



## CRITICAL ANALYSIS OF LAW RELATING TO LATE-TERM ABORTIONS OF CHILD RAPE VICTIMS

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### I. INTRODUCTION

Two cases of late-term abortion of child rape victims in 2017, which created pandemonium were of a 10-year-old and a 13-year-old child, both of whom sought permission from the Supreme Court to abort their pregnancies which had crossed twenty weeks. The 13-year-old child was permitted to abort, while the 10-year-old child was not allowed to abort. She later gave birth to a child. Words would fall short to describe the extremely traumatic, painful, humiliating, frightening and psychological suffering that a minor rape victim undergoes after being raped. This is very unfortunate! The cases of rape against children rose by 82% from 2015 to 2016.<sup>1</sup> The figure of 19,920 children being raped in 2016<sup>2</sup> makes us to think about the consequences that a child faces after rape. One of the most atrocious aftermath of rape is pregnancy, the cases of which are increasing. Time and again, the victims have had to knock the doors of the Courts to seek permission to abort late-term pregnancies. The verdicts in such cases are not same always.<sup>3</sup> For the purpose of this paper, late-term abortion is meant as the abortion of pregnancy beyond the legally permissible limit i.e. 20 weeks as per the Indian law.

### II. RIGHT TO ABORTION: CONSTITUTIONAL PERSPECTIVE

Article 21 of the Constitution of India which guarantees right to life and personal liberty has been interpreted broadly to include various facets. Over the years a broader meaning of life has been attributed to mean not only animal existence but a dignified life with all its concomitant attributes like right to healthy environment, proper health and so on.

A very expansive interpretation was made in the case of *Munn v. Illinois*<sup>4</sup>, an American case while dealing with the concept of life:

“by the term ‘life’ as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. ....”

Article 21 of the Constitution of India, which guarantees life and personal liberty, has been interpreted to include rights of women, of which right to make reproductive choices is significant. “Right to reproductive choices would include right to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction

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<sup>1</sup>As per NCRB Report, 2016. Crime in India 2016, Statistics, National Crime Records Bureau, Ministry of Home Affairs, Government of India.

<sup>2</sup>*Ibid.*

<sup>3</sup>The petitioner who was a minor rape victim was allowed to terminate the pregnancy in *D. Rajeswari v. State of Tamil Nadu*, 1996 Cri.LJ. 3795. The Madras High Court did not allow termination of pregnancy in *V. Krishnan v. G. Rajan alias MadipuRajan* (decided on 2 December, 1993).

<sup>4</sup>94 U.S. 113(1877).

whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods."<sup>5</sup> Several international Conventions on Human Rights also recognise abortion as a right of women.

Rape is not just an offence but is also a violation of the most important fundamental right of a woman i.e. right to life. The constitutional validity of the law allowing abortion was a matter of debate across the world. A decision of the United State Supreme Court which became one of the most politically significant decision is *Roe v. Wade*.<sup>6</sup> It established that that most laws against abortion violate the constitutional right to privacy. Thus, it overturned all State laws restricting abortion that were inconsistent with the decision. Jone Roe wanted to terminate her pregnancy because she contended that it was a result of rape. Relying on the then prevalent state of medical knowledge, the decision established a system of trimesters that attempted to balance the State's legitimate interests with the individual's constitutional rights. The Court ruled that the State cannot restrict a woman's right to an abortion during the first trimester, the State can regulate the abortion procedure during the second trimester "in ways that are reasonably related to maternal health" and in the third trimester, demarcating the viability of the foetus, a State can choose to restrict or even to prescribe abortion as it would deem fit. It was held that "childbirth endangers the lives of some women, voluntary abortion 'at any time and place' regardless of medical standards would impinge on a rightful concern of the society. The woman's health is part of that concern, as is the life of the foetus after quickening. These concerns justify the State in treating the procedure as medical one."

