gained a lot of attention, as this was apparently the first case in India to be filed by a woman initiating proceedings against her former spouse and his family under the PCPNDT Act. It has been reported that the complainant is going to move to the Supreme Court after the Delhi High Court dismissed the case.

Additional Analysis and Implications: Although only a few cases involving sex determination were found, these cases are very important, as they highlight the importance of the rules under the PCPNDT Act and the MTP Act. In the case of *State v. Dr. Saraswati* (Misc. CA. No. 145/2013, Beed District Courts Maharashtra), the court discussed the object of the Act while denying the accused doctor bail, stating that, “The object behind the provisions of PCPNDT Act is the prohibition of sex selection either before or after conception. The sex selection leads to female feticide. The object of the Act shows that it is to prevent the abuse of diagnostic techniques as it is discriminatory against the female sex and it affects the dignity and status of woman. The Act provides the modes, which need to be used to give effect to the provisions of Act.” Providers must keep proper case records, consent forms and send monthly reports to the Chief District Medical Officer (CDMO). Therefore, providers must understand that violations of the PCPNDT Act and MTP Act will lead to severe consequences.

The *Dr. Mitu Khurana* case, which was dismissed due to lack of evidence, is an important case to understand the kind of evidence that is needed to prove a violation of the PCPNDT Act. In this case, the doctors that recommended an ultrasound were not charged with a crime but rather, only the doctors performing the sex-selective ultrasound and abortion were charged. The court, in this case, discussed the kind of evidence and the importance of corroborative evidence, which is crucial in proving violations under the PCPNDT Act.

D. Medical Negligence under the IPC

Cases of medical negligence fall under the Penal Code. Civil cases demanding compensation due to failed procedure are also filed rarely. Section 304A of the Indian Penal Code, which prohibits causing death by any rash or negligent act, has been interpreted to cover unqualified doctors who conduct abortions that lead to a patient's death. In these cases, filed in District Courts, the prosecution has to prove the case beyond a reasonable doubt, in contrast with the medical negligence cases filed in the Consumer Forum, where the burden of proof is based on a balance of probability. Therefore, in cases under the Penal Code, it can be difficult to prove the nexus between the act of the doctor and the death of the patient.

Cases:

***Satbir v. Dr. Saroj*, SC No. 190/03, Delhi District Court, Delhi:**

The complainant, in this case, was advised by the respondent doctors not to have another child after the birth of her fourth child, as frequent pregnancies had taken a toll on her health. She visited the respondent's hospital for an abortion and tubectomy procedure when she was expecting for the fifth time. However, the abortion and requested sterilization procedure failed, and the complainant became pregnant. She was already 14 weeks pregnant at the time of discovery of this pregnancy. Doctors advised her that an abortion would be risky given her health. The plaintiff demanded financial compensation, due to the failed abortion and the lack of post-sterilization operation checkups. The District Court ruled in favor of the complainant, citing medical negligence, and granted her compensation.

***State v. Baby*, RBT 72/13, Karkardooma District Courts, Delhi:**

The complainant's wife slipped during the second month of her pregnancy and approached the respondent doctor. The doctor gave her some medicines for the bleeding but the medicines failed to stop the bleeding. Thereafter the respondent doctor advised and conducted an abortion, but afterwards, the complainant's wife suffered acute pain in the stomach. She was taken to the clinic of the respondent doctor, however, the same was shut and therefore she died during her treatment in another hospital. The husband filed a complaint alleging that the accused was not a registered practitioner and the rash and negligent conduct of the accused caused his wife's death. The respondent doctor was charged under Section 304A of the Indian Penal Code. As the sole material witness was the husband, who turned hostile during the trial, the court acquitted the respondent doctor on the grounds of lack of evidence.

***State v. Sangarika*, SC No. 167/2010, Saket District Courts, Delhi:**

The accused doctor was tried under IPC Section 304 A, as well as Sections 5/6 of the MTP Act. The post-mortem report of the deceased showed that the death was caused

by “Hemorrhagic shock consequent upon incomplete abortion and uterine perforation.” The deceased's husband admitted that the accused doctor had not conducted the abortion and also stated that the police had obtained his signatures on a blank piece of paper, indicating false implication by the police. Since the evidence failed to establish any nexus between the respondent doctor and the deceased, the respondent doctor was acquitted.

Yashwanth Kumar v. State, CA No. 41/2014, Saket District Courts, Delhi:

The complainant's wife was found dead in a clinic operated by the appellant doctor. It was alleged by the complainant that his wife died because the appellant doctor acted negligently. The Court held that, while doctors may be given protection against actions resulting from informed risk, the primary reason for the conviction of the appellant doctor was that he was not qualified to conduct the medical termination of pregnancy. Further, the clinic lacked sufficient facilities such as the infrastructure required to back up a situation giving rise to a medical emergency, such as in this case. The appellant doctor was convicted and sentenced to 18 months of rigorous imprisonment, but the appellate court modified the sentence to rigorous imprisonment of one year while enhancing the fine to Rs. 10,000/. In default of payment of fine, the appellant would undergo simple imprisonment for a further period of 2 months.

Additional Analysis and Implications: Under the Indian Penal Code, medical negligence is covered under Section 304A. For medical negligence to be proven thereunder, the case has to be proven beyond a reasonable doubt and the prosecution has to prove a nexus between the negligent act and the death of the patient. The degree of proof is high and it is necessary to prove that doctor in his ordinary senses and prudence would have done what the accused doctor has done or failed to do.



Consumer Courts

Many cases are filed in the District and the State Consumer Forums under the Consumer Protection Act, 1986 on account of medical negligence during abortion procedures. In India, medical negligence falls under the Consumer Protection Act, as medical care is viewed as a service to a patient/consumer. A complaint regarding medical negligence can be filed in 1) the District Forum if the value of services and compensation claimed is less than 20 lakh rupees, 2) before the State Consumer Disputes Redressal Commission (SCDRC), if the value of the goods or services and the compensation claimed does not exceed more than 1 crore rupees, or 3) in the National Consumer Disputes Redressal Commission (NCDRC), if the value of the goods or services and the compensation claimed exceeds more than 1 crore rupees. This hierarchy is maintained even in the case of appeals. As the cases are filed in the forums, they are civil in nature, and the aggrieved consumers can file a complaint against the doctor/hospital themselves. This remedy in the hands of the consumer is compensatory in nature, which is most commonly monetary compensation.

