

CHAPTER SEVEN

DISABILITY AND REPRODUCTIVE RIGHTS

The reproductive rights of women with disabilities have been adjudicated by courts on various occasions, especially over the last decade. Parliament enacted the Rights of Persons with Disabilities Act, 2016 (RPD Act), which guarantees various rights to persons with disabilities,¹ including in relation to their reproductive autonomy.² Section 3(4)(b) of the Medical Termination of Pregnancy Act, 1971 (MTP Act), mandates that no pregnancy shall be terminated without the consent of the pregnant woman. This is further reiterated, in the context of women with disabilities, by the RPD Act. Section 92(f) of the RPD Act criminalizes performing, conducting, or directing a medical procedure on a woman with disability which leads to or is likely to lead to the termination of pregnancy without her express consent. It exempts procedures where medical termination of pregnancy is carried out in severe cases of disability, with the consent of the guardian of the woman, and on the opinion of a registered medical practitioner. This exemption is in line with Section 3(4)(a) of the MTP Act, which states that the pregnancy of a woman who is above the age of 18 and mentally ill cannot be terminated without the consent in writing of her guardian. The MTP Act defines a “mentally ill” person as a “person who is in need of treatment by reason of any mental disorder other than mental retardation.” In the context of this statutory framework, in this chapter we discuss cases that examine reproductive autonomy of women with intellectual disabilities.³

Pregnant Women with Intellectual Disabilities

In *Suchita Srivastava v. Chandigarh Administration*,⁴ the Supreme Court set aside the High Court’s order for termination of pregnancy of a woman with “mild mental retardation” (intellectual disability) without her consent. The Court noted that the woman was not “mentally ill” and had attained majority and upheld her fundamental right to make reproductive choices under Article 21 of the Indian Constitution. It contrasted “mental retardation” with “mental illness” in interpreting Section 3 of the MTP Act in relation to the issue of consent of a woman to terminate her pregnancy, stating that diluting the requirement of consent for women with “mental retardation” would be an arbitrary and unreasonable restriction of reproductive rights. The Court noted the state obligation under the Convention on the Rights of Persons with Disabilities to ensure respect for reproductive choice of women with mental retardation.

In *Z v. State of Bihar & Ors.*,⁵ the Supreme Court laid emphasis on a woman’s right to bodily integrity, personal autonomy, and sovereignty over her body and stated that the concept of a guardian should not be overemphasized. In the case of denial of abortion to a woman with mild mental retardation because of lack of guardian and spousal consent, the Court criticized the insistence on the consent of the woman’s guardian, when (i) she was over the age of majority and did not suffer from mental illness; (ii) she had been raped and wished to terminate her pregnancy; and (iii) her medical report did not indicate any risk to her life from termination of pregnancy. The Court awarded compensation to the woman under the public law remedy and victim compensation scheme under the Code of Criminal Procedure, 1973 for the grave mental injury of having to carry a pregnancy resulting from rape to term and to give birth, due to the laxity of the state authorities.

Related Human Rights Standards and Jurisprudence

Below is a selection of international and regional human rights standards and jurisprudence relating to state obligations to ensure the reproductive autonomy of women and girls with disabilities. Human rights mechanisms recognize that women and girls with disabilities are particularly vulnerable to sexual and reproductive health violations and have established state obligations to ensure that sexual and reproductive health information, facilities, goods, and services are available, accessible, acceptable, and of good quality for women and girls with disabilities on a basis of equality with others.

The Government of India has committed itself to comply with obligations under various international human rights treaties to protect sexual and reproductive health and rights. These include the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Rights of Persons with Disabilities (CRPD).⁶ Under international law, all government organs and authorities, including the judiciary, are obligated to uphold the laws and standards outlined in these treaties.⁷ The Supreme

Court has held that in light of the obligation to “foster respect for international law” in Article 51 (c) of the Indian Constitution “[a]ny International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into [fundamental rights] to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.”⁸

INTERNATIONAL TREATY STANDARDS

TREATIES

- **CRPD, Articles 3, 5–7, 8(1)(b), 9–10, 12, 15, 17, 22–23, 25** (calling for respect for inherent dignity and individual autonomy, and guaranteeing the rights to life, privacy, personal integrity, nondiscrimination, freedom from torture and inhuman or degrading treatment, and equality of legal capacity as well as support in exercising this capacity; outlining states’ duties to “combat stereotypes, prejudices and harmful practices relating to persons with disability, including those based on sex and age”; safeguarding the rights to sexual and reproductive health on a basis of free and informed consent, including the rights to retain fertility, to decide the number and spacing of children, to access reproductive and family planning facilities, information and services, including in rural areas, and to access the necessary means to exercise these rights; and protecting the right to found a family and to access child-rearing support, in keeping with the best interests of the child).
- **CEDAW, Articles 1–3, 5(a), 10(h), 12, 16(d)–(f)** (outlining women’s rights to equality in law and practice, including within the family; to health, including access to family planning information and services; and to determine the number and spacing of children; and defining states’ duty to eliminate cultural prejudices based on stereotyped roles for men and women).
- **ICESCR, Articles 2(2), 3, 10, 12(1), 15(1)(b)** (guaranteeing the rights to health, equality, and non-discrimination, and to enjoy the benefits of scientific progress and its applications; and according “the widest possible protection and assistance to the family, [...] particularly for its establishment,” including “[s]pecial measures of protection and assistance [...] on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions”).
- **ICCPR, Articles 2(1), 6, 7, 17, 23, 26** (protecting the rights to life, non-discrimination, equality before the law, freedom from torture, ill-treatment and non-consensual medical experimentation, privacy, and to found a family).

SELECTED GENERAL COMMENTS

- **Joint statement by the CRPD and CEDAW Committees, *Guaranteeing sexual and reproductive health and rights for all women, in particular women with disabilities***, 19 Aug. 2018 (outlining the obligation of states to respect, protect, and fulfill the rights of all women, including women with disabilities, in relation to their sexual and reproductive health and rights; emphasizing that “states parties should decriminalize abortion in all circumstances and legalize it in a manner that fully respects the autonomy of women, including women with disabilities”; affirming the obligation of states to place women’s autonomy at the center of policy and law-making relating to sexual and reproductive health and to ensure that all women, including women with disabilities are protected against reproductive health procedures against their will or without their informed consent; and stating that states must address the root causes of discrimination against women and persons with disabilities).
- **CRPD, *General Comment No. 6 (2018) on equality and non-discrimination***, U.N. Doc. CRPD/C/GC/6 (2018), paras. 7, 17, 30, 36, 61–62, 66 (emphasizing that prohibited discrimination includes “denial of reasonable accommodations” for people with disabilities as well as denials of access to health care and forced or involuntary sterilization, contraception, pregnancy, abortion, or hormone interventions; and calling on states to protect the rights to health and to family by protecting the rights to legal capacity, to access justice, to receive health care on a basis of free and informed consent, to accessible facilities and information, and for parents with disabilities to access the necessary support to care for children).
- **CRPD Committee, *General Comment No. 3 (2016) on women and girls with disabilities***, U.N. Doc. CRPD/C/GC/3 (2016), paras. 2, 10, 23, 28–30, 32, 38–44, 47–48, 51, 54, 57, 63(a), 64(b)–(c), 65 (calling on states to ensure that sexual and reproductive health facilities, information, and services are available, accessible, and affordable for women with physical and mental impairments, on a basis of free and informed consent, with decision-making support where desired; highlighting that violations of the rights to sexual and reproductive

health, such as forced or involuntary sterilization, abortion, pregnancy, or contraception, are a high-priority concern for women with disabilities; and noting that such violations are often facilitated by restrictions of legal capacity and harmful stereotypes).

- **CRPD Committee, *General Comment No. 1: Article 12: Equal Recognition Before the Law***, U.N. Doc. CRPD/C/GC/1 (2014), paras. 8, 29(f), 33, 35, 41–42 (outlining that the rights to autonomous decision-making, to reproductive health on a basis of free and informed consent, to physical and mental integrity, to found a family, and to freedom from torture, violence, and abuse often depend upon recognition of the right to legal capacity; and underscoring that the right to supported decision-making, where desired, must not be used to justify limiting a person’s legal capacity or other fundamental rights).
- **CEDAW Committee, *General Recommendation No. 24 on article 12 of the Convention (women and health)***, U.N. Doc. A/54/38/Rev.1 (1999), paras. 6, 12, 14, 25–27, 31 (highlighting that, particularly for women with disabilities, including mental disabilities, states must ensure that health services are accessible, sensitive to their needs, and respectful of their dignity and rights to autonomy, privacy, confidentiality, informed consent, and choice; and outlining that states should remove all barriers and restrictions to women’s access to health services, including abortion as well as prenatal, perinatal, and postnatal care).
- **Committee for Economic Social and Cultural Rights (CESCR), *General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the ICESCR)***, U.N. Doc. E/C.12/GC/22 (2016), paras. 8–9, 12–21, 24, 30 (outlining that to ensure the realization of the right to sexual and reproductive health, states must address contextual social determinants such as sex and disability and ensure that facilities, information, and decision-making support are accessible, available, acceptable, and of good quality for persons with disabilities).
- **CESCR, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12)***, U.N. Doc. E/C.12/2000/4 (2000), paras. 12, 18–23, 26, 33–37 (emphasizing the state duty to respect, protect, and fulfill the right to health without discrimination against women or persons with disabilities).
- **Human Rights Committee, *General Comment No. 36 (2018) on Article 6 of the ICCPR, on the right to life***, U.N. Doc. CCPR/C/GC/36 (2018), paras. 8, 24–25 (outlining that states may not adopt measures on voluntary termination of pregnancy that violate women’s rights to life, dignity, nondiscrimination, freedom from inhuman and degrading treatment, and privacy; and highlighting that persons with disabilities, including psychosocial and intellectual disabilities, are entitled to specific measures of protection so as to enjoy their right to life on an equal basis with others, including access to essential facilities and services and heightened protection for those in detention or institutions).

INQUIRIES AND INDIVIDUAL COMPLAINTS

- **Human Rights Committee, *L.M.R. v. Argentina, Communication No. 1608/2007***, U.N. Doc. CCPR/C/101/D/1608/2007 (2011), paras. 9.2–11 (where a rape survivor with an intellectual disability sought an abortion as permitted under the law, but was prevented from receiving it by a court injunction that delayed the abortion past a gestational period where the hospital would perform it, even after the Supreme Court overturned the injunction: finding violations of her rights to privacy, to be free from cruel and inhuman treatment, with a particular view to her vulnerability due to her disability, and to access an effective remedy that could guarantee timely access to legal abortion in practice; and requiring the state to provide compensation and guarantees of non-repetition).

