



Campaign for Gender Equality
and Safe Abortion.



Assessing the Judiciary's Role in Access to Safe Abortion

An Analysis of Supreme Court and High Court
Judgements in India from June 2016-April 2019

**A Pratigya Campaign for Gender Equality and Safe
Abortion Report**

About Pratigya Campaign for Gender Equality & Safe Abortion

Pratigya Campaign for Gender Equality and Safe Abortion is a network of individuals and organisations working towards protecting and advancing women's rights and their access to safe abortion care in India. The campaign advocates with governments, organisations and media at the national and state levels on issues of women's empowerment and women's access to healthcare services. Foundation for Reproductive Health Services India hosts the secretariat and a dedicated eight member Campaign Advisory Group guides and offers strategic direction to the coalition and its advocacy efforts. The Campaign focuses on four thematic areas: a) Extending support to the providers to ensure they continue to provide abortion services b) Ensuring continued availability of Medical Abortion drugs in the markets and support to women using MA out of facility c) Understanding and engaging with the legal landscape, particularly the jurisprudence in abortion related cases d) Building strong alliances with organisations and individuals to sharpen the collective voice of the Campaign.

Acknowledgements

The research was undertaken by Pratigya Campaign for Gender Equality and Safe Abortion to analyse the crucial role that the judiciary plays in paving the path for access to safe abortion. We are thankful to Gargi Mishra, Shreyasi Tripathi, Surabhi Singh and Aryan Naik for their support in research and analysis, steadfast tracking and compiling relevant cases, and creating valuable case briefs.

We are immensely grateful to the Pratigya Campaign's Advisory Group for providing strategic guidance and inputs to strengthen the report and would also like to extend gratitude to the Campaign's Secretariat, Foundation for Reproductive Health Services India for their support with the project.

We thank Anupam Shukla and Prerna Puri for their guidance in the initial phase of this report. We thank Debanjana Choudhuri for her assistance in project management; and Ananya Vajpeyi and Ankur Sagar for their assistance with data cleaning, standardisation and invaluable efforts in analysing data and preparing graphs.

The report would not have been successful without the guidance from V.S. Chandrashekar and Vinoj Manning. We thank them for their continued support and efforts in peer reviewing the report.

We thank the MSL team for designing the report.

Sincerely,

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Abbreviations

CFPB	Central Family Planning Board
DCA	Drugs and Cosmetics Act, 1940
IPC	Indian Penal Code, 1860
MA	Medical Abortion
MOHFW	Ministry of Health and Family Welfare
MTP	Medical Termination of Pregnancy/Abortion
MTP Act	Medical Termination of Pregnancy Act, 1971
PCPNDT Act	Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994
POCSO Act	Protection of Children from Sexual Offenses Act, 2012
RMP	Registered Medical Practitioner
SC	Supreme Court
SCC Online	Supreme Court Cases Online

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Overview

For nearly five decades, since the enactment of Medical Termination of Pregnancy Act, women have been legally allowed to terminate unwanted pregnancies. The enactment of the Medical Termination of Pregnancy Act, 1971 brought a new era in women's health by creating a framework that allowed women to exercise a basic control over their bodies, since voluntarily causing a miscarriage was a crime under the Indian Penal Code, 1860 and women were also liable to be prosecuted. By formalising the procedure, the Act created a framework that allows women to access medical assistance without fear of bodily harm at the hands of inexperienced/underqualified persons. However, in its near 50-year existence, the framework continues to be riddled with hurdles in implementation, ambiguities in processes, interpretative differences, all of which have been buoyed by a shaky legislative foundation that has approached the issue from a medico-legal rather than a rights-based perspective. Moreover, the law has not kept pace with significant progress that has been made in medical technology and has been negatively impacted by other legislations. This potent mixture of factors has rendered the mechanism ineffectual in scores of cases that involve minors, survivors of sexual assault, and women with limited access to medical facilities or legal recourse. In essence, the framework has not been able to deliver a consistent mechanism for women to actualise reproductive rights.

The Act sets a threshold of 12 weeks based on the opinion of one Registered Medical Practitioner and of 20 weeks based on the opinion of two RMPs for the medical termination of pregnancies to be lawful.¹ An additional provision allows for termination of later stage pregnancies, in the event where it is immediately necessary to save the life of a woman.² The law prioritises the experience and health of a woman as the primary parameter while determining whether a pregnancy should be continued or not. It recognises that an unwanted pregnancy can cause "grave injury" to the mental health of a woman. That said, the Act does not provide or recognise an inherent right of a woman to terminate an unwanted pregnancy and lends the entire agency to medical practitioners in decision-making. Such an approach creates a decision-making matrix that does not prioritise the choice of the woman, leading many to carry unwanted pregnancies to term, risking their physical and mental health in the process. Even in instances where a court's intervention has

been in a woman's benefit, the verdict comes after subjecting a vulnerable woman to an arduous judicial process that culminates with a decision being made on her behalf, but not by her.

Over the last three years, the Supreme Court and High Courts of India have seen a total of 194 writ petitions from women who have sought to have their pregnancies medically terminated. While every case emanates from traumatic circumstances, such as rape, risk to life, risk to mental health, or foetal abnormalities, the results are varied and unpredictable. Such inconsistencies dilute the credibility of a legislation that affects the lives and bodies of women. It also makes women lose faith in the judiciary and its ability to recognise the choice of women in what happens to their bodies.

The implementation of the law is often compromised as it intersects and overlaps with other legislations. For instance, the unnecessary impact that implementation of the Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994 has on the access to MTP services. With more and more medical practitioners fearing backlash by the PCPNDT Authorities, refusals to perform MTPs are high. In the event of a minor becoming pregnant as a result of rape, medical practitioners are mandatorily bound to report the pregnancy to the police. Since they fear the perceived legal hassles or investigations under the Protection of Children from Sexual Offences Act, 2012, most medical practitioners now refuse to see a minor pregnant girl, thereby reducing access for minor pregnant girls.

This report seeks to provide an informative context for the development of access to MTP in India, followed by a thorough analysis of Supreme Court and High Court judgements from June 2016 to April 2019 in order to determine patterns and inconsistencies in how the judiciary enforces the Act. Through such an analysis and corresponding recommendations, this report hopes to identify specific problems and what must be undertaken to address them. It is necessary to state here that while the endeavour has been to access all judgements on permissions from courts, some judgments may have been missed out.

¹ Section 3, Medical Termination of Pregnancy Act, 1971. Accessible [here](#).

² Section 5, Medical Termination of Pregnancy Act, 1971. Accessible [here](#).

Methodology

This report uses website databases of the Supreme Court, High Courts, Supreme Court Cases Online and Manupatra, with key search terms/filters such as “abortion” and “medical termination of pregnancy”, to procure relevant judgements. The timeline for this search was 1 June, 2016 to 30 April, 2019. Each case is of a pregnant woman who has, either directly or through a representative, approached the judiciary to seek permission to terminate her pregnancy during this period. Various parameters were added in this analysis, such as the age of the pregnant woman, duration of pregnancy, reasons cited for permission, reasons cited in the judgement, etc.

It is important to note that the analysis is limited to the stated timeline and cases where permission is sought from the court. This analysis was complimented by secondary research on the Act and its implementation. The study used only available information from sources stated above and did not attempt to reach out to litigants or their lawyers, as the intention was only to analyse the judgments.

Another caveat is that the information across High Courts and the Supreme Court is inconsistent and, in several cases, not fully specified. The authors and researchers have tried their best to retrieve as much information as possible and made informed estimations with respect to certain timelines.