Most of the cases are filed due to incomplete abortion or post-abortion complications, such as leaving parts of the fetus in the uterus, profuse bleeding after the abortion, administration of the wrong medicines/injections, or conducting the wrong procedure. The forums focus on two major aspects while deciding cases on medical negligence: misrepresentation of skill, lack of judgement and expertise. In many of the cases discussed below, the forums decided in favour of the complainant, therefore holding the respondent doctor or hospital liable for medical negligence. The amount of compensation usually depends on the level of negligence exhibited and the level of distress suffered by the complainant.

Cases:

C. V. Mathew v. P. Babu, (2000) CPJ 134 Ker , Kerala:

The complainant was advised by the respondent doctor not to continue her third pregnancy. After the doctor conducted the abortion, the complainant suffered from severe pain in the abdomen and it was determined that part of the fetus was still in the uterus. The respondent doctor claimed that the surgery was a D and C and it was a blind procedure where bleeding, incomplete abortion, perforation of the uterus, etc. could happen even when done by experts. The respondent doctor had an MBBS degree and a diploma in Orthopedics. The State Forum found that the respondent doctor did not have any training or authority to perform the surgery, and did not have a recognized qualification under the MTP Act to perform any such surgery. Therefore, the respondent doctor was held liable for medical negligence and was liable to pay compensation.

Kiran Verma v. Nidhi Agarwal, CC No. 336/1999, SCDRC, Delhi:

The complainant went to the nursing home when she was one-month pregnant after she felt pain in the abdomen and was also having vaginal bleeding. The respondent doctor gave her one injection on her right upper arm and another injection on her left arm. She became unconscious because of this medication and her left arm lost sensation. The complainant suffered an abortion and a discolored, swollen arm because of this wrong injection and medication. This ultimately resulted in gangrene in the left hand and her fingers had to be amputated. The complainant alleged gross negligence in her treatment. The State Forum considered several questions, including

whether the respondent doctor had the skill that he claimed, and whether the complainant was near death *inter alia*. The respondent doctor was held liable under Section 9(b) of the Consumer Protection Act and the complainant was entitled to compensation of Rs. 1 Lakh.

***Dr. Mathangi v. S. Reghukumar*, FA No 106/13, SCDRC, Kerala:**

The complainant claimed that her husband's consent for the abortion was obtained by compulsion after the appellant doctor stated that it was the only way to stop the profuse bleeding and complications. After the abortion procedure was completed, the complainant discovered that a healthy fetus was growing in her uterus. In rare cases of twins, one fetus dies while the other continues to grow healthily and the same had occurred in the present case. The complainant filed for compensation due to the negligence of the appellant doctor; she was worried about the health of the fetus. The Forum mentioned that in order to sustain the complaint, the complainant has to prove that there was an injury suffered by the complainant as a result of the negligence. The State Forum did not find any negligence on part of the appellant doctor, as the fetus was healthy and there was no evidence to show that consent was obtained under compulsion and the complaint was dismissed.

***N. Lalitha Krishna v. Deepa Nair*, FA. No. 44 of 1999, NCDRC:**

The complainant, in this case, had approached the doctor for a medical termination of pregnancy. After the procedure was performed, a subsequent ultrasound revealed that the fetus was intact and was continuing to grow, so the complainant had to obtain an abortion from another doctor. The Commission held that “the compensation is for the failure of the abortion conducted by the appellant because of which the complainant who was desirous of having MTP effected to undergo the operation for the second time.” It further added that “would suffice if the appellant is required to pay back the medical charges incurred by the complainant for the unsuccessful MTP operation performed by her i.e. of Rs. 1,200/-a consolidated compensation of Rs.5000/- would be adequate for the deficiency in service on the part of the appellant and the consequent mental agony and suffering underwent by her for having an MTP on her a second time”.

***Shivani v. Dr. Gagan Lata*, FA No. 458 of 2003, SCDRC, Punjab:**

The complainant consulted the respondent doctor as she suspected that she was pregnant. The pregnancy test was positive and the doctor prescribed a treatment of daily injections for 15–20 days to preserve the pregnancy, as she had suffered multiple miscarriages in the past. The complainant then consulted Dr. Leela Gupta, who explained to her that the fetus had no heartbeat and that it was an unsuccessful pregnancy. No medical negligence was established, as the complainant had not disclosed details or produced any documents of her medical history of miscarriages to the first doctor, which would have led to a different method of treatment. Dr. Leela Gupta also deposed that considering the information available with the respondent doctor, the treatment was proper and advisable.

***Gurmail v. Navpreet Kaur*, FA No. 463 of 2011, SCDRC, Punjab:**

The complainant's wife approached the respondent doctor for an abortion because the pregnancy was under twelve weeks. The complainant alleged that due to the

negligence on the part of the respondent doctor, the health of his wife deteriorated. He further claimed the doctor was responsible for the unsuccessful sterilization procedure, which led to the wife conceiving again. The State Forum held that doctors cannot be held liable for medical negligence merely because a woman became pregnant after a sterilization operation. Medical evidence suggests that the prevalent methods of sterilization are not absolutely effective and a woman can become pregnant again due to natural causes even after the surgery. In the present case, the evidence suggested that there was no assurance by the doctor regarding a 100% exclusion of pregnancy and the complainant's wife was advised to report to the government hospital in case she became pregnant again.