UNITED NATIONS HUMAN RIGHTS EXPERT REPORTS

- **Special Rapporteur on the rights of persons with disabilities (SR Disability), *Rights of persons with disabilities***, U.N. Doc. A/73/161 (2018), paras. 13, 16, 27, 40, 44, 49–50, 54, 57, 68, 72, 74 (highlighting persons with disabilities’ rights to access sexual and reproductive health information and services, and to retain fertility and decide on the number and spacing of their children on a basis of informed consent and free from violence or coercion; stressing that stereotypes and stigmas undermine women’s and girls’ access to sexual and reproductive health care; and urging states to ensure that sexual and reproductive health-care goods, services, facilities, and information are available, accessible, affordable, acceptable, and of good quality for women and girls with disabilities, free from third-party consent requirements or substitute decision-making, including by guardians, family members, or health professionals).

- **SR Disability, *Sexual and reproductive health and rights of girls and young women with disabilities***, U.N. Doc. A/72/133 (2017), in its entirety, but particularly paras. 60–62 (providing guidance to states on how to ensure legal and policy frameworks that ensure women and girls with disabilities’ sexual and reproductive health and rights, including by working to amend stigma and stereotypes; establishing laws, policies, and procedural safeguards that protect their rights, including the right to autonomous decision-making; and providing human rights training to health-care and service providers, teachers, families, and legal officers).
- **Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *Report on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health***, U.N. Doc. A/64/272 (2009), paras. 38, 54–55, 57–60, 69–74, 94–95, 98 (highlighting the rights of women with disabilities to give free and informed consent with decision-making support where necessary; noting that nonconsensual sterilization may amount to torture and ill-treatment; outlining that women are entitled to reproductive health information and services and that women may not be denied the right to consent-based health care justified by the best interests of the unborn child or due to third-party consent requirements, with particular attention to gender inequality and legal capacity for persons with disabilities).
- **Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (SR Torture), *Report of the SR Torture, Juan E. Méndez***, U.N. Doc. A/HRC/22/53 (2013), paras. 20, 23, 27, 30, 32, 35, 48–50, 58–59, 65–66, 80, 90 (emphasizing the role of deprivation of legal capacity in facilitating forced medical interventions against persons with disability, which may rise to the level of torture or ill treatment).
- **Working Group on the issue of discrimination against women in law and in practice, *Report of the Working Group on the issue of discrimination against women in law and in practice***, U.N. Doc. A/HRC/32/44 (2016), paras. 45–47 (highlighting that “[w]omen with disabilities face particular barriers in accessing health care for reasons of cost, distance, discriminatory attitudes, and lack of physical access or information”; and noting the heightened vulnerability of women with disabilities, and particularly intellectual disabilities, to nonconsensual sterilization, abortion, or long-term contraception).

SELECTED REGIONAL CASE LAW

EUROPEAN COURT OF HUMAN RIGHTS

- ***Tysic v. Poland, Application No. 5410/03 (2007)***, paras. 105–130, 146–152 (where a woman suffered the loss of her eyesight, worsening a preexisting disability, due to pregnancy but was denied an abortion that was legally permitted on the grounds of risk to her health: finding violations of her right to private life, encompassing the rights to personal autonomy, physical integrity, and to access information; reiterating that where legal, abortion must be practically accessible; and ordering the state to pay compensation for the woman’s mental suffering due to her inability to prevent the risk of vision loss by terminating the pregnancy).

INTER-AMERICAN COURT OF HUMAN RIGHTS

- ***Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica, Ser. C, No. 257, Preliminary Objections, Merits, Reparations and Costs (2012)***, paras. 272, 285–304 (where couples were denied access to assisted reproductive technology: holding that the decision to have children is encompassed in the rights to personal integrity, private and family life, and autonomy and identity of the person, and that denial of access to this technology was discriminatory on the basis of reproductive disability, gender, and financial situation).

RELEVANT EXCERPTS FROM SELECT CASE LAW

(Arranged chronologically)

IN THE SUPREME COURT OF INDIA

Suchita Srivastava & Anr. v. Chandigarh Administration
(2009) 9 SCC 1

K.G. Balakrishnan, C.J., and P. Sathasivam and B.S. Chauhan, JJ.

A “mentally retarded” woman became pregnant as a result of rape while she was living as an inmate in a government run welfare home in Chandigarh. The Chandigarh Administration had received approval from the Punjab and Haryana High Court to terminate her pregnancy (of 19 weeks), as it was considered by the court to be in her best interest. In this appeal, the Supreme Court examined the validity of the High Court’s order which did not take into account the woman’s consent. It also considered what should be the appropriate approach for a court while ascertaining the “best interests” of an intellectually disabled woman in exercise of its “parens patriae” jurisdiction.

Balakrishnan, C.J.: “Leave granted. A Division Bench of the High Court of Punjab and Haryana in *Chandigarh Admn. v. Nemo*, by orders dated 9-6-2009 [CWP No. 8760 of 2009, order dated 9-6-2009] and 17-7-2009 [CWP No. 8760 of 2009, order dated 17-7-2009], ruled that it was in the best interests of a mentally retarded woman to undergo an abortion.

2. The said woman (name withheld, hereinafter “the victim”) had become pregnant as a result of an alleged rape that took place while she was an inmate at a government-run welfare institution located in Chandigarh. After the discovery of her pregnancy, the Chandigarh Administration, which is the respondent in this case, had approached the High Court seeking approval for the termination of her pregnancy, keeping in mind that in addition to being mentally retarded she was also an orphan who did not have any parent or guardian to look after her or her prospective child.

3. The High Court had the opportunity to peruse a preliminary medical opinion and chose to constitute an expert body consisting of medical experts and a judicial officer for the purpose of a more thorough inquiry into the facts. In its order dated 9-6-2009 [CWP No. 8760 of 2009, order dated 9-6-2009], the High Court framed a comprehensive set of questions that were to be answered by the expert body. In such cases, the presumption is that the findings of the expert body would be given due weightage in arriving at a decision. However, in its order dated 17-7-2009 [CWP No. 8760 of 2009, order dated 17-7-2009] the High Court directed the termination of the pregnancy in spite of the expert body’s findings which show that the victim had expressed her willingness to bear a child.

4. Aggrieved by these orders, the appellants moved this Court...and sought a hearing on an urgent basis because the woman in question had been pregnant for more than 19 weeks at that point of time. We agreed to the same since the statutory limit for permitting the termination of a pregnancy i.e. 20 weeks was fast approaching.

...

6. After hearing the counsel at length we had also considered the opinions of some of the medical experts who had previously examined the woman in question. Subsequent to the oral submissions made by the counsel and the medical experts, we had granted a stay on the High Court’s orders thereby ruling against the termination of the pregnancy.

7. The rationale behind our decision hinges on two broad considerations. The first consideration is whether it was correct on the part of the High Court to direct the termination of pregnancy without the consent of the woman in question. This was the foremost issue since a plain reading of the relevant provision in the Medical Termination of Pregnancy Act, 1971 clearly indicates that consent is an essential condition for performing an abortion on a woman who has attained the age of majority and does not suffer from any “mental illness”. As will be explained below, there is a clear distinction between “mental illness” and “mental retardation” for the purpose of this statute.

8. The second consideration before us is that even if the said woman was assumed to be mentally incapable of making an informed decision, what are the appropriate standards for a court to exercise “parens patriae” jurisdiction? If the intent was to ascertain the “best interests” of the woman in question, it is our considered opinion that the direction for

termination of pregnancy did not serve that objective. Of special importance is the fact that at the time of hearing, the woman had already been pregnant for more than 19 weeks and there is a medico-legal consensus that a late-term abortion can endanger the health of the woman who undergoes the same.

...

13. [Upon discovery of the pregnancy of the woman], [t]he Director-Principal of GMCH thereafter constituted a three-member Medical Board on 25-5-2009 which was headed by the Chairperson of the Department of Psychiatry in the said hospital. Their task was to evaluate the mental status of the victim and they opined that the victim's condition was that of "mild mental retardation".

...

TERMINATION OF PREGNANCY CANNOT BE PERMITTED WITHOUT THE CONSENT OF THE VICTIM IN THIS CASE

18. Even though the expert body's findings were in favour of continuation of the pregnancy, the High Court decided to direct the termination of the same in its order dated 17-7-2009 [CWP No. 8760 of 2009, order dated 17-7-2009]. We disagree with this conclusion since the victim had clearly expressed her willingness to bear a child.

19. The victim's reproductive choice should be respected in spite of other factors such as the lack of understanding of the sexual act as well as apprehensions about her capacity to carry the pregnancy to its full term and the assumption of maternal responsibilities thereafter. We have adopted this position since the applicable statute clearly contemplates that even a woman who is found to be "mentally retarded" should give her consent for the termination of a pregnancy.

20. In this regard we must stress upon the language of Section 3 of the Medical Termination of Pregnancy Act, 1971 (hereinafter also referred to as "the MTP Act") ...

...

22. There is no doubt that a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised 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 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. Furthermore, women are also free to choose birth control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, 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 MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.

23. A perusal of [Sections 3 and 4 of the MTP Act] makes it clear that ordinarily a pregnancy can be terminated only when a medical practitioner is satisfied that a "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" [as per Section 3(2)(i)] or when "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" [as per Section 3(2)(ii)]...

24. The Explanations to Section 3 have also contemplated the termination of pregnancy when the same is the result of a rape or a failure of birth control methods since both of these eventualities have been equated with a "grave injury to the mental health" of a woman.

25. In all such circumstances, the consent of the pregnant woman is an essential requirement for proceeding with the termination of pregnancy. This position has been unambiguously stated in Section 3(4)(b) of the MTP Act, 1971.

26. The exceptions to this rule of consent have been laid down in Section 3(4)(a) of the Act. Section 3(4)(a) lays down that when the pregnant woman is below eighteen years of age or is a "mentally ill" person, the pregnancy can be terminated if the guardian of the pregnant woman gives consent for the same. The only other exception is found in Section 5(1) of the MTP Act which permits a registered medical practitioner to proceed with a termination of pregnancy when he/she is of an opinion formed in good faith that the same is "immediately necessary to save the life of the pregnant woman". Clearly, none of these exceptions are applicable to the present case.

27. In the facts before us, the State could claim that it is the guardian of the pregnant victim since she is an orphan and has been placed in government-run welfare institutions. However, the State's claim to guardianship cannot be mechanically extended in order to make decisions about the termination of her pregnancy. An ossification test has revealed that the physical age of the victim is around 19-20 years. This conclusively shows that she is not a minor. Furthermore, her condition has been described as that of "mild mental retardation" which is clearly different from the condition of a "mentally ill person" as contemplated by Section 3(4)(a) of the MTP Act.

