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CENTRE FOR HEALTH EQUITY, LAW & POLICY

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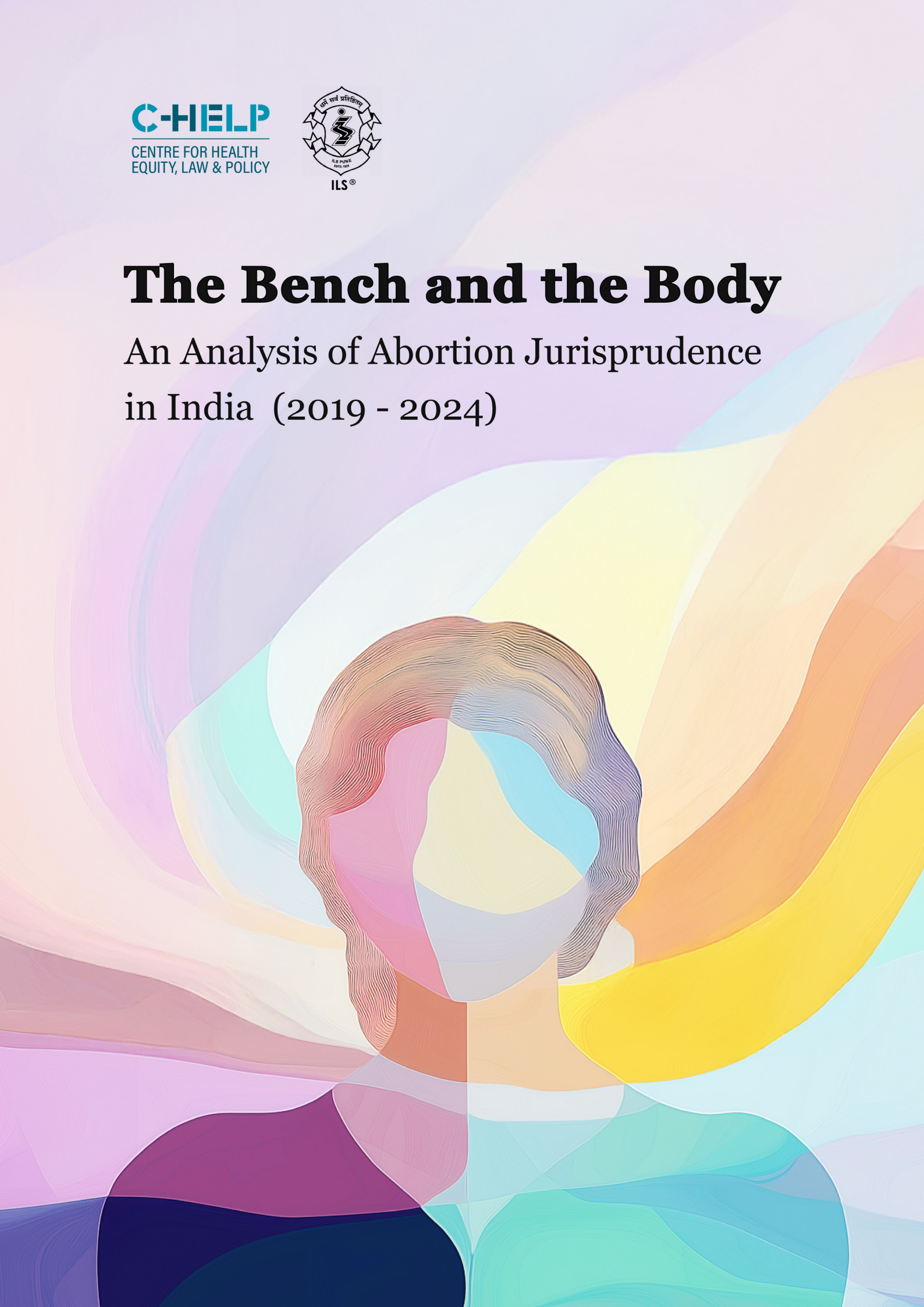
# The Bench and the Body

## An Analysis of Abortion Jurisprudence in India (2019 - 2024)



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### About

The Centre for Health Equity, Law & Policy is a research, knowledge production and advocacy forum which works on law & policy issues related to health, embedding its work in the right to health as envisaged within India's constitutional framework and her international commitments. It is located at the Indian Law Society, Pune.

### Authorship and Acknowledgement

The study has been authored by Anima Anjuri and Harshda Bargal, with research assistance from Reonia Mathew. Data collection and analysis were undertaken by Anima Anjuri, Harshda Bargal and Reonia Mathew with assistance from Shreya Sunny and Falguni Singh.

Vivek Divan reviewed, edited and contributed to the writing of the paper. Special thanks to Anubha Rastogi, Nilangi Sardeshpande and Suraj Sanap for reviewing the study.

We express our appreciation to Adeeba Ifrah for designing the layout.



### Contact Information

contact@c-help.org
Centre for Health Equity, Law & Policy
Indian Law Society
Law College Road
Pune, 411004 Maharashtra, India

# Preface

Frequent news reports in the last several years have covered cases where courts have adjudicated in matters related to women seeking abortion services. For a lay reader these accounts would have caused considerable confusion. While some decisions established empowering and enabling standards that put women's health and rights at the forefront, others were to the contrary – failing to recognise the agency of women to make autonomous reproductive choices, restricting their exercise of health rights, and casting them and their lived realities as lower in priority than those of foetuses or medical opinions rendered in their cases.

Reports analysing court decisions on abortion in India have been published in the past, covering judgments until 2019. The Centre for Health Equity, Law & Policy (C-HELP) at the Indian Law Society in Pune felt a need to take forward the analysis, bringing it up to 2024. Not only was the increasing reportage a sign that this may be an important exercise, but a key amendment to the Medical Termination of Pregnancy Act, 1971 took place in 2021, which called for further analysis.

A few things are striking in this study, not least of which are the surprisingly large number of women seeking court interventions to obtain abortion services – not required by the law, yet seemingly necessitated – and the inconsistent application of the law by courts.

C-HELP is pleased to publish this study in hopes that it adds to the literature and knowledge on reproductive rights, reveals how and where judicial action can serve the interests of women seeking to exercise their right to health, and contributes to a more consistent, equitable and rights-based jurisprudence in the future.

Vivek Divan

Centre for Health Equity, Law & Policy
Indian Law Society, Pune

# Executive Summary

This study critically examines the judicial landscape of abortion access in India by analysing reported cases adjudicated by Indian High Courts and the Supreme Court between January 2019 and December 2024. Despite legal reforms, such as amendments to the Medical Termination of Pregnancy (MTP) Act in 2021, the study reveals a pattern of judicial inconsistencies, systemic delays, and recurring rights violations.

Data reveals that while 80% of abortion pleas were permitted, a significant proportion involved women who were already legally entitled to access abortion without judicial intervention. Particularly stark is the number of minors and survivors of sexual violence compelled to approach courts, often due to fear-driven denials by medical practitioners and ambiguity around legal obligations.

The analysis highlights how courts have inconsistently applied constitutional and statutory standards. In some instances, courts expanded reproductive rights through a purposive interpretation of the MTP Act and the Constitution; in others, relief was denied based on arbitrary readings of gestational limits, foetal viability, or moral judgments. This has led to unequal outcomes for similarly situated petitioners and undermined the constitutional promise of substantive equality.

Further, the study situates India's abortion jurisprudence within the international normative framework, referencing obligations under CEDAW, the ICCPR, CRC, and WHO guidance, all of which emphasise the need for decriminalised, stigma-free, and accessible reproductive healthcare.

The study concludes with a strong call for systemic reforms — decriminalisation of abortion, clearer regulatory guidance for healthcare providers, and a shift toward a gender justice framework — to uphold women's autonomy, dignity, and fundamental rights.

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# Abbreviations

**AIIMS** : All India Institute of Medical Sciences

**AIR** : All India Reporter

**Anr.** : Another

**BNS** : Bharatiya Nyaya Sanhita

**BNSS** : Bharatiya Nagarik Suraksha Sanhita

**CEDAW**: Convention on the Elimination of All Forms of Discrimination Against Women

**CESCR** : Committee on Economic, Social and Cultural Rights

**CRC** : Committee on the Rights of the Child

**CWP** : Civil Writ Petition

**ICPD** : International Conference on Population and Development

**MoHFW** : Ministry of Health and Family Welfare

**MTP** : Medical Termination of Pregnancy

**NFHS** : National Family Health Survey

**Ors.** : Others

**PCPNDT** : Pre-Conception and Pre-Natal Diagnostic Techniques

**POCSO** : Protection of Children from Sexual Offences

**RMP** : Registered Medical Practitioner

**SCC** : Supreme Court Cases

**SCR** : Supreme Court Reporter

**SLP** : Special Leave Petition

**SRHR** : Sexual and Reproductive Health Rights

**T.N.** : Tamil Nadu

**UOI** : Union of India

**U.P.** : Uttar Pradesh

**v.** : versus

**WHO** : World Health Organisation

**W.P.** : Writ Petition

Chapter 1

# Introduction

It is estimated that 22 per cent of abortions in India occur in perilous environments.[1] In the case of adolescents, this figure is as high as 78 per cent.[2] Consequently, approximately 8 per cent of maternal mortality is attributed to unsafe abortion.[3] Despite being a healthcare need, abortion or 'voluntarily causing miscarriage' is a punishable offence in India[4] and can only be availed under the Medical Termination of Pregnancy Act, 1971 (MTP Act), which was introduced as an exception to the criminal law.

## The Medical Termination of Pregnancy Act, 1971

Under the MTP Act, abortion is not a right and is allowed only conditionally.[5] The

1 National Family Health Survey (NFHS-5), 2019-2021; Malik, M., Girotra, S., Zode, M., & Basu, S. (2023). Patterns and Predictors of Abortion Care-Seeking Practices in India: Evidence From a Nationally Representative Cross-Sectional Survey (2019-2021). Cureus, 15(7), e41263. https://doi.org/10.7759/cureus.41263

2 United Nations Family Population Fund (UNFPA) State of the World Population Report. (2022).

3 United Nations Family Population Fund (UNFPA) State of the World Population Report.(2022).

4 Bharatiya Nyaya Sanhita. (2023). Section 89.

5 The Medical Termination of Pregnancy Act. (1971). The Statement of Objects and Reasons - The provisions regarding the termination of pregnancy in the Indian Penal Code which were enacted about a century ago were drawn up in keeping with the then British Law on the subject. Abortion was made a crime for which the mother as well as the abortionist could be punished except where it had to be induced in order to save the life of the mother. It has been stated that this very strict law has been observed in the breach in a very large number of cases all over the country. Furthermore, most of these mothers are married women, and are under no particular necessity to conceal their pregnancy. 2. In recent years, when health services have expanded and hospitals are availed of to the fullest extent by all classes of society, doctors have often been confronted with, gravely ill or dying pregnant women whose pregnant uterus have been tampered with, view to causing an abortion and consequently suffered very severely. 3 There is thus avoidable wastage of the mother's health, strength and, sometimes. life. The proposed measure which seeks to liberalise certain existing provisions relating to termination of pregnancy has been conceived (1) as a health measure - when there is danger to the life or risk to physical or mental health of the women, (2) on humanitarian grounds - such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman, etc.; and (3) eugenic grounds - where there is substantial risk that the child,

Act permits abortion under specific circumstances, classified into three categories. First, as a health measure, abortion is permitted when continuing the pregnancy poses a threat to the woman's life or endangers her physical or mental health. Second, on humanitarian grounds, abortion is allowed in cases arising from crimes such as rape or incest, recognising the severe physical and psychological impact of such pregnancies. Lastly, on eugenic grounds, the law permits abortion when the foetus presents significant abnormalities, deformities, or genetic disorders.

As per the Act, abortion has to be permitted on approval of a single Registered Medical Practitioner (RMP) up to 20 weeks of pregnancy. In cases between 20 to 24 weeks of gestation, it is allowed on the opinion of two RMPs and presence of certain situations such as risk to pregnant woman's physical or mental health, in case of rape or incest, pregnancies involving minors, and changes in marital status.[6] Beyond 24 weeks, however, abortion is permitted only in two instances: to save the life of the woman[7] (a ground which is available irrespective of the gestation time on opinion of even one RMP), or in case of a substantial foetal abnormality (as diagnosed by a Medical Board).[8]

Such framing does not take into account the varied needs and circumstances of women. Narrowly defined legal grounds for cases beyond 24 weeks of gestation effectively exclude women who otherwise have the same valid grounds for seeking abortion, including cases of late diagnosis of pregnancy, underlying medical conditions, changes in relationship status or systemic barriers that prevent timely access to abortion within the legal window. As a result, women are often forced to approach courts, both due to



if born, would suffer from deformities and diseases.
Medical Termination of Pregnancy (Amendment) Act. (2021). The Statement of Objects and Reasons- The Medical Termination of Pregnancy Act, 1971 legalised termination of pregnancy on various socio-medical grounds. This amendment was aimed at eliminating abortion by untrained persons and in unhygienic conditions, thus reducing maternal morbidity and mortality.