***Nisha v. Pradeep Shukla*, FA 1001/2005, SCDRC, Delhi:**

The complainant alleged that during the dilation and curettage (DNC) procedure, the doctor left some piece of the fetus inside his wife's womb, which caused a severe infection and resulted in her subsequent death. The State Forum held that this was a case of medical negligence due to incomplete clinical termination of pregnancy and allowed compensation.

***Dr. Radha v. Kusuma*, FA 2071/2011, SCDRC, Andhra Pradesh:**

After undergoing a termination of pregnancy and sterilization procedure done by the appellant doctor, the complainant fell severely ill and was diagnosed with Cerebral Venous Thrombosis. The evidence showed that the appellant doctor had taken steps to treat her as soon as she noticed signs of illness. Medical experts stated that the appellant doctor had treated the complainant with due care and caution, per the standards of medical practice. The State Forum held that the doctor was not liable for medical negligence.

***Sau Sarika Ritesh Chaudhari v. Vaishali Anil Tondare*, FA No. A/11/128 SCDRC, Maharashtra:**

The complainant slipped when she was three months pregnant, due to which she approached the respondent doctor. It was alleged that the respondent doctor gave her some homoeopathic medicines. He further told her to undergo an abortion in order to save her life. After the abortion procedure, she was released from the clinic. She suffered from immense pain and, due to unavailability of the respondent doctor, went to another doctor. That second doctor told her that the abortion was incomplete and there were still parts of the fetus inside her womb. The District Forum held the doctor liable for medical negligence as she had to undergo further medical treatment for abortion. On appeal, the State Forum dismissed the complaint of medical negligence due to the lack of supportive medical opinion or reports proving the performance of an abortion by the respondent doctor and second doctor. In addition, there was no evidence of fees paid and the complainant failed to prove any consumer-service provider relationship with the respondent doctor.

***Thakkar v. Mohanbhai*, CC No. 105/1997, SCDRC, Gujarat:**

The complainants were the husband and children of the deceased. Due to the negligent act of the respondent doctor in the dilation and curettage procedure and the resulting complications, the complainant's wife died. Despite the pain after the procedure and several warnings from other doctors, the respondent doctor did not treat her, insisting

it was normal to have such pains after the dilation and curettage procedure. The State Forum held the respondent doctor liable for negligence and therefore ordered him to pay compensation to the complainants.

***Meena v. Dr. Shyamal*, FA No. 803 of 2008, SCDRC Andhra Pradesh:**

The complainant stated that she had approached the respondent doctor for an abortion. Due to incomplete abortion, the complainant suffered severe bleeding. The respondent doctor did not pay any heed to her complaints of pain.

The complainant then consulted another doctor and had to undergo another surgery in the government hospital to remove the remnants of the fetus, which could have severely damaged her health. On the basis of the evidence, the respondent doctor was held liable for medical negligence.

***Dr. Arogyam v. Kavitha*, FA No. 947/2002, SCDRC, Tamil Nadu:**

The respondent doctor performed a dilation and curettage procedure. The complainant alleged that the procedure was not done properly and that pieces of the fetus were left in her uterus, resulting in infection. As a result, the complainant had to consult a second doctor and the dilation and curettage had to be performed again. The respondent doctor produced evidence showing that no products of conception remained in the uterus. The vaginal bleeding was due to a normal period and she did not develop any physiological symptoms of infection (fever, foul smell, etc.). The court held that there could not be any specific plea of negligence, as there are only two grounds in which an expert such as a doctor can be sued—misrepresentation of skill and lack of judgement and expertise. The present case did not establish negligence on either ground. As the burden of proof was not met by the complainant, the complaint was dismissed.

***Abha Ganesh Dhuaari v. L.H. Hiranandani*, CC No. 181/10, SCDRC, Maharashtra:**

The complainant visited the respondent doctor for an abortion. The abortion was not carried out properly and the complainant had to undergo another surgery by the second respondent doctor, which resulted in heavy bleeding and pain. The State Forum held both doctors liable for medical negligence and deficiency in service on the basis of the evidence adduced.

***Namita Patel v. Dr. Jyoti Ekka*, CC No. 3/2006, SCDRC, Chhattisgarh:**

The complainant was referred to the respondent doctor by a private medical practitioner for dilation and curettage after she was diagnosed with an incomplete abortion. The complainant alleged that the respondent doctor did not perform the dilation and curettage, due to which she suffered from the infection. The infection led to pus formation in the abdominal cavity and she had to receive treatment at another hospital. The respondent doctor produced evidence that the dilation and curettage procedure could not be completed as the patient was not cooperating and discharged herself before completion of the procedure. On the basis of the expert medical opinion and analysis of other evidence, it was held that the doctor was not liable for medical negligence.

***Dr. Prabha v. Kamakhya Singh*, FA No. 117/07, NCRDC:**

The complainant's wife was admitted to the hospital because she was suffering from stomach pains during her pregnancy and some medication was provided to her. The respondent doctor advised medical termination of pregnancy by the dilation and curettage procedure when the pain increased after medication. The complainant husband deposited part of the payment and the abortion procedure was performed. However, the hospital denied further treatment and post-operative care due to the lack of full payment. The complainant's husband took her to another hospital. Due to the lack of post-operative care by the first hospital, the wife had developed several complications, as the uterus had perforated. The second hospital performed a very risky operation to cure the critical condition of wife and she died soon after. The complaint was allowed and the doctor who withheld treatment was held liable for medical negligence and monetary compensation.

***Madhu v. R Khurana*, CC No. 383/98, SCDRC, Delhi:**

The complainant had approached the respondent doctor for an abortion. The surgery was conducted by the method of dilation and curettage but she suffered from abdominal pain, heavy bleeding, weakness, severe acidity, and numbness in the left-hand post procedure. She approached another doctor, only to find that the pregnancy was not terminated. She had to undergo another abortion four months after the first procedure. The complainant alleged negligence and deficiency in service while conducting medical termination of pregnancy. The doctor denied negligence and produced evidence suggesting that the process of dilation and curettage is not 100% effective and there is a chance of continuing pregnancy in some cases. The State Forum held that there was no negligence in light of the overall facts, the failure statistics of the procedure, and the fact that the complainant had not suffered as much as she would have suffered if the negligence of the doctor had caused severe physical harm or irreversible harm and injury. The State forum awarded a token compensation considering the percentage of failure.