28. It is pertinent to note that the MTP Act had been amended in 2002, by way of which the word "lunatic" was replaced by the expression "mentally ill person" in Section 3(4)(a) of the said statute. The said amendment also amended Section 2(b) of the MTP Act, where the erstwhile definition of the word "lunatic" was replaced by the definition of the expression "mentally ill person" which reads as follows:

"2. (b) 'mentally ill person' means a person who is in need of treatment by reason of any mental disorder other than mental retardation;"

The 2002 amendment to the MTP Act indicates that the legislative intent was to narrow down the class of persons on behalf of whom their guardians could make decisions about the termination of pregnancy. It is apparent from the definition of the expression "mentally ill person" that the same is different from that of "mental retardation". A similar distinction can also be found in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. This legislation treats "mental illness" and "mental retardation" as two different forms of "disability". This distinction is apparent if one refers to Sections 2(i), (q) and (r) [of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.] which define "disability", "mental illness" and "mental retardation" in the following manner:

"2. (i) 'disability' means—

...

(vi) mental retardation;

(vii) mental illness;

(q) 'mental illness' means any mental disorder other than mental retardation;

(r) 'mental retardation' means a condition of arrested or incomplete development of mind of a person which is specially characterised by subnormality of intelligence."

The same definition of "mental retardation" has also been incorporated in Section 2(g) of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999.

29. These legislative provisions clearly show that persons who are in a condition of "mental retardation" should ordinarily be treated differently from those who are found to be "mentally ill". While a guardian can make decisions on behalf of a "mentally ill person" as per Section 3(4)(a) of the MTP Act, the same cannot be done on behalf of a person who is in a condition of "mental retardation".

30. The only reasonable conclusion that can be arrived at in this regard is that the State must respect the personal autonomy of a mentally retarded woman with regard to decisions about terminating a pregnancy. It can also be reasoned that while the explicit consent of the woman in question is not a necessary condition for continuing the pregnancy, the MTP Act clearly lays down that obtaining the consent of the pregnant woman is indeed an essential condition for proceeding with the termination of a pregnancy.

31. As mentioned earlier, in the facts before us the victim has not given consent for the termination of pregnancy. We cannot permit a dilution of this requirement of consent since the same would amount to an arbitrary and unreasonable restriction on the reproductive rights of the victim. We must also be mindful of the fact that any dilution of the requirement of consent contemplated by Section 3(4)(b) of the MTP Act is liable to be misused in a society where sex-selective abortion is a pervasive social evil.

32. Besides placing substantial reliance on the preliminary medical opinions presented before it, the High Court has noted some statutory provisions in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 as well as the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental

Retardation and Multiple Disabilities Act, 1999 where the distinction between “mental illness” and “mental retardation” has been collapsed. The same has been done for the purpose of providing affirmative action in public employment and education as well as for the purpose of implementing anti-discrimination measures. The High Court has also taken note of the provisions in IPC which lay down strong criminal law remedies that can be sought in cases involving the sexual assault of “mentally ill” and “mentally retarded” persons. The High Court points to the blurring of these distinctions and uses this to support its conclusion that “mentally ill” persons and those suffering from “mental retardation” ought to be treated similarly under the MTP Act, 1971. We do not agree with this proposition.

33. We must emphasise that while the distinction between these statutory categories can be collapsed for the purpose of empowering the respective classes of persons, the same distinction cannot be disregarded so as to interfere with the personal autonomy that has been accorded to mentally retarded persons for exercising their reproductive rights.

TERMINATION OF PREGNANCY IS NOT IN THE “BEST INTERESTS” OF THE VICTIM

34. In the impugned orders, the High Court has in fact agreed with the proposition that a literal reading of Section 3 of the MTP Act would lead to the conclusion that a mentally retarded woman should give her consent in order to proceed with the termination of a pregnancy. However, the High Court has invoked the doctrine of “*parens patriae*” while exercising its writ jurisdiction to go beyond the literal interpretation of the statute and adopt a purposive approach. The same doctrine has been used to arrive at the conclusion that the termination of pregnancy would serve the “best interests” of the victim in the present case even though she has not given her consent for the same. We are unable to accept that line of reasoning.

35. The doctrine of “*parens patriae*” has been evolved in common law and is applied in situations where the State must make decisions in order to protect the interests of those persons who are unable to take care of themselves. Traditionally this doctrine has been applied in cases involving the rights of minors and those persons who have been found to be mentally incapable of making informed decisions for themselves.

36. Courts in other common law jurisdictions have developed two distinct standards while exercising “*parens patriae*” jurisdiction for the purpose of making reproductive decisions on behalf of mentally retarded persons. These two standards are the “best interests” test and the “substituted judgment” test.

37. As evident from its literal description, the “best interests” test requires the Court to ascertain the course of action which would serve the best interests of the person in question. In the present setting this means 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. It is important to note that the Court’s decision should be guided by the interests of the victim alone and not those of the other stakeholders such as guardians or the society in general. It is evident that the woman in question will need care and assistance which will in turn entail some costs. However, that cannot be a ground for denying the exercise of reproductive rights.

38. The application of the “substituted judgment” test requires the Court to step into the shoes of a person who is considered to be mentally incapable and attempt to make the decision which the said person would have made, if she was competent to do so. This is a more complex inquiry but this test can only be applied to make decisions on behalf of persons who are conclusively shown to be mentally incompetent.

39. In the present case the victim has been described as a person suffering from “mild mental retardation”. This does not mean that she is entirely incapable of making decisions for herself. The findings recorded by the expert body indicate that her mental age is close to that of a nine-year-old child and that she is capable of learning through rote memorisation and imitation. Even the preliminary medical opinion indicated that she had learnt to perform basic bodily functions and was capable of simple communications. In light of these findings, it is the “best interests” test alone which should govern the inquiry in the present case and not the “substituted judgment” test.

40. We must also be mindful of the varying degrees of mental retardation, namely, those described as borderline, mild, moderate, severe and profound instances of the same. Persons suffering from severe and profound mental retardation usually require intensive care and supervision and a perusal of academic materials suggests that there is a strong preference for placing such persons in an institutionalised environment. However, persons with borderline, mild or moderate mental retardation are capable of living in normal social conditions even though they may need some supervision and assistance from time to time.

41. A developmental delay in mental intelligence should not be equated with mental incapacity and as far as possible the law should respect the decisions made by persons who are found to be in a state of mild to moderate “mental retardation”.

42. In the present case, the victim has expressed her willingness to carry the pregnancy till its full term and bear a child. The expert body has found that she has a limited understanding of the idea of pregnancy and may not be fully prepared for assuming the responsibilities of a mother. As per the findings, the victim is physically capable of continuing with the pregnancy and the possible risks to her physical health are similar to those of any other expecting mother. There is also no indication that the prospective child may be born with any congenital defects. However, it was repeatedly stressed before us that the victim has a limited understanding of the sexual act and perhaps does not anticipate the social stigma that may be attached to a child which will be born on account of an act of rape.

43. Furthermore, the medical experts who appeared before us also voiced the concern that the victim will need constant care and supervision throughout the pregnancy as well as for the purposes of delivery and childcare after birth. Maternal responsibilities do entail a certain degree of physical, emotional and social burdens and it was proper for the medical experts to gauge whether the victim is capable of handling them.

44. The counsel for the respondent also alerted us to the possibility that even though the victim had told the members of the expert body that she was willing to bear the child, her opinion may change in the future since she was also found to be highly suggestible.

45. Even if it were to be assumed that the victim's willingness to bear a child was questionable since it may have been the product of suggestive questioning or because the victim may change her mind in the future, there is another important concern that should have been weighed by the High Court. At the time of the order dated 17-7-2009 [CWP No. 8760 of 2009, order dated 17-7-2009], the victim had already been pregnant for almost 19 weeks. By the time the matter was heard by this Court on an urgent basis on 21-7-2009, the statutory limit for terminating a pregnancy i.e. 20 weeks, was fast approaching. There is of course a cogent rationale for the provision of this upper limit of 20 weeks (of the gestation period) within which the termination of a pregnancy is allowed. This is so because there is a clear medical consensus that an abortion performed during the later stages of a pregnancy is very likely to cause harm to the physical health of the woman who undergoes the same.

...

48. ...[I]t is our considered opinion that the direction given by the High Court (in its order dated 17-7-2009 [CWP No. 8760 of 2009, order dated 17-7-2009]) to terminate the victim's pregnancy was not in pursuance of her “best interests”. Performing an abortion at such a late stage could have endangered the victim's physical health and the same could have also caused further mental anguish to the victim since she had not consented to such a procedure.

49. We must also mention that the High Court in its earlier order had already expressed its preference for the termination of the victim's pregnancy (see para 38 in order dated 9-6-2009 [CWP No. 8760 of 2009, order dated 9-6-2009]) even as it proceeded to frame a set of questions that were to be answered by an expert body which was appointed at the instance of the High Court itself. In such a scenario, it would have been more appropriate for the High Court to express its inclination only after it had considered the findings of the expert body.

50. Our conclusions in the present case are strengthened by some norms developed in the realm of international law. For instance one can refer to the principles contained in the United Nations Declaration on the Rights of Mentally Retarded Persons, 1971 [GA Res 2856 (XXVI) of 20-12-1971] which have been reproduced below:

“1. The mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings.

2. The mentally retarded person has a right to proper medical care and physical therapy and to such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential.

3. The mentally retarded person has a right to economic security and to a decent standard of living. He has a right to perform productive work or to engage in any other meaningful occupation to the fullest possible extent of his capabilities.

4. Whenever possible, the mentally retarded person should live with his own family or with foster parents and participate in different forms of community life. The family with which he lives should receive assistance. If care in an institution becomes necessary, it should be provided in surroundings and other circumstances as close as possible to those of normal life.
5. The mentally retarded person has a right to a qualified guardian when this is required to protect his personal well-being and interests.
6. The mentally retarded person has a right to protection from exploitation, abuse and degrading treatment. If prosecuted for any offence, he shall have a right to due process of law with full recognition being given to his degree of mental responsibility.
7. Whenever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities.”

Special emphasis should be placed on Principle 7 (cited above) which prescribes that a fair procedure should be used for the “restriction or denial” of the rights guaranteed to mentally retarded persons, which should ordinarily be the same as those given to other human beings.

51. In respecting the personal autonomy of mentally retarded persons with regard to the reproductive choice of continuing or terminating a pregnancy, the MTP Act lays down such a procedure. We must also bear in mind that India has ratified the Convention on the Rights of Persons with Disabilities (CRPD) on 1-10-2007 and the contents of the same are binding on our legal system.

52. The facts of the present case indeed posed some complex questions before us. While we must commend the counsel for their rigorous argumentation, this case also presents an opportunity to confront some social stereotypes and prejudices that operate to the detriment of mentally retarded persons. Without reference to the present proceedings, we must admit to the fact that even medical experts and judges are unconsciously susceptible to these prejudices. [See generally: Susan Stefan, “Whose Egg is it anyway? Reproductive Rights of Incarcerated, Institutionalised and Incompetent Women”, 13 *Nova Law Review* 405-56 (November 1989).]