6 The Medical Termination of Pregnancy Act, (1971), Section 3. The Medical Termination of Pregnancy (Amendment) Rules, (2021), Rule 3A and Rule 3B.

7 The Medical Termination of Pregnancy Act, (1971), Section 5 - Sections 3 and 4 when not to apply. - (1) The provisions of Sec.4 and so much of the provisions of sub-section (2 of Sec. 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioners, shall not apply to the termination of a pregnancy by the registered medical practitioner in case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.

8 The Medical Termination of Pregnancy Act, (1971), Section 3(2B) - The provisions of sub-section (2) relating to the length of the pregnancy shall not apply to the termination of pregnancy by the medical practitioner where such termination is necessitated by the diagnosis of any of the substantial foetal abnormalities diagnosed by a Medical Board.

the law's limitations and because healthcare providers frequently deny abortions for fear of prosecution — especially in cases of minors or survivors of sexual violence.[9]

The combined effect of criminalisation of abortion, laws like the Protection of Children from Sexual Offences Act, 2012 (POCSO Act)[10] and the Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994 (PCPNDT Act)[11] and socio-legal barriers like access to sexual and reproductive health rights (SRHR) services and information[12] push women towards seeking unsafe abortion. The POCSO Act criminalises all sexual acts involving minors, including those which are consensual. It also mandates all healthcare providers to report cases to the police; failing to do so can result in punishment.[13] The PCPNDT Act, introduced to curb the menace of sex-selective abortion, prohibits the use of prenatal diagnostic techniques – violations of which can lead to a fine, imprisonment or cancellation of licenses of RMPs. This entire context creates fear of prosecution among RMPs, adversely impacting abortion access for women.[14]

# The Normative Framework

## International Law

Globally, access to safe abortion is increasingly recognised as a fundamental component of women's human rights. India, as a signatory to various international conventions and declarations, is bound by a range of normative standards that frame abortion as a healthcare as well as a matter of gender justice, bodily autonomy, and equality.[15]



9 Chandra, A., Satish, M., Shree, S., Saxena, M.(2021). *Legal barriers to accessing safe abortion services in India: a fact finding study*. Center for Reproductive Rights, Centre for Constitutional Law, Policy, and Governance, NLU Delhi, & National Law School of India University, Bengaluru. . https://www.nls.ac.in/wp-content/uploads/2021/08/Legal-Barriers-to-Accessing-Safe-Abortion-Services-in-India.pdf

10 The Protection of Children from Sexual Offences Act, (2012).

11 Pre-Conception and Pre-Natal Diagnostic Techniques Act, (1994).

12 Chandra, A., Satish, M., Shree, S., Saxena, M.(2021). *Legal barriers to accessing safe abortion services in India: a fact finding study*. Center for Reproductive Rights, Centre for Constitutional Law, Policy, and Governance, NLU Delhi, & National Law School of India University, Bengaluru. . https://www.nls.ac.in/wp-content/uploads/2021/08/Legal-Barriers-to-Accessing-Safe-Abortion-Services-in-India.pdf

13 The Protection of Children from Sexual Offences Act. (2012). Section 19.

14 Pre-Conception and Pre-Natal Diagnostic Techniques Act. (1994). Section 22 & 27.

15 See: Committee on the Elimination of Discrimination against Women. *General Recommendation No. 24: Women and Health*, U.N. Doc. A/54/38/Rev.1, Chap. I (1999). United Nations. (1966). *International Covenant on Economic, Social and Cultural Rights*. https://www.ohchr.org/en/

India endorsed the Programme of Action adopted at the International Conference on Population and Development (ICPD) in 1994, which called for universal access to comprehensive reproductive health services, including safe pregnancy and childbirth care.[16] The ICPD has been important in recognising that meaningful participation of women in all aspects of public and private life is contingent on the elimination of sex-based discrimination and the realisation of their reproductive autonomy.[17]

The Beijing Platform for Action (1995) also called on States to review laws that criminalise or restrict access to abortion, especially where such laws contribute to unsafe procedures.[18] It underlined that unsafe abortion is not only a legal issue but a pressing public health concern, and that its consequences must be addressed alongside efforts to improve access to contraception, sexual education, and reproductive health services.[19] India has endorsed this platform too.

Article 12 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) requires States to eliminate discrimination in access to healthcare, including family planning services, and to ensure appropriate care during pregnancy, childbirth, and the postnatal period.[20] General Recommendation No. 24 of the Committee on Economic, Social and Cultural Rights (CESCR) clarifies further



instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights. United Nations. *Beijing Declaration and Platform for Action: The Fourth World Conference on Women* (4–15 September 1995), Sec 94–95, https://www.un.org/womenwatch/daw/beijing/platform/

16 See United Nations. *Programme of Action of the International Conference on Population and Development,* Cairo, 5–13 September 1994, U.N. Doc. A/CONF.171/13/Rev.1 (1995), https://www.unfpa.org/sites/default/files/event-pdf/PoA_en.pdf

17 United Nations. *Programme of Action of the International Conference on Population and Development,* Cairo, 5–13 September 1994, U.N. Doc. A/CONF.171/13/Rev.1 (1995), https://www.unfpa.org/sites/default/files/event-pdf/PoA_en.pdf

18 United Nations. (1995, September 4–15). *Beijing Declaration and Platform for Action: The Fourth World Conference on Women*. Section 94–95. https://www.un.org/womenwatch/daw/beijing/platform/

19 The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination, and violence. See- *United Nations. Beijing Declaration and Platform for Action: The Fourth World Conference on Women* (4–15 September 1995), Sec 94–95, https://www.un.org/womenwatch/daw/beijing/platform/

20 Committee on the Elimination of Discrimination against Women, *General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, U.N. Doc. A/54/38/Rev.1, chap. I (1999), https://www.ohchr.org/en/treaty-bodies/cedaw/general-recommendations

that healthcare policies must address the unique biological, socio-economic, and psychological realities faced by women, such as gender-based violence, adolescent vulnerability, and mental health conditions like postpartum depression.[21] It emphasises that laws must be enacted with women's autonomy and marginalised experiences at the centre, and that States are obligated to provide services as well as to regulate private actors and institutions that may infringe on women's health rights.[22]

The CESCR has also affirmed that restrictions on safe abortion access violate the rights to equality, non-discrimination, and the right to the highest attainable standard of health, including sexual and reproductive freedoms.[23] Such denials often result in avoidable maternal morbidity and mortality, which violates women's right to life.

The Human Rights Committee of the United Nations Office of the High Commissioner on Human Rights has noted that while States have the authority to regulate abortion, such regulation must not infringe on a pregnant woman or girl's life, health, or dignity.[24] Restrictions that expose women to risk, physical or mental suffering, discrimination, or arbitrary interference with privacy are inconsistent with international human rights obligations.[25]

Global guidance has stated that criminalising abortion, penalising healthcare providers, or punishing women, especially unmarried women, for being pregnant are examples



21 Committee on the Elimination of Discrimination against Women, *General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, U.N. Doc. A/54/38/Rev.1, chap. I (1999), https://www.ohchr.org/en/treaty-bodies/cedaw/general-recommendations

22 Committee on the Elimination of Discrimination against Women, *General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, U.N. Doc. A/54/38/Rev.1, chap. I (1999), https://www.ohchr.org/en/treaty-bodies/cedaw/general-recommendations

23 Committee on Economic, Social and Cultural Rights. *General Comment No. 22 on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights),* U.N. Doc. E/C.12/GC/22 (2016), https://digitallibrary.un.org/record/842544

24 Human Rights Committee. *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights: The Right to Life* (CCPR/C/GC/36, 2018), United Nations, https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-36-article-6-right-life.

25 Human Rights Committee. *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights: The Right to Life* (CCPR/C/GC/36, 2018), United Nations, https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-36-article-6-right-life

of measures that States must avoid.[26] Such legal barriers, including those of provider refusal on grounds of conscience, must be removed. Instead, States are expected to ensure access to confidential, stigma-free, and quality reproductive health services, including contraception, sexuality education, and post-abortion care.[27]

Additionally, the Committee on the Rights of the Child (CRC Committee) established under the United Nations Convention on the Rights of the Child, has called on States to decriminalise abortion to protect the rights of adolescent girls.[28] It has emphasised that access to safe abortion and post-abortion care is essential to protecting girls' health and respecting their decisional autonomy in reproductive matters.[29]

## Reproductive Justice in Indian Courts

In order to secure women's constitutional rights, Indian courts have often relied on the reproductive justice framework by interweaving the right to make reproductive choices and the State's duty to facilitate the same with the rights to privacy, health, equality, and life and personal liberty.

In the context of this study, certain rulings are worth highlighting. In *K.S. Puttaswamy v. Union of India* (2017)[30] the Supreme Court held that the right to privacy safeguards an individual's ability to make autonomous decisions about crucial aspects of their life, including choices related to contraception and procreation. In *Suchita Srivastava v. Chandigarh Administration* (2009)[31] the court held that women have the right to plan their future and that reproductive choices made by a woman are protected under Article 21 of the Constitution. Similarly, on the issue of maternal mortality in *Laxmi*



26 See World Health Organization. *(2022). Abortion care guideline*. WHO. https://www.who.int/publications/i/item/9789240039483

27 World Health Organization. *(2022). Abortion care guideline. Geneva:* WHO. https://www.who.int/publications/i/item/9789240039483

28 Committee on the Rights of the Child. *General Comment No. 20 on the Implementation of the Rights of the Child During Adolescence,* U.N. Doc. CRC/C/GC/20 (2016), 60, https://digitallibrary.un.org/record/845728?v=pdf

29 The Committee on the Rights of the Child has emphasised that States must decriminalise abortion to protect adolescent girls' health and decisional autonomy, recognising access to safe abortion and post-abortion care as essential. See Committee on the Rights of the Child, *General Comment No. 20 on the Implementation of the Rights of the Child During Adolescence,* U.N. Doc. CRC/C/GC/20 (2016), 60, https://digitallibrary.un.org/record/845728?v=pdf

30 K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

31 Suchita Srivastava v. Chandigarh Administration, (2009) 9 SCC 1.

*Mandal v. Deen Dayal Harinagar Hospital* (2010)[32] in recognising reproductive justice, the court held that women's right to make reproductive choices is part of the right to survival under their rights to life and personal liberty. In *Joseph Shine v. Union of India* (2018)[33] and *Navtej Singh Johar v. Union of India* (2018),[34] the court ruled that sexual autonomy is a crucial aspect of leading a dignified life and is protected under the right to privacy.

In *Devika Biswas v. Union of India* (2016)[35] and *Sandesh Bansal v. Union of India* (2012),[36] the court reaffirmed the positive obligation on the State to provide information and infrastructure necessary for enabling realisation of reproductive choices and the right to health. Similarly, in *Independent Thought v. Union of India* (2017),[37] while reading down Exception 2 to Section 375 of the Indian Penal Code (IPC) and making sexual intercourse with a minor wife an offence, the Supreme Court reaffirmed that the right to make reproductive choices was a crucial element for a dignified life. It observed that the positive obligation on the State to facilitate realisation of reproductive choices cannot be done away with by taking the defence of a perceived social reality.[38]

Abortion is a reproductive choice which has real-life implications for women. Reproductive justice places it within the larger framework of substantive equality, self-determination, autonomy and bodily integrity. While the MTP Act seemingly lacks this understanding, some courts have used the rights-based lens of freedom, choice, bodily and decisional autonomy to allow abortion even beyond the contours of the Act.