Chapterisation

This report is divided into three chapters:

Chapter I

A brief look at the Act, the context of its enactment, and inherent issues in its framework

Chapter II

After reviewing the legal setup, the second chapter offers a quantitative and qualitative review of the findings from this study, supplemented by graphs

Chapter III

The final chapter of this report offers concluding remarks and recommendations

Annexure

Briefs of select cases from three High Courts (Bombay High Court, Madhya Pradesh High Court and Gujarat High Court)



Chapter I

Understanding Abortion in India

A brief look at the Act, the context of its enactment,
and inherent issues in its framework

Chapter I

Understanding Abortion in India

I. Before the MTP Act

Prior to 1971, voluntary termination of pregnancies in India was a criminal offence (except when done in order to save a woman's life) under Sections 312 to 316 of the Indian Penal Code, 1860.³ Notably, the sections applied not only to other individuals but to the pregnant woman herself. Apart from these sections providing evidence of abortions occurring in India, historical records indicate the same as well. They point to abortions being conducted by women themselves, nurses, doctors, quacks, other experienced women, etc. using indigenous methods, such as herbs, heavy massages, and uterine insertions.⁴ While sometimes perceived as a "western" import, the practice was prevalent in India already, until outlawed by a colonial legislation. The enactment of the IPC, however, did not mean that the practice was discontinued in India. These provisions saw a massive gap in implementation, particularly since an MTP left no evidence (as the pregnancy itself ceases to exist) and it was in the interest of both, women and abortion providers, to maintain secrecy. Small surveys done in the 1960s offer evidence to this effect. An unpublished but later reported study revealed that all women admitted to Stanley Medical College in Chennai from 1965-66, for excessive bleeding and sepsis hemorrhage, had undergone an abortion.⁵ Similarly, a study from 1962 in Delhi found that 31.8% of all maternity ward admissions were of women who had undergone an abortion.⁶ Therefore, abortions were neither a new phenomenon nor

out of the ordinary. Its status as a criminal act only pushed it underground and away from the reach of law enforcement. This highlights the vitality of abortion as a choice exercised by women in order to be able to lead the kind of life that they wish to, despite the obvious risks associated with an abortion conducted by untrained individuals, illegally. This also left women requiring MTP vulnerable to exploitation by unscrupulous individuals.

On August 25, 1964 the Central Family Planning Board held its 16th meeting and expressed concern over the burgeoning number of illegal abortions and the threat this posed to the lives and health of women.⁷ This led to the formation of a Committee under the Chairmanship of Shanti Lal Shah ('Shah Committee'), the erstwhile Minister for Health and Law in the Government of Maharashtra in 1964, to look into the legality of abortion. The Shah Committee conducted exhaustive quantitative studies of various jurisdictions (such as the United Kingdom, Japan, erstwhile Hungary and Czechoslovakia, etc.) as well as India, where it concluded that in a population of 500 million, 6.5 million abortions could be expected just that year.⁸ The recommendations of the Shah Committee and the CFPB led to the promulgation of the MTP Act, which came into force on August 10, 1971.

3 The MTP Act is an exception to these provisions and any termination done outside the purview of the Act is an offence under the IPC

4 N.R. Madhava Menon, "Population Policy, Law Enforcement and the Liberalisation of Abortion: A Socio-Legal Inquiry into the Implementation of the Abortion Law in India", Vol. 16, No. 4, Journal of the Indian Law Institute (JILI), 1974. Accessible [here](#).

5 *Ibid.*

6 *Ibid.*

7 Sarosh Framroze Jalnawalla, "Medical Termination of Pregnancy Act: A Preliminary Report of the First Twenty Months of Implementation", Journal of Obstetrics and Gynaecology of India, 1974. Accessible [here](#).

8 Sarosh Framroze Jalnawalla, "Medical Termination of Pregnancy Act: A Preliminary Report of the First Twenty Months of Implementation", Journal of Obstetrics and Gynaecology of India, 1974. Accessible [here](#).



II. A Questionable Approach to Liberalising Abortion

Unfortunately, the approach towards the enactment of a legal framework for abortion had less to do with women's rights and more to do with issues such as family planning and potential criminal cases against medical professionals. Indeed, neither the Act nor its preceding deliberations focused on the rights of women, instead looking at abortion as more of a public health issue.

As argued by researchers before, the demand for a liberalised abortion law did not come from any feminist movement, but rather from policymakers and doctors seeking to address the increasing Indian population.⁹ Over and above that, the MTP Act also created a monopoly that allowed only Registered Medical Practitioners to conduct MTPs, despite the fact that MTPs were being successfully carried out by non-allopathic practitioners.¹⁰ Aside from the fact that abortions took place in India well before its colonisation,¹¹ the idea that abortion as a surgery can only be performed by allopathic doctors has been refuted by studies and experts in the field.¹² A 2012 study that trained allopathic physicians, ayurvedic physicians, and nurses in providing MTP in the first trimester of the pregnancy found that the failure rate was low (5%-6%) and identical across all three categories of professionals, over the course of 1,255 abortions carried out between 2008 and 2010.¹³ The researchers concluded that the pool of practitioners providing services under the Act should be expanded to enable greater access for

women.¹⁴ A similar observation of inadequate facilities was noted immediately after the enactment of the MTP Act as well. It was observed that a mere 48,242 terminations had been performed between April 1972 and November 1973 due to the presence of only 550 approved institutions for MTP in the country (despite the initial anticipation of approximately 1-1.5 million beneficiaries).¹⁵

A review of studies conducted shortly after the implementation of the MTP Act, including those referenced in this report, clearly point to a state-centric, over-medicalised and policy-oriented approach towards MTP, with women as incidental beneficiaries rather than primary stakeholders.

The preamble to the MTP Act states that it is "an Act to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto." While legally codifying the need to obtain consent from a pregnant woman, it does nothing more to emphasise a right of the woman to choose whether or not to continue a pregnancy. Therefore, the argument that the MTP Act "is limited to the liberalisation of conditions under which women may have access to abortion services by approved medical practitioners" does hold water.¹⁶

9 Amar Jesani and Aditi Iyer, "Abortion: Who is Responsible for Our Rights?", *Our Lives Our Health* (pp. 114-130), edited by Dr. Malini Karkal, Coordination Unit, World Conference on Women, 1995. Accessible [here](#).

10 Ibid.

11 N.R. Madhava Menon, "Population Policy, Law Enforcement and the Liberalisation of Abortion: A Socio-Legal Inquiry into the Implementation of the Abortion Law in India", Vol. 16, No. 4, *Journal of the Indian Law Institute (JILI)*, 1974. Accessible [here](#).

12 Shireen J., Jejeebhoy, Shveta Kalyanwala, and ors., "Feasibility of Expanding the Medication Abortion Provider Base in India to Include Ayurvedic Physicians and Nurses", Vol. 38, No. 3, *International Perspectives on Sexual and Reproductive Health*, 2012. Accessible [here](#).

13 Ibid.

14 Ibid.

15 Sarosh Framroze Jalnawalla, "Medical Termination of Pregnancy Act: A Preliminary Report of the First Twenty Months of Implementation", *Journal of Obstetrics and Gynaecology of India*, 1974. Accessible [here](#).

16 Amar Jesani and Aditi Iyer, "Abortion: Who is Responsible for Our Rights?", *Our Lives Our Health* (pp. 114-130), edited by Dr. Malini Karkal, Coordination Unit, World Conference on Women, 1995. Accessible [here](#).

III. Problems in the Act

Owing to the fact that the MTP Act was meant to address the issue of population control, its perspective was limited and did not account for the rights of women to exercise choices that affect their bodies. Furthermore, since the Act was developed in the late 60s and implemented in 1971, its foundations were rooted in the technology available at the time and has unfortunately not kept up with medical advancements. This dual factor, enhanced by limited jurisprudential development, has led to the Act being outdated, and implemented inconsistently in India.

MTP Caught in a Time Warp

- a. The Act does not formally recognise MTP as a right of the woman. The access to MTP has developed as a rights issue world-over and the same has been recognised through various judgements in India. The analysis chapter shall further reveal that MTP is rightly addressed from the standpoint of women's rights in various cases. This development in jurisprudence and discourse around MTP needs to be formally recognised in the Act. As it stands, the Act prioritises the decision and judgement of the RMP, based on outdated standards of medical risk. Instead, the Act should prioritise the decision of the woman and view MTP as a matter of right and not only medical feasibility.
- b. The Act was developed at a time when MTP beyond a certain point created major risks for the woman, as medical technology was not as advanced as today. At the time, the only method available for termination was Dilatation and Curettage, which required a higher level of skill, medical infrastructure and had greater risks. In today's context, with advanced medical technology, Medical Abortion drugs and vacuum aspiration (manual and electric), the same thresholds of risk mitigation do not apply. An MTP carried out at any time during the pregnancy today does not pose the same risk as it did in 1971. The Act must therefore account for these technological changes in its framework.
- c. While the Act views grave injury to mental health on the same level as grave injury to physical health, the importance placed on mental health is relegated in pregnancies over 20 weeks and that needs to be addressed by the judiciary. Considering that the risks associated with such MTPs does not stand on the same level as it did in 1971, the Act should recognise grave injury to mental health across the Act as a reason for MTP.
- d. The Act does not adequately recognise the social and economic implications of unwanted pregnancies and their impact on women. This leads to an incomplete determination of why a woman may seek an MTP and why she should be entitled to it.
- e. The Act and corresponding rules limit the scope for RMPs to be from outside the community of allopathic doctors. Considering that advances in technology, drugs, and skill development to utilise them have been significant, the framework for MTP needs to recognise capable and certified professionals from nursing, homeopathy, Ayurveda, etc. who can offer MTP services to women. This will greatly enhance the access to woman across the country.
- f. The condition for 'contraceptive failure' is limited to married women, which looks absurd in a time when courts have recognised women's autonomy regarding her body, privacy, and live-in relationships.



