PERSPECTIVE

Defining the Best Interest of a Child: Who Comes First – The Child or the Fetus?

SAMIR H DALWAI[1] AND SANTOSH T SOANS[2]

From [1]New Horizons Child Development Centre, Mumbai, Maharashtra; and [2]AJ Institute of Medical Sciences and Research Centre, Mangalore, Karnataka; India.

Correspondence to: Dr Samir Dalwai, Developmental Pediatrician and Director, New Horizons Child Development Centre, Mumbai, Maharashtra, India. samyrdalwai@enablemychild.org

In 2017, a 10-year-old girl, who was allegedly raped and impregnated, was denied an abortion on the basis of the Medical Termination of Pregnancy Act 1971. This perspective re-examines this issue while prioritizing the best interest of the child. We recommend that boards should be constituted at district-level hospitals, headed by senior pediatricians, and supported by obstetricians, psychologists, neonatologists, medical social workers, and others to decide the course of action – in particular, the outcome, irrespective of the weeks of pregnancy. If not compatible with the child's life, earlier termination of pregnancy should be considered ensuring the availability of state-of-the-art care to the newborn and the young mother.

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In July 2017, the Additional District and Sessions court, Chandigarh (India), denied abortion for a 10-year-old girl who was allegedly raped several times, and impregnated by one of her relative [1,2]. The Medical Termination of Pregnancy (MTP) Act 1971 was the basis of this decision. The obstetrician's report mentioned that the fetus was 'beyond that age' where an abortion would be possible, and added that "at some stage of pregnancy, the baby has earned the right to live'' [2]. The court ruled that an abortion would not be in the girl's interest due to the advanced stage of the pregnancy (~28 weeks). The Federation of the Obstetric and Gynaecological Societies of India (FOGSI) advised premature induction of labour because either case would be extremely challenging given the girl's anatomical inability to carry a child to term [2]. Since then, there has been a spate of many such cases.

The entire national debate on this matter has only defined the fetus as the 'child' and seems to have overlooked that this is primarily a case of child safety and child rights, where 'child' refers to the 10-year-old girl who had been abused. Moreover, the debate has become lopsided due to its engagement with the archaic MTP Act - 1971. Medical view would gravitate towards the fact that the chances of survival of a premature newborn are much more today than in 1970s, due to advances in neonatal intensive care. A case of rape of a minor on multiple occasions merits a thorough criminal investigation, which has been rather side-lined by the national debate on the Right of Abortion. According to the Protection of Children from Sexual Offences (POCSO) Act, 2012 [3], the child's relative could be guilty of 'aggravated penetrative sexual assault' (*i.e.* whoever commits penetrative sexual assault on the child more than once or repeatedly). The Act clearly states that "Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine." Apart from the punishment to the offender, the debate has not focused on the several other aspects that must be evaluated and duly addressed from the perspective of the pediatricians community of India:

The MTP Act 1971 was brought in to prevent cases of harmful and unsterile abortions by legalizing the process of abortion under certain conditions. One of the conditions is the age limit for abortion. The lawmakers have indicated that a woman had enough scope for 20 weeks to decide whether she wanted to carry on with the pregnancy or to abort it. And if she did not think for 20 weeks that she wanted to abort, there would be no reason for her to change her mind thereafter. Also, by 20 weeks, the fetus has acquired a potential viability and may be delivered live. In view of the same, the MTP Act 1971, denies relief, namely abortion, to the pregnant woman when the pregnancy is more than 20 weeks. Thus, in case where a minor girl who has been a victim of rape resulting in a pregnancy, this law does not allow abortion after 20

weeks, and she is expected to continue her pregnancy till term or labour whichever is earlier. However, in cases of child rape and pregnancy, it is important to understand a few key issues.

No one expects a minor to conceive. Most cases of abuse are within the confines of home or neighbourhood and do not come to light in view of the victim's age and ignorance of these issues. And hence it is almost impossible to suspect or detect pregnancy unless it reaches an advanced stage as evident in this case. Most cases are detected when the child is being evaluated for abdominal swelling or pain or weakness.

This is naturally followed by a period of shock or denial by the family, in addition to the task of criminal investigation wherein the child is the witness and has to be examined, both for her health and pregnancy as well as for the crime perpetrated on her. Thus, by the time the family receives appropriate legal counsel and approaches the suitable court, the pregnancy is way beyond 20 weeks. By such time, the MTP Act 1971 prohibits a registered medical practitioner to carry out an abortion.

The debate now lies between the child's right to be liberated from the confines of an ongoing potentially devastating condition of being pregnant at such a tender innocent age impacting her physical and mental health, and the right of the unborn fetus that is considered viable and not appropriate for abortion.

In recent years, the Honourable Supreme Court of India has made an exception and allowed abortion after 20 weeks of pregnancy in some cases where it was discovered after 20 weeks that the fetus had a medical complication not compatible with life or with the quality of life. This is in contrast to the issue of child rape resulting in pregnancy. In the former, the fetus is expected to be terminated in view of its medical condition and hence, abortion is appropriate and allowed. However, in the case of the latter, the fetus if medically healthy, is expected to be carried into the third trimester and beyond. Thus, the dilemma arises between choosing the interest of the child victim or that of the unborn fetus. In the absence of a clear guideline, the best interest of the child should be primary as compared to that of the fetus.