Despite its paternalistic roots, some landmark decisions from the Supreme Court and High Courts have attempted to make the Act more inclusive and liberal through expansive interpretation. They have reiterated the right of women to live as complete human beings and not as entities whose rights disappear as soon as they become pregnant.[39] Courts have established that women have a right to plan their future,



32 Laxmi Mandal v. Deen Dayal Harinagar Hospital, 2010 SCC OnLine 2234.

33 Joseph Shine v. Union of India, (2019) 3 SCC 39.

34 Navtej Singh Johar v. Union of India, (AIR 2018 SC 4321).

35 Devika Biswas v. Union of India, (2016) 10 SCC 726.

36 Sandesh Bansal v. Union of India, 2011 SCC OnLine MP 948.

37 Independent Thought v. Union of India, (2017) 10 SCC 800.

38 Independent Thought v. Union of India, (2017) 10 SCC 800, para 155-158.

39 X v. The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr, (2022) SCC OnLine SC 905.

prioritise their health and make reproductive choices.[40] They have also held that with the passing of the threshold provided in the MTP Act, the rights in the person of the woman do not simply vanish.[41]

While a plethora of judgments recognise the right to abortion of the pregnant woman, far too many simply deny abortion using either a very rigid interpretation of the law, or extrajudicial grounds like morality and foetal viability. As will be described further, many courts do this even in cases where women approach them by invoking writ or extraordinary jurisdiction.

This inconsistency in jurisprudence, the data on unsafe abortion[42] and the reports on barriers to accessing safe and illegal abortion[43] necessitate a study on how courts in India respond to abortion pleas before them, especially as the decisive and final stakeholder in the process.

# Structure & Methodology

## Research Objective

The objective of this study is to analyse judgments related to abortion passed by constitutional courts in India between 2019 and 2024, and assess their impact on women's health and rights. Through this analysis key issues, trends, trajectories, and reasoning being articulated by courts are highlighted, which provide nuance and better understanding of this jurisprudence, while also suggesting the lacunae in law and its interpretation in meeting the imperatives of reproductive justice.



40 Suchita Srivastava v. Chandigarh Administration (2009) 9 SCC 1; Laxmi Mandal v. Deen Dayal Harinagar Hospital 2010 SCC OnLine 2234; X v NCT Delhi (2022) SCC OnLine SC 905, Justice K S Puttaswamy (Retd) v. Union Of India (2017) 10 SCC 1; Devika Biswas v. Union of India (2016) 10 SCC 726.

41 X v. The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr., (2022) SCC OnLine SC 905.

42 United Nations Population Fund. (2022). Seeing the unseen: The case for action in the neglected crisis of unintended pregnancy- India key insights, State of the World Population Report.

43 Chandra, A., Satish, M., Shree, S., Saxena, M.(2021). *Legal barriers to accessing safe abortion services in India: a fact finding study*. Center for Reproductive Rights, Centre for Constitutional Law, Policy, and Governance, NLU Delhi, & National Law School of India University, Bengaluru. https://www.nls.ac.in/wp-content/uploads/2021/08/Legal-Barriers-to-Accessing-Safe-Abortion-Services-in-India.pdf

## Methodology

This study examines reported cases seeking abortion filed before various High Courts and the Indian Supreme Court between January 2019 and December 2024. This time period was selected for two key reasons. First, most of the previous studies covered the time period only up to 2019.[44] Second, the MTP Act was amended in 2021; tracing the impact of these amendments in abortion jurisprudence seemed vital.

The cases were found using the following legal case law databases and platforms: Manupatra, Supreme Court Cases Online, LiveLaw, and High Court websites. Keywords employed to find relevant cases were "abortion" and "medical termination of pregnancy," and filters such as year of inquiry, "Medical Termination of Pregnancy Act", and "Medical Termination of Pregnancy Rules".

For purposes of sifting through the vast number of cases that were of potential relevance, they were grouped as per the date of the final decision and analysed against a set of queries developed for the study: the ground for approaching the court, the final decision of the court, the Medical Board's reported advise/ opinion, and whether courts allowed or denied abortion per the Medical Board's advice or despite it. In cases of significant foetal abnormality, the Medical Board findings were categorised into foetal abnormality, lethal abnormality and significant foetal abnormality. Cases where abortion was sought based on rape were further categorised based on the age of the survivor (minor/major), and whether they approached the court within the timeframe mentioned in the Act or after it.

Cases which were filed on the ground of injury to mental health were similarly separately identified. While discussions on mental health considerations occurred in other cases as well, those were not included in the data set pertaining to mental health, as the final finding of the courts did not account for the grounds of mental health.

While the study solely focuses on pregnant women, this is because reported judgments use women-centric language and limit the scope of discussion to women. Yet, it is recognised that pregnancy is a biological reality for persons other than cisgender women. Indeed, reproductive issues of trans and queer communities warrant a detailed examination in and of themselves and remain an area for future inquiry.



44 Rastogi, A. (2020). *Assessing the Judiciary's role in access to safe abortion-II*. Pratigya Campaign Report. https://pratigyacampaign.org/wp-content/uploads/2019/09/assessing-the-judiciarys-role-in-access-to-safe-abortion.pdf

### Chapterisation

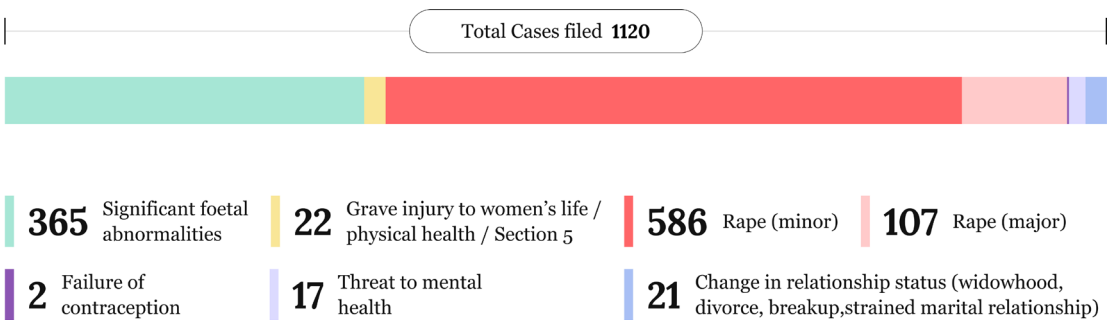
The study begins by briefly introducing the MTP Act, the normative framework on abortion, and judicial engagement on reproductive justice, including inconsistency in court rulings on abortion. Substantive chapters follow an explanation of the study's structure and methodology, and trends observed from the research. Chapters 2-5 cover key themes that are implicated in analysing abortion adjudication - 'Saving Life', Mental Health Consideration, Rape, and Foetal Abnormality. These Chapters are based on the grounds on which women approach courts. They traverse the manner in which courts apply the law in adjudications. Chapters 6-7, on Medical Boards and Foetal Viability, discuss issues of medical paternalism and concerns around the notion of viability. Chapter 8 on the State Interest principle and Chapter 9 on the *Parens Patriae* principle question the use of these doctrines of law in restricting women's fundamental rights and reproductive justice. Chapter 10 on Change in Status of Relationship and Chapter 11 on Failure of Contraceptive Methods focus on these grounds. Chapter 12 examines the hidden expectation of victimhood in these cases, which is revealed through paternalistic language used by the courts. Finally, the Conclusion summarises the findings of the study along with recommendations.

## Trends

The study examined a total of 1126 judgments, 85 per cent of which allowed abortion. About 11.28 per cent of the abortion pleas were denied, and among these cases, a majority of women were denied abortion based on the Medical Board's opinion (81.89 per cent).

Data reflects that most cases, i.e., 52.04 per cent, were filed on the ground of rape in case of minor survivors, followed by the ground of significant foetal abnormality (32.33 per cent) and rape in major survivors (9.41 per cent).

*Fig 1:* **Cases Filed per Ground**



DESCRIPTION - This figure shows the number of cases filed per ground between 2019 and 2024.
*Note: Final orders in 6 cases provided no information on the grounds for filing. Therefore, these cases are not included in the above representation.*

Abortion was allowed in 180 cases where the pregnancy was beyond the 24-week gestation limit introduced by the 2021 amendments to the MTP Act. Simultaneously, the judicial and Medical Board discussions increasingly focused on '*foetal viability*', a debatable concept; quite novel in India's abortion discourse. Concerns around a '*viable foetus*' were often correlated to pregnancies that had crossed the 24-week mark, with both courts and Medical Boards citing the presence of a '*viable foetus*' as one of the grounds for denying abortion in 65 cases. Moreover, in 19 cases, the fundamental rights of the unborn child, the foetus's right to life or foetal personhood were discussed.

It was observed that 21 cases were filed on the ground of change in status of relationship, and eight others (filed on the ground of rape or mental health) discussed change in relationship status as an issue and material consideration. Notably, the language used by courts in such cases lacked empathy and dignity, as discussed later in the study. The attitude of courts differed vastly where women had filed divorce proceedings as against cases where major women were in consensual relationships not in the nature of marriage. Crucially, many of these cases were filed on the grounds of rape or intercourse on the false pretext of marriage, highlighting the need felt by pregnant women to initiate a criminal case to get abortion services.

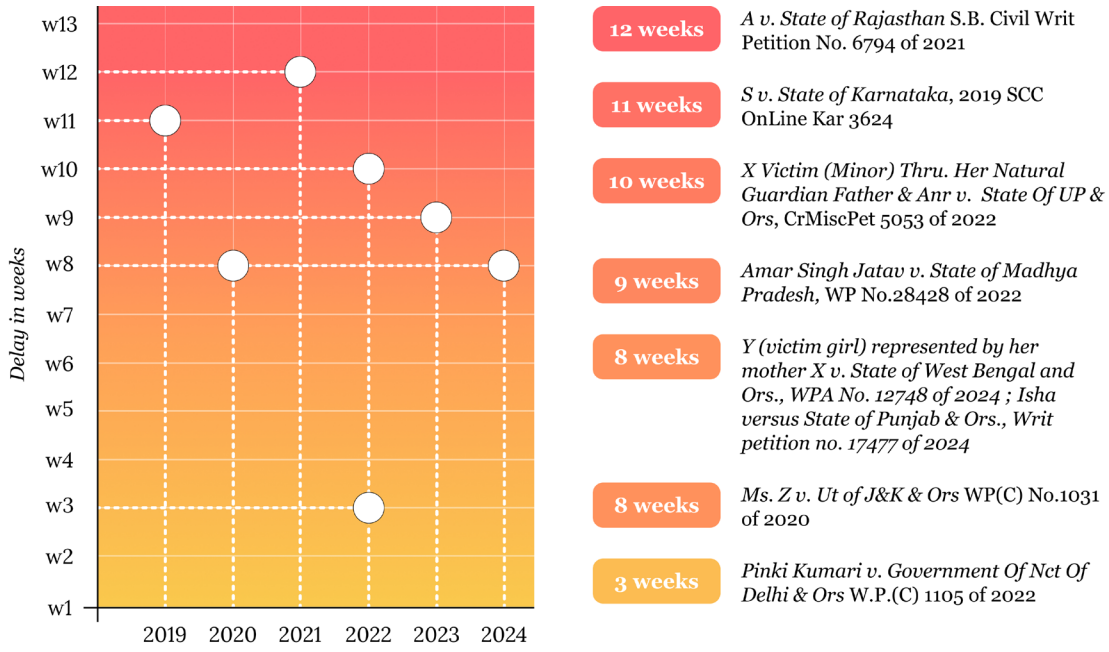
Across the data set, not one judgment commented on the responsibility of the male partner or contraception use in men. However, despite the law being clear that only the consent of the pregnant woman is needed for abortion to be undertaken, courts impleaded husbands as parties in at least 2 cases.

In several judgments, phrases like "unborn child" or "pre-term baby" and biologically incorrect phrases like "the uterus is _ weeks old" and "foetus of the unborn child" have been used, reflecting the courts' limited understanding of female biology and physiology.

In 958 cases, the decision of the court was in conformity with the Medical Board's opinion, or treated its opinion as final. Even where the Medical Board commented on things beyond the scope of the MTP Act (such as the implications for a woman's 'future pregnancies'), courts unquestioningly followed such opinions.