Chapter II

Analysis of Recent MTP Judgements

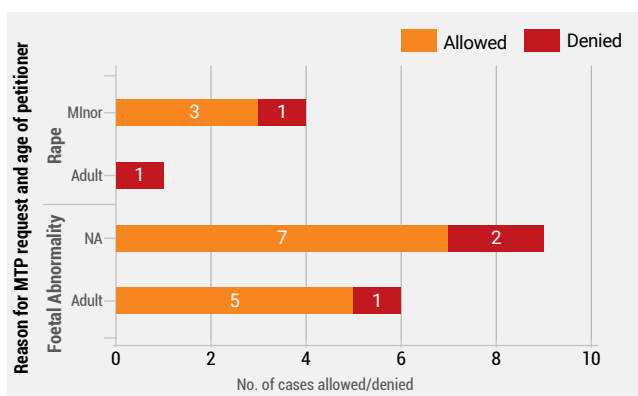
After reviewing the legal setup, the second chapter offers a quantitative and qualitative review of the findings from this study, supplemented by graphs

Chapter II

Analysis of Recent MTP Judgements

I. Supreme Court Cases

In 2016 there was a sudden spurt of cases being filed in the Supreme Court seeking permission for termination of pregnancies which were beyond 20 weeks in gestation. From the period **1st June 2016 till 3rd February 2018**, the Supreme Court saw a total of **21 cases*** before it. The following graph highlight the reasons forwarded by women to have their pregnancy medically terminated, the age of litigants, and whether the MTP was permitted by the courts:



Graph No. 1: Supreme Court figures categorised by the reason for the MTP request

**Information of one case is not available. All cases are above 20 weeks. There were no cases below 20 weeks in this timeline*

Of the 21 cases that came before the SC, one case involved a petition to set up committees to draft amendments to the MTP Act and various guidelines related to safe access for MTPs.¹⁷ Of the remaining 20 cases, the court permitted MTP in 15 cases and denied MTP in five cases. Notably, every case recorded before the Supreme Court in this timeline involved a pregnancy that had crossed 20 weeks.

Important Observations

a. Age of the woman/girl:

- Of the 20 cases with available information, the age of the woman was not made available in nine cases. Among the remainder, four cases involved minors and seven involved majors.
- Among the four cases involving minors, the Supreme Court permitted MTP in three, while rejecting the plea in one case.

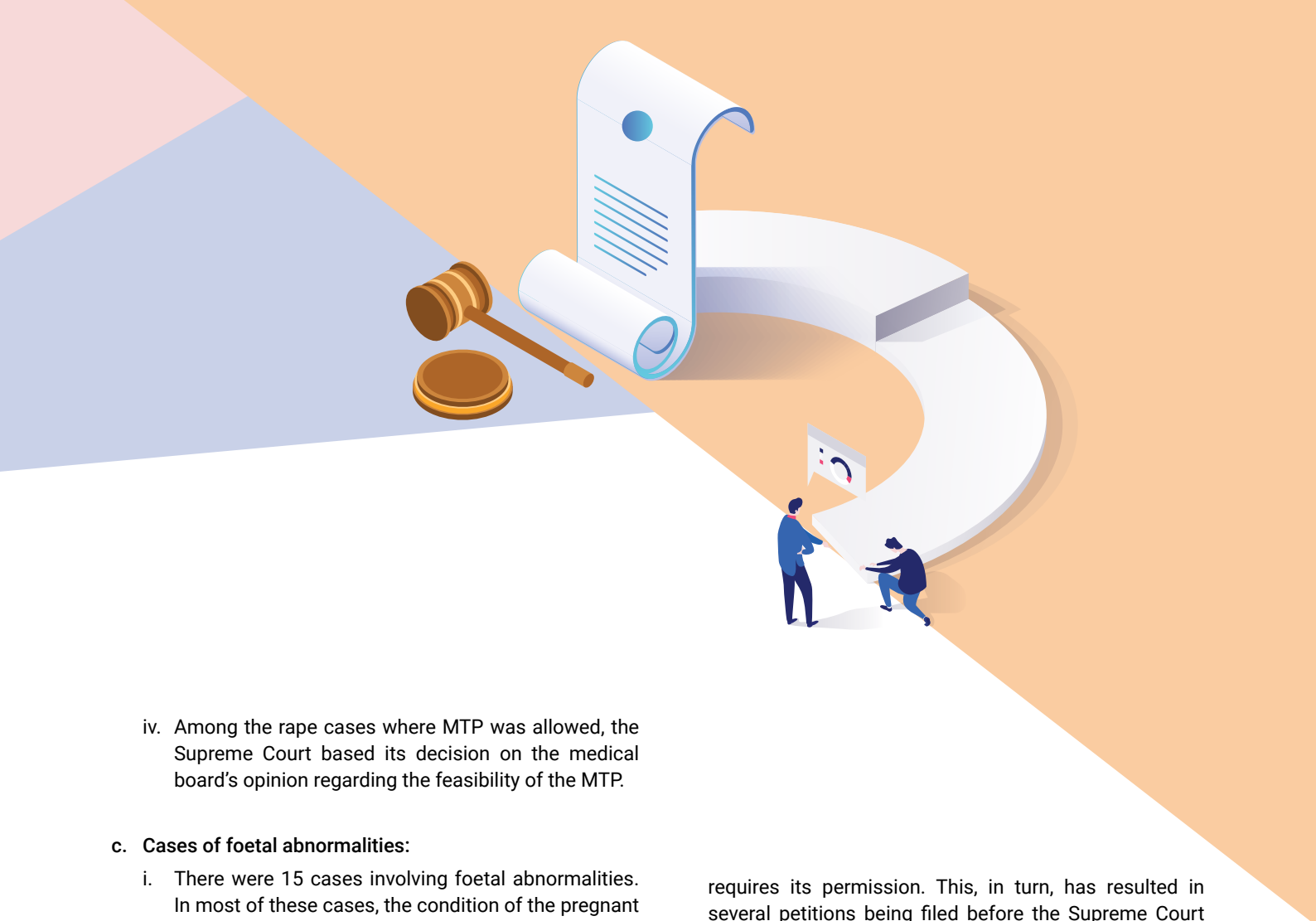
b. Cases of rape:

- Among the five cases where MTP was rejected, two involved pregnancies that resulted from rape. In both cases, the court was of the opinion that since the pregnancies crossed the statutory threshold of 20 weeks, MTP cannot be permitted. Pregnancies in both these cases had crossed 30 weeks.
- In one of these rejections, involving the rape of a minor, the court relied on the medical board's opinion that the continuance of the pregnancy was safer for the minor than a termination.¹⁸ The court ordered state authorities to handle the requisite medical care.
- In the second case where MTP was rejected, noting that the pregnancy had crossed 36 weeks, the court found that it was too late to allow MTP. However, the court ordered the state to pay a compensation of INR 10 lakh to the petitioner, stating that the state and the High Court acted negligently by not ensuring the provision of the MTP sooner.¹⁹

¹⁷ Anusha Ravindran v. Union of India, Supreme Court, Civil Writ Petition No.934 of 2017

¹⁸ Alakh Alok Srivastava v. Union of India, Supreme Court, Civil Writ Petition No.565 of 2017

¹⁹ Ms. Z v. State of Bihar, Supreme Court, Civil Appeal No.10463 of 2017



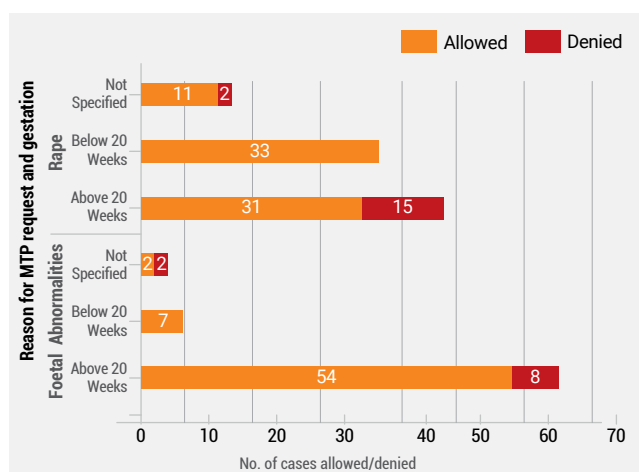
- iv. Among the rape cases where MTP was allowed, the Supreme Court based its decision on the medical board's opinion regarding the feasibility of the MTP.