53. We have already stressed that persons who are found to be in borderline, mild and moderate forms of mental retardation are capable of living in normal social conditions and do not need the intensive supervision of an institutionalised environment. As in the case before us, institutional upbringing tends to be associated with even more social stigma and the mentally retarded person is denied the opportunity to be exposed to the elements of routine living. For instance, if the victim in the present case had received the care of a family environment, her guardians would have probably made the efforts to train her to avoid unwelcome sexual acts. However, the victim in the present case is an orphan who has lived in an institutional setting all her life and she was in no position to understand or avoid the sexual activity that resulted in her pregnancy. The responsibility of course lies with the State and fact situations such as those in the present case should alert all of us to the alarming need for improving the administration of the government-run welfare institutions.

54. It would also be proper to emphasise that persons who are found to be in a condition of borderline, mild or moderate mental retardation are capable of being good parents. Empirical studies have conclusively disproved the eugenics theory that mental defects are likely to be passed on to the next generation. The said “eugenics theory” has been used in the past to perform forcible sterilisations and abortions on mentally retarded persons. [See generally: Elizabeth C. Scott, “Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy”, *Duke Law Journal* 806-65 (November 1986).] We firmly believe that such measures are anti-democratic and violative of the guarantee of “equal protection before the law” as laid down in Article 14 of our Constitution.

55. It is also pertinent to note that a condition of “mental retardation” or developmental delay is gauged on the basis of parameters such as intelligence quotient (IQ) and mental age (MA) which mostly relate to academic abilities. It is quite possible that a person with a low IQ or MA may possess the social and emotional capacities that will enable him or her to be a good parent. Hence, it is important to evaluate each case in a thorough manner with due weightage being given to medical opinion for deciding whether a mentally retarded person is capable of performing parental responsibilities.

CONCLUSION AND DIRECTIONS

...

57. The substantive questions posed before us were whether the victim's pregnancy could be terminated even though she had expressed her willingness to bear a child and whether her "best interests" would be served by such termination. As explained in the forementioned discussion, our conclusion is that the victim's pregnancy cannot be terminated without her consent and proceeding with the same would not have served her "best interests".

58. In our considered opinion, the language of the MTP Act clearly respects the personal autonomy of mentally retarded persons who are above the age of majority. Since none of the other statutory conditions have been met in this case, it is amply clear that we cannot permit a dilution of the requirement of consent for proceeding with a termination of pregnancy. We have also reasoned that proceeding with an abortion at such a late stage (19-20 weeks of gestation period) poses significant risks to the physical health of the victim.

59. Lastly, we have urged the need to look beyond social prejudices in order to objectively decide whether a person who is in a condition of mild mental retardation can perform parental responsibilities.

60. The findings recorded by the expert body which had examined the victim indicate that the continuation of the pregnancy does not pose any grave risk to the physical or mental health of the victim and that there is no indication that the prospective child is likely to suffer from a congenital disorder. However, concerns have been expressed about the victim's mental capacity to cope with the demands of carrying the pregnancy to its full term, the act of delivering a child and subsequent childcare. In this regard, we direct that the best medical facilities be made available so as to ensure proper care and supervision during the period of pregnancy as well as for post-natal care.

61. Since there is an apprehension that the woman in question may find it difficult to cope with maternal responsibilities, the Chairperson of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities (constituted under the similarly named 1999 Act) has stated in an affidavit that the said Trust is prepared to look after the interests of the woman in question which will include assistance with childcare. In the said affidavit, it has been stated that this Trust will consult the Chandigarh Administration as well as experts from the Post Graduate Institute of Medical Education and Research (PGIMER) in order to ensure proper care and supervision.

62. If any grievances arise with respect to the same subject-matter in the future, the respondent can seek directions from the High Court of Punjab and Haryana under its writ jurisdiction. The present appeal is disposed of accordingly."

IN THE SUPREME COURT OF INDIA

Z v. State of Bihar & Ors.**(2018) 11 SCC 572****Dipak Misra, Amitava Roy and A.M. Khanwilkar, JJ.**

The petitioner, a destitute woman aged 35 years, was found to be pregnant, HIV+ and was diagnosed with mild mental retardation. Subsequently, she disclosed that she had been raped and wished to terminate her pregnancy of 17 weeks. The hospital authorities, however, refused to carry the procedure as her father, who signed the consent form, failed to prove his identity. The petitioner approached the Patna High Court where her request was denied on several grounds, including that her pregnancy was over 20 weeks at the time of writ petition, her medical report did not indicate any foetal abnormality or risk to her life due to the pregnancy, and that termination would require a major surgical procedure. In this case, the Supreme Court examined the correctness of the High Court's order and dealt with the question of compensation to the victim for the suffering caused due to laxity on part of the State authorities.

Misra, J.: "...

2. The factual score that has been depicted in the instant appeal is reflective of a retardant attitude and laxness to the application of the provisions of law at the appropriate time by the authorities that can cause a disastrous effect on the mind of a hapless victim. And the victim here is a destitute woman, who was brought to a shelter home from the footpath, as she was not wanted by her husband and her family, living in abject poverty and being scared of social stigma could not afford her a home...The woman, a destitute, was found to be pregnant by the functionaries of the home and further being aware of the fact that she had been condemned to that condition because of rape committed on her, the competent authority of the home took her to the hospital for termination of pregnancy with her consent. Though the steps taken by the shelter home were prompt, yet delay was caused by the authorities of the hospital. The delay in such a situation has the seed that can cause depression to a woman, who is already in despair. And this despair has the potentiality to drive one on the path of complete distress. In such a situation, the victim in a state of anguish may even think of surrendering to death or live with a traumatic experience which can be compared to having a life that has been fragmented at the cellular level. It is because the duty cast on the authorities under the Medical Termination of Pregnancy Act, 1971 (for brevity "the Act") is not dutifully performed, and the failure has ultimately given rise to a catastrophe, a prolonged torment. That is the sad narrative of the appelland victim.

3. The appelland, a thirty-five year old woman, was living on the footpath in Phulwarisharif, Patna. On 25-1-2017 she was brought to Shanti Kutir. The medical test done by Shanti Kutir showed that she was pregnant. On 2-2-2017, she was taken to Patna Medical College Hospital, Patna (PMCH) for medical examination. On 8-2-2017 an ultrasound test was done at PMCH and it was found that she was 13 weeks and 6 days pregnant. On 4-3-2017, she expressed her desire to terminate the pregnancy and, accordingly, she was taken to PMCH for further medical examination. At that juncture, the appelland revealed that she had been raped and, therefore, the pregnancy should be terminated. On 14-3-2017, she was taken to PMCH for termination and her father and brother were called and made to sign a consent form, which they duly signed. However, the hospital authorities did not proceed with the termination of the pregnancy. It is worthy to mention here that on 18-3-2017, an FIR under Section 376 of the Penal Code, 1860 (IPC) was registered with Mahila Police Station, Patna as Case No. 13 of 2017. The Home Superintendent, Shanti Kutir wrote to the Superintendent of Patna Medical College and Hospital, Patna, stating, inter alia, that the pregnancy is more than 17 weeks and a divorce petition had been filed by the husband, and the father and the brother of the appelland expressed their inability to take her with them because of social and financial constraints. On 3-4-2017, she was again taken to PMCH, but the termination was not carried out and, by that time, her pregnancy was 20 weeks old. As the factual narration would reveal, the appelland was found to be HIV+ve.

4. As the medical termination of pregnancy was not carried out, the appelland approached the High Court in CWJC No. 5286 of 2017 with the prayer to ascertain the physical condition including the stage of pregnancy and to direct for termination of pregnancy as she had been sexually assaulted and further she was HIV+ve. The High Court, on 10-4-2017 [*Z v. State of Bihar*, 2017 SCC OnLine Pat 1713], permitted the counsel for the victim to implead the husband and her father and the Director of Indira Gandhi Institute of Medical Sciences, Patna (IGIMS). Thereafter, the learned Single Judge directed for constitution of a Medical Board at IGIMS, Patna, to assess the physical and mental condition of the writ petitioner therein and the foetus...

5. ...IGIMS examined the victim and submitted a report in a sealed cover.

6. As the factual matrix would further uncurtain, on 18-4-2017 [*Z v. State of Bihar*, 2017 SCC OnLine Pat 1714], the High Court took note of the fact that the name of the appellant's husband had been wrongly mentioned and a direction was issued to make dasti service on the husband and the father through the officer in charge of the local police station and the matter was fixed for 20-4-2017. On 20-4-2017, the matter could not be taken up and stood adjourned to 21-4-2017. On the adjourned date, the father of the appellant prayed for time to file counter-affidavit... Thereafter, the High Court proceeded to determine the issue whether the victim, who is HIV+ve and is carrying a pregnancy of 24 weeks could be allowed to have medical termination of pregnancy under the Act. The stand of the Government before the High Court was that the victim was being provided with all facilities to survive in the rehabilitation centre and the pregnancy could not be terminated because the identity of the father of the victim was not established and he had refused to swear an affidavit in this regard and subsequently escaped from the scene. The stand of the father of the victim before the High Court was that he did not have any objection for getting the pregnancy terminated. The husband, Respondent 8 before the High Court, admitted that he had entered into wedlock with the victim and from the said wedlock two children were born, but the victim had deserted him in March 2007, and the said circumstances led him to file Matrimonial Suit No. 984 of 2015 before the Principal Judge, Family Court, Patna, seeking dissolution of marriage.

7. The High Court perused the report submitted by IGIMS, which suggested that the pregnancy was 20 to 24 weeks old and the termination of pregnancy would require major surgical procedure along with the subsequent consequences such as bleeding, sepsis and anaesthesia hazards. The report that was filed by IGIMS, which has been referred to by the High Court, needs to be reproduced: (*Z case [Z v. State of Bihar*, 2017 SCC OnLine Pat 786], SCC OnLine Pat para 16)

<i>Issues</i>	<i>Opinion</i>
1. Examination report of the patient (petitioner) with regard to her physical and mental state (physical medical examination of all systems will be desirable): Respiratory, CVS, Neurology, etc.	Physical examination: Pulse — 100/min regular, BP-114/80 mmHg, Pallor-Mild, Icterus—NIL, edema—Nil, Cyanosis & clubbing—Nil, JVP — normal, Chest — B/L clear no added sound; CVS-S1 & S2 — Normal, no added sound; P/A exam-fundal height corresponds to 22-24 week pregnancy; CNS — Higher mental function intact, no focal neurological deficit. Mentally alert, well oriented with time, place and person (Annexure I).
2. Stage of pregnancy	2nd trimester of approximately 23 weeks (as per 1st USG report of whole abdomen on 8-2-2017 of PMCH. And IGIMS, USG on dated 11-4-2017 shows 21 weeks' foetus ... (Annexure II). According to recommendations 1st i.e. earliest USG is to be used for gestational age calculation.
3. Overall condition of foetus	Normal single alive intra-uterine foetus (as per physical examination and USG report)
4. How far the termination of pregnancy will be detrimental to the petitioner.	Termination of pregnancy at this stage sometimes may need major surgical procedure along with the subsequent consequences such as bleeding, sepsis and anaesthesia hazards.
5. How far it will be detrimental, if the petitioner is allowed to complete full term of pregnancy.	The patient can continue pregnancy according to NACO guidelines. Still there is likelihood that foetus may be HIV+ve. But definitive diagnosis can only be given when the child is 18 months old.
6. How far it will be detrimental to the petitioner and foetus, particularly in view of the fact that she is mentally abused and HIV+ve.	As per the clinical assessment and documentary evidence, the patient is diagnosed to have psychiatry illness, provisionally schizophrenia with mild mental retardation. She is currently on medications and behaviourally stable and will require long-term psychiatry treatment.
7. Investigation reports	Reports which are made available before the Board Members are ... Annexure III. Some investigation reports which are not available at IGIMS like CD4 +T lymphocyte count, serum HIV RNA level (viral load) and triple marker maternal blood test advised by members concerned are still awaited, after which progression of HIV and through marker congenital abnormality of foetus can be assessed."