While this study did not set out to examine procedural delays as a research proposition, over the course of analysis, cases were identified that featured procedural delays longer than 10 weeks between when the woman approached the court and the final order was passed. In one case, a minor approached the court around 9 weeks into pregnancy, and the court permitted abortion at 19 weeks - a procedural delay of 10 weeks.[45] In another case, a minor approached the court at 23 weeks, but the final order whereby abortion was denied was issued at 34 weeks a delay of a full 11 weeks.[46] In yet another case, despite the petition having been filed when the woman was around 14 weeks pregnant, the final order denying abortion was issued at 26 weeks, a full 3 months of procedural delay, the longest in the dataset as depicted below.[47]

*Fig 2:* ***Duration between filing of the petition and the final order***




In none of these cases did the court seek or attempt to provide any justification for the drastically lengthy delays. Such procedural delay becomes an invisible barrier for women seeking abortion, and significantly skews medical diagnosis of risk to the detriment of women. As a result, women who otherwise would have been eligible for

45 X Victim (Minor) Thru. Her Natural Guardian Father & Anr v. State Of UP & Ors, Criminal Misc. Writ Petition No. 5053 of 2022.

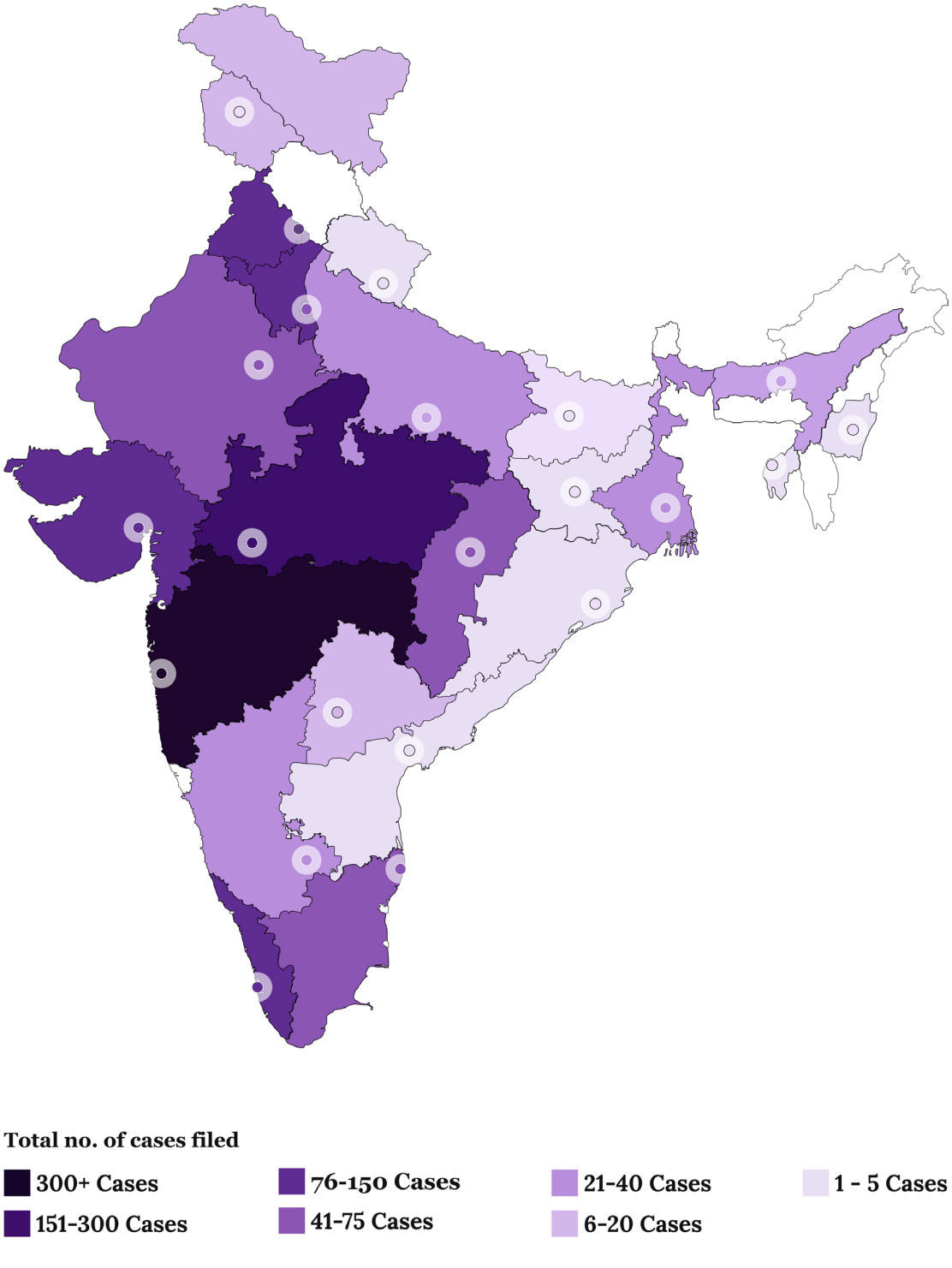
46 S v. State of Karnataka, 2019 SCC OnLine Kar 3624.

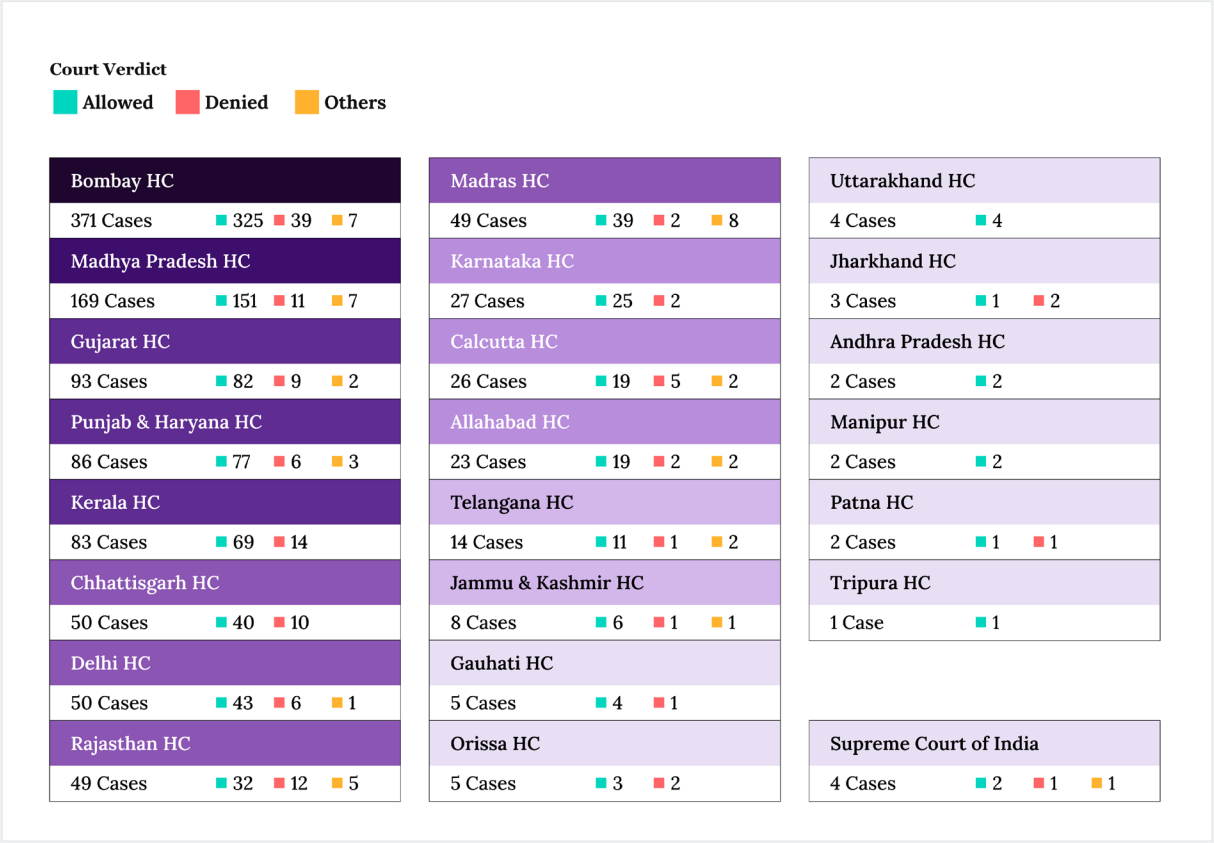
47 A v. State of Rajasthan, S.B. Civil Writ Petition No. 6794 of 2021.

abortion are inadvertently refused such crucial medical care.

It was also observed that more cases are filed before certain High Courts as against others. Some High Courts saw 20 cases or more on average every year for the six years the study reviewed, while others saw a lot less. Also, the rate of approval and denial of abortion varied largely, even in cases with similar facts. While this rate can depend on

***Fig 3: Number of abortion cases filed across the country.***






the facts of the case, some courts, such as the Chhattisgarh High Court and Rajasthan High Court, have a fairly high denial rate.

While the rate of denial of abortion within the period of study is fairly low, the contradictions noted in the following Chapters on understanding of the law and processes followed are worrisome. Many women are forced to come to courts even within the 24-week threshold, and courts appoint Medical Boards to get opinions even though it is not required by the Act.

Another inconsistency which reveals itself is that while many courts allow abortion beyond the statutory limit, others deny, stating that they are not empowered to allow termination of pregnancy in cases and situations not mentioned in the Act, despite their powers under writ jurisdiction.[48] Given that abortion has been read to be protected under the Constitution,[49] such discordance in constitutional courts is perturbing.

This study explores these inconsistencies and others using the human rights framework, and examines a body of emerging jurisprudence that reveals dissonance and a lack of clarity in the adjudication of the MTP Act.

48 The Constitution of India. (1950). Article 32 and Article 226.

49 Justice K S Puttaswamy (Retd) v. Union Of India (2017) 10 SCC 1; XYZ v. Union of India, 2019 SCC OnLine Bom 560.

Chapter 2

# *Saving 'Life'*

Section 5 of the MTP Act stipulates that in cases where it is "*immediately necessary to save the life of the pregnant woman*"[50], a pregnancy may be terminated if deemed so by at least two RMPs, even if gestation has gone beyond the permissible period for abortion under the law, i.e., 24 weeks. The interpretation of 'life' thus becomes the key to adjudication under this section.

In *XYZ v. Union of India* (2019),[51] the Bombay High Court delved into the meaning and interpretation of 'life' under this legal provision. The court indulged in a detailed interpretative examination of "*whether life is to be interpreted narrowly as antithetic to the expression death. Or is it to be liberally construed to comprehend not only physical existence but also quality of life?*" It held that life should be viewed not as physical existence or antithetical to death but holistically in terms of quality life. Interpreting 'life' narrowly, dissolves the purpose and reason for which the Act was made - to allow abortion as a health measure; on humanitarian or eugenic grounds.[52] The court continued by adding that interpreting life as an antithesis to death reduces the provision to cases of medical necessity, where abortion is the only solution to save a pregnant woman from dying.[53] Such reading would deny abortion in cases of physical and mental injury, rape, and significant foetal abnormality and does not leave any scope for rights-based intervention. It takes away the decision to abort from pregnant women, reducing it to a medical necessity to be determined solely by doctors.

Observing in favour of the principle of purposive construction, the court stated that in case of confusion about the meaning of words in a statute, the meaning that best harmonises the subject of the law with the object of the legislature should be considered.

> *77. Applying the principles of purposive interpretation, the expression "life" as it appears in Section 5 of the MTP Act is to be construed liberally to effectuate the purpose for enactment of the MTP Act as reflected in*

50 The Medical Termination of Pregnancy Act. (1971). Section 5- Sections 3 and 4 when not to apply.- (1) The provisions of Sec.4 and so much of the provisions of sub-section (2 of Sec. 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioners, shall not apply to the termination of a pregnancy by the registered medical practitioner in case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman. (2) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), the termination of a pregnancy by a person who is not a registered medical practitioner shall be an offence punishable under that Code, and that Code shall, to this extent, stand modified.

51 XYZ v. Union of India, 2019 SCC OnLine Bom 560.

52 The Medical Termination of Pregnancy Act. (1971). Statement of Objects and Reasons.

53 XYZ v. Union of India, 2019 SCC OnLine Bom 560, para 77.

*the Statement of Objects and Reasons. Such construction will advance the purpose of the MTP Act by liberalizing or decriminalizing the existing provisions relating to termination of pregnancy in IPC where medical termination of pregnancy is warranted on account of risk to the physical as well as mental health of the mother (health measure), where pregnancy arises from a sex crime like a rape or intercourse with a mentally ill woman etc. (humanitarian grounds) and where there is substantial risk that the child, if born, would suffer from deformities and diseases (eugenic grounds). Narrow or literal construction, in contrast, will force a pregnant mother to continue her pregnancy even though the same might involve grave injury to her mental health, even though the pregnancy may have arisen from a sex crime, and even though there is a substantial risk that the child if born, would suffer from deformities and diseases. Narrow or literal construction, would, therefore, exclude almost altogether the humanitarian and eugenic grounds as well as the ground of grave injury to the mental health of the mother. In such circumstances, the principle of narrow or literal construction will have to yield to the principle of liberal or purposive construction."*



Further, the court held that dignity and liberty are crucial aspects of life, making reproductive freedom, bodily integrity and privacy its functional elements.