In the case of *Suchita Srivastava v. Chandigarh Administration*<sup>7</sup>, the Indian Supreme Court observed that in the case of pregnant women there is also a "compelling state interest in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled." Hence, the provisions of the Medical Termination of Pregnancy Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.

When it comes to the termination of pregnancy of child rape victims, it is important to strike a balance between the right to life of the victim bearing the child and the unborn child, the balance of which would always turn towards the child rape victim. In case of *R. and Anr. v. State of Haryana*,<sup>8</sup> it was observed by the Court that:

"No doubt, the protection of right of unborn child is an obligation cast upon the State under the Constitutional provisions, yet in view of the unambiguous language of Section 5 of the Medical Termination of Pregnancy Act, 1971, the conflict between the right to life of the mother and the right to life of the unborn child would yield in favour of the right to life of the mother. To force a woman to continue with the pregnancy which she does not want to continue is an infringement of right to privacy and dignity of the woman as well as an infringement of the right to a healthy and dignified life of the nascent life in her womb."

Abortion is multi-faceted because it involves the culmination of many aspects such as

<sup>5</sup>*Ashaben v. State of Gujarat*, 2015 (4) Crimes1 (Guj.).

<sup>6</sup>35 L Ed 2d 147: 410 US 113 (1973).

<sup>7</sup>2009 (9) SCC 1.

<sup>8</sup>Decided on 30 May, 2016, CWP-6733-2016.

religion, ethics, medicine and law.<sup>9</sup> “Abortion is an issue overshadowed and shrugged with glaring questions of morality, infanticide, suicide, ethics, religious beliefs and women's rights. To what amplitude, abortion should be permitted; encouraged, restricted or repressed is a social issue that has effectively divided theologians, philosophers, legislators and general masses. The laws governing this delicate sphere of the woman's autonomy reflect immensely on the plight of women in society and encompasses emotive and poignant sets of views, making it a mammoth task for the legislators to ensure that the constitutional mandate of equality and liberty are adhered to and the constitutional spirit is kept alive.”<sup>10</sup>

In *Nand Kishore Sharma v. Union of India*,<sup>11</sup> the petitioner challenged the validity of the Medical Termination of Pregnancy Act, 1971 as being violative of Article 21 of the Constitution of India. The Court while dismissing the petition observed certain things which need to be drawn attention to while considering the case of child rape victims. The Court said:

“It would appear that the dominant object to achieve which the law has been enacted is to save the life of the pregnant woman or to relieve her of any injury towards physical and mental health or prevent the possible deformities in the child to be born.”

The Court further observed that “the object of the Act being to save the life of the pregnant woman or relieve her of any injury to her physical and mental health, and no other thing, it would appear that the Act is rather in consonance with Article 21 of the Constitution of India than in conflict with it. While it may be debatable as to when the foetus comes to life so as to attract Article 21 of the Constitution of India, 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.”

Considering the interest of child rape victims in light of Article 21, it is important to consider the abortion of such child in order to make her life dignified and allow her to enjoy personal liberty. The duty is on the Government to come out with specific guidelines to save the rights of child rape victims in cases of abortion of late-term pregnancy.

### III. PROVISIONS UNDER THE INDIAN PENAL CODE, 1860

There was no specific abortion law in India until the Medical Termination of Pregnancy Act, 1971(MTP Act) was enacted, which made Section 312 of the Indian Penal Code (IPC) subservient. The idea of not allowing abortion of a child stems from the religious, moral and cultural sensibilities that influence the minds of the people.<sup>12</sup> The IPC in its Sections 312 to 316 provides punishments for causing miscarriage under different circumstances. Section 312 provides for voluntary causing miscarriage of a woman with child. It provides a punishment that can be extended to three years or with fine or with both. It enhances the punishment to seven years' imprisonment and also fine when the woman was quick with child. The said section did not even spare the woman who herself caused miscarriage from being guilty. The only exception provided was a miscarriage which was caused in good faith for the purpose of saving the life of the woman. This led to an increase

<sup>9</sup>Bhavish Gupta & Meenu Gupta, “The Socio-Cultural Aspect of Abortion in India: Law, Ethics and Practice”, *ILI Law Review* (Winter Issue, 2016).