8. The learned Single Judge, after referring to the provisions of the Act, observed thus: (*Z case [Z v. State of Bihar*, 2017 SCC OnLine Pat 786], SCC OnLine Pat para 18)

“18. In the present case, the medical report does not suggest that the foetus is suffering from any abnormality. It further does not suggest that the foetus has already been infected with HIV+ve. It only predicts that any definite opinion can be given only when the child attains the age of 18 months. The medical report further does not suggest that if the victim is allowed to carry the pregnancy to its full course, then she will suffer any risk of life or grave injury to her physical or mental health. Explanation 1 of sub-section (2) of Section 3 provides that such pregnancy which is alleged to have been caused by rape shall be presumed to constitute grave injury to the mental health of the pregnant woman. In the present case, the victim has alleged that she had been ravished, but her conduct of not disclosing the incident of rape for more than 13 weeks and deciding not to get the pregnancy terminated for more than 20 weeks, as the writ application has been filed after 20 weeks of pregnancy i.e. on 7-4-2017, prima facie, does not suggest that such alleged conception has really caused grave injury to the mental health of the victim. Moreover, the termination, as contemplated under Section 3 of the 1971 Act, is only permissible up to 20 weeks of pregnancy. Definitely the effort for termination was made on behalf of the victim in the 17th week of pregnancy, but the present writ application has been filed before this Court after 20 weeks of her pregnancy.”

9. After so stating, the High Court adverted to Sections 3 to 5 of the Act and opined that the provisions are not applicable to the writ petitioner. The learned Single Judge also referred to Section 10 of the Human Immunodeficiency Virus and AIDS (Prevention and Control) Act, 2017 and distinguished the decisions rendered in *Meera Santosh Pal v. Union of India* [*Meera Santosh Pal v. Union of India*, (2017) 3 SCC 462 : AIR 2017 SC 461] , *X v. Union of India* [*X v. Union of India*, (2017) 3 SCC 458 : AIR 2017 SC 1055] and *X v. Union of India* [*X v. Union of India*, (2016) 14 SCC 382 : (2016) 14 SCC 383 (2) : (2016) 4 SCC (Cri) 388 : (2016) 4 SCC (Cri) 389 (2) : AIR 2016 SC 3525] . He placed reliance on *Sheetal Shankar Salvi v. Union of India* [*Sheetal Shankar Salvi v. Union of India*, (2018) 11 SCC 606 : (2017) 5 Scale 428] , wherein this Court has declined termination of 20 weeks of pregnancy. The High Court, thereafter, adverted to the statement of law in *Suchita Srivastava v. State (UT of Chandigarh)* [*Suchita Srivastava v. State (UT of Chandigarh)*, (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570] and reproduced certain paragraphs and took note of the concept that in the case of a pregnant woman and “compelling State interest” and further adverted to the doctrine of “*parens patriae*” where in certain situations the State must make decisions in order to protect the interest of those persons who are unable to take care of themselves. Thereafter, the learned Single Judge adverted to the two standards, namely, “best interests” test and “substituted judgment” test as laid down in *Suchita Srivastava* [*Suchita Srivastava v. State (UT of Chandigarh)*, (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570] . The High Court also dwelled upon the role of the court that it must undertake a careful inquiry of the medical opinion on the feasibility of the pregnancy as well as social circumstances faced by the victim.

10. After so stating, the learned Single Judge delved into the factual score projected in the writ petition and opined thus: (*Z case* [*Z v. State of Bihar*, 2017 SCC OnLine Pat 786] , SCC OnLine Pat paras 28-32)

“28. In the present case also, in the “best interest” of the victim and the foetus, this Court finds no reason to exercise the jurisdiction under Article 226 of the Constitution of India for directing the pregnancy to be terminated in its 23-24 weeks, particularly such termination of pregnancy, as per the Medical Board report would be hazardous to the life of the victim. However, keeping in view the fact that the victim was leading a life of destitute and she has been almost deserted by her husband, her father, her brother and her sister, as none of them in their counter-affidavit have stated that they are ready to take her to their house, this Court feels that she will be safe if she is allowed to remain in rehabilitation centre, Shanti Kutir so long as she desires.

29. Mr Kaushal Kumar Jha, learned AAG-8 submits that the rehabilitation centre is run by the Government and the Government is ready to provide all medical facilities, as well as amenities of day-to-day life to the victim.

30. In the circumstances, it is expected from the Superintendent, PMCH to get the victim medically examined every month or so and provide all medicines or other medical facilities required for carrying the pregnancy to its full term and bringing up the child after its birth, till the child attains the age of five years. The Superintendent, PMCH would ensure to provide the victim with necessary medical cover in light of the direction made above.

31. This Court is hopeful that the NGO will take care of the victim and provide all the facilities for the post-natal care.

32. In the circumstances, in the interest of justice and in the interest of victim and foetus/prospective child, this Court is not inclined to permit the medical termination of pregnancy of the victim.”

11. After so holding, the learned Single Judge issued certain directions, which are to the following effect: (*Z case [Z v. State of Bihar, 2017 SCC OnLine Pat 786]* , SCC OnLine Pat para 33)

(i) Respondent 4 will get the bank account of the victim opened within a period of one week, if she does not have one.

(ii) Respondents 7 and 8, the father and the husband of the victim will deposit Rs 1000 and Rs 1500, respectively, per month in the account of the victim from May 2017.

(iii) If Respondents 7 and 8 make default in payment on three consecutive occasions, of the instalment of the aforesaid amount, then any of the parties concerned would be at liberty to file an application before this Court and Respondents 7 and 8 will be answerable to this Court, in this regard.

(iv) Respondents 7 and 8 will provide their mobile number to Respondent 4 and shall visit the victim every month.

(v) Respondent 4 shall allow the relatives and husband of the victim to meet her.

...”

12. The High Court decided the matter on 26-4-2017 [*Z v. State of Bihar, 2017 SCC OnLine Pat 786*] . When the said order was challenged, the present appeal was taken up on 3-5-2017. The learned counsel for the appellant referred to the facts as asserted in the special leave petition which is evincible from the order of the High Court. Though the Union of India is not a party, Mr P.S. Narasimha and Mr Tushar Mehta, learned Additional Solicitors General were asked as to whether arrangements could be made for the appellant to come to Delhi to be examined by a Medical Board at All India Institute of Medical Sciences (AIIMS), New Delhi. The learned counsel for the appellant, after obtaining instructions, stated that she is inclined to be examined by the Medical Board at AIIMS. ...

13. In pursuance of the order passed by this Court, the Medical Board at AIIMS examined the appellant. The opinion of the Medical Board was that the procedure involved in termination of the pregnancy is risky to the life of the appellant and the foetus in the womb. It has suggested that she should be advised to continue HAART therapy and routine antenatal care to reduce the risk of HIV transmission to the foetus. In view of the said report, the Court on 9-5-2017 [*Z v. State of Bihar, (2017) 14 SCC 525 : (2017) 14 SCC 527 : (2017) 4 SCC (Cri) 916 : (2017) 4 SCC (Cri) 918*] , directed as follows: (*Z case [Z v. State of Bihar, (2017) 14 SCC 525 : (2017) 14 SCC 526 : (2017) 4 SCC (Cri) 916 : (2017) 4 SCC (Cri) 917]* , SCC pp. 529-30, paras 10-15)

“10. In view of the aforesaid opinion, it is the accepted position at the Bar that there cannot be termination of pregnancy. The learned counsel for the petitioner would submit that the petitioner along with the companion be sent back to Patna and for the said purpose appropriate arrangements be made by the Union of India to which Mr Tushar Mehta, learned Additional Solicitor General concedes. We appreciate the stand taken by the Union of India in this regard.

11. The learned counsel for the petitioner submitted that the doctors at AIIMS may give the appropriate treatment graph for the petitioner so that she can survive the health hazard that she is in. Mr Tushar Mehta, learned Additional Solicitor General submitted that she will be given the treatment graph by 10-5-2017.

12. The controversy does not end here. The learned counsel for the petitioner would submit that because of the delay caused, she is compelled to undergo the existing miserable situation and, therefore, she is entitled to get compensation and that apart, she is also entitled to get compensation under the Victim Compensation Scheme as framed under Section 357-A of the Code of Criminal Procedure by the State of Bihar.

13. Apart from the above submission, we are obligated to direct the State of Bihar to provide all the medical facilities to the petitioner as per the treatment graph given by the doctors who are going to examine the petitioner at AIIMS through the Indira Gandhi Institute of Medical Sciences at Patna. The Indira Gandhi Institute of Medical Sciences shall work in coordination with AIIMS, New Delhi so that the health condition of the petitioner is not further jeopardized.

14. The learned counsel for the petitioner is granted liberty to file an additional affidavit with regard to the facet of compensation within six weeks thence. The State of Bihar, which is represented by Ms Abha R. Sharma, learned counsel shall file a reply to the special leave petition as well as to the additional affidavit within four weeks therefrom.

15. We have stated about the grant of compensation hereinbefore. The one facet of granting compensation pertains to negligence and delay which comes within the domain of public law remedy. The other aspect of the compensation comes under the scheme dated 24-3-2014 framed under Section 357-A of the Code of Criminal Procedure. Needless to say, the petitioner is eligible to get the compensation under the said Scheme and, therefore, the petitioner shall be paid a sum of Rs 3,00,000 (Rupees three lakhs only) by the State of Bihar as she has been a victim of rape. Needless to say, we have determined the compensation regard being had to Clause 4 of the Scheme. The said amount shall be paid to her within four weeks hence and compliance report thereof shall be filed before the Registry of this Court. As far as the other aspect of compensation is concerned, the said aspect shall be considered on 9-8-2017.”

14. We have narrated the facts in extenso so that the controversy can be appreciated in proper perspective and further the laxity on the part of the authorities and also the approach of the High Court can be appositely deliberated upon. ...