> *78. The narrow and literal construction of the expression "life" in Section 5 of the MTP Act as restricted to mere physical existence or mere animal existence will also not be in harmony with the constitutional principles of life, personal liberty and human dignity. In Suchita Shrivastava (supra), the Supreme Court has already held that there is no doubt that a woman's right to make reproductive choices is also a dimension of personal liberty as understood in Article 21 of the Constitution of India. The crucial consideration in such matters is that a woman's right to privacy, dignity and bodily integrity should be respected.*
>
> ...
>
> *80. In contrast the adoption of the principle of liberal or purposive construction will harmonize the provision in Section 5 of the MTP Act with the constitutional provisions. It is a well-settled principle in the interpretation of statutes that if two interpretations are reasonably*

*possible, then the one which harmonizes the statute with the Constitution must be preferred to the interpretation which conflicts the statute with the Constitution. The Supreme Court has already held that the fundamental right to life which is the most precious human right and which forms the ark of all other rights must be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person. The right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival. The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and mingling with fellow human beings. Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with a reasonable, fair and just procedure established by law which stands the test of other fundamental rights. (See - Francis Coralie Mullin v. UT of Delhi, (1981) 1 SCC 608).”*



Extending this logic and in consonance with fundamental rights, a literal and narrow interpretation of the term ‘life’ in Section 5 of the MTP Act contravenes the object and reasoning laid down in the law and is reductive of the meaning provided to the term ‘life’ under Article 21 of the Constitution. A similar decision was given in *Ritika Prajapat v. State of Madhya Pradesh* (2019)[54] which held that Section 5 must be construed as a whole while having regard to the object of the Act. This ruling further noted that the provision cannot be construed in a manner which would destroy the very purpose for which the law was enacted. Therefore, if the purpose of the law is to preserve the health of the pregnant woman, both physical and mental, and her autonomy and choice, then all these aspects need consideration when interpreting the section.

In *X (through father and natural legal guardian) v. State of Maharashtra* (2020),[55] the Bombay High Court relied on *XYZ v. Union of India* (2019) mentioned above and allowed abortion as continuation of pregnancy was causing a psychological impact on a pregnant minor.

54 Ritika Prajapat v. State of Madhya Pradesh, 2019 SCC OnLine MP 1687, para 20-21.

55 X (through father and natural legal guardian) v. State of Maharashtra, 2020 SCC OnLine Bom 4286, para 21.

In *XYZ v. State of Madhya Pradesh* (2021),[56] the Madhya Pradesh High Court held that the aspect of a pregnant woman's actual or reasonably foreseeable environment has greater nexus to mental health as compared to physical health, and the grave injury to mental health does not evaporate as soon as the statutory limit for abortion prescribed in Section 3(2)(b)[57] of the MTP Act is crossed. If the concept of 'life' is not limited to physical existence or survival, then permission to abort will have to be granted if significant harm to mental health is being caused.

In *Sri X v. State of West Bengal* (2023),[58] the Calcutta High Court highlighted the mental trauma and the physical ordeal that a pregnant woman has to go through because of an unwanted pregnancy and observed that "*it would not end in a flash but cause permanent stigma throughout her life.*" The court took an expansive approach and held that there was no reason why Section 3(2)(b) should not be read in conjunction with Section 5(1) of the Act.

In effect, in the aforementioned decisions, the courts held that physical and mental health considerations do not cease to exist after the permissible gestational limit of 24 weeks for abortion has passed, and need to be assessed as part of the imperative to '*save the life of the pregnant woman*' under Section 5 of the Act. "Life" must be liberally interpreted to further the purpose of the Act, which is to prioritise and preserve women's health and health choices, interpretively including her right of self-determination, dignity, privacy and reproductive choices. "Saving life" is not a matter of life and death, but has to be understood in a more nuanced manner.



56 XYZ v. State of Madhya Pradesh, 2021 SCC OnLine MP 5920, para 21.

57 The Medical Termination of Pregnancy Act. (1971). Section 3- When Pregnancies may be terminated by registered medical practitioners.-...(2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,- (a) where the length of the pregnancy does not exceed twelve weeks if such medical practitioner is, or (b) where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are. Of opinion, formed in good faith, that,- (i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury physical or mental health ; or (ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. Explanation 1.-Where any, pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman. Explanation 2.-Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

58 Sri X v. State of West Bengal, 2023 SCC OnLine Cal 2435, para 33.

Despite these decisions, a starkly contrary stance has been taken by courts in a number of other cases.

In *ABC v. State of Gujarat* (2024),[59] the High Court of Gujarat denied abortion, stating that the medical records did not indicate that termination of pregnancy was immediately necessary to save the life of the petitioner, thereby not satisfying the requirements of Section 5. The court ignored the petitioner's plea that the pregnancy was causing her grave physical and mental injury and posited that "*the unborn child has the right to proper care and nutrition and to be protected from 'unlawful killing'*." A similar logic around the immediacy of danger being absent was used to deny the abortion plea in *S v. UOI and Ors.* (2024).[60] In this case, the Delhi High Court prioritised the mental and physical health of '*the newborn*' and held that as there was no danger to the life of the pregnant woman, and foeticide would neither be ethical nor legal.[61]

In both cases, the courts relied on *X v. Union of India* (2023),[62] in which the Supreme Court held that termination beyond 24 weeks is permissible only if it is needed to save the life of the pregnant woman or if there is a substantial foetal abnormality. This interpretation draws from a rigid understanding of Rules 3A[63] and 3B[64] of the MTP

59 ABC v. State of Gujarat, 2024 SCC OnLine Guj 1520, para 9.

60 S v. UOI and Ors., 2024 SCC OnLine Del 736.

61 S v. UOI and Ors., 2024 SCC OnLine Del 736, para 12.

62 See Chapter on Foetal Viability for elaborate discussion on X v UOI, 2023 SCC Online Sc 1338.

63 The Medical Termination of Pregnancy Rules. (2021). Rule 3A- Powers and functions of Medical Board-For the purposes of Section 3,— (a) the powers of the Medical Board shall be the following, namely:- (i) to allow or deny termination of pregnancy beyond twenty-four weeks of gestation period under sub-section (2B) of the said Section only after due consideration and ensuring that the procedure would be safe for the woman at that gestation age and whether the foetal malformation has substantial risk of it being incompatible with life or if the child is born it may suffer from such physical or mental abnormalities to be seriously handicapped; (ii) co-opt other specialists in the Board and ask for any additional investigations if required, for deciding on the termination of pregnancy; (b) the functions of the Medical Board shall be the following, namely :- (i) to examine the woman and her reports, who may approach for medical termination of pregnancy under subsection (2B) of Section 3; (ii) provide the opinion of Medical Board in Form D with regard to the termination of pregnancy or rejection of request for termination within three days of receiving the request for medical termination of pregnancy under sub-section (2B) of Section 3; (iii) to ensure that the termination procedure, when advised by the Medical Board, is carried out with all safety precautions along with appropriate counselling within five days of the receipt of the request for medical termination of pregnancy under sub-section (2B) of Section 3.

64 The Medical Termination of Pregnancy Rules. (2021). Rule 3B- Women eligible for termination of pregnancy up to twenty-four weeks.— The following categories of women shall be considered eligible for termination of pregnancy under clause (b) of subsection (2) Section 3 of the Act, for

Rules, 2021, which provide powers and functions of the Medical Board. Rule 3A states that abortion beyond 24 weeks of gestation can only be provided after ensuring that it would be safe for the woman, and if any foetal malformation has a substantial risk of being incompatible with life, or there is a chance the child born would have serious physical or mental abnormalities. Rule 3B provides the category of women who are eligible for consideration of abortion up to 24 weeks. The court's interpretation of these provisions in *X v. Union of India* (2023) reveals an overly literal understanding, which considers the power of Medical Boards in examining abortion cases to only include cases of foetal abnormalities, while limiting the application of the women-centric factors to an upper limit of 24 weeks.

The State is duty-bound to protect the 'life' of women and has a positive obligation to create an institutional framework which allows them to lead a dignified life. While exercising powers under Article 226 or Article 32 of the Constitution, courts should deploy the fundamental rights framework.[65] This framework, read with the MTP Act, therefore, requires a liberal interpretation of 'life' under Section 5, which is expansive, and reifies an understanding of the term that is holistic.

The absence of foetal abnormalities or advanced pregnancy does not make an unwanted pregnancy less invasive and can jeopardise the life of the pregnant woman in various ways. As noted, "*the decision to gestate and be pregnant carries serious consequences for a person in their self-worth, stability and security, and in the ways they think about themselves and how they relate to others and society*".[66] It has direct and indirect consequences on the rights to live with dignity, privacy, health and the right to make reproductive choices, and without these rights, life is nothing but mere animal existence.



a period of up to twenty-four weeks, namely:-(a) survivors of sexual assault or rape or incest; (b) minors; (c) change of marital status during the ongoing pregnancy (widowhood and divorce); (d) women with physical disabilities [major disability as per criteria laid down under the Rights of Persons with Disabilities Act, 2016 (49 of 2016)]; (e) mentally ill women including mental retardation; (f) the foetal malformation that has substantial risk of being incompatible with life or if the child is born it may suffer from such physical or mental abnormalities to be seriously handicapped; and (g) women with pregnancy in humanitarian settings or disaster or emergency situations as may be declared by the Government.

65 K. Vijayakumar v. State of T.N., 2022 SCC OnLine Mad 3724, para 12; Xyz v. State Of Gujarat, 2023 SCC OnLine SC 1573, para 19.

66 Sękowska-Kozłowska, K. (2018). A tough job: recognizing access to abortion as a matter of equality. A commentary on the views of the UN Human Rights Committee in the cases of Mellet v. Ireland and Whelan v. Ireland. Reproductive Health Matters, 26(54), 25–31. https://doi.org/10.1080/09688080.2018.1542911

Notably, while adjudicating abortion-related cases, courts have held that the right to life includes the right to live with dignity. For instance, in *X v. The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr.* (2022),[67] the Supreme Court held that the right to dignity encapsulates the right of every individual to be treated as a self-governing entity having intrinsic value merely by virtue of being a human. In this case, the court posited that forcing unwanted pregnancies onto women strips them of the right to determine their immediate and long-term path, thereby violating both their bodily integrity and dignity. It ruled:

> *110. ... The right to choose for oneself – be it as significant as choosing the course of one's life or as mundane as one's day-to-day activities – forms a part of the right to dignity. It is this right which would be under attack if women were forced to continue with unwanted pregnancies."*

Linking dignity and the autonomy to make health-related decisions, in *Xyz v. State Of Gujarat* (2023)[68] the court stated that in cases of unintended or accidental pregnancies, the burden falls on the pregnant woman, significantly influencing her mental and physical well-being. Rooting its reasoning in decisional and bodily autonomy, the court found that Article 21 of the Constitution upheld and protected a woman's right to terminate a pregnancy if her mental or physical health was jeopardised. It held:

> *18. In the context of abortion, the right to dignity entails recognising the competence and authority of every woman to take reproductive decisions, including the decision to terminate the pregnancy. Although human dignity is inherent in every individual, it is susceptible to violation by external conditions and treatment imposed by the State. The right of every woman to make reproductive choices without undue interference from the state is central to the idea of human dignity. Deprivation of access to reproductive healthcare or emotional and physical well-being also injures the dignity of women."*

Abortion for most women is an act of self-preservation. Viewing pregnancy as a mere nine-month period ignores the fact that it, along with childbirth, can have serious long-term mental and physical health outcomes for the woman. Abortion, therefore, also needs to be understood in the context of the right to health. Indeed, denying abortion



67 X v. The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr, (2022) SCC OnLine SC 905, para 109-116.

68 XYZ v. State of Gujarat, 2023 SCC OnLine SC 1573.

tantamounts to compromising women's health and life in the long run.[69]