<sup>10</sup>As cited in *Ashaben Patel v. State of Gujarat*, 2015 (4) Crimes1 (Guj.).

<sup>11</sup>AIR 2006 Raj 166.

<sup>12</sup>K.D.Gaur, “Abortion and the Law in India”, 15 *Cochin University Law Review* 123-153 (1991).

in illegal and unsafe abortions. The 1960s and 1970s saw liberalization of abortion laws across Europe and America which continued in many other parts of the world. It also had an effect in India owing to high maternal mortality rates due to unsafe abortions.<sup>13</sup> Even though Sections 312 and 316 provided for punishments for causing miscarriage under different circumstances, it has a good faith clause which made the causing of miscarriage as legal.

#### IV. THE MEDICAL TERMINATION OF PREGNANCY ACT, 1971

The attempts to liberalise the strict law on abortion in India were initiated as early as in 1964 with the constitution of Shri Shantilal Shah Committee based upon the recommendations of Central Family Planning Board. The Board reported an increase of illegal abortions being conducted in unhygienic conditions by untrained persons affecting the life and health of women.<sup>14</sup> The Shah Committee carried out a comprehensive review of socio-cultural, legal and medical aspects of abortions. The Committee recommended that the existing IPC was too restricted and that it should be liberalised. It pointed out that legalising abortion to prevent wastage of women's health and lives on both compassionate and medical grounds. The Committee suggested various situations justifying termination of pregnancy under law. It was of the view that this should be allowed not for saving the life of the pregnant woman, but also to avoid grave injury to her physical or mental health. The MTP Act was eventually passed which came into operation on 1 April 1972 after the government framed rules for its implementation as required under the Act. The basic objectives of the Act are:

- (i) "Health measures, when there is danger to the life or risk to physical or mental health of the woman.
- (ii) Humanitarian grounds, such as when pregnancy is caused as a result of a sex crime or intercourse with a lunatic woman etc.
- (iii) Eugenic grounds, when there is a substantial risk that the child, if born, would suffer from deformities and disease."

The Act having only eight sections provides for circumstances wherein carrying abortions are legal and also provides for requirements of health service providers who can carry out abortions and a place where abortions can be carried. It has no specific provisions relating to the victims of child rape and hence child rape victims whose pregnancy has to be aborted are covered under the said Act.

The law is clear when the abortion is to be carried within 20 weeks of pregnancy. The MTP Act, 1971 in its Section 3(2) provides that "a pregnancy may be terminated by a registered medical practitioner, —

- (a) where the length of the pregnancy does not exceed twelve weeks, if such medical practitioner is, or
- (b) where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are, of opinion, formed in good faith that-
  - (i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or if grave injury to her physical or mental health; or

<sup>13</sup>Siddhivinayak S. Hirve, "Abortion Law, Policy and Services in India: A Critical Review; Reproductive Health Matters", 12(24) *Supplement: Abortion Law, Policy and Practice in Transition* 114-121 (Nov, 2004).

<sup>14</sup>SF Jalnawalla, "Medical Termination of Pregnancy Act: A Preliminary Report of the First Twenty months of implementation", 25(2) *Journal of Obstetrics and Gynaecology in India* 588-92 (1974).

- (ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.”

Explanation I to Section 3 provides that “where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.”

Further, Section 4 provides the place where pregnancy can be terminated. Most important is an exception of Section 3(2) which is carved out in Section 5(1) which provides that “the provisions of Section 4, and so much of the provisions of sub-section (2) of Section 3 as related to the length of the pregnancy and the opinion of not less than two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.”<sup>15</sup>

Certainly, Section 5(1) can be very much made applicable to cases when a pregnant woman’s life is in immediate danger. However, applying section 5(1) in cases where the life of the pregnant woman is not in immediate danger, it seems to be juxta positioned with Section 3(2). Section 3(2) mandates the opinion of two medical practitioners for termination of pregnancy where the length of pregnancy is between 12 to 20 weeks. Conversely, the opinion of even one medical practitioner is sufficient for pregnancies beyond 20 weeks in cases of application of Section 5(1).