...

18. To appreciate the rivalised submissions advanced at the Bar, it is necessary to understand the background in which the Act was enacted by Parliament. The Statement of Objects and Reasons of the Act reads as follows:...

The aforesaid makes it absolutely clear that the legislature intended to liberalise the existing provisions relating to termination of pregnancy keeping in view the danger to life or risk to physical or mental health of the woman; on humanitarian grounds, such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman, and eugenic grounds where there is substantial risk that the child, if born, would suffer from deformities and diseases.

19. Section 2, which is the dictionary clause, defines the term “guardian” to mean a person having the care of the person of a minor or a mentally ill person. “Mentally ill person” has been defined to mean a person who is in need for treatment by reason of any mental disorder other than mental retardation. The dictionary clause also defines the terms “minor” and “registered medical practitioner”.

20. Section 3 stipulates that when pregnancy may be terminated by the registered medical practitioners. ...

21. ...[W]here length of pregnancy exceeds 12 weeks but does not exceed 20 weeks, two registered medical practitioners, after forming an opinion in good faith, that the 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 and that there is substantial risk that if the child were born, it would suffer from physical or mental abnormalities as to be seriously handicapped, may terminate the pregnancy. Explanation 1 to sub-section (2) of Section 3 to which our attention has been drawn postulates that where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by the same has to be presumed to constitute a grave injury to the mental health of the pregnant woman. Once such a statutory presumption is provided, the same comes within the compartment of grave injury to mental health. Sub-section (4) of Section 3 requires consent of the guardian of a minor, or a major who is mentally ill person. The opinion to be formed by the medical practitioners is to be in good faith.

22. In the instant case, the gravamen of the submission of the learned counsel for the appellant is that negligence and delay have been caused by the authorities of the State. Be it noted, the learned counsel for the appellant has filed a chart giving various dates to highlight the chronology of events. On a perusal of the same, it is demonstrable that after the appellant was brought to Shanti Kutir, it was noticed that she was pregnant. She was taken to PMCH. At that time, she was 13 weeks and 6 days pregnant. In the midst of 18th week, she expressed her desire to terminate her pregnancy and that was communicated by Shanti Kutir to the hospital and, thereafter, she was taken to PMCH, where she made an allegation that she had been raped and expressed her desire to terminate her pregnancy. Though she was taken to the hospital for termination of pregnancy, yet the hospital authorities instead of proceeding with the termination, called the father of the appellant to sign the consent form. According to the learned counsel for the appellant, while she had gone to the government hospital and clearly stated that she had been raped and further she was taken by the persons from Shanti Kutir, which is a women rehabilitation centre, and further there was no material that she was suffering from any mental illness, it was obligatory on the part of the hospital to terminate the pregnancy. Had that been done at the

right time, the grave mental torture that she has been going through could have been avoided. The learned counsel also criticised the approach of the High Court in not dealing with the matter with required amount of sensitivity and not adhering to the statutory provision that when there is an allegation of rape, the pregnancy can be terminated. The High Court directed for a Medical Board to be constituted and after receipt of the report of the Medical Board some time was consumed and, thereafter, also the High Court required the father of the appellant to file an affidavit giving his consent.

23. We have already analysed in detail the factual score and the approach of the High Court. We do not have the slightest hesitation in saying that the approach of the High Court is completely erroneous. The report submitted by IGIMS stated that termination of pregnancy may need major surgical procedure along with subsequent consequences such as bleeding, sepsis and anaesthesia hazards, but there was no opinion that the termination could not be carried out and it was risky to the life of the appellant. There should have been a query in this regard by the High Court which it did not do. That apart, the report shows that the appellant, who was a writ petitioner before the High Court, was suffering from mild mental retardation and she was on medications and her condition was stable and she would require long-term psychiatry treatment. The Medical Board has not stated that she was suffering from any kind of mental illness. The appellant was thirty-five years old at that time. She was a major. She was able to allege that she had been raped and that she wanted to terminate her pregnancy. PMCH, as we find, is definitely a place where pregnancy can be terminated.

24. For the said purpose, we may usefully reproduce Section 4 of the Act...

25. The Medical Termination of Pregnancy Regulations, 2003 (for short "the Regulations") deal with various aspects.

25.1. Regulation 3 provides for form of certifying opinion or opinions. It stipulates that where one registered medical practitioner forms or not less than two registered medical practitioners form such opinion as is referred to in sub-section (2) of Section 3 or 5, he or she shall certify such opinion in Form I. It further provides that every registered medical practitioner who terminates any pregnancy shall within three hours from the termination of the pregnancy certify such termination in Form I.

...

25.3. In the present case, we are concerned with Regulation 3 only.

26. Form I has been provided under Regulation 3 and that covers sub-section (2) of Section 3 and Section 5...

27. Thus, the opinion has to be formed by the registered practitioners as per the Act and they are required to form an opinion that continuance of pregnancy would involve a grave mental or physical harm to her. We have already referred to Explanation 1 which includes allegation of rape. As is perceivable, the appellant had gone from a women rehabilitation centre, had given consent for termination of pregnancy and had alleged about rape committed on her, but the termination was not carried out. In such a circumstance, we are obliged to hold that there has been negligence in carrying out the statutory duty, as a result of which, the appellant has been constrained to suffer grave mental injury.

28. In such a situation, submits Ms Grover, the State is bound to compensate the appellant under public law remedy. It is her proponent that the appellant was suffering from mental retardation, but not from mental illness and the distinction is clear from the language of sub-section (4) of Section 3 of the Act. That apart, her contention is that the victim was a destitute and in such a situation, impleadment of her husband and father for obtaining their consent was wholly unwarranted and, in a way, allow time to "rule".

29. In *Suchita Srivastava* [*Suchita Srivastava v. State (UT of Chandigarh)*, (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570], the High Court of Punjab and Haryana ruled [*State (UT of Chandigarh) v. Nemo*, 2009 SCC OnLine P&H 6879] that it was in the best interests of a mentally retarded woman to undergo an abortion. The victim had become pregnant as a result of an alleged rape that took place when she was an inmate at a Government-run welfare institution located in Chandigarh and after discovery of her pregnancy, the Chandigarh Administration, approached the High Court seeking approval for the termination of her pregnancy, keeping in mind that in addition to being mentally retarded she was also an orphan who did not have any parent or guardian to look after her or her prospective child. The High Court perused the preliminary medical opinion and constituted an expert body and, eventually, directed the termination of pregnancy in spite of the expert body's findings which show that the victim had expressed her willingness to bear a child. In that context, the Court adverted to the distinction between the "mental illness" and "mental retardation". It also noted that the expert body's findings were in favour of continuation of pregnancy and took note of the fact that the victim had clearly given her willingness to bear a child.

30. In that context, the Court stated: (*Suchita Srivastava case [Suchita Srivastava v. State (UT of Chandigarh), (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570]* , SCC p. 13, para 19)

“19. The victim's reproductive choice should be respected in spite of other factors such as the lack of understanding of the sexual act as well as apprehensions about her capacity to carry the pregnancy to its full term and the assumption of maternal responsibilities thereafter. We have adopted this position since the applicable statute clearly contemplates that even a woman who is found to be “mentally retarded” should give her consent for the termination of a pregnancy.”

And again: (SCC p. 15, para 22)

“22. There is no doubt that a woman's right to make reproductive choices is also a dimension of “personal liberty” as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised 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 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. Furthermore, women are also free to choose birth control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, 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 MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.”

31. Explaining the provision of the Act, the Court in *Suchita Srivastava [Suchita Srivastava v. State (UT of Chandigarh), (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570]* opined that ordinarily a pregnancy can be terminated only when a medical practitioner is satisfied that a continuance of the pregnancy would involve risk to the life of the pregnant woman or of grave injury to her physical or mental health or when 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. While the satisfaction of one medical practitioner is required for terminating a pregnancy within twelve weeks of the gestation period, two medical practitioners must be satisfied about either of these grounds in order to terminate a pregnancy between twelve to twenty weeks of the gestation period.

32. The Court in *Suchita Srivastava [Suchita Srivastava v. State (UT of Chandigarh), (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570]* also took note of the provision that termination of the pregnancy has been contemplated when the same is the result of a rape or a failure of birth control methods, since both of these eventualities have been equated with a grave injury to the mental health of a woman. The Court emphasised that in all such circumstances, the consent of the pregnant woman is an essential requirement for proceeding with the termination of pregnancy. The three-Judge Bench referred to the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short “the 1995 Act”) and opined that in the said Act also “mental illness” has been defined as mental disorder other than mental retardation.

33. The Court also took note of the definition of “mental retardation” under the 1995 Act. The definition read as follows: (*Suchita Srivastava case [Suchita Srivastava v. State (UT of Chandigarh), (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570]* , SCC p. 17, para 28)

“28. ... **2. (r) “mental retardation”** means a condition of arrested or incomplete development of mind of a person which is specially characterised by subnormality of intelligence.’

34. The Court in *Suchita Srivastava [Suchita Srivastava v. State (UT of Chandigarh), (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570]* also apprised itself that the same definition of “mental retardation” has also been incorporated under Section 2(g) of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999. Analysing the provision of the Act, the Court opined that while a guardian can make decisions on behalf of a “mentally ill person” as per Section 3(4)(a) of the 1971 Act, the same cannot be done on behalf of a person who is in a condition of “mental retardation.” Thus, the difference between the “mental illness” and “mental retardation” as recognised in law, was emphasised.

35. The three-Judge Bench proceeded to address the “best interest” of the victim and invocation of the doctrine of *parens patriae*. In that context, it held: (*Suchita Srivastava case [Suchita Srivastava v. State (UT of Chandigarh), (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570]* , SCC p. 18, para 37)

“37. As evident from its literal description, the “best interests” test requires the Court to ascertain the course of action which would serve the best interests of the person in question. In the present setting this means 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. It is important to note that the Court’s decision should be guided by the interests of the victim alone and not those of the other stakeholders such as guardians or the society in general. It is evident that the woman in question will need care and assistance which will in turn entail some costs. However, that cannot be a ground for denying the exercise of reproductive rights.”

36. After so stating, the Court in *Suchita Srivastava [Suchita Srivastava v. State (UT of Chandigarh), (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570]* adverted to the facts of the case and came to hold that though the victim had been described as a person suffering from mild mental retardation, that did not mean that she was entirely incapable of making decision for herself. It discarded the “substituted judgment” test, which requires the Court to step into the shoes of a person who is considered to be mentally incapable and attempt to make the decision which the said person would have made, if she was competent to do so. The Court observed that it is a more complex inquiry but this test can only be applied to make decisions on behalf of persons who are conclusively shown to be mentally incompetent. The Court noted that there are varying degrees of mental retardation, namely, those described as borderline, mild, moderate, severe and profound instances of the same. Persons suffering from severe and profound mental retardation usually require intensive care and supervision and a perusal of academic materials suggests that there is a strong preference for placing such persons in an institutionalised environment. However, persons with borderline, mild or moderate mental retardation are capable of living in normal social conditions even though they may need some supervision and assistance from time to time.