This aspect was discussed in *Suparna Debnath & Anr v. State of West Bengal & Ors.* (2019),[70] where the Calcutta High Court stated that the woman's personal life and liberty, as understood under Article 21, is inextricably linked with that of the child, which continues after she has given birth. Forcing motherhood on an unwilling woman compromises her quality of life forever. Per the court, the constitutional protection of life and liberty is statutorily recognised and embedded within the MTP Act. It noted that a reading of the Statement of Objects and Reasons of the Act along with various other provisions, particularly in the backdrop of Article 21 of the Constitution, revealed that the protection encompassed within its fold the right of the pregnant woman to lead a normal healthy life - post-delivery - and not a compromised existence that affects her mental health, caused agony and pain, and crippled her economically. The judgment stated:

> *21. We must hasten to add here that even though in the case of pregnant women, there is a compelling State interest to protect the life of the prospective child, there is a corresponding obligation - nay, a bounden duty - on the part of the State to provide quality and dignity to such life and such quality and dignity of life should extend to the mother as well, whose life is paramount at the stage of pregnancy."*

Similarly, in *A (Mother of X) v. State of Maharashtra* (2024),[71] the court held:

> 21- The right to abortion is a concomitant right of dignity, autonomy and reproductive choice. This right is guaranteed under Article 21 of the Constitution. The decision to terminate pregnancy is deeply personal for any person. The choice exercised by a pregnant person is not merely about their reproductive freedom but also about their agency as recognised by this court in X v. State (NCT of Delhi). It is therefore imperative that the fundamental right of a pregnant person

69 Chandra, A., Satish, M., Shree, S., Saxena, M.(2021). *Legal barriers to accessing safe abortion services in India: a fact finding study*. Center for Reproductive Rights, Centre for Constitutional Law, Policy, and Governance, NLU Delhi, & National Law School of India University, Bengaluru. https://www.nls.ac.in/wp-content/uploads/2021/08/Legal-Barriers-to-Accessing-Safe-Abortion-Services-in-India.pdf ; Herd, P., Higgins, J., Sicinski, K., & Merkurieva, I. (2016). The implications of unintended pregnancies for mental health in later life. American journal of public health, 106(3), 421–429. https://doi.org/10.2105/AJPH.2015.302973

70 Suparna Debnath & Anr. v. State of West Bengal & Ors., AIR 2019 Cal 99.

71 A (Mother of X) v. State of Maharashtra, (2024) 6 SCC 327.

> is not compromised for reasons other than to protect the physical and mental health of the pregnant person."

The reduction of the meaning of 'life' to mere physical existence is akin to positing that the rights of a woman evaporate with pregnancy and that her right to life and personal liberty warrants protection only if she is dying. Such an understanding of rights exists in contrast to the expansive framing of life under the Constitution and vitiates the objective of the MTP Act, which was legislated to safeguard the health of pregnant women. Denial of abortion affects the life of a pregnant woman in the short- and long-term in multiple ways;[72] this understanding needs to be extended to the adjudication of abortion cases and the larger discourse around quality of life.



72 Vogel, J. P., Bohren, M. A., Brizuela, V., Tuncalp, □., Oladapo, O. T., Gülmezoglu, A. M., & Temmerman, M. (2024). Neglected medium-term and long-term consequences of labour and childbirth: A systematic analysis of the burden, recommended practices, and a way forward. The Lancet Global Health, 12(2), e317–e330. https://www.thelancet.com/journals/langlo/article/PIIS2214-109X(23)00454-0/fulltext; Foster, D. G. (2020). The Turnaway study: Ten years, a thousand women, and the consequences of having—or being denied—an abortion. Scribner. https://www.ansirh.org/research/ongoing/turnaway-study; Nair, S. B. (2018). Teenage marriage and fertility in India and its negative health outcomes. Population Research Centre, Ministry of Health and Family Welfare, Government of India, University of Kerala. https://prc.mohfw.gov.in/fileDownload?fileName=Teenage%20marriage%20and%20fertility%20in%20India%20and%20its%20negative%20health%20outcomes.pdf

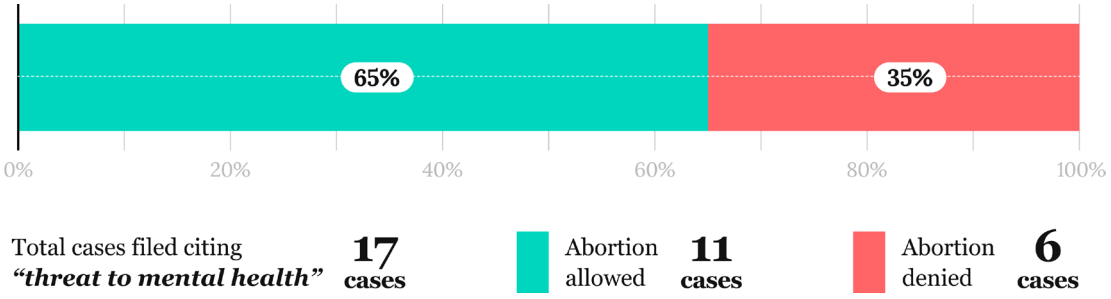
Chapter 3

# Mental Health Considerations

*Fig 4:* ***The 'Mental Health' Jargon used in Judgments***


DESCRIPTION - This figure shows the general trend in how the "mental health" aspect of an unwanted pregnancy is discussed in judgments. The use of language is tilted towards "mental illness", and "mental retardation." Seeking a medically diagnosed mental illness, as is often done by courts, demonstrates the lack of a holistic understanding of "mental health". This aspect is discussed in detail in the chapter.

*Fig 5:* ***Abortion Requests on Grounds of Threat to Mental Health***




DESCRIPTION - This figure represents cases explicitly filed on the ground of "threat of injury to mental health" arising from pregnancy. It does not include cases where mental health was discussed or cited alongside other grounds for seeking abortion. Further, under the MTP Act, a threat to mental health is presumed in instances of contraceptive failure or pregnancies resulting from rape, making strict disaggregation of data difficult.

The MTP Act provides that a pregnancy may be terminated up to 24 weeks if RMPs, acting in good faith, believe that continuing the pregnancy would pose a grave risk to the physical or mental health of the woman. The law also presumes that the failure of

contraceptives or a pregnancy resulting from rape causes grave injury to a woman's mental health.[73] It requires that, when assessing whether continuing the pregnancy would pose risks or injury to her health, the woman's actual or reasonably foreseeable circumstances must be considered.[74] Courts have, by liberal purposive interpretation of the Act, extended this reasoning and factored in the risks to the woman's mental health while granting abortion requests in some decisions. However, the analysis of judgments reviewed for this study highlights a vast inconsistency across decisions on the basis of mental health considerations.

In *XYZ v. State of Gujarat* (2023), the Supreme Court recognised that any unwanted pregnancy could cause grave injury to the mental health of a woman.[75] Previously, the Bombay High Court in *XYZ v. Union of India* (2019)[76] noted that the MTP Act adopts a liberal understanding of mental health. It held that "*the aspect of taking into consideration reasonably foreseeable circumstances of the pregnant person has a greater nexus with the mental health of the pregnant person as compared to physical health.*"[77] This interpretation required Medical Boards to assess the risks to a woman's mental health in light of her actual or reasonably foreseeable circumstances, irrespective of whether the pregnancy fell within or beyond the statutory limit for termination.

Similarly, in *A (Mother of X) v. State of Maharashtra* (2024),[78] the Supreme Court held that Medical Board reports must address the impact of the pregnancy on both the physical and mental health of the woman. It stressed that medical opinions in such cases must be "exhaustive" and consider threats to the mental health of the pregnant person in light of the circumstances surrounding the pregnancy.[79]

The Bombay High Court decision in *X v. Union of India* (2019)[80] also questioned the distinction between pregnancies within the statutory limit and those beyond it under the framework of the MTP Act.[81] The court held that affording mental health considerations to pregnancies within the legal timeframe, while denying the same for

73 The Medical Termination of Pregnancy Act, (1971). Section 3.

74 The Medical Termination of Pregnancy Act. (1971).Section 3(3).

75 XYZ v. The State of Gujarat & Ors, 2023 SCC OnLine SC 1573.

76 XYZ v. Union of India, 2019 SCC OnLine Bom 560.

77 XYZ v. Union of India, 2019 SCC OnLine Bom 560, para 101.

78 A (Mother of X) v. State of Maharashtra, (2024) 6 SCC 327.

79 A (Mother of X) v. State of Maharashtra, (2024) 6 SCC 327.

80 X v. Union of India, 2019 SCC OnLine Bom 9965.

81 X v. Union of India, 2019 SCC OnLine Bom 9965.

those beyond the ceiling, would be arbitrary.[82] The Supreme Court, too, in *A (Mother of X) v. State of Maharashtra* (2024)[83] critiqued the statutory framework of the MTP Act, particularly the selective removal of gestational limits in only two scenarios: when the termination is necessary to save the "life" of the pregnant person[84] or when the foetus has substantial abnormalities.[85]

The court observed that the legislation "*has made a value judgment*" by presuming that a substantially abnormal foetus causes more injury to a woman's mental health than other circumstances, such as pregnancies resulting from rape or incest.[86] This presumption, it noted, is not rooted in scientific evidence but reflects an arbitrary hierarchy of what could be an injury to mental health, observing that such distinctions are "*prima facie unreasonable and arbitrary.*" [87]

In *Sidra Mehboob Sheikh v. State of Maharashtra* (2021)[88] the Bombay High Court rejected the narrow medicalised approach of equating "mental health" with "mental illness." This case arose when the petitioner sought an abortion, citing adverse effects on her mental health due to ongoing domestic violence. The medical report submitted to the court was insensitive to the circumstances of the petitioner. It stated,

> *4. ...the petitioner does not suffer from mental illness at present; she is of sound mind and there is no evidence of mental incapacity to raise the child. She suffers from mental distress and distress due to ongoing marital discord can be overcome through marital counselling which has been recommended..."* [89]

On the other hand, while critiquing the Medical Board's opinion, the court emphasised an understanding of mental health beyond the narrow expression "mental illness." It stated, "*that while examining the expression mental health of a pregnant woman it is also necessary to take note of such woman's actual or reasonably foreseeable*

82 X v. Union of India, 2019 SCC OnLine Bom 9965, para 16-18.

83 A (Mother of X) v. State of Maharashtra, (2024) 6 SCC 327.

84 The Medical Termination of Pregnancy Act, (1971). Section 5.

85 The Medical Termination of Pregnancy Act, (1971). Section 3(2-B).

86 A (Mother of X) v. State of Maharashtra, (2024) 6 SCC 327.

87 A (Mother of X) v. State of Maharashtra, (2024) 6 SCC 327, para 28.

88 Sidra Mehboob Sheikh v. State of Maharashtra 2021 SCC OnLine Bom 1839.

89 Sidra Mehboob Sheikh v. State of Maharashtra, 2021 SCC OnLine Bom 1839, para 4.

*environment.*"[90]

Drawing on the World Health Organization's (WHO) definition,[91] the court observed that mental health is "*a state of well-being in which every individual realizes his or her own potential, can cope with the normal stresses of life, can work productively and fruitfully, and is able to make a contribution to his or her community.*"[92] The decision recognised that mental health is a continuum, with diagnosable mental illness at one end and robust mental well-being at the other.[93]

Despite expansive and clearly articulated judgments based on a scientific and medical understanding of mental health, courts have been inconsistent in using such an approach in multiple other cases. In many instances, women's mental health is often subjected to a simplistic and reductive standard of proof, with their pleas of mental distress due to an unwanted pregnancy being disregarded. Courts are often reluctant to accept that the mere fact of an unwanted pregnancy can cause significant mental harm to women. This is contrary to the Supreme Court's observations in *XYZ v. State of Gujarat* (2023) as discussed above.[94]

Even in cases where the threat to mental health is clearly established in medical terms, courts have frequently denied abortion requests. For instance, in *X v. Union of India* (2023),[95] the Supreme Court denied abortion to a woman diagnosed with postpartum depression and suicidal ideation. Similarly, in *R v. Union of India* (2024),[96] the Delhi High Court dismissed a widow's plea seeking termination on grounds of severe mental health issues with suicidal thoughts following her husband's death. In both cases, the courts failed to give due consideration to the diagnosed mental health condition of the petitioners.

The same approach is mirrored by other High Courts, where decisions often reveal a patronising stance, with judges and Medical Boards arrogating the authority to determine whether a pregnancy poses a threat to a woman's mental health to themselves. Rarely are the "*reasonably foreseeable circumstances*" of the pregnant



90 Sidra Mehboob Sheikh v. State of Maharashtra, 2021 SCC OnLine Bom 1839, para 21.

91 World Health Organization. (2022). Mental health: Strengthening our response. https://www.who.int/news-room/fact-sheets/detail/mental-health-strengthening-our-response.