Thus, the health of the child victim, her age, physical fitness, cognitive capacity, emotional status, and familial bonding and support need to be determined in order to decide the course of action. This can be best done by a pediatrician, rather than an obstetrician. A separate mental health evaluation may be in order. Moreover, a neonatologist and excellent neonatal intensive care services need to be requisitioned to save the fetus after delivery. The newborn child may be considered for adoption if the biological family (mother being minor) legally wish to give away the child for adoption; and the services of a medical social worker would be desirable. A pediatrician should be the fulcrum of care to be delivered to such a child; and if the victim is less than 18 years of age, the services of a pediatrician at a minimum, are absolutely critical. This is consistent with the role of the Pediatrician highlighted in the recommendations on recognition and response to child abuse and neglect in the Indian context [4]. In addition, guidelines for detailed forensic examination of a child victim of sexual abuse are also available, which the pediatrician should review, and oversee their implementation while supervising the management of the child-victim [5].

In view of the above, we suggest following actions:

1. The Government should issue an Ordinance whereby such boards are constituted at district level hospitals, preferably medical colleges where available, headed by a senior pediatrician and supported by an obstetrician, a psychologist, a neonatologist, a medical social worker and others, to decide the course of action. Thus, parents and the child would not need to run from pillar to post.
2. This Board shall decide the outcome of the pregnancy. If not compatible with the child-mother's life, earlier termination of pregnancy should be allowed, ensuring availability of state-of-the-art care to the newborn as well as the young mother.
3. The terminology in such cases should be changed from 'Abortion' (which implies death of the fetus) to 'Termination of Pregnancy' or 'Delivery' (which means delivering the fetus at the optimal point for both the mother and child).

Few more pertinent questions or points that need to be considered:

1. What should be the role of the pediatrician in decision-making in any case of abuse of a child below 18 years of age? Other medical professionals due to their different medical roles may fail to justify the perspective of the child victim. It should be reiterated that the ten-year-old is not an adolescent; she is still a child. A pediatrician should be at the center of all decision-making in such cases, as these cases relate to the 'child victim' first, and then to the question of fetal life.
2. Do we have a list of guidelines or a protocol for all judges handling cases of child abuse / child assault? It can be noted that in the above case, the judges based

their decisions only on medical reports submitted by the obstetricians and gynecologists. Clearly, a consensus was not arrived at, by the medical community at-large.

3. Has the Government allotted a Clinical Psychologist and a Social worker for the child? Has the Government taken steps to assess if she has symptoms of psychological stress? Is any social worker helping the family cope-up with the stress?

4. Has the criminal investigation commenced? Has it been defined what action will be taken against the accused?

5. All Abuse is an attempt to assert Power. Is the current law a sufficient deterrent? Does the current law have the power to punish the accused in order to make the accused – and potential future offenders – aware of the consequences of asserting power over children.

6. What do we mean by the 'best interest of a child'? Can there be a legally framed definition of 'best interest' and/or should it not be left to medical science and clinical judgment?

7. In view of the grave scenario of child safety in India, why is amending the MTP Act 1971 not a pressing priority? If girls get impregnated due to rapes, more frequently than what we may think, should the law not be amended as soon as possible, to allow an abortion based on sound clinical judgment that lies in the best interest of the child?

8. State-of-the-art care to the newborn and the young mother will incur substantial costs. Who will bear the expenses involved in the short-term and lifelong care? The family cannot be expected to support optimum care of the unwanted baby. Will the State bear the expenses? Once the baby is born, she/he deserves our best; indeed that is her/his basic right to life.

REFERENCES

1. Court rejects abortion plea of minor's parents. The Indian Express 2017 Jul 19; Chandigarh. Available from: *http://indianexpress.com/article/chandigarh/court-rejects-abortion-plea-of-minors-parents-chandigarh-4757232/*. Accessed February 9, 2018.
2. India's High Court denies abortion for 10-year-old girl. The New York Times 2017 Jul 28. Available from: *https://www.nytimes.com/2017/07/28/world/asia/india-abortion-10-year-old.html*. Accessed February 9, 2018.
3. The Protection of Children from Sexual Offences Act; June 19, 2012. Government of India. Available from: *http://indiacode.nic.in/amendmentacts2012The%20Protection%20of%20Children%22From%20Sexual%20Offences%20Act.pdf*. Accessed February 9, 2018.
4. Aggarwal K, Dalwai S, Galagali P, Mishra D, Prasad C, Thadhani A. Recommendations on recognition and response to child abuse and neglect in the Indian setting. Indian Pediatr. 2010;47:493-504.
5. Seth R, Srivastava RN. Child sexual abuse: Management and Prevention, and Protection of Children from Sexual Offences (POCSO) Act. Indian Pediatr. 2017;54:949-53.