Kalu Ram v. Kana Ram, II (2006) CPJ 234 NC, NCDRC:

The complainant and his seven-month pregnant wife visited Kana Ram at his Clinic. Kana Ram was a compounder by training and misrepresented his skill and qualifications. He assured the complainant that he could perform an abortion and based on his representations the complainant agreed to have an abortion. However, Kana Ram did not perform the abortion properly and, even after multiple visits to his clinic, the wife suffered from pain and finally died.

Later findings showed that Kala Ram was not authorized to perform abortions, nor did he have any prior experience. He was only competent to do dressing and administer injections under the prescription of a doctor. The National Forum held Kana Ram deficient in rendering medical services and awarded compensation to the complainant.

***Dr. K. Mahabala Bhat v. K. Krishna*, 2001 (3) CPR 137, NCDRC:**

The complainant's wife consulted the respondent doctors for termination of pregnancy. On the same date, she was admitted to their Nursing Home. The doctors

found that she was carrying a dead fetus and performed surgery. The doctors were qualified in practicing in medicines but did not have requisite qualifications or specialization for performing surgical procedures. The complainant's wife died during the procedure. It was affirmed by the National Forum that they should not have performed the surgery when they did not possess the requisite skills. It was held that the doctors are allowed to perform such procedures in a matter of extreme urgency but they should not have done so in the present case because the patient was not in a situation where there was an immediate danger to her life and there was enough time to take her to an appropriate hospital. The National Forum awarded compensation to the complainant.

Dr. Kala v. Roshan Tulsiram, FA. No. A/03/620, SCDRC, Maharashtra:

The complainant's wife approached the doctor for termination of pregnancy but the complainant was not informed of the same. She felt severe pain in her stomach after the termination procedure, despite which she was discharged. Her health subsequently deteriorated, as she suffered from severe stomach pain, and was admitted to a government hospital, where they examined her and found that her uterus was badly damaged and infected. Due to the infection, she lost her life. On the basis of the evidence adduced, it was found that the doctor did not have the facilities to successfully terminate a pregnancy, and hence was held liable for medical negligence. The State Forum awarded compensation to the complainant.

Dr. Vijayalekshmi v. Sushama Subramanyan, FA No. A/09/77, SCDRC, Kerala:

The complainant filed a medical negligence case alleging deficiency in services during a medical termination of pregnancy, which led to excessive bleeding after the procedure. The complainant stated that she was pregnant when she approached the appellant doctor. The appellant doctor performed the dilation and curettage procedure. The evidence indicated that the bleeding after the dilation and curettage procedure was not a result of medical negligence and that the standards of care had been met by the appellant doctor and the hospital. The State Forum, in the light of this evidence, ruled against the complainant.

Dr. Queen Aditya v. Raj Kumar, CC. No. 711/2006, SCDRC, Delhi:

The complainant's wife approached the appellant doctor for a routine pregnancy check-up, and, on the constant advice of the appellant doctor, she agreed to undergo an abortion. The appellant doctor, despite the absence of a blood donor and an anaesthetist, proceeded with the operation. During the operation, the wife's vital organs were damaged, which led to excessive bleeding. The appellant doctor did not make a single attempt to procure blood. The wife's condition deteriorated, and by the time she was shifted to another hospital, she succumbed to the bleeding and died. The State Forum held the appellant doctor liable for medical negligence, citing the requisite foresight and preparation necessary for doctors before admitting a patient like the deceased, and noted that her demise left her three young children without a mother. The State Forum also awarded compensation to the complainant.

Geeta Devi v. Dr. Ketki Garg, 1999 (2) CPR, SCDRC, Punjab:

The complainant, in this case, alleged that the respondent doctor told her that her fetus was without cardiac activity. The respondent doctor did not advise an immediate

abortion. Rather, the respondent doctor kept her under observation at the hospital as an indoor patient for 7 days and advised 2 days treatment as an outdoor patient (i.e., medication and treatment after discharge from the hospital). The complainant alleged that the respondent doctor delayed in advising an abortion and that this could have caused her death. The evidence showed that dilation and curettage were suggested only after the respondent doctor was sure that the pregnancy could not be saved and the respondent doctor, in this case, was well qualified and had adopted the known procedure and treatment. The mere fact that the ultrasound scan was not suggested at the primary stage of the pregnancy cannot be attributed to a deficiency in rendering service, as the respondent doctor followed the acceptable medical procedure. Hence the complaint was dismissed.

Kusum Pahwa v. R.R. Rana, CC No. 316/97, SCDRC, Delhi:

The complainant filed a consumer complaint against the respondent doctor for negligence in terminating her pregnancy. She had approached him for termination of pregnancy as soon as she found out she was pregnant. After terminating the pregnancy, he prescribed some medications as well. Later, it was found out that the termination had not occurred, and when the complainant approached the respondent doctor, he convinced her to terminate the pregnancy then and performed the surgery when she was 13 weeks pregnant. The surgery caused severe pain and injury in the lower intestine, along with a hole in the uterus. According to Sections 3 and 4 of the MTP Act, in cases where the length of the pregnancy is between 12 and 20 weeks, the abortion should be performed after consultation with another registered medical practitioner and in a government approved nursing home. None of the above criteria was met. The respondent doctor was held liable for medical negligence and was ordered to provide compensation.

Anil Kumar v. Care Hospital, FA. No. 110/2010, SCDRC, Andhra Pradesh:

The complainant's daughter approached the hospital, having taken an abortive medication. In the course of the treatment, an abortion was conducted, but the patient did not recover, due to various complications. The patient's father alleged that she died from excessive anesthesia given during the abortion procedure. The complainant further alleged that the hospital authorities did not take the consent of his daughter for the procedure. The State Forum ruled in favor of the complainant, finding the hospital guilty of medical negligence due to the lack of proper consent and careless treatment of the patient.