92 Sidra Mehboob Sheikh v. State of Maharashtra 2021 SCC OnLine Bom 1839, para 22.

93 Sidra Mehboob Sheikh v. State of Maharashtra 2021 SCC OnLine Bom 1839, para 22.

94 XYZ v The State of Gujarat & Ors, 2023 SCC OnLine SC 1573.

95 X v. Union of India, 2023 SCC OnLine SC 1338.

96 R v. Union of India, 2024 SCC OnLine Del 440.

woman taken into account, as provided by the MTP Act.[97] Instead, courts have even prioritised the mental well-being of the "unborn child" or the foetus.[98] For example, in *R v. Union of India* (2024)[99] the Delhi High Court, while denying abortion, cited the Medical Board's report indicating that the child would be born alive in case of abortion and there was a reasonable risk of physical and mental handicap to the newborn. Thus, the court denied abortion in this case to a woman who was diagnosed with depression in the aftermath of her husband's death. Here, instead of giving due consideration to the woman's extant mental health issues, the court and the Medical Board relied on the "potential child's" risk of mental handicap to deny abortion.

Courts and Medical Boards often demand a formal diagnosis of a mental disorder or illness, despite the Act's broader framing of mental health. As seen in multiple cases, Medical Boards and courts have routinely dismissed women's trauma and distress as insufficient, perpetuating an overly narrow and exclusionary standard. For instance, in *Raisa Bi v. State of Madhya Pradesh* (2019),[100] the High Court of Madhya Pradesh denied abortion to a 13-year-old rape survivor at 26 weeks of gestation. The Medical Board, including a psychiatrist, opined that the girl was not suffering from any mental illness and had "*average mental health,*" experiencing only occasional anxiety and uneasiness. Based on this assessment, the court ruled against the minor's plea for termination, citing the absence of a diagnosed mental illness and a lack of immediate danger to her life. In doing so, it gave credence to narrow medical definitions to determine mental health risks over the traumatic experience of sexual violence lived by the minor.

In another instance, the Bombay High Court denied abortion to a woman who had conceived through an extramarital affair.[101] Here, the abortion plea was based on grounds of mental health injury due to the circumstances around the pregnancy. However, the court did not consider the social stigma (for having conceived through an extramarital affair) as a sufficient reason to allow abortion on the grounds of mental health.

Distress due to rape, adolescent pregnancies, actual diagnosis of mental illness or simply the threat to mental health arising from societal stereotypes and taboo — all of

97 The Medical Termination of Pregnancy Act. (1971). Section 3(3).

98 R v. Union of India, 2024 SCC OnLine Del 440.

99 R v. Union of India, 2024 SCC OnLine Del 440.

100 Raisa Bi v. State of Madhya Pradesh, 2019 SCC OnLine MP 7011.

101 X.Y.Z. v. Dean of Vitthal Sayanna Civil Hospital and Others, 2024 SCC OnLine Bom 2090.

which form the "reasonably foreseeable circumstances"[102] that courts are required to take into account in determining injury to mental health – have seldom been considered adequate in such cases.

This points to a failure in consistently prioritising women's mental health and respecting their lived experiences, which in turn has sustained reproductive injustice in Indian courts. If the standards upheld in progressive decisions, such as *Sidra Mehboob Sheikh* had been applied, women in these cases would have been entitled to abortions based solely on the mental health risks posed by their unwanted pregnancies.

A 2018 study of the Ministry of Health and Family Welfare's (MoHFW) Population Research Centre[103] linked adolescent pregnancies with undesirable health outcomes and mental health issues in clear terms. Similar findings were highlighted by the Turnaway Study conducted in the USA, which revealed that women who are denied abortion face increased risk of mental distress[104] and physical health issues, along with financially compromised lives and careers. Thus, the absence of mental illness during medical evaluation while ignoring the larger relationship between physical and mental health is not only inconsiderate but also ignorant of these lived realities. A simplistic approach by courts and Medical Boards points to a widespread misconception and misunderstanding of issues of mental health, and a lack of sensitivity to women's struggles with it in the context of unwanted pregnancies. It also goes against the State policies that aim to improve the health outcomes for women, especially with respect to maternal health.[105]

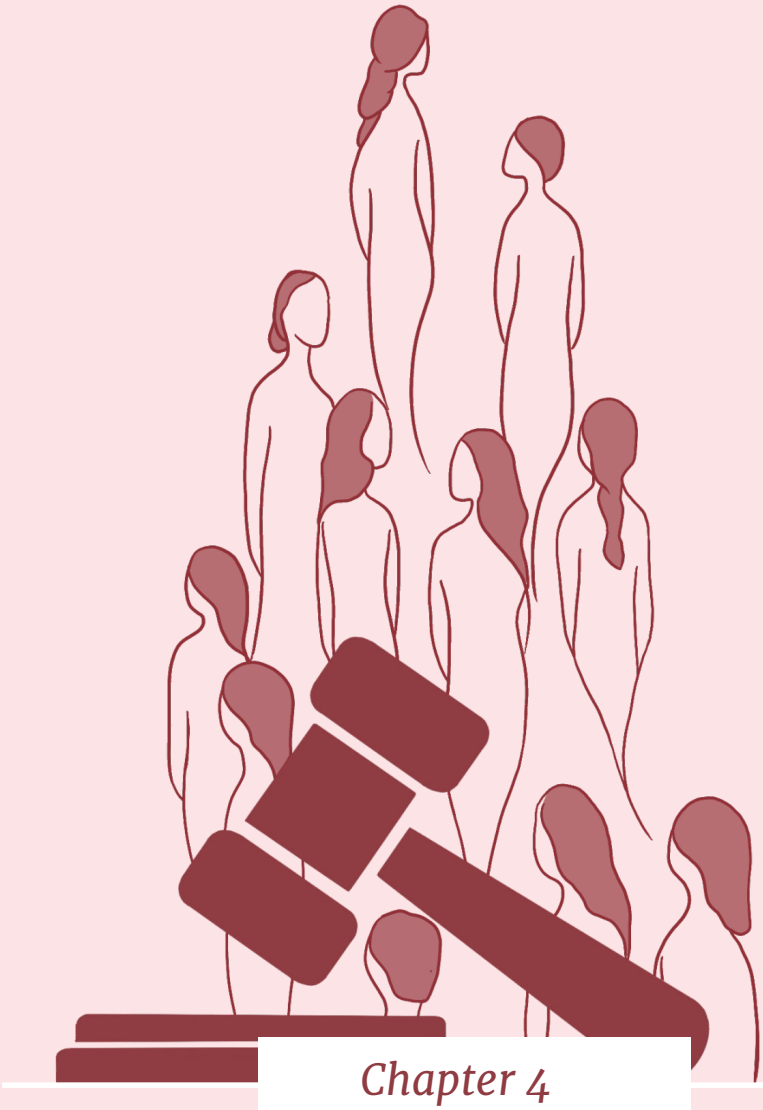


102 The Medical Termination of Pregnancy Act. (1971). Section 3(3).

103 Nair, S. B. (2018). Teenage marriage and fertility in India and its negative health outcomes *Population Research Centre, Ministry of Health and Family Welfare, Government of India, University of Kerala*. https://prc.mohfw.gov.in/fileDownload?fileName=Teenage%20marriage%20and%20fertility%20in%20India%20and%20its%20negative%20health%20outcomes.pdf

104 Foster, D. G. (2020). The Turnaway study: Ten years, a thousand women, and the consequences of having—or being denied—an abortion. Scribner. https://www.ansirh.org/research/ongoing/turnaway-study

105 See, policies like Janani Suraksha Yojana (2005), Janani Shishu Suraksha Karyakram (2011), Pradhan Mantri Surakshit Matritva Abhiyan (2016), Labour Room Quality Improvement Initiative (2017), Surakshit Matritva Aashwasan (2019), National Health Mission. *Maternal Health Division – Quality services for pregnant women and newborns*. Government of India. https://nhm.gov.in/index1.php?lang=1&level=2&sublinkid=822&lid=218



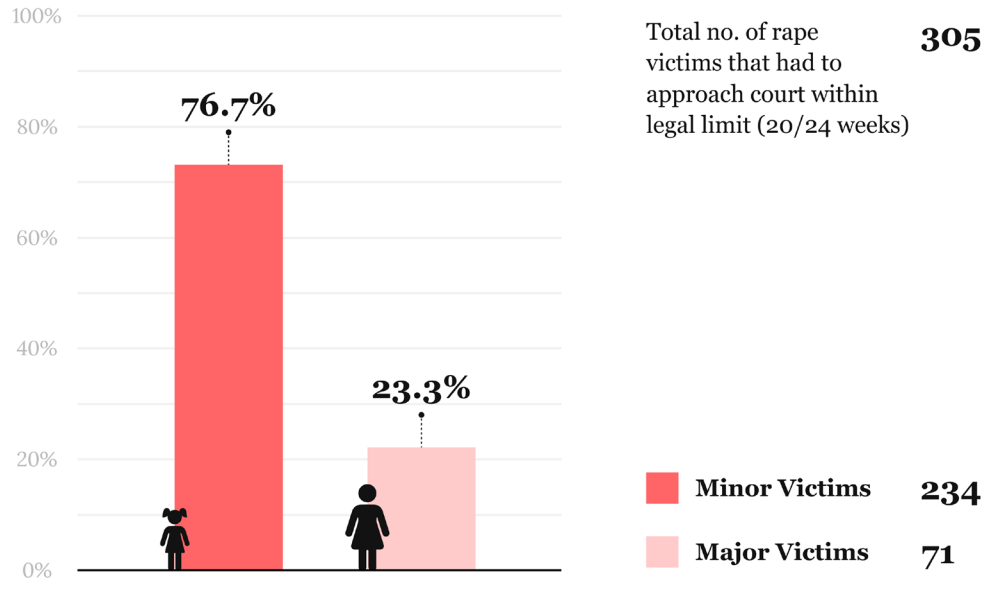
Chapter 4

# Rape

Rape is a profound act of domination that exploits existing power imbalances to strip victims of their agency and render them powerless.[106] Far beyond a physical violation, it is a deliberate assault on the dignity, autonomy, and personhood of survivors, often leaving deep psychological scars. The act of rape is traumatic enough. Yet, when a woman becomes pregnant as a result of such violence and seeks an abortion, there is no certainty that she will be able to obtain this health service within the framework of the MTP Act.

Abortion is permitted up to 24 weeks of gestation for rape survivors with the consent of two RMPs under the Act.[107] Rape is construed under the Act to constitute grave injury to the mental health of the woman, and any pregnancy that poses a threat of grave injury to the mental health of a woman can be aborted.[108] Beyond 24 weeks, the only recourse for pregnant survivors is to approach a court. Indeed, this study's analysis reveals that a significant number of rape survivors seeking abortion are compelled to get authorisation from courts even when their pregnancies fall well within the statutory limit of the MTP Act.[109] Judgments from various High Courts and the Supreme Court vary greatly in allowing or denying such requests for abortion to rape survivors.