c. Cases of foetal abnormalities:

- i. There were 15 cases involving foetal abnormalities. In most of these cases, the condition of the pregnant woman was given priority over the viability of the foetus. However, in a few cases, where the medical board believed that there was a likelihood of survival of the foetus after birth, the court was inclined to refuse permission. This is a departure from the original standard that gauged the impact of the pregnancy or its termination on the physical and mental health of the woman. By using terms like "life of the foetus", the viability of the foetus has been made a factor in decision-making.
 - ii. Among the five permissions rejected by the court, three cases involved foetal abnormalities. Each case involved a foetus between 26 and 28 weeks. However, in each of these cases, the medical boards opined that the foetuses were viable. Relying on the opinion of the boards, the Supreme Court rejected the MTP request in each of these three cases.
- d. It is pertinent to observe that the Supreme Court did not rely on the medical opinions of the doctors consulted by the women, instead directing the set-up of medical boards. The court was being approached because of the legal impediment in receiving MTP, not because the women had not consulted doctors beforehand. By not relying on medical opinions placed before the court by the women, the Supreme Court has created the public opinion that the termination of any foetus over 20 weeks requires its permission. This, in turn, has resulted in several petitions being filed before the Supreme Court and High Courts, which could otherwise have been legally terminated. The court, did not settle the law and instead only relied on medical opinion by a board that it had constituted.
- e. In cases where the court allowed MTP, it noted the potential physical or mental agony while making its decision. The court did not base its verdicts on whether there was a threat to the life of the woman – a higher standard. This lends credibility to the fact that Section 5 of the MTP Act is an exception that provides for the termination of pregnancy by a single RMP to save the life of the women at any stage. In 2016, the Supreme Court had held that apart from the length of the pregnancy and the number of RMPs stated in Section 3, everything else in this section applies in the reading of Section 5. Since the Supreme Court has directed that these cases should be filed before the respective High Courts, there is a flood of litigation on these issues now before the High Courts, instead of them being lawfully resolved beforehand.

II. High Courts Cases

The High Courts of India have seen 173* cases in the stated timeline. However, these cases are not evenly distributed among all High Courts. The Bombay High Court has heard the lion's share, with 88 cases. With 22 cases, Madhya Pradesh comes in as a distant second, which highlights a disproportionate number of MTP requests coming to the Bombay High Court. Graphs below offer insights on the reasons forwarded by women to have their pregnancy medically terminated, the age of litigants, whether the MTP was permitted by the courts, and how many pregnancies crossed the 20 week threshold:

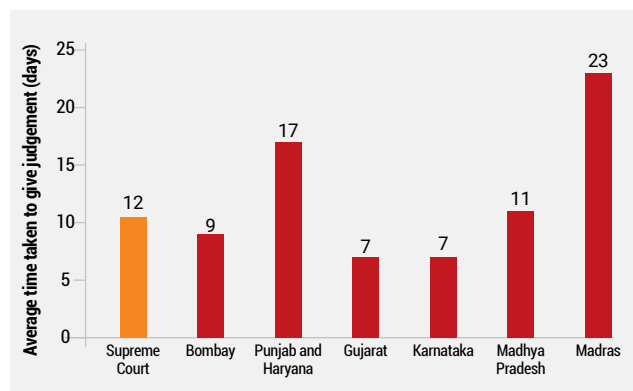


Graph No. 2: Cumulative High Court figures categorised by the reason for the MTP request and gestation



Graph No. 3: Cumulative High Court figures categorised by reason for the MTP request and the age of the women/girls

***Note:** The graphs exclude eight outlier cases. These cases have been included in the qualitative analysis, but have been excluded from the graphs and numerical analysis to enhance readability and comprehension. The graphs therefore represent 165 cases from across the High Courts of India.



Graph No. 4: Figures comparing the average time taken by the Supreme Court and select High Courts to decide MTP requests. Note that the figures are in days. Only High Courts that have adjudicated five or more cases have been analysed here.

Important Observations

Out of the 173 cases before High Courts in India, MTPs were permitted in 139 cases and denied in 29 cases. Of the remaining five cases, three petitions were withdrawn by the petitioners, one case was dismissed on account of petitioner not appearing before the medical board (effectively withdrawing her petition) and the last was disposed, on account of the petitioner having a miscarriage. An additional three cases, each involving adult women, cited unique circumstances for the MTP request: a) In one case, the petitioner cited mental trauma associated with the pregnancy on account of marital discord – the court rejected the request, arguing that no reason under the Act was put forward by the petitioner; b) One case involved a petition by the guardian citing lacking mental health of the pregnant woman – the court found the mental health to be adequate and that the woman wanted to carry the pregnancy to term, thus declining the request; c) One case involved the possibility of the foetus contracting HIV/AIDS from the pregnant woman who tested HIV positive – the court permitted this request.



The following points assess the remaining 165 cases.

a. Age of the woman/girl:

- i. 78 cases involved minors and in nine cases, the age of the woman was not disclosed. 78 cases involved adults.
- ii. Among the 78 cases involving minors, every case involved a pregnancy that was a result of rape. Among those cases, 12 MTP requests were rejected by High Courts and one was withdrawn. Of these 12 cases, one case involved the rape of a minor where a medical exam was conducted in the 19th week of pregnancy, but the MTP was not carried out by the doctor and no reason was provided for the same, which resulted in the petition to the High Court.²⁰ The High Court noted this lapse, but denied the MTP since the foetus was over 20 weeks. In another case, the petitioner was the father of a minor daughter who consensually conceived while below the age of 18 years, but did not want to terminate the pregnancy.²¹ By the time the case reached the court, she had turned 18 years of age and was no longer a minor, which meant that the MTP could not have taken place without her consent. Therefore, the petition of the father was rejected by the court.
- iii. Notably, among the eight outlier cases referred to above, one case involved a minor who became pregnant as a result of rape. Despite the pregnancy being under 20 weeks, she was forced to file a petition in the High Court. However, the petition was later withdrawn.
- iv. Among the ten cases involving adults, three pregnancies were the result of rape, seven pregnancies involved foetal abnormalities. In each case, permission was granted by the High Courts.

c. Pregnancies above 20 weeks:

In 108 cases, the pregnancy had crossed the 20 week threshold. Of these cases, 85 requests were permitted, 23 were rejected. Notably, of these cases, as many as 69 cases were between 20 and 24 weeks, whereas 32 cases were between 24 and 28 weeks and seven cases were over 28 weeks. Among the seven cases, four involved minors who were raped – three of these survivors were denied access to MTP and were forced to carry their pregnancies to term.

b. Pregnancies below 20 weeks:

- i. Surprisingly, 40 cases came before High Courts, where the gestation was below 20 weeks. The fact that such cases came before the court to begin with is troubling and a departure from the text of the Act as well as its implementation.
- ii. Among these 40 cases, 30 cases involved minors – each case was the result of rape. All of these requests were permitted by the courts.

d. Cases of rape:

- i. Among the 92 cases involving rape, 75 permissions were allowed and 17 were rejected.
- ii. The reasons noted by the court in the 17 cases where permission was rejected were varied. In majority of the cases, the court relied primarily on the opinion of the medical board. Notably, medical boards do not follow a consistent set of parameters on the basis of which they offer advice, leading to inconsistencies.