The Gujarat High Court took a restrictive view in interpreting Section 5 of MTP Act in the case of *Ashaben v. State of Gujarat*,<sup>16</sup> wherein the victim was held captive before she could seek termination. On approaching the High Court over 24-week pregnancy, the Court observed that:

“Undoubtedly, Section 5 of the Act relates to the right of a pregnant woman to terminate pregnancy in case it is found necessary to save her life. Section 5 nowhere speaks of any right of a pregnant woman to terminate the pregnancy beyond 20 weeks on the ground of having conceived on account of rape. It strictly restricts to the cases where the life of the pregnant woman would be in danger in case the pregnancy is not terminated and does not refer to any other circumstances. Undoubtedly, the opinion in that regard has to be formed by a registered medical practitioner and such opinion should be in good faith. The expression ‘good faith’ discloses that the opinion has to be based on the necessary examination required to form such an opinion.”

In the case of *Chandrakanta Jayantilal Suthar v. State of Gujarat*,<sup>17</sup> the Court denied the abortion to child rape victim who was in her 24<sup>th</sup> week of pregnancy. The case was later on overruled by the Hon’ble Supreme Court. The decision in the case was given upholding *Ashaben’s case*. The Court held that:

<sup>15</sup> Sec. 5(1): The provisions of section 4, and so much of the provisions of sub-section (2) of section 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.

<sup>16</sup>2015 (4) Crimes1 (Guj.).

<sup>17</sup>SLP (Crl.) No. 6013 of 2015.



“there are times when a poignant situation arises in a case where the application of the law gives rise to a situation that would have physical, mental and social connotations upon the life of an innocent girl. Nevertheless, the law is the law, and has to be obeyed. If the provision of the statute is unambiguous and the legislative intent is clear from it, no other rules of interpretation are required to be resorted to and the statutory provision is to be followed as it is.”

The verdict in the abovementioned case can very well be applicable on adult women who normally do not face any immediate danger to their lives. But it would be dangerous to apply in cases of child rape victims. Child rape victims are in a dangerous situation from both the fronts i.e. whether they deliver a baby or abort. It is also noteworthy that a child may not have the required strength to bear the burden of pregnancy. The pelvic bones in the tender years are not developed enough to support pregnancy and to give passage to baby during delivery. Further, there are complications involved in teenage pregnancies and abortions which need to be weighed.<sup>18</sup> In light of this, it is desirable to interpret Section 5(1) and cover the cases of abortion of late-term pregnancy.<sup>19</sup>

In *R and Anr. v. State of Haryana*,<sup>20</sup> the Court pointed out that “some abortions are necessary beyond the statutory limit in the light of circumstances under which they are sought and, therefore, streamlining of the system in this regard is required. The MTP Act is an inadequate Act and only appears to have been designed to serve the interest of the family planning programme. Under the MTP Act, women have restricted right to termination of pregnancy. The declared objects of the MTP Act are to help women, who become pregnant as a result of rape, women who are pregnant due to contraceptive failure (applicable to married women/marital sexuality) or to reduce the risk of severely handicapped children being born.” The Court allowed the termination of pregnancy of a child rape victim applying the ‘best interest test’ as explained by the Hon’ble Supreme Court in *Suchita Srivastava’s case*.<sup>21</sup>

In the case of *King v. Broune*,<sup>22</sup> it was held that “when a doctor on reasonable grounds and with adequate knowledge in the field comes to a conclusion of probable consequences of pregnancy that it will make the concerned victim/woman physically and mentally wrecked then the concerned doctor/doctors, if they decide for termination of pregnancy, are proceeding with purpose of preserving the life of the woman. On the anvil of the settled position of law, the best interest parameters and the social circumstances that may be faced by the rape victim, the decisions of Court as well as of the doctors should be guided by the interest of the victim alone.”<sup>23</sup>