Anita Bhushan v. Sumita Sharma, FA No. 3031 and 3098/2004, SCDRC, Haryana:

The complainant got a copper-T, which is a T-shaped copper wire inserted into the uterus to avoid further pregnancy. However, she conceived and was advised by the respondent doctor for removal of the copper-T. It was also alleged that, in order to do this, she would have to have an abortion. Even post-abortion, the copper-T could not be removed by the respondent doctor. Ultimately, another doctor removed the copper-T. After reviewing the evidence, the court found that the abortion was not required for the removal of the copper-T. The State Forum held the respondent doctor liable for negligence and deficiency of service.

Navya v. Manipal Northside Hospital, 2006 2 CPJ 48, Karnataka:

The deceased's daughter and husband were the complainants in this case. It was alleged that the respondent doctors advised the deceased to undergo an abortion. The deceased's husband was not allowed to interact with her. It was further alleged that the hospital did not obtain consent for the abortion in violation of the MTP Act. It was also alleged that the hospital was not authorized to conduct abortions. The evidence showed that the hospital was not registered or authorized to perform an abortion, nor did they get a consent form signed by the deceased. Hence, the hospital was held liable to pay compensation to the complainants.

Dr. Prema v. Kanchana Bai, FA. No. 717/2011, SCDRC, Tamil Nadu:

The complainant approached the doctor for a missed menstrual cycle and it was discovered that she was 45 days pregnant. After this discovery, the appellant doctor performed an abortion and fixed a device for to prevent future conception.

The appellant doctor did not take proper consent for the abortion or the anti-pregnancy device, which was inserted without informing the complainant or her husband. The consent form put forth by the appellant doctor showed that the patient signed as a witness, not as a patient, and the patient's husband signed as a representative. Additionally, the abortion led to bleeding and acute abdominal pain. The Court concluded that "In determining whether negligence exists in a particular case, all the attending and surrounding facts and circumstances have to be taken into account. It is the act which can be treated as negligence without any proof as to the surrounding circumstances because it is in violation of statute or ordinance or is contrary to the dictates of ordinary prudence." The State Forum held the appellant doctor guilty of medical negligence and directed the doctor to compensate the complainant.

Dr. E Regina v. Parveen Begum, FA No. 215/2012, SCDRC, Andhra Pradesh:

The complainant approached the appellant doctor in the third month of pregnancy due to vaginal bleeding. She was entrusted to junior doctors with little experience. The complainant alleged that the doctors could not stop the bleeding. The junior doctor aborted the fetus without her consent and the uterus was removed. The appellant doctor, in this case, was found guilty of medical negligence owing to her knowledge of the complainant's medical history (having undergone three surgeries in the past) and yet handing her case to junior doctors whose credentials were not reflected in the evidence. The State Forum awarded monetary compensation to the complainant.

Dr. Yashvant v. Rama Bai, FA No. 788/2004, SCDRC, Maharashtra:

The patient approached the appellant doctor in the second month of pregnancy with a stomach problem. The appellant doctor, allegedly without her consent, aborted the fetus. Additionally, the abortion was done negligently and carelessly. It was admitted by the appellant doctor that the consent was not obtained due to the oversight of his juniors. The evidence also showed that there were remnants of the fetus in the patient after the procedure. The State Forum, therefore, upheld the District Forum's verdict of negligence and awarded monetary compensation.

Sukanti Behera v. Sashi Bhushan Rath, II (1993) CPJ 633, Orissa:

The complainant, in this case, alleged that the respondent doctor refused to perform an abortion, whereas two other doctors had approved of the termination. The National

Commission held that the mere denial to perform a termination of pregnancy procedure does not fall within the ambit of deficiency or delay in services under the Consumer Protection Act and thus, the respondent doctor was not liable for medical negligence.

***Salvador Francis Borges v. Dr. Arun Bhohe*, LAWS (NCD)2004-6-213, NCDRC:**

The complainant, in this case, alleged that his wife's death was caused by the respondent doctor's negligence during the medical termination of pregnancy. His wife was twelve weeks pregnant and the doctor had assured the patient that it was safe for the pregnancy to be terminated. Two medical experts were appointed for their opinions. Both the doctors said that the deceased died due to meningitis not associated with the termination of pregnancy and hence the complaint was dismissed and the respondent doctor was not held liable for medical negligence.

Additional Analysis and Implications: As earlier, the standard of proof required for proving liability under the Consumer Protection Act is lower than what is required under the Indian Penal Code. Therefore, medical negligence cases under the Consumer Protection Act are easier to prove.

The consumer forum, while adjudging a case under the Consumer Protection Act, considers the following questions, as held in the case of *Kiran Verma v. Nidhi Agarwal*, (CC No. 336/1999, SCDRC, Delhi): “1. Whether the treating doctor had the ordinary skill and not the skill of the highest degree that he professed and exercised as everybody is not supposed to possess the highest or perfect level of expertise or skills in the branch he practices? 2. Whether the accused doctor had done something or failed to do something which in the given facts and circumstances no medical professional would do when in ordinary senses and prudence? 3. Whether the risk involved in the procedure or line of treatment was such that injury or death was imminent or risk involved was up to the percentage of failures? 4. Whether there was an error of judgment in adopting a particular line of treatment? If so, what was the level of error? Was it so overboard that result could have been fatal or near fatal or at lowest mortality rate? 5. Whether the negligence was so manifest and demonstrative that no professional or skilled person in his ordinary senses and prudence could have indulged in? 6. Everything being in place, what was the main cause of injury or death? Whether the cause was the direct result of the deficiency in the treatment and medication? 7. Whether the injury or death was the result of an administrative deficiency or post-operative or condition environment-oriented deficiency?”

Several acts have been adjudicated as per se negligent acts. In the case of *Satbir v. Saroj*, (SC No. 190/03, Delhi District Court, Delhi), the forum categorically stated that the patient signing the consent form does not absolve the doctors from negligence and they are bound by rules of utmost care.