²⁰ Kottaichemy v. State of Madras, Madras High Court, Writ Petition No. 4889 of 2017

²¹ Marimuthu v. Inspector of Police, Writ Petition No. 12212 of 2016



- iii. In at least three cases, the court did not look beyond the statutory limit of 20 weeks. This line of reasoning departs from Section 5, which permits MTP over 20 weeks as well.
- iv. In one case²² the court rejected the MTP request, stating (among other things) that the delay in disclosing the incident of rape suggested that conception had not caused any discernible mental anguish. Furthermore, the court argued that there was a compelling state interest in protecting the life of the foetus. This verdict was later appealed in the Supreme Court. The Supreme Court did not grant the MTP request on account of the gestation being over 30 weeks.²³ However, the Supreme Court did provide the survivor with a compensation in lieu of the lapse in state machinery.
- v. Among the 75 cases where MTP was allowed, over half of the cases did not rely exclusively on the opinion of the medical boards. Such cases viewed pregnancies that resulted from rape as falling within Section 5, noting that rape (especially in the case of minors) constituted a grave threat to the mental health of the survivor.
- vi. However, in remaining cases, a priority over a woman-centric interpretation of Section 5 was either not considered or was placed below the opinion of the medical board, which proved to be the primary reason to allow MTP.

e. Cases of foetal abnormality:

- i. Of the total 73 cases involved in potential foetal abnormalities, the court permitted 63 MTP requests and turned down the rest 10.
- ii. In each of these rejections, the court's decision was based on the opinion of the medical boards. The boards either warned of a threat to the life of the woman if an MTP was conducted, or stated that the foetal abnormality in question was either not significant or could be rectified after one or more surgeries.
- iii. Similarly, most of the cases that resulted in the petitioner being granted permission turned on the opinion of the medical board.
- iv. Notably, in one case the court noted that the MTP posed a substantial risk to the woman, based on the opinion of the medical board. However, the court based its decision on the wishes of the woman, who was willing to take the risks associated with the procedure.²⁴ This case highlighted that the court does not need to base its decision exclusively on the opinion of the medical board, but can allow the woman to take a call based on her informed consent.
- f. Like the Supreme Court, the High Courts of India decide such cases very inconsistently. Since there are more High Court cases than the Supreme Court, the scope of variance is a lot higher. This implies that the text of the MTP Act lends itself to a wide degree of interpretation, leading to inconsistencies in how the judiciary responds to such cases.
- g. High Courts also rely primarily on court-appointed medical boards.

²² Ms. Z v. State of Bihar, Patna High Court, Writ Petition No. 5286 of 2017

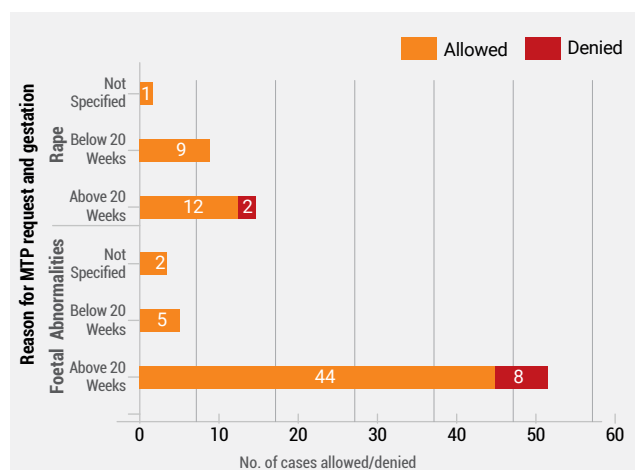
²³ Ms. Z v. State of Bihar, Supreme Court, Civil Appeal No.10463 of 2017

III. Specific High Courts

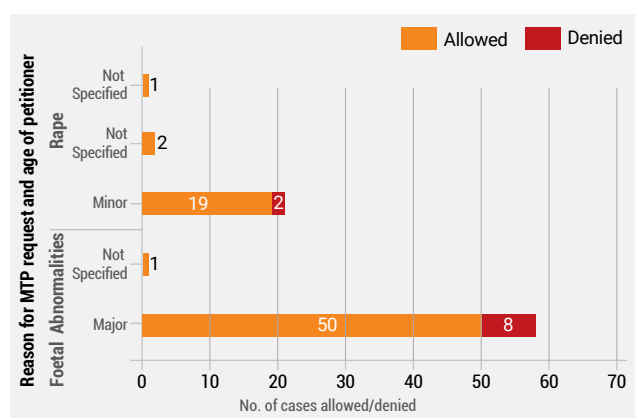
Here, we take a closer look at Bombay High court (88 cases), Madhya Pradesh High Court (22 cases) and Gujarat High Court (13 cases). Aside from offering a quantitative assessment of these High Courts, the annexure also takes a look at some specific judgements.

Bombay High Court

The Bombay High court has seen the most litigation on this aspect. A total of 88 cases have been analysed and a number of these judgments are jurisprudentially strong. Notably, five of the eight outlier cases analysed in the previous section were from the Bombay High Court, leaving 83 cases that have been represented in the graphs. Of the 83, as many as 14 cases were below 20 weeks. As many as 21 cases were of minors seeking MTP and in two cases the judgements did not disclose the age. A total of 59 MTP requests came as a result of foetal abnormalities being detected, 24 requests came from women who were raped. In 73 cases the permission to terminate the pregnancy was granted, in ten cases it was refused. A graphical breakdown of these cases is given. Briefs of certain important cases have been included in the Annexure.



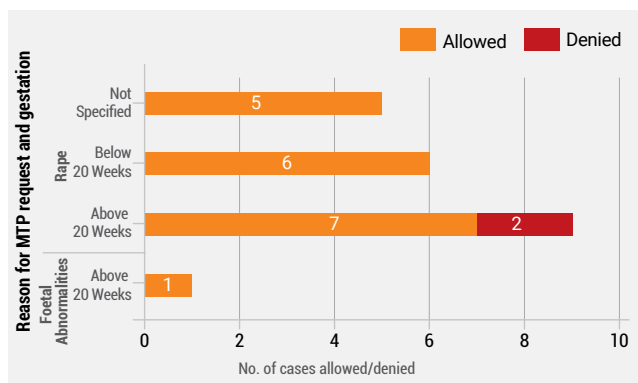
Graph No. 5: Bombay High Court cases categorised by reason for the MTP request and gestation



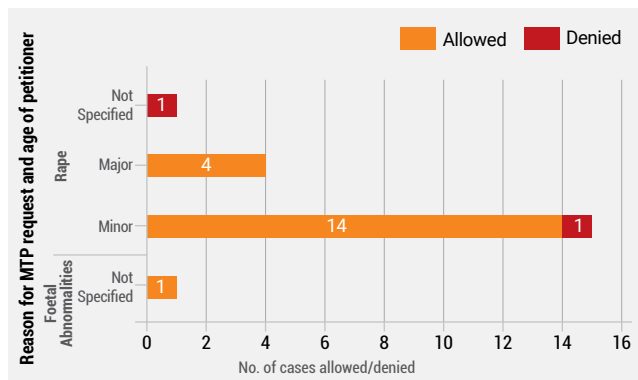
Graph No. 6: Bombay High Court cases categorised by reason for the MTP request and the age of the women/girls

Madhya Pradesh High Court

There were 22 cases which were analysed in the time period. One of these cases includes an outlier case, which leaves 21 cases that have been graphically represented. Of the 21 cases, six were below 20 weeks, ten were above 20 weeks. However, none of the cases saw the High Court question the necessity of approaching the court for permission. Except for one, all cases were of pregnancies resulting from rape and in most cases, it appears that the criminal justice procedure had already been initiated. Despite this, the Court did not question the reason why the petitioner had to approach the High Court. In two cases permission was refused. In the remaining 19 cases permission was granted. All of the cases were decided by a single judge of the High Court. A graphical breakdown of these cases is given below. Briefs of certain important cases have been included in the Annexure.



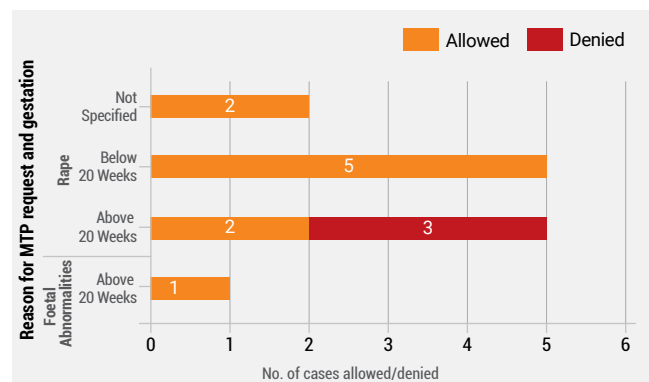
Graph No. 7: Madhya Pradesh High Court cases categorised by reason for the MTP request and gestation



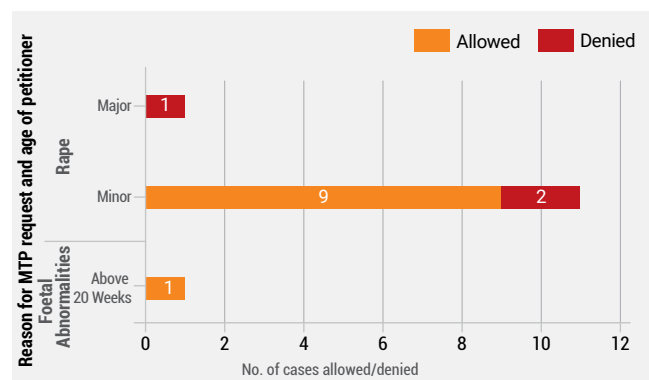
Graph No. 8: Madhya Pradesh High Court cases categorised by reason for the MTP request and the age of the women/girls

Gujarat High Court

There were 13 cases analysed from this state, five of which were below the 20 week statutory threshold. Except for two cases, all petitioners were minors and the reason for seeking the MTP was rape. In three cases, the permission was refused. Each case was decided by a Single Judge of the High Court. A graphical breakdown of these cases is given below. Briefs of certain important cases have been included in Annexure.