In *Bashir Khan v. State of Punjab*,<sup>24</sup> it was held that “to ensure that the victim of rape who becomes pregnant does not lose time by applying from court to court, there shall be general instructions given by the Director General of Police to all the police stations who

<sup>18</sup> Mukesh Yadav, “Is There Need for Danger to Health (Physical/Mental)/Life Ground of MTP beyond Permissible Limit in Exceptional Cases?”, 37(4) *J. Indian Acad Forensic Med. October-December* 334-337 (2015).

<sup>19</sup> In an interview to *The Hindu*, senior advocate Indira Jaising said that doctors are not providing timely interventions for child rape victims despite being armed with the powers under Section 5. The doctors “just wash their hands off the case”, she said. “That’s why victims of rape – children – come to court. This tragic situation boils down to the failure of the medical profession.” *The Hindu*, August 25, 2017

<sup>20</sup> *Supra* note 8.

<sup>21</sup> *Supra* note 7.

<sup>22</sup> [1938] 3 All ER 615.

<sup>23</sup> *Supra* note 20.

<sup>24</sup> Civil Writ Petition No.14058 of 2014 (Decided on 02.08.2014).

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 traumatised victim. The need to apply to the court for permission would arise 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. It is hardly necessary in a situation where there is no contest and the victim gives her own consent and the guardian also gives consent and there is proof that such pregnancy was a result of rape. This instruction shall also be circulated to all the Station Inspectors manning police stations in the State of Punjab.”

The Medical Termination of Pregnancy Act in India was amended in 2003 to facilitate better implementation and increase access for women, especially in the private health sector. The Act allows abortion up to 20 weeks of pregnancy and hence women seeking abortions after 20 weeks’ time period are required to obtain permission from the courts. Attempts have been made to amend the Act by way of a Bill which was introduced in 2014 to increase the period of 20 weeks to 24 weeks, but the same has not been passed owing to a strong opposition from the medical community as it also had other provisions which allowed nurses and non-allopathic doctors to conduct abortions.<sup>25</sup>

#### **V. PREVENTIVE MEASURES UNDER CRIMINAL LAW AMENDMENT ACT, 2013 AND THE POCSO ACT**

The newly added provisions in the Code of Criminal Procedure, 1973 vide Criminal Law (Amendment) Act, 2013 in its Section 357C provides for the treatment of rape victims. It obligates all hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person, to immediately, provide the first-aid or medical treatment, free of cost, to rape victims. Also Section 166B has been added to the IPC which provides that “whoever, being in charge of a hospital, public or private, whether run by the Central Government, the State Government, local bodies or any other person, contravenes the provisions of section 357C of the Code of Criminal Procedure, 1973, shall be punished with imprisonment for a term which may extend to one year or with fine or with both.” However, whether this immediate medical treatment can cover the issue of pregnancy of child rape victims is a matter of interpretation.

If a case of child rape is registered within the 20 weeks’ time frame as provided by the MTP Act, the issue of abortion does not arise. Unfortunately, in India, the rape crimes are underreported and unreported due to various reasons which include social taboos. Also child rape victims many a times do not understand the nature of crime being committed on them and are unaware of the consequences. The issue of late term abortions emerges only after a period of 20 weeks where the child complaints of health disorders or where the pregnancy bulge is seen. Also as children and adolescents have less access to reproductive health information and services compared to older married counterparts, they are more likely to delay recognising pregnancy, to delay obtaining care, and to access care from unsafe providers.<sup>26</sup> Furthermore, doctors deter to abort late-term pregnancies of child rape victims in

<sup>25</sup>Shweta Krishnan, “MTP Amendment Bill 2014: Towards Re-imagining Abortion Care”, 12(1) *Indian Journal of Medical Ethics* 43-46 (January-March 2015). Also see, Dr. K.K. Agarwal, “MTP Amendment Bill, 2014: A Retrograde Step by the Ministry of Health”, 25(6) *Indian Journal of Clinical Practice* 506-507 (November 2014). See, Phanjoubam M., “Proposed amendments in the Medical Termination of Pregnancy Act in a nutshell”, 31(1) *J Med Soc* 1-2(2017).