Not only is carelessness in conducting a procedure considered to be a negligent act, but a misdiagnosis and non-treatment are also considered a deficiency in service under the Consumer Protection Act.

There is inconsistency in the opinion of the forums on the question of whether an incomplete abortion *per se* is considered a negligent act and a deficiency in service. Some forums have held that the proof by the complainant that there were remains of

the fetus inside the patient was sufficient to prove negligence, while other forums have held that the mere fact of an unsuccessful procedure does not constitute negligence if the doctor has the requisite qualifications and has exercised care and reasonable diligence.

In the case of *Madhu v. R Khurana*, (CC No. 383/98, SCDRC, Delhi), the State Forum held that there was no negligence in light of the overall facts, the failure statistics of the procedure, and the fact that the complainant had not suffered as much as she would have suffered if the negligence of the doctor had caused severe physical harm or irreversible harm and injury. In the case of *C. V. Mathew v. P. Babu*, ((2000) CPJ 134 Ker), the forum while holding the doctor liable for medical negligence stated that a doctor is held liable when his act falls below the standard of a reasonably competent practitioner. Other acts that come under the ambit of medical negligence are: not paying heed to the complaints of the patient leading to health complications (and, in one such case, death), withholding treatment because of lack of full payment, and non-compliance with the requirements of the MTP Act (such as not taking proper consent and trusting junior doctors in complicated cases).

The cases which are more successful in ensuring a conviction are those where lack of services and due diligence is coupled with the lack of skill and misrepresentation of skill, as shown in the cases of *Kalu Ram v. Kana Ram*, (II (2006) CPJ 234 NC, NCDRC), *Dr. K. Mahabala Bhat v. K. Krishna*, (2001 (3) CPR 137:2002 (2) 127, NCDRC), and *Dr. Kala v. Roshan Tulsiram* (FA. No. A/03/620, SCDRC, Maharashtra). Unlike other medical procedures, medical termination of pregnancy requires strict adherence to administrative norms (the MTP Act and Rules) and to medical norms governing the quality of care. Where providers fail to uphold one or both sets of requirements, they will be guilty of medical negligence. The kinds of evidence which are usually required to prove medical negligence are expert opinions, medical reports from other hospitals, the discharge summary and receipts of treatment showing a payment made to the respondent doctor.

On the other hand, cases where the woman herself is negligent—for example, where she has not disclosed her previous medical history—then the doctor is not held liable for negligence. Even if any complications occur after the procedure, what is required of the doctor is that he/she took utmost care and exercised diligence to treat the patient as soon as possible. Further, the mere refusal to conduct an abortion is not a case covered by the Consumer Protection Act.

Cases may be unsuccessful if they involve a complete lack of evidence, such as where the complainant fails to adduce even basic evidence (e.g., the discharge summary or receipts of payment to establish a relationship of service between the health provider and the complainant). Compilation under this section is helpful in understanding exactly what constitutes medical negligence in abortion procedures, what kind of evidence the forums look at while adjudicating cases and the general outlook of the forum in such cases.

The health providers must understand the standard of care and diligence required in performing abortion procedures and the consequences of non-compliance. As stated above, negligence is attributed at two levels: first, where the doctor is not in compliance with the MTP Act (e.g., he/she is not a registered practitioner), and second, where the doctor has not exercised reasonable care and due diligence. This

information is also helpful for women to understand their rights and to help them understand the importance of documenting any medical procedure they undergo (e.g., through receipts and discharge summaries). This is necessary to establish a doctor's liability under the Consumer Protection Act. Finally, this compilation may be used by policy makers and activists to identify problems in access to safe abortion.

4

International Law

While courts throughout India have not relied on international law to make the above judgments, myriad international human rights instruments guarantee Indian women's rights to access quality abortion care. This compilation will provide a brief overview of India's treaty obligations closely related to abortion¹⁰, outline a few key international human rights cases on abortion, and finally describe United Nations human rights treaty mechanism concluding remarks on India and abortion. Like the Constitution of India, the international law guarantees the right to life, to health, to equality, and to privacy.

The Government of India has an obligation to ensure the rights, protections, and obligations enshrined in each human rights treaty it signs.¹¹ In addition to the articles outlined below, the United Nations has created general comments and general recommendations to provide a precise outline for each state party's obligations under each article. The United Nations holds states accountable for treaty compliance through the periodic review process and through individual complaint mechanisms. Using the texts of the treaties, the guidance provided by the United Nations, and reports filed by governments and civil society, treaty-monitoring bodies evaluate each state's treaty compliance at periodic reviews.¹² The treaty-monitoring bodies express concerns and recommend action to address specific state failures to ensure the rights enshrined in each treaty. Some human rights treaty-monitoring bodies allow individual complaints that result in judgments against state parties.¹³ Finally, special rapporteurs also examine rights violations and treaty implementation on specific issues, including the right to health and violence against women.¹⁴

CEDAW: The Convention on the Elimination of all forms of Discrimination against Women (CEDAW)¹⁵ obligates the Government of India to “eliminate discrimination against women in the area of health care, including reproductive health care such as family planning services.”¹⁶ More specifically, Article 16 of CEDAW ensures that every woman has the right to determine the number and spacing of children and to have access to both information and the means to make those decisions.¹⁷

In its Concluding Observations on the Combined Fourth and Fifth Periodic Reports of India, the Committee on the Elimination of Discrimination against Women expressed its concern that “patriarchal attitudes and deep-rooted stereotypes entrenched in the social, cultural, economic and political institutions and structures of Indian society and in the media that discriminate against women.”¹⁸

The Committee specifically mentions sex-selection as a “harmful traditional practice” that furthers inequality.¹⁹ The Committee urged the Government of India to launch a “comprehensive national campaign and strategy to eliminate patriarchal attitudes and stereotypes.”²⁰