Graph No. 9: Gujarat High Court cases categorised by reason for the MTP request and gestation



Graph No. 10: Gujarat High Court cases categorised by reason for the MTP request and the age of the women/girls



Chapter III

Conclusions and Recommendations

The final chapter of this report offers concluding remarks and recommendations

Chapter III

Conclusions and Recommendations

Study Findings and Implications

Cases involving rape of minors were not addressed promptly or treated differently:

In the stated timeline, 40 MTP requests came before various High Courts where the gestation of the foetus was under 20 weeks. Such cases clearly defy the provisions of the MTP Act and represent a major problem in the trends associated with MTP access. While the High Courts permitted MTP in each case, the fact that such cases – 33 of which were the result of rape – ended up in the High Court proves the difficulty that women face in accessing MTP, even when they are well within the confines of the law. Such cases do not require an adjudicative process by a court of law and need to be addressed by RMPs in the first instance. Especially cases that involve rape of minors need to be addressed promptly and sensitively in order to not increase the mental trauma that has already been inflicted. In the stated timeline, 98 cases where a woman or a child was pregnant as result of rape were heard before the Supreme Court and various High Courts. Despite such cases falling squarely within the ambit of serious mental and physical trauma, survivors of rape are forced to approach the courts for relief. In a context where the law is clear and the pregnant woman/girl is already in the realm of the criminal justice system, it is inhumane that she has to seek specific permission from the courts. An alarming facet of this trend is that in most of these cases, the High Court has not questioned the need for the petitioner to have approached the court and there have been no directions passed to ensure that this situation is not repeated.

In cases with foetal abnormalities, attention to the pregnant woman's caring abilities have been ignored:

Nearly half the cases heard by the High Courts involved foetal abnormalities, seven of which were below the 20 week threshold and therefore should not have ended up in courts at all. The Supreme Court heard 15 such cases, of which it rejected three. Among the total of 88 cases (Supreme Court and all High Courts), 32 cases involved fetuses whose gestation had exceeded 24 weeks. This observation bolsters the longstanding argument for an increase in the 20 week threshold, since most abnormalities are undetectable before 20 weeks. Furthermore, most cases turned on the viability

of the foetus, whereas little or no attention was paid to the reasonable and foreseeable future of the pregnant woman to be able to take care of a child born with special needs.

The judiciary's continued reliance on medical boards is cumbersome and complicated:

The judiciary's continued reliance on medical boards that it has constituted seems to further complicate the issue. In many cases, women approach the courts with the opinion of doctors who had examined them already. In such instances, to constitute a board and determine the state of the woman and the pregnancy afresh is wholly unnecessary. Furthermore, in cases where the gestation has already exceeded 20 weeks, ordering for a fresh examination consumes valuable time that can prejudice the woman's petition for an MTP. Over and above this, the central issue is the extent to which the court relies on medical boards' opinions regarding foetal viability. The MTP Act does not state that medical boards are required and that they must offer their opinion on the viability of fetuses or that it should factor in decision-making. Yet, the judiciary relies wholly on the opinion of the board on this subject, which turns such cases exclusively on medical fact rather than legal opinion that includes a determination of the circumstances of the woman.

Inconsistencies within the judiciary:

In cases over 20 weeks, the MTP Act only refers to a vague *"immediately necessary to save the life of the pregnant woman"* standard, deviating from the mental and/or physical health standard used in cases under 20 weeks. Mental and/or physical health could also threaten life in the short or long term, which is further complicated by inconsistent deliberations on the text of the Act across High Courts. This has led to doctors, who would otherwise interpret circumstances more broadly and in the woman/girl's benefit, to apply narrow standards employed by the judiciary. Several cases allow for MTP, noting that severe mental trauma cannot be ignored and must be a major factor to consider, especially if the pregnancy is the result of rape. On the flip side, certain judgements rule that an MTP over 20 weeks is exceptional



and can rarely be permitted. It is vital to remember that these thresholds were drawn when the legislation was first enacted in 1971 and found their basis in the medical technology available at the time. Therefore, applying such standards verbatim, without having definitional clarity, and with an inadequate consideration of mental health and its implications is severely problematic. This is made worse by the fact that the determination does not account for a woman's financial capacity for child-rearing, which can have a drastic impact on the future of the woman and her family. Lastly, little attention is paid to the possible societal stigma associated with carrying a pregnancy to term for a minor, widow, or survivor of rape and the implications this stigma may have on mental health. The determination of injury to mental health and the impact of mental trauma is therefore seen to be severely lacking in the Indian judiciary.

Attributing 'Personhood' to the foetus:

In several cases, judges attribute personhood to the foetus, either intentionally or unintentionally. Passing references to the foetus as a "child" and the pregnant woman as the "mother" leads to a subconscious assessment of the situation which is far removed from what is contemplated in the law. The decision to permit MTP is seen less as a medical procedure for the well-being of the consenting woman and more as an undesirable method to end a pregnancy. This perception leads to the odds being stacked against women from exercising agency over their bodies, by attributing competing rights that do not find basis in law, science, or jurisprudence. It also creates an opportunity for judges to decide based on their personal beliefs.

Inconsistent time periods:

Despite having well-defined time periods, the systemic response to such cases is far from quick. On average, it took 12 days for the Supreme Court to decide MTP cases. The time factor is worse in the case of several high courts, such as the Madras High Court (average of 23 days) and the Punjab and Haryana High Court (average 17 days). The speediest resolution of such cases took place in the Karnataka High Court and Gujarat High Court (seven days each). These figures represent the time taken from the filing of the writ petition until the verdict is delivered. In reality, an even longer time is taken, considering that women first approach unwilling RMPs and sometimes district courts, before filing a writ petition before a High Court. The end result is that such

systemic delays are held against the woman, as medical boards deem such surgeries to be unsafe.

Parameters across states do not work consistently:

It is unlikely that the state of Maharashtra has four times as many unwanted/unplanned pregnancies as the state of Madhya Pradesh, yet the data reveals that the Bombay High Court hears four times the number of cases as its Madhya Pradesh counterpart. This is a worrying observation and further corroborates the inconsistency with which such cases are addressed across India. Without a rationalised framework across the country, women seeking MTP are forced to have their fates sealed by the prevailing standards of the state they reside in.

Selective use of 'reproductive rights':

Reproductive rights find mention in various judgements where women do not want an MTP, but the same rights do not find frequent mention when the decision of the woman is to medically terminate the pregnancy. There is, therefore, a selective application of these rights favouring women seeking to bear and raise children, rather than otherwise. If the courts have identified women's rights over their bodies then it needs to encompass all consequences of decision-making by women and not selectively value certain decisions over others. Such an interpretation defeats the purpose of valuing choice in the first place.

Lack of a current, cogent and comprehensive interpretation of the Act:

Overall, the Supreme Court and High Courts often adjudicate such matters on a case by case basis, with little inclination to develop a cogent, current, and comprehensive interpretation of the MTP Act that rightly prioritises the choice of women over their bodies. There seems to be no consistently applied jurisprudence for cases involving sexual assault, fetuses with abnormalities, the correct process through which women can access MTP in the quickest manner, compensation for systemic delays and the trauma it causes, the understanding of mental trauma and its implications, what constitutes a threat to life, the financial capacity to raise children, etc. In the past three years, the Supreme Court has had several opportunities to set the record straight on how women can access a basic medical option to exercise over their bodies, but has chosen neither to do so nor to direct the government to do so.