37. The Court referred to the United Nations Declaration on the Rights of Mentally Retarded Persons, 1971 [GA Res 2856 (XXVI) of 20-12-1971] and relied on Principle 7 of the same. Principle 7 reads as follows: (*Suchita Srivastava case [Suchita Srivastava v. State (UT of Chandigarh), (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570]* , SCC pp. 21-22, para 50)

“50. ... ‘7. Whenever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities.’

38. Placing reliance on the same, it observed thus: (*Suchita Srivastava case [Suchita Srivastava v. State (UT of Chandigarh), (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570]* , SCC pp. 22-23, paras 51 & 54-55)

“51. In respecting the personal autonomy of mentally retarded persons with regard to the reproductive choice of continuing or terminating a pregnancy, the MTP Act lays down such a procedure. We must also bear in mind that India has ratified the Convention on the Rights of Persons with Disabilities (CRPD) on 1-10-2007 and the contents of the same are binding on our legal system.

54. It would also be proper to emphasise that persons who are found to be in a condition of borderline, mild or moderate mental retardation are capable of being good parents. Empirical studies have conclusively disproved the eugenics theory that mental defects are likely to be passed on to the next generation. The said “eugenics theory” has been used in the past to perform forcible sterilisations and abortions on mentally retarded persons. [See generally: Elizabeth C. Scott, “Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy”, *Duke Law Journal* 806-65 (November 1986).] We firmly believe that such measures are anti-democratic and violative of the guarantee of “equal protection before the law” as laid down in Article 14 of our Constitution.

55. It is also pertinent to note that a condition of “mental retardation” or developmental delay is gauged on the basis of parameters such as intelligence quotient (IQ) and mental age (MA) which mostly relate to academic abilities. It is quite possible that a person with a low IQ or MA may possess the social and emotional capacities that will enable him or her to be a good parent. Hence, it is important to evaluate each case in a thorough manner with due weightage being given to medical opinion for deciding whether a mentally retarded person is capable of performing parental responsibilities.”

39. On the basis of the aforesaid analysis, the Court concluded: (*Suchita Srivastava case [Suchita Srivastava v. State (UT of Chandigarh)*, (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570] , SCC p. 23, para 58)

“58. In our considered opinion, the language of the MTP Act clearly respects the personal autonomy of mentally retarded persons who are above the age of majority. Since none of the other statutory conditions have been met in this case, it is amply clear that we cannot permit a dilution of the requirement of consent for proceeding with a termination of pregnancy. We have also reasoned that proceeding with an abortion at such a late stage (19-20 weeks of gestation period) poses significant risks to the physical health of the victim.”

40. In the said case in *Suchita Srivastava [Suchita Srivastava v. State (UT of Chandigarh)*, (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570] , the Court took note of the fact that the expert body which had examined the victim indicated that the continuation of the pregnancy did not pose any grave risk to the physical and mental health of the victim and that there was no indication that the prospective child was likely to suffer from a congenital disorder. Regard being had to the totality of the facts and circumstances of the case, it was directed that the best medical facilities be made available so as to ensure proper care and supervision during the period of pregnancy as well as for the post-natal care.

41. In a recent decision in *Eera v. State (NCT of Delhi) [Eera v. State (NCT of Delhi)*, (2017) 15 SCC 133 : (2017) 8 Scale 112] , the distinction between mental illness and mental retardation, keeping in view the statutory provisions and the concept of purposive interpretation, has been accepted.

42. In the case at hand, the appellant is a victim of rape. She suffers from mild mental retardation and she is administered psychiatry treatment, but she is in a position to express her consent. Under the statutory framework, she was entitled to give her consent for termination of pregnancy. As is evident, she did not desire to bear a child. This is a reverse situation what has been portrayed in *Suchita Srivastava [Suchita Srivastava v. State (UT of Chandigarh)*, (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570] . The principle set out in *Suchita Srivastava [Suchita Srivastava v. State (UT of Chandigarh)*, (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570] emphasises on consent. As the facts would unfurl, the appellant had given consent for termination and she had categorically alleged about rape. In such a circumstance, we perceive no fathomable reason on the part of PMCH not to have proceeded for termination of the pregnancy because there was nothing on record to show that there was any danger to the life of the victim.

43. In this context, we may refer with profit to the recent decision rendered in *X v. Union of India [X v. Union of India*, (2017) 3 SCC 458 : AIR 2017 SC 1055] wherein the Court laying stress on a woman's right to make reproductive choices and further taking into consideration the report of the Medical Board directed as follows: (SCC pp. 460-61, para 9)

“9. Though the current pregnancy of the petitioner is about 24 weeks and endangers the life and the death of the foetus outside the womb is inevitable, we consider it appropriate to permit the petitioner to undergo termination of her pregnancy under the provisions of the Medical Termination of Pregnancy Act, 1971. We order accordingly.”

44. In *Sheetal Shankar Salvi [Sheetal Shankar Salvi v. Union of India*, (2018) 11 SCC 606 : (2017) 5 Scale 428] , a two-Judge Bench declined termination of pregnancy after perusal of the report of the Medical Board. The observations and the conclusion of the Court are to the following effect: (SCC p. 607, paras 6-7)

“6. ... However, having regard to the fact that there is no danger to the mother's life and the likelihood that ‘the baby may be born alive and may survive for variable period of time, we do not consider it appropriate in the interests of justice to direct the respondents to allow Petitioner 1 to undergo medical termination of her pregnancy. In fact, the aforesaid Medical Board has itself stated that it does not advise medical termination of pregnancy for Petitioner 1 on medical grounds.

7. The only other ground that appears from the observations made in the aforesaid medical report apart from the medical grounds, is that Petitioner 1 is anxious about the outcome of the pregnancy. We find that the termination of pregnancy cannot be permitted due to this reason.”

45. On a careful reading of the aforesaid decision in *Sheetal Shankar Salvi case* [*Sheetal Shankar Salvi v. Union of India*, (2018) 11 SCC 606 : (2017) 5 Scale 428], we do not have slightest hesitation in our mind that the facts in the said cases and the observations made therein have no application to the facts of the instant case.

46. In *Meera Santosh Pal* [*Meera Santosh Pal v. Union of India*, (2017) 3 SCC 462 : AIR 2017 SC 461], the Court noted the fact that the foetus is without a skull and would, therefore, not be in a position to survive. The Court adverted to the fact that the petitioner therein was a woman of average intelligence and with good comprehension and she had understood that her foetus was abnormal and the risk of foetal mortality was high. She had also the support of her husband in her decision-making. The Court allowed the termination of pregnancy despite the pregnancy having gone into 24th week. What weighed with the Court was danger to the life of the woman and the certain inability of the foetus to survive extra-uterine life. Emphasis has been laid on the aspect that the overriding consideration is that she has a right to take all such steps as necessary to preserve her own life against the avoidable danger to it.

47. In the case at hand, we have noted, termination of pregnancy could have been risky to the life of the appellant as per the report of the Medical Board at AIIMS which was constituted as per the direction of this Court on 3-5-2017 [*Z v. State of Bihar*, (2017) 14 SCC 525 : (2017) 14 SCC 526 : (2017) 4 SCC (Cri) 916 : (2017) 4 SCC (Cri) 917]. This situation could have been avoided had the decision been taken at the appropriate time by the Government Hospital at Patna. For the negligence and carelessness of the hospital, the appellant has been constrained to suffer. The mental torture on certain occasions has more grievous impact than the physical torture.

48. In *Mehmood Nayyar Azam v. State of Chhattisgarh* [*Mehmood Nayyar Azam v. State of Chhattisgarh*, (2012) 8 SCC 1 : (2012) 4 SCC (Civ) 34 : (2012) 3 SCC (Cri) 733 : (2012) 2 SCC (L&S) 449], the Court has observed that the word “torture” in its denotative concept includes mental and psychological harassment. It has the potentiality to cause distress and affects the dignity of a citizen. Under the present Act, the appellant is covered by the definition. In such a situation, there was no justification to push back her rights and throw her into darkness to corrode her self-respect and individual concern. She had decided to exercise her statutory right, being a victim of rape, not to bear the child and more so, when there is possibility of the child likely to suffer from HIV+ve, the authorities of the State should have been more equipped to assist the appellant instead of delaying the process. That apart, as is seen, the State in a way contested the matter before the High Court on the foundation of State interest. The principle of State interest is not at all applicable to the present case. Therefore, the concept of grant of compensation under public law remedy emerges.

49. In *Nilabati Behera* [*Nilabati Behera v. State of Orissa*, (1993) 2 SCC 746 : 1993 SCC (Cri) 527], J.S. Verma, J., (as his Lordship then was), opined thus: (SCC pp. 762-63, para 17)

“17. ... “a claim in public law for compensation” for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is “distinct from, and in addition to, the remedy in private law for damages for the tort” resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Articles 32 and 226 of the Constitution.”

50. Dr A.S. Anand, (as his Lordship then was), in his concurring opinion, expressed that: (*Nilabati case* [*Nilabati Behera v. State of Orissa*, (1993) 2 SCC 746 : 1993 SCC (Cri) 527], SCC pp. 768-69, para 34)

“34. ... The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by [the Supreme Court] or under Article 226 by the High Courts, for established infringement of the indefeasible right guaranteed under Article 21 of the Constitution is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilise public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting “compensation” in proceedings under Articles 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it

does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making “monetary amends” under the public law for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of “exemplary damages” awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law.”

51. In *Sube Singh v. State of Haryana* [*Sube Singh v. State of Haryana*, (2006) 3 SCC 178 : (2006) 2 SCC (Cri) 54] , a three-Judge Bench, after referring to earlier decisions, held: (SCC pp. 198-99, para 38)

“38. It is thus now well settled that the award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under Article 21, by a public servant. The quantum of compensation will, however, depend upon the facts and circumstances of each case. Award of such compensation (by way of public law remedy) will not come in the way of the aggrieved person claiming additional compensation in a civil court, in the enforcement of the private law remedy in tort, nor come in the way of the criminal court ordering compensation under Section 357 of the Code of Criminal Procedure.

52. In *Hardeep Singh v. State of M.P.* [*Hardeep Singh v. State of M.P.*, (2012) 1 SCC 748 : (2012) 1 SCC (Cri) 684] , though the High Court had granted compensation of Rs 70,000, this Court, while concurring with the opinion that related to justification of compensation, enhanced the compensation by holding thus: (SCC pp. 752-53, para 17)

“17. Coming, however, to the issue of compensation, we find that in the light of the findings arrived at by the Division Bench, the compensation of Rs 70,000 was too small and did not do justice to the sufferings and humiliation undergone by the appellant. In the facts and circumstances of the case, we feel that a sum of Rs 2,00,000 (Rupees two lakhs) would be an adequate compensation for the appellant and would meet the ends of justice. We, accordingly, direct the State of Madhya Pradesh to pay to the appellant the sum of Rs 2,00,000 (Rupees two lakhs) as compensation. In case the sum of Rs 70,000 as awarded by the High Court, has already been paid to the appellant, the State would naturally pay only the balance amount of Rs 1,30,000 (Rupees one lakh thirty thousand).”