<sup>26</sup>Jejeebhoy, Shireen J., “Adolescent Sexual and Reproductive Behavior: A Review of the Evidence from India: ICRW’ and Mathai, Saramma, “Review of Incomplete and Septic Abortions in India with Particular Reference

order to avoid legal complications.<sup>27</sup>

Rule 5 of the Protection of Children from Sexual Offences Rules, 2012 envisage that “whenever a police officer comes to know about the commission of an offence on a child, he/she is required to arrange to take such child to the nearest hospital or medical care facility centre for emergency medical care. And the registered medical practitioner rendering emergency medical care shall attend to the needs of the child, which includes possible pregnancy and emergency contraceptives to be discussed with the pubertal child and her parent or any other person in whom the child has trust and confidence.”

The aforementioned provisions have been included vide the 2013 amendments in Criminal Laws as a preventive measure to be taken and to ensure that the rape on a girl child does not result into pregnancy. It is significant to note that the said provision should be strictly adhered to while dealing with the cases of child rape victims.

As and when the Court is approached for the permission to seek an abortion, the Courts rely on the advice of the medical boards appointed to examine the girl child. The opinion of the medical board plays an important role in the decision of the case.

## VI. CONCERNS OVER LATE-TERM ABORTIONS OF CHILD RAPE VICTIMS

On critically analysing the aforementioned provisions, the following legal questions do emerge for providing justice to those child rape victims who become pregnant and who could not abort the child within the 20 weeks’ legal time frame:

1. Can't medical practitioners immediately carry out late-term abortions of child rape victims under Section 5(1) considering it as immediately necessary to save the life of the pregnant girl?
2. Is it feasible, affordable and accessible for every child rape victim to approach the Supreme Court/High Court for late-term abortions?
3. Can't the law be made flexible enough to allow abortions, even if it is not life threatening, to abort after a period of 20 weeks?
4. Can't there be any other machinery in place other than the Courts to seek immediate relief from the burdensome pregnancy?
5. Can't government set up special Medical Boards consisting of medical and legal experts in each district to refer such cases for immediate disposal?
6. Can't a duty be imposed on Medical Practitioner to immediately refer cases to such special Medical Boards for prompt action?
7. Can't a panel of medical practitioners having expertise be formed in each district or group of districts to perform complicated late-term abortions of child rape victims?
8. Can't abortion be interpreted to mean immediate medical treatment as per Section 357C of the Cr.P.C?
9. Won't the present time consuming, expensive and inaccessible procedure of approaching the higher judiciary lead to an increase in illegal abortions?<sup>28</sup>

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to West Bengali: Department for International Development “as cited in Heidi Bart Johnston, “Abortion Practice in India: A Review of Literature”, *available at*: [http://www.commonhealth.in/safe\\_abortion/308.pdf](http://www.commonhealth.in/safe_abortion/308.pdf) (last visited on Nov. 30, 2018).

<sup>27</sup>Sec. 8 of MTP provides that no suit or other legal proceeding shall lie against any registered medical practitioner or any damage caused or likely to be caused by anything which is in good faith done or intended to be done under this Act. The section is often ignored from reading!

<sup>28</sup>*Supra* note 26.



10. Can't the good faith clause be made applicable while performing late term abortion of child rape victims?
11. Isn't it necessary that the law which is now almost five decades old be revisited in light of medical developments?
12. Doesn't the issue of late-term abortion, especially of child rape victims, need urgent attention of the Government?

The challenge, experts say, is that there are no legal guidelines under the MTP Act for doctors or courts to follow when deciding on abortion after 20 weeks.