Medical boards have no role in MTP:

Medical boards constituted by the judiciary have no basis in the Act itself and the manner of reliance placed on such boards is a cause of serious concern. Aside from unnecessary reliance, the constitution and sometimes reconstitution of medical boards lead to the loss of precious time in such cases. Furthermore, the manner in which boards are consulted are inconsistent, partially owing to the fact that there are no clear guidelines that specify the nature of consultations between the judiciary and medical boards. In certain cases, the court puts specific questions before medical boards. In other cases, medical boards offer additional unsolicited observations that become red herrings in the process of judicial decision-making. Therefore, the nature of interaction between medical boards and the judiciary needs to be carefully considered and determined in a consistent manner.

Recommendations

Ministry of Health and Family Welfare can issue a statement clarifying that women under 20 weeks of gestation do not need to go to courts, amend the Act, and harmonise the framework with other Acts:

We recommend that Ministry of Health and Family Welfare issue a public statement that clarifies to the public, the judiciary and the medical community across India that a pregnant woman does not need to approach the court for permission while seeking MTP, if the foetus is under 20 weeks gestation.

Table and Pass the MTP Amendment:

Table the MTP Amendment Bill, 2014 in the Houses of Parliament for deliberation and pass the amendments listed: a) Liberalise access to MTP by expanding the definition of RMPs to include non-doctors who have undergone specified training to perform an MTP; b) Recognise MTP as a right of the woman, by allowing it on-demand in the first trimester and put mental trauma, physical trauma, and the threat to life on the same footing; c) Expanding the threshold in cases of foetal abnormalities – this way the courts would not have to intervene in a number of cases; d) Revise the 20 week threshold to 24-26 weeks for any other cases.

The MTP Amendment Bill proposes several other changes, which will increase access to safe abortion. Additionally, the report proposes adding a provision to allow abortion for pregnancies arising out of rape at any stage, considering the serious injury to mental health such pregnancies can cause.

Harmonise the framework with other Acts:

Begin a consultative process that seeks to collate recommendations on how to harmonise the Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994, the Protection of Children from Sexual Offences Act, 2012, the Drugs and Cosmetics Act, 1940 and the MTP Act. These Acts often collide in practice and stand in the way of women seeking a bona fide MTP. We propose developing a rationalised framework in collaboration with medical experts, lawyers, reproductive rights activists, NGOs working on this issue and other stakeholders.

The Supreme Court can permit all pending cases under 20 weeks, account for time-sensitivity in such cases and lay down comprehensive jurisprudence that creates a consistent interpretation of the Act, which can be applied across the country.

Permit all pending cases:

Immediately permit all pending cases across all courts that involve foetuses under 20 weeks. The courts should also impose costs/fines on doctors who refuse to perform such MTPs, forcing women to seek relief from the courts.

Time-sensitive adjudication:

Considering the time-sensitive nature of such cases, the courts should adjudicate them in a speedy manner. The courts must give medical opinions brought by women, due attention and not set up new medical boards and force the case to drag on for longer than it requires. Medical boards often fail to accurately capture the risks associated with carrying the pregnancy to term and risks associated with childbirth, particularly in the case of minors. Such boards also unnecessarily second-guess the opinions of RMPs placed before the court by the petitioners. The practice of setting up medical boards to re-determine medical facts must therefore be stopped, considering the time-sensitive nature of these cases.

SC should lay down comprehensive jurisprudence:

The Supreme Court should try and lay down a comprehensive jurisprudence that clarifies certain definitions and processes to ensure that justice delivery is consistent across the country.



Annexure

Briefs of select cases from three High Courts
(Bombay High Court, Madhya Pradesh High Court and Gujarat High Court)

Annexure

This annexure provides briefs of certain notable cases from the Supreme Court, Bombay High Court, Madhya Pradesh High Court and Gujarat High Court.

1. Supreme Court

a. **Tapasya Umesh Pisal v. Union of India & Ors. – Civil Writ Petition No. 635 of 2017 – Decided on 10.08.2017:**

The petitioner approached the Supreme Court in her 24th week of pregnancy due to foetal abnormality. Medical opinion was that if the baby is delivered alive, it would have to undergo several surgeries which are associated with high morbidity or mortality. The court held that, apart from the length of the pregnancy, the case fell within Section 3 of the Act. It further stated that it is certain if the foetus is allowed to be born, it would have a limited lifespan with serious handicaps and that it would certainly not reach adulthood. In the interest of justice, the petitioner was permitted to undergo MTP.

b. **Ms. Z v. State of Bihar – Civil Appeal No. 10463 of 2017 – Decided on 17.08.2017:**

This was an appeal filed by the petitioner after having been refused the permission to terminate the pregnancy by the High Court. In this case, the petitioner was a survivor of rape who had become pregnant. She was residing in a shelter home for women. Although she had a family, she was destitute after being deserted by her husband. She approached the authorities when her pregnancy had reached 13 weeks gestation. But owing to systemic delays, she was not provided the option of an MTP until the 20th week, forcing her to approach the High Court. The High Court spent a considerable amount of time in obtaining the consent of her husband and father, eventually ruling that she had not approached the

High Court in time. Her petition was denied, which led her to appeal to the Supreme Court. In a thorough judgment, the Supreme Court stated that the manner in which her case was treated amounted to a violation of her fundamental rights. The Supreme Court held the High Court responsible for delays and therefore awarded a compensation to the petitioner. However, by the time the appeal reached the Supreme Court, the pregnancy was too far along for an MTP to be a viable for the petitioner. The medical opinion was clear that an MTP at that stage posed a risk to the life of the woman. The Supreme Court was therefore forced to reject the request.

c. **Meera Santosh Pal v. Union of India – Civil Writ Petition No. 17 of 2017 – Decided on 16.01.2017:**

The petitioner had approached the court in the 24th week of her pregnancy. The reason for this termination was foetal abnormality. The opinion of the Medical Board was that the foetus was not viable and would not survive. The Supreme Court considered the fact that continuing the pregnancy would have gravely endangered the physical and mental health of the petitioner and thus granted permission. Interestingly, the Supreme Court specifically stated that it would not enter into the medico-legal aspect of the identity of the foetus and instead decide the matter on the basis of the petitioner's rights. The court reiterated that a woman's right to make reproductive choices was protected as a dimension of personal liberty, under Article 21 of the Constitution of India. Applying the principle to this case, the court stated that the petitioner had a right to protect and preserve her life by making an informed decision. This judgement has since been followed in other Supreme Court and High Court cases.



2. Bombay High Court

a. **Shaikh Ayesha Khatoon v. State – Writ Petition No. 36727 of 2017 – Decided on 09.01.2018:**

The petitioner approached the court seeking termination due to foetal abnormalities. The petition was filed at 26 weeks of gestational age and was decided at 27 weeks. Medical opinion pointed clearly to the fact that existence after birth would be very difficult and highlighted the clear communication by the petitioner to terminate. This was a groundbreaking judgment that included mental health and personal liberty in its decision. Section 5 was interpreted in light of the issues highlighted in Section 3, which meant that mental and physical anguish had to be considered while interpreting “immediately necessary to save the life.”

b. **Ramesh Rathod v. State – Writ Petition No. 5289 of 2018 – Decided on 11.06.2018:**

In this case, a minor was represented by her father to seek the termination of a pregnancy that was the result of rape. The medical opinion was that the continuation of the pregnancy would impact the mental health of the pregnant minor. The court, while permitting the termination, held that the minor had a choice to make with respect to this pregnancy. The freedom to choose could not be taken away. It was also considered that, besides physical injury, the legislature had widened the scope of MTP by including “injury” to mental health. Despite the pregnancy being the result of physical abuse, the choice of the survivor needed to be respected.

c. **Court on its Own Motion – Suo Motu Public Interest Litigation No. 1 of 2016 – Decided on 19.09.2016:**

In this case, an undertrial prisoner kept in a District Women’s Prison requested a visiting District and Sessions Judge permission to terminate her pregnancy. In the request, she had set out the fact that she already had a five-month-old baby, suffering from convulsions and epilepsy and her own health was not good. In such a condition, it was not possible for her to take care of herself, her child and continue her pregnancy. The judge was informed by the prison’s Medical Officer that the MTP request was sent to a committee, but no decision had been communicated. It had been more than a month and the decision had not been taken. Considering this scenario, the judge decided to send an application to the High Court and the matter was taken up. While the issue in public interest was being heard, the undertrial was given permission to seek MTP. The court was informed that the jail manual dealt with situations where a pregnant woman is admitted as an undertrial/convict, but not with situations where an undertrial/convict becomes pregnant and seeks an MTP. An amicus was appointed by the court, who informed the court about another pregnant undertrial seeking permission to access MTP. The court discussed the provisions of the Act. Relying on Section 3, the court first dealt with the issue of the impediment of referring the request for an MTP by an inmate of the jail to a committee, irrespective of the length of the pregnancy. The court clarified that the Act is clear in its provisions and that there is no requirement to bring in an additional hurdle of a committee.