In the same Concluding Observations, the Committee addressed India's high maternal mortality and “the high rate of deaths from unsafe abortion, lack of access to safe abortion, post-abortion care, and high-quality services for the management of complications arising from unsafe abortion.”²¹ The Committee also notes the links between maternal deaths from and inadequate access to contraceptive information and services, comprehensive sex education, and budget constraints.²² The Committee specifically urges the Government of India to provide women access to “high-quality and safe abortion services, including managing complications arising from unsafe

abortion, and to increase access to and use of effective and affordable methods of contraception, including by subsidizing them, in order to reduce the use of abortion as a method of family planning.”²³

CRDP: The Convention on the Rights of Persons with Disabilities states that the states are under the obligation to provide persons with the highest attainable standard of health including in the area of sexual and reproductive health.²⁴

ICESCR: The International Covenant on Economic Social and Cultural Rights guarantees the right to the highest attainable standard of physical and mental health.²⁵ The Committee on Economic, Social and Cultural Rights, General Comment 14, obligates the Government of India to improve “child and maternal health, sexual and reproductive health services, including access to family planning, pre-and post-natal care, emergency obstetric services and access to information, as well as to resources necessary to act on that information.”²⁶ The Committee uses availability, accessibility, acceptability, and quality determinants (the “AAAQ framework”) to determine whether a state party fully complies with its obligations under the right to health. In the context of safe abortion services, abortion centers must function and have adequate staff, goods, and services (availability). At the same time, services must be physically accessible, affordable, and provided free of discrimination (accessibility).²⁷ All abortion centers and providers have an obligation to respect medical ethics and cultural norms (acceptable) and provide the highest standard of medically appropriate care (quality).

ICCPR: The International Covenant on Civil and Political Rights recognizes the right to life in Article 6. Article 7 guarantees the right to be free from cruel inhumane and degrading treatment. As a result of lobbying from international women's rights groups, the Human Rights Committee has increasingly identified failures to remove barriers to safe abortion access, forced pregnancy, and inadequate reproductive health services as violations of essential rights in the ICCPR. For example, in *KL v. Peru* the Human Rights Committee concluded that failure to ensure a 17-year old's access to an abortion in the case of an anencephalic fetus constituted a violation of the rights to be free from discrimination based on sex,²⁸ to be free from cruel, inhuman, and degrading treatment,²⁹ to personal liberty and autonomy,³⁰ to protections as an adolescent,³¹ and to equality before the law. The Human Rights Committee obligates Peru to provide K.L. with an “effective remedy.”³²

CRC: In Article 24, the Children's Rights Convention guarantees all children the right to the highest attainable standard of health. The Convention also guarantees children's rights to be free from discrimination,³³ the right to life,³⁴ to information,³⁵ and to liberty and security of person.³⁶

The Committee on the Rights of the Child expressed similar concerns about safe abortion services in India in its July 2014 concluding observations on the combined third and fourth periodic reports of India.³⁷ In addition to identifying sex-selective abortion as a widespread discriminatory practice, the Committee expressed serious concerns “at the lack of access to sexual and reproductive information and services, including modern contraception methods, by adolescent girls and the consequent high rate of teenage pregnancies, widespread use of female sterilization and unsafe abortions in India. Here, the Committee recommends implementation of adolescent

health schemes, improved sex education, measures to guarantee access to modern contraception and legal abortions for girls, and to ensure “that the views of pregnant teenagers are always heard and respected in abortion decisions.”³⁸

CERD: The Convention on the Elimination of Racial Discrimination obligated the Government of India to ensure that women who belong to minority groups have access to health services free of discrimination.³⁹ In its concluding observations for India, the Committee on the Elimination of Racial Discrimination noted its concerns about disproportionately high rates of maternal mortality among scheduled castes, scheduled tribes, and other tribes.⁴⁰

The Special Rapporteur on the Right to Health – In 2010, Paul Hunt's Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health included a special addendum on India's grave violations of women's rights to health and life. The Special Rapporteur noted, “a yawning gulf between India's commendable maternal mortality policies and their urgent, focused, sustained, systematic and effective implementation.”⁴¹ The Special Rapporteur underscores the importance of safe abortion care as a fundamental component to reducing maternal mortality and to guaranteeing women's fundamental right to health.⁴²

What does this mean for women, providers, and NGOs?

An understanding of India's legal obligations under international law arms safe abortion advocates with the language and tools to hold the government accountable for violations. Requirements under each human rights treaty and concluding observations on India can be used to design research and fact-finding missions. For example, a fact-finding report illustrating that abortion services are not available, accessible, acceptable or quality in a specific district can be used as evidence of ICESCR Article 12 violations. This information can be used to advocate for change in international and domestic forums. At the international level, civil society submits shadow reports to each treaty body. Additionally, any person or organization can submit a complaint or report to a special rapporteur.

Domestically, Article 51(c) of the Constitution of India⁴³ obliges courts to uphold international law and treaty obligations. Supreme Court Jurisprudence has consistently upheld the use of international treaties in interpreting the Constitution of India. *See e.g., Gramophone Co. of India Ltd. v. Birendra Bahadur Pandey & Ors.*⁴⁴ International decisions including *K.L. v. Peru* can be used to bolster increased access to safe abortion both in court and with policy makers. While it is rare, Indian courts will rely on international law to support rulings. For example, in *Laxmi Mandal v. Deen Dayal Hari Nagar Hospital & Ors.*⁴⁵ the Delhi High Court cites the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC) in confirming a woman's fundamental right to survive pregnancy. International legal obligations can be a powerful accountability mechanism where states fail to ensure women's fundamental rights.