53. In *Railway Board v. Chandrima Das*, (2000) 2 SCC 465] , the Court copiously adverted to the public law remedy and finding fault with the Railways opined that: (SC pp. 485-86, para 42)

“42. Running of the Railways is a commercial activity. Establishing the Yatri Niwas at various railway stations to provide lodging and boarding facilities to passengers on payment of charges is a part of the commercial activity of the Union of India and this activity cannot be equated with the exercise of sovereign power. The employees of the Union of India who are deputed to run the Railways and to manage the establishment, including the railway stations and the Yatri Niwas, are essential components of the government machinery which carries on the commercial activity. If any of such employees commits an act of tort, the Union Government, of which they are the employees, can, subject to other legal requirements being satisfied, be held vicariously liable in damages to the person wronged by those employees. *Kasturi Lal* [*Kasturi Lal Ralia Ram Jain v. State of U.P.*, AIR 1965 SC 1039 : (1965) 2 Cri LJ 144] decision therefore, cannot be pressed into aid. Moreover, we are dealing with this case under the public law domain and not in a suit instituted under the private law domain against persons who, utilising their official position, got a room in the Yatri Niwas booked in their own name where the act complained of was committed.”

54. On the aforesaid basis, this Court in *Railway Board v. Chandrima Das*, (2000) 2 SCC 465] affirmed the judgment of the High Court and directed that the amount of compensation should be made over to the High Commissioner for Bangladesh in India for payment of the same to the victim as she was entitled to it.

55. In *Rini Johar v. State of M.P.* [*Rini Johar v. State of M.P.*, (2016) 11 SCC 703 : (2017) 1 SCC (Cri) 364], the petitioners therein were arrested in violation of the mandate of law under Section 41-A of the Code of Criminal Procedure and the judgment of this Court rendered in *D.K. Basu* [*D.K. Basu v. State of W.B.*, (1997) 1 SCC 416 : 1997 SCC (Cri) 92]. The petitioners in the said case were a doctor and a practising advocate. The arrest being illegal, the Court opined that their dignity had been absolutely jeopardised. Referring to the earlier decisions, the Court held as under: (*Rini Johar case* [*Rini Johar v. State of M.P.*, (2016) 11 SCC 703 : (2017) 1 SCC (Cri) 364], SCC pp. 716-17, paras 23-24)

“23. In such a situation, we are inclined to think that the dignity of the petitioners, a doctor and a practising advocate has been seriously jeopardised. Dignity, as has been held in *Charu Khurana v. Union of India* [*Charu Khurana v. Union of India*, (2015) 1 SCC 192 : (2015) 1 SCC (L&S) 161] is the quintessential quality of a personality, for it is a highly cherished value. It is also clear that liberty of the petitioner was curtailed in violation of law. The freedom of an individual has its sanctity. When the individual liberty is curtailed in an unlawful manner, the victim is likely to feel more anguished, agonised, shaken, perturbed, disillusioned and emotionally torn. It is an assault on his/her identity. The said identity is sacrosanct under the Constitution. Therefore, for curtailment of liberty, requisite norms are to be followed. Fidelity to statutory safeguards instil faith of the collective in the system. It does not require wisdom of a seer to visualise that for some invisible reason, an attempt has been made to corrode the procedural safeguards which are meant to sustain the sanguinity of liberty. The investigating agency, as it seems, has put its sense of accountability to law on the ventilator. The two ladies have been arrested without following the procedure and put in the compartment of a train without being produced before the local Magistrate from Pune to Bhopal. One need not be Argus-eyed to perceive the same. Its visibility is as clear as the cloudless noon day. It would not be erroneous to say that the enthusiastic investigating agency had totally forgotten the golden words of Benjamin Disraeli:

‘I repeat ... that all power is a trust—that we are accountable for its exercise—that, from the people and for the people, all springs and all must exist.’

24. We are compelled to say so as liberty which is basically the splendour of beauty of life and bliss of growth, cannot be allowed to be frozen in such a contrived winter. That would tantamount to comatosing of liberty which is the strongest pillar of democracy.”

After so holding, the Court referred to the concept of public law remedy and awarded Rs 5,00,000 (Rupees five lakhs only) towards compensation to each of the petitioners to be paid by the State within a stipulated time.

56. In the instant case, it is luminescent that the appellant has suffered grave injury to her mental health. The said injury is in continuance. It is a sad thing that despite the prompt attempt made by this Court to get her examined so that she need not undergo the anguish of bearing a child because she is a victim of rape, it could not be so done as the medical report clearly stated that there was risk to the life of the victim. Therefore, we are inclined to think that the continuance of the injury creates a dent in the mind and the appellant is compelled to suffer the same. One may have courage or cultivate courage to face a situation, but the shock of rape is bound to chain and enslave her with the trauma she has faced and cataclysm that she has to go through. Her condition cannot be reversed. The situation as is unredeemable. But a pregnant one, she has to be compensated so that she lives her life with dignity and the authorities of the State who were negligent would understand that truancy has no space in a situation of the present kind. What is needed is promptitude.

57. This Court had earlier directed that she should be paid compensation under the Victims Compensation Scheme as framed under Section 357-A of the Code of Criminal Procedure. She has been paid Rs 3,00,000 as she has been a victim of rape. It may be clearly stated that grant of compensation for the negligence and the suffering for which the authorities of the State are responsible is different as it comes within the public law remedy and it has a different compartment. Keeping in view the mental injury that the victim has to suffer, we are disposed to think that the appellant should get a sum of Rs 10,00,000 (Rupees ten lakhs only) as compensation from the State and the same shall be kept in a fixed deposit in her name so that she may enjoy the interest. We have so directed as we want that money to be properly kept and appropriately utilised. It may also be required for child's future. That apart, it is directed that the child to be born shall be given proper treatment and nutrition by the State and if any medical aid is necessary, it shall also be provided. If there will be any future grievance, liberty is granted to the appellant to approach the High Court under Article 226 of the Constitution of India after the birth of the child.

58. Having said so, it is necessary to state that the learned Single Judge should have been more alive to the provisions of the Act and the necessity of consent only of the appellant in the facts of the case. There was no reason whatsoever to implead the husband and father of the appellant. We say so as it is beyond an iota of doubt that the appellant was a destitute, a victim of rape and further she was staying in a shelter home. Calling for a medical report was justified but to delay it further was not at all warranted. It needs to be stated that the High Courts are required to be more sensitive while dealing with matters of the present nature.

59. We will be failing in our duty if we do not deal with the submission of the learned counsel for the State. According to her, the State should not be made liable because of the fault of the Court. The principle of *actus curiae neminem gravabit* basically means an act of the court shall prejudice no man. Though such a principle has been advanced yet the same is not applicable to the facts of the case at hand. In *A.R. Antulay v. R.S. Nayak* [*A.R. Antulay v. R.S. Nayak*, (1988) 2 SCC 602 : 1988 SCC (Cri) 372], Sabyasachi Mukharji, J. (as his Lordship then was), speaking for the majority for the Constitution Bench, quoted the following observation of Lord Cairns in *Rodger v. Comptoir D'Escompte de Paris* [*Rodger v. Comptoir D'Escompte de Paris*, (1871) LR 3 PC 465 : 17 ER 120] : (*A.R. Antulay case* [*A.R. Antulay v. R.S. Nayak*, (1988) 2 SCC 602 : 1988 SCC (Cri) 372], SCC p. 672, para 82)

“82. ... ‘Now, their Lordships are of opinion, that one of the first and highest duties of all courts is to take care that the act of the Court does no injury to any of the suitors, and when the expression “the act of the Court” is used, it does not mean merely the act of the Primary Court, or of any intermediate Court of Appeal, but the act of the Court as a whole, from the lowest court which entertains jurisdiction over the matter up to the highest court which finally disposes of the case. It is the duty of the aggregate of those tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court.’ (*Rodger case* [*Rodger v. Comptoir D'Escompte de Paris*, (1871) LR 3 PC 465 : 17 ER 120], ER p. 125)”

The aforesaid principle despite its broad connotation is not attracted to the obtaining factual matrix inasmuch as we have granted compensation because of the delay caused by the authorities of PMCH.

60. Before parting with the case, we must note that India has ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1993 and is under an international obligation to ensure that the right of a woman in her reproductive choices is protected. Article 11 of the said Convention provides that all State parties shall ensure the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction. Article 12 of the Convention stipulates that State parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on the basis of equality of men and women, accesses to health care services, including those related to family planning.

61. The legislative intention of the 1971 Act and the decision in *Suchita Srivastava* [*Suchita Srivastava v. State (UT of Chandigarh)*, (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570] prominently emphasise on personal autonomy of a pregnant woman to terminate the pregnancy in terms of Section 3 of the Act. Recently, Parliament has passed the Mental Healthcare Act, 2017 which has received the assent of the President on 7-4-2017. The said Act shall come into force on the date of notification in the Official Gazette by the Central Government or on the date of completion of the period of nine months from 7-4-2017. We are referring to the same only to highlight the legislative concern in this regard. It has to be borne in mind that element of time is extremely significant in a case of pregnancy as every day matters and, therefore, the hospitals should be absolutely careful and treating physicians should be well advised to conduct themselves with accentuated sensitivity so that the rights of a woman are not hindered. The fundamental concept relating to bodily integrity, personal autonomy and sovereignty over her body have to be given requisite respect while taking the decision and the concept of consent by a guardian in the case of major should not be overemphasized.

62. In view of the aforesaid analysis, the appeal is allowed to the extent indicated above and the order passed by the High Court is set aside except for the direction pertaining to investigation carried out on the basis of the FIR lodged by the appellant. There shall be no order as to costs.”

Endnotes

- 1 See Chapter II, Rights of Persons with Disabilities Act, 2016.
- 2 Section 10, Rights of Persons with Disabilities Act, 2016.
- 3 Cases dealing with termination of pregnancies where fetal impairment was an issue are discussed in Chapter 5, “Medical Termination of Pregnancy.”
- 4 (2009) 9 SCC 1.
- 5 (2018) 11 SCC 572.
- 6 U.N. Office of the High Commissioner for Human Rights, “Status of Ratification Interactive Dashboard—India,” <http://indicators.ohchr.org/>.
- 7 *Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the Commission at its fifty-third session in 2001 (Final Outcome) (International Law Commission [ILC]), contained in U.N. Doc. A/56/49(Vol. I)/Corr.4 (2001), Arts. 3-4.*
- 8 *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.