Where a woman inmate seeks an MTP, the case should be directly referred to the concerned government hospital and that steps should be taken as per the Act. The court contextualised the Act in today's day and age. It interpreted the explanation to Section 3, which refers to the anguish caused by a pregnancy as a result of contraceptive failure. While this provision is applicable to a married woman, the court construed this to include any couple living together like a married couple. The court then deliberated on the consequence of an unwanted pregnancy and how it becomes the responsibility and burden of the woman. It further stated that where the burden is only on her, she should not suffer and that the RMP, while assessing the grave injury to her mental health, must also account for the impact of an unwanted pregnancy on an unmarried woman. The court then elaborated on the factors considered by a pregnant woman, such as the welfare of her existing children, impact on her health, enhanced financial burdens, etc. The judgment said, "If a woman does not want to continue with the pregnancy, then forcing her to do so represents a violation of the woman's bodily integrity and aggravates her mental trauma, which would be deleterious to her mental health." The court then dealt with the oft-quoted right of the foetus, stating that the unborn foetus is not an entity with human rights and that the decision of what needs to be done with the pregnancy is of the woman alone, since it is taking place within her body, having a profound impact on her health, mental well-being, and life. It emphasised the woman's right to bodily autonomy. While interpreting Section 3, the court also went on to say that if it is the right of a woman to be a mother, it is also her right to not be a mother and this choice is protected by Article 21. The court issued specific directions to be followed by all women prisons in Maharashtra. These directions covered pregnancy testing, informing women of the Act, their options, and the corresponding legal implications. The court directed prisons to maintain an OPD register and to ensure that inmates are taken to the nearest hospital to save time. As a first, the judgement interpreted Act from a woman's perspective, acknowledging that pregnancies can be unplanned and that the moment

a pregnancy is unplanned or unwanted, it invariably becomes a burden for the woman, leading to ostracisation and irreversible damage to physical and mental health. Therefore, the decision to continue the pregnancy or to terminate it rests with the woman. The law only provides the procedure and safeguards to ensure that her rights are not violated.

d. Nandini Tushar Rawool v. State – Writ Petition No. 8313 of 2018 – Decided on 14.08.2018:

This is a case where a woman sought the court's permission to terminate her pregnancy in the 25th week. The court declined the permission on the basis of the medical opinion that the condition of the baby could be managed. Whereas, if the pregnancy was terminated at 26 weeks, the baby was likely to be born alive and the doctors would face an ethical dilemma with respect to potential non-resuscitation. The court stated that mental anguish is a part of life and different from anguish that stems from sexual assault. Furthermore, that the supposed inconvenience in looking after the child and request for MTP amounted to reproductive materialism. The medical board was also concerned about the promotion of MTP outside of legal sanction. The court stated that until the law is modified, an MTP would be inappropriate.

e. Sudha Devgirkar v. State – Writ Petition No. 10835 of 2018 – Decided (the issue of termination) on 09.10.2018 and tagged with other petitions, which was decided on 03.04.2019:

The court granted permission, but notably, the medical board told the court that it should instruct the parents to take responsibility of the child, if born alive. Owing to this, the petitioner was forced to file an affidavit. Since the court realised that in previous cases where MTP was granted the foetus could be born alive, it decided to address this larger issue and held that the court has the power to permit MTP after the 20 week limitation. However, the court narrowed the interpretation of Section 5 to only life or death situations. In any other instance, the woman must secure permission from the High Court or Supreme Court. The judgement set out procedures and timelines for securing such permissions.



3. Madhya Pradesh High Court

a. Preeti Jindal v. State – Writ Petition No. 8404 of 2016 – Decided on 21.12.2016:

The petitioner approached the High Court due to foetal abnormalities at 26 weeks of gestational age. The court relied on Section 5 to permit the MTP. This decision was based on the medical report, which stated that the woman would not be able to bear the mental and physical burden of the pregnancy. It is necessary to state that the husband's consent was also taken into account. The medical board was already set up and had expressed its opinion for termination. The matter was decided in two days.

b. Priyanka Yadav v. State – Writ Petition No. 23307 of 2017 – Decided on 05.01.2018:

The petitioner approached the court through her parents. The pregnancy was as a result of rape and was at 26 weeks of gestational age. The court, while refusing permission at 29 weeks, based its decision on the medical board's report. The report stated that the woman was severely anaemic and the likelihood of the foetus being born alive was high. The board advised that the pregnancy should continue and that the risks associated with MTP were high. Since the criminal case was pending, no compensation was awarded. The court did not delve into the reasons for delay.

c. Sundar Lal v. State – Writ Petition No. 20961 of 2017 – Decided on 06.12.2017:

The father approached the High Court on behalf of his daughter who was pregnant as a result of being raped. The gestational age, although not mentioned specifically, was more than 20 weeks. The survivor had not been medically examined by two or more registered medical practitioners, leaving the conditions of Section 3 unmet. The court set up a

committee, stating that it would follow whatever the committee recommended. While the court opined that an MTP cannot be granted in the absence of statutory requirements, it gave preference to the fact that the case cannot be refused on technicalities and therefore legally permitted MTP. While reaching this conclusion, it discussed previous High Court and Supreme Court verdicts. It is important to point out that this is one of the few cases where the court's opinion was based on the Act, not on the medical report. This judgement has since been relied on in several other verdicts.

4. Gujarat High Court

a. Bhoi Kunjalben v. State – Criminal Appeal No. 1211 of 2017 – Decided on 15.02.2017:

The petitioner was a minor who approached the High Court seeking permission for termination of her pregnancy which was the result of rape. The gestational age of the pregnancy was 24 weeks when the petition was filed and was at 27 weeks when the case was decided. On examining the petitioner directly, the court found that there was no consent of the petitioner for the MTP. The court spoke with the petitioner at length and realised that what was stated in the petition was contrary to her choice. It appeared that the parents of the petitioner had filed a case under the POCSO Act as she had eloped with a man and got pregnant. The court emphasised the need for consent and the difference between a wanted and unwanted pregnancy.

b. Kiranben Shiyaliya v. State - Criminal Appeal No. 6657 of 2016 – Decided on 15.09.2016:

The petitioner approached the High Court seeking permission for termination of a pregnancy carried by her 14 year old daughter, which was the result of rape. The court was approached at the gestational age of 27 weeks and the decision was made by the 28th week. The court declined permission, relying on the medical report. The report of the medical board revealed that termination may result in a live-born foetus and could create complications for the mother. The court held that its rejection was based on the “best interest” principle and included a compensation for the girl. Notably, the case involved two medical reports by the board, since the first report only said that the MTP request should be rejected and did not offer medical reasons. The court did not look into the delays surrounding the corresponding criminal case.

c. Madhuben v. State – Special Criminal Application No. 3679 of 2016 – Decided on 08.06.2016:

In this case, a 14 year old girl, represented through her mother, sought permission from the High Court for termination of her pregnancy. The gestational age was 18 weeks and the pregnancy was a result of rape. Criminal proceedings were ongoing, but the Sessions Court had refused permission, since the doctor who examined the girl was unable to determine whether the gestational age had crossed 20 weeks. The High Court decision came at 22 weeks of gestation. It held that taking into consideration the “best interest principle”, the board of doctors appointed could

take the decision for termination without any further permission from the court. There was no observation on the refusal by the Sessions Court. Court passed orders for preservation of the foetus for DNA and a compliance report to ensure the medical needs of the girl were being taken care of.

d. Surjibhai v. State - SCA No. 585 of 2018 – Decided on 30.01.2018:

The father of a 13/14 year old girl approached the High Court seeking permission, since the pregnancy which was as a result of rape. The pregnancy was at a gestational age of 26 weeks when they first reached a medical facility. By the time the case was decided, the pregnancy was at a gestational age of 31 weeks. Eight doctors opined that the foetus would be born alive and that the complications involved in MTP and delivery were the same. The High Court, while reluctantly refusing permission, gave a number of observations on the basis of the medical opinion. Specifically, it observed that the doctors thought more about the foetus than the women/ girls. Detailed submissions made by the petitioner, especially on the right of a woman versus the right of the foetus, and that in a conflict the right to life of the mother has to be prioritised. The court also awarded compensation and highlighted the need for more awareness. Notably, the lower court was to decide on an application for termination by 18.01.2018, but the petitioner approached the HC before the decision could be reached.

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