Notes

- ¹ *High Court on its Own Motion v. State of Maharashtra*, 19th Sept., 2016 (Suo Moto PIL No.1 of 2016)
- ² *Guidance: Ensuring Access to safe Abortion and Addressing Gender Biased Sex Selection*, Ministry of Health & Fam. Welfare, Govt. of India (Feb. 2015); *National Health Policy*, Ministry of Health and Fam. Welfare, Govt. of India 1-39 (2002); See S.K. Banerjee, et al, *Evaluation of a multi-pronged intervention to improve access to safe abortion care in two districts in Jharkhand*, 14 (1), BMC Health Services Research 1 (2014); See also M. Stillman et al, *Abortion in India: a literature review*. N. Y. Guttmacher Institute 9-10 (2014).
- ³ S. K. Banerjee, et al, *supra* note 2 at 1; Prashant Onkar & Kajal Mitra, *Important Points in the PC-PNDT Act. 22.2* The Indian J. of Radiology & Imaging 141–143 (2012).
- ⁴ D.A. Grimes et al, *Unsafe abortion: the preventable pandemic*, 368(9550) The Lancet, 1908-1919 (2006); V. Jain et al, *Unsafe abortion: A neglected tragedy. Review from a tertiary care hospital in India*. 30(3) J. Obstetrics & Gynaecology Research 197-201 (2004)
- ⁵ J. W. Njagi, *The State and Sexual Politics: An Analysis of Abortion Discourses in Kenya* 134-142 (2013) (Thesis, Doctor of Philosophy (PhD), University of Waikato, Hamilton, New Zealand), <http://hdl.handle.net/10289/7250>
- ⁶ A. FAÚNDES & J. BARZELATTO, *THE HUMAN DRAMA OF ABORTION: A GLOBAL SEARCH FOR CONSENSUS* 110-120 (2006); K.A. Rao & A. Faúndes, *Access to safe abortion within the limits of the law*. 20(3) Best Practice & Research Clinical Obstetrics & Gynaecology 421-432 (2006); E. D. Adinma et al, *Knowledge and perception of the Nigerian Abortion Law by abortion seekers in south-eastern Nigeria*, 31.8 J. Obstetrics & Gynaecology 763-766 (2011).
- ⁷ *High Court on its Own Motion v. State of Maharashtra*, 19th Sept., 2016 (Suo Moto PIL No.1 of 2016)
- ⁸ *Id.*; See D.P., *JUDGES, HARD CHOICES, LOST VOICES: HOW THE ABORTION CONFLICT HAS DIVIDED AMERICA, DISTORTED CONSTITUTIONAL RIGHTS, AND DAMAGED THE COURTS* (1993)
- ⁹ *Id.*
- ¹⁰ *Bringing Rights to Bear: Abortion and Human Rights*, Center for Reproductive Rights (Oct. 2008), http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/BRB_abortion_hr_revised_3.09_WEB.PDF
- ¹¹ *Id.* at 3
- ¹² *Id.* at 2 .
- ¹³ *Id.*
- ¹⁴ See *supra* note 11
- ¹⁵ *Convention on the Elimination of All Forms of Discrimination Against Women*, UN General Assembly, Dec. 18 1979, 1249 UN Treaty Series, 13, <http://www.refworld.org/docid/3ae6b3970.html> (9 Nov. 2016, 10 PM)
- ¹⁶ Article 12, CEDAW

- ¹⁷ Article 16, CEDAW
- ¹⁸ U.N. Doc. CEDAW/C/IND/CO/3 (2007)
- ¹⁹ U.N. Doc. CEDAW/C/IND/CO/3 (2007), ¶ 20
- ²⁰ *Id.* at ¶ 11
- ²¹ *Id.*
- ²² *Id.*
- ²³ *Id.*
- ²⁴ The Convention on the Rights of Persons with Disabilities, UN General Assembly, , Jan. 24 2007, A/RES/61/106, <http://www.refworld.org/docid/45f973632.html> (9 Nov. 2016, 10 PM)
- ²⁵ Article 12, International Covenant on Economic, Social and Cultural Rights, UN General Assembly Dec. 16 1966, U N 993 Treaty Series 3, <http://www.refworld.org/docid/3ae6b36c0.html> (9 Nov. 2016, 10 PM)
- ²⁶ General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12) International Covenant on Economic, Social and Cultural Rights, Committee on Economic, Social and Cultural Rights; (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 85 (2003).
- ²⁷ *Id.*
- ²⁸ Article 2, International Covenant on Civil and Political Rights, UN General Assembly, Dec. 16, 1966, 999 U. N. Treaty Series 171, <http://www.refworld.org/docid/3ae6b3aa0.html> (9 Nov. 2016, 10 PM)
- ²⁹ Article 7 ICCPR
- ³⁰ Article 17, ICCPR.
- ³¹ Article 24, ICCPR.
- ³² U.N. Doc CCPR/C/85/D/1153/2003 (2005).
- ³³ Article 2, Convention on the Rights of the Child, UN General Assembly, Nov. 20, 1989, 1577 U.N. Treaty Series 3, <http://www.refworld.org/docid/3ae6b38f0.html> (9 Nov. 2016, 10 PM)
- ³⁴ Article 6, CRC
- ³⁵ Article 13, CRC
- ³⁶ Article 37, CRC
- ³⁷ U.N. Doc. CRC/C/IND/CO-3-4
- ³⁸ *Id.*
- ³⁹ Article 5(e), International Convention on the Elimination of All Forms of Racial Discrimination, UN General Assembly, Dec. 21, 1965, 660 U.N. Treaty Series 195, <http://www.refworld.org/docid/3ae6b3940.html>(9 Nov. 2016, 11 PM)
- ⁴⁰ U.N. Doc CERD/C/IND/CO/19 (2007)
- ⁴¹ Paul Hunt, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health, Addendum: Mission to

India, United Nations Human Rights Council, Apr. 15, 2010, U.N. Doc. A/HRC/14/20/Add.2

⁴² *Id.*

⁴³ Constitution of India, 1950

⁴⁴ *Gramophone Co. of India Ltd. v. Birendra Bahadur Pandey & Ors.*, (1984 2 SCC 534)

⁴⁵ *Laxmi Mandal v. Deen Dayal Hari Nagar Hospital & Ors.*, (W.P.(C) 8853/2008)

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