*Fig 6:* ***Structural Barriers to Abortion for Rape Survivors.***




106 Burgess-Jackson, K. (2016). Feminist perspectives on rape. In E. N. Zalta (Ed.), The Stanford encyclopedia of philosophy (Fall 2016 Edition). Stanford University. https://plato.stanford.edu/entries/feminism-rape/

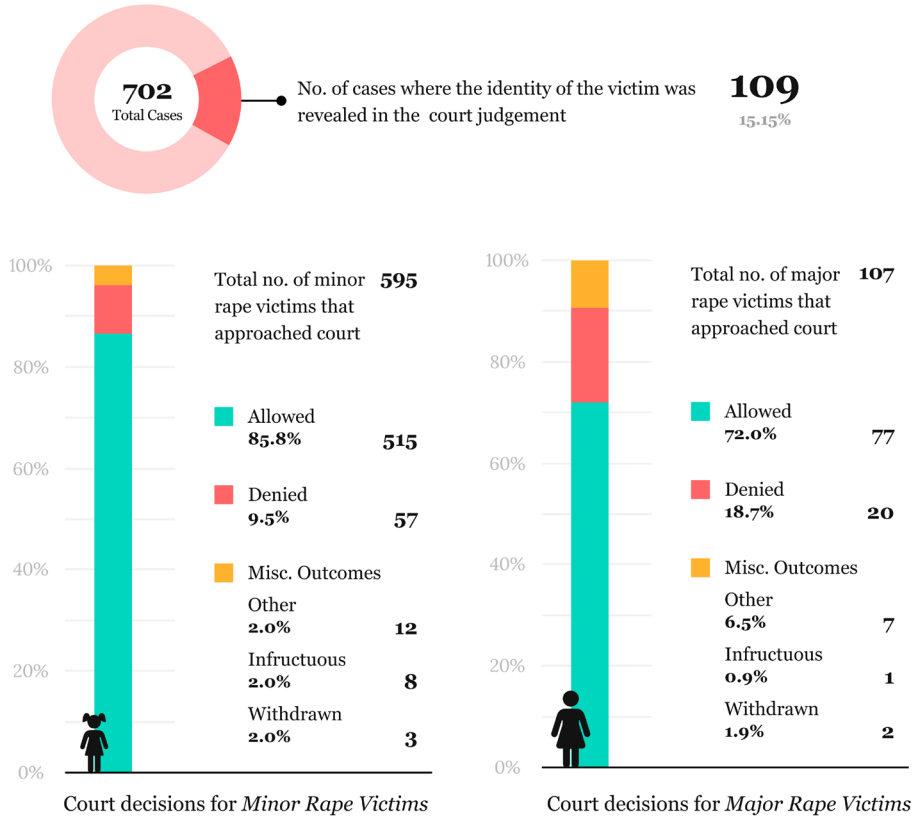
107 The Medical Termination of Pregnancy Act. (1971). Section 3 (3).

108 The Medical Termination of Pregnancy Act. (1971). Section 3(2) b(i).

109 See- Figure 6- Structural Barriers to Abortion for Rape Survivors.

DESCRIPTION - Between 2019 and 2024, 305 rape survivors (234 minors, 71 adults) had to approach courts for abortions within the legal gestational limit, indicating unlawful denials and bureaucratic red tape. For minors, mandatory reporting under the POCSO Act deters RMPs from providing care due to medico-legal complications. For adults, the denial often stems solely from the case being linked to rape.

*Fig 7:* ***Abortion Requests on Grounds of Rape***




Court decisions for *Minor Rape Victims*

Court decisions for *Major Rape Victims*

DESCRIPTION - This infographic presents data from 702 court cases where rape victims sought permission for abortion between 2019 and 2024. Of these, 109 judgments revealed the survivors' identities, breaching their right to privacy. A large majority of petitioners—595 cases (85%)—involved minors. In these, abortion was allowed in 515 cases (85.8%), denied in 57 cases (9.5%). Among adult survivors (107 cases), abortion was allowed in 77 cases (72%) and denied in 20 cases (18.7%).

*Note: Although 693 cases (586 minors, 107 majors; see Figure 1) explicitly cited rape as the ground, 9 additional minor cases—initially not filed on this ground—were*

*adjudicated by the courts as rape. Hence, the infographic shows 702 cases, inclusive of these 9.*

One reason for the denial or delay of abortion services to rape survivors could be the restrictive framing of the MTP Act itself. Another could be the criminal law provisions that intersect with the MTP Act. Criminal law provisions in statutes such as the Bhartiya Nyay Sanhita (BNS),[110] Bhartiya Nagarik Suraksha Sanhita (BNSS)[111] and the Protection of Children from Sexual Offences (POCSO)[112] Act together have a chilling effect on service providers, leading to delays and denial in abortion access. BNS criminalises abortion except in situations as provided under the MTP Act. Additionally, BNSS[113] and the POCSO Act[114] mandate compulsory reporting of rape/sexual assault survivors to police by the RMPs.[115] While these two laws aim to punish the perpetrators, in practice, they also do a disservice to survivors by imposing barriers for them to access necessary health services in a timely fashion.[116]

On the one hand, courts which have allowed termination in such instances do so by way of liberal purposive interpretation of the law and reading women's constitutional

110 Bharatiya Nyaya Sanhita. (2023). Section 88.

111 Bharatiya Nagarik Suraksha Sanhita. (2023).

112 The Protection of Children from Sexual Offences Act. (2012).

113 Bharatiya Nagarik Suraksha Sanhita. (2023). Section 397C– All hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person, shall immediately, provide the first-aid or medical treatment, free of cost, to the victims of any offence covered under Section 64, Section 65, Section 66, Section 67, Section 68, Section 70, Section 71 or sub-section (1) of Section 124 of the Bharatiya Nyaya Sanhita, 2023 or under Sections 4, 6, 8 or Section 10 of the Protection of Children from Sexual Offences Act, 2012, and shall immediately inform the police of such incident.

114 The Protection of Children from Sexual Offences Act. (2012). Section 19– Any person (including a child) who fears that an offence under this Act is likely to be committed, or has knowledge that such an offence has been committed, shall inform the special juvenile police unit or the local police & Section 21- A person who fails to report the commission of an offence under subsection (1) of Section 19 shall be punished with imprisonment of either description that may extend to six months, or with a fine or with both.

115 Bharatiya Nyaya Sanhita. (2023). Section 200– Whoever, being in charge of a hospital, public or private, whether run by the Central Government, the State Government, local bodies or any other person, contravenes the provisions of Section 397 of the Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023, shall be punished with imprisonment for a term which may extend to one year, or with fine, or with both.

116 Jain, D., & Tronic, B. (2019). Conflicting abortion laws in India: Unintended barriers to safe abortion for adolescent girls. Indian Journal of Medical Ethics, 4(4), 302–307. https://doi.org/10.20529/IJME.2019.059

and reproductive rights into the framing of the MTP Act. On the other hand, when courts deny abortion, they interpret the Act literally, citing the advanced gestational age, and point to the Act not allowing abortion beyond 24 weeks of gestation. While it is understandable that such cases are considered case-by-case, the inconsistent application of constitutional and human rights principles creates a dangerous and unjust trend of volatility and uncertainty.

## Inconsistencies in Safeguarding Fundamental Rights for Rape Survivors

In *Xyz v. State of Gujarat* (2023),[117] while allowing abortion to a rape victim in her 27th week of gestation, the Supreme Court observed that,

> *13. pregnancy outside marriage, in most cases, is injurious, particularly, after a sexual assault/abuse and is a cause of stress and trauma affecting both the physical and mental health of the pregnant woman, the victim. Sexual assault or abuse of a woman is itself distressing and sexual abuse resulting in pregnancy compounds the injury. This is because such a pregnancy is not a voluntary or mindful pregnancy."*

In the case of *XXXXXX v. Union of India* (2024),[118] the Kerala High Court stated that while the MTP Act limits abortion beyond 24 weeks, there are broader powers available to the court under Article 226 of the Constitution. In this particular instance, the court was considering a case under the POCSO Act involving a minor who was 28 weeks pregnant. It aptly noted, "*a rape victim cannot be forced to give birth to a child of a man who sexually assaulted her,*"[119] underlining that denying permission for abortion would amount to coercing the victim into motherhood and violating her fundamental right to dignity.

In *X v. State of Maharashtra and Another* (2022),[120] the Bombay High Court permitted a 14-year-old sexual assault survivor to terminate her 25-week pregnancy. The court observed that the circumstances of the case, like the petitioner's age, the fact that pregnancy occurred through rape and that the pregnancy's continuation would result in grave injury to the physical and mental health of the petitioner, all need to

117 XYZ v. State of Gujarat, 2023 SCC OnLine SC 1658.

118 XXX and Anr v. Union of India rep by its Secretary and Ors., WP(C) No. 16583 of 2024.

119 XXX and Anr v. Union of India rep by its Secretary and Ors., WP(C) No. 16583 of 2024, para 8.

120 X v. State of Maharashtra and Another, 2022 SCC OnLine Bom 10683.

be considered. Similarly, it permitted abortion for a 15-year-old rape victim with a 28-week pregnancy in *Tania Avijit Chowdhury v. State of Maharashtra* (2021).[121]

When the Delhi High Court, in *GDN v. Gov. of NCT of Delhi* (2023),[122] allowed abortion at 25 weeks to a minor victim of gangrape, it based its decision on the fact that the girl was a rape victim, which necessitated taking a humanitarian view of the matter.[123] Similarly, the High Court of Uttar Pradesh in *Ms. X v. State of UP & Ors* (2023) held that denying the right to choose in aborting a pregnancy conceived through rape to the survivor "*would amount to the denial of her right to live with dignity*."[124]

As stated earlier, under the MTP Act, the risk of injury to a woman's mental health is recognised as a valid ground for permitting termination up to 24 weeks of pregnancy. Moreover, as per judicial interpretation of Section 5 of the MTP Act, courts have allowed termination beyond the limit stated in the Act while considering the mental health aspect in many cases which has been discussed in detail in the Chapter "Saving Life".[125] Ironically, this critical consideration is often disregarded for rape survivors whose pregnancies exceed 24 weeks. Survivors often face numerous legal, social, and economic barriers that delay access to abortion services during early gestation.[126] Denials by RMPs and other institutional hurdles often push the gestational age beyond the statutory limit.[127] Despite these systemic barriers, courts denying abortion in such cases rarely address these factors, perpetuating the survivors' trauma and victimisation.

By interpreting the term "life" under the Act narrowly in a number of cases[128] courts



121 Tania Avijit Chowdhury v. State of Maharashtra and Ors., W.P. No. 21314 of 2021.

122 GDN v. Govt. of NCT of Delhi, CWP 5112 of 2023.

123 GDN v. Govt. of NCT of Delhi, CWP 5112 of 2023, para 10.

124 Ms. X v. State of U.P. & Ors, WP 22016 of 2023, para 19.

125 See- Chapter 2 Saving Life, page 17.

126 Chandra, A., Satish, M., Shree, S., Saxena, M.(2021). *Legal barriers to accessing safe abortion services in India: a fact finding study*. Center for Reproductive Rights, Centre for Constitutional Law, Policy, and Governance, NLU Delhi, & National Law School of India University, Bengaluru. . https://www.nls.ac.in/wp-content/uploads/2021/08/Legal-Barriers-to-Accessing-Safe-Abortion-Services-in-India.pdf

127 Chandra, A., Satish, M., Shree, S., Saxena, M.(2021). *Legal barriers to accessing safe abortion services in India: a fact finding study*. Center for Reproductive Rights, Centre for Constitutional Law, Policy, and Governance, NLU Delhi, & National Law School of India University, Bengaluru. . https://www.nls.ac.in/wp-content/uploads/2021/08/Legal-Barriers-to-Accessing-Safe-Abortion-Services-in-India.pdf

128 See- Chapter 2 Saving Life, page 17.

have denied abortion to rape victims. For instance, in *Mumtaz Begum v. State of Assam* (2021),[129] the Gauhati High Court denied a 16-year-old rape victim an abortion. It dismissed the petition by simply stating that:

> *Since A is more than 24 weeks pregnant and a medical termination of pregnancy beyond the statutory limit of 24 weeks in terms of sub-section 2 of Section 3 of the MTP Act is not permissible and there is no opinion of the doctors on record which states that the abortion is immediately required to save the life of the pregnant woman."*[130]

Similarly, the High Court of Punjab and Haryana in *XXX v. State of Haryana* (2024)[131] denied abortion to a rape victim in her 25th week of pregnancy. While referencing the *X v. Union of India* (2023)[132] decision of the Supreme Court, the court opined that,

> *23. ... the circumstances surrounding the case do not give rise to compulsive and convincing reasons where pregnancy must be terminated. The Medical Board has already opined in the negative and with the passage of time and delay on the part of the petitioner in approaching this Court, it has only further aggravated the cause against feticide. There is no material available on record with this Court on the basis whereof this Court may differ with the opinion expressed by the medical report."*

It disposed of the petition by leaving the final decision with respect to abortion to the Medical Board. Apparently blind to the precarious condition and intimidating nature of the criminal justice system, and the barriers that victims face in timely access to abortion, the court's reasoning perversely suggests culpability of the victim for the delay in approaching it.

Furthermore, the ruling in *X v. State of Odisha* (2021)[133] highlights the paradox within judicial reasoning in abortion cases involving rape survivors. In this case, the court vividly recognised the victim's plight, describing rape as a crime against humanity and emphasising the indelible scars left on the victim's psyche and personhood.[134] It

129 Mumtaz Begum v. State of Assam and Ors., I.A.(Civil) 1032 of 2021.

130 Mumtaz Begum v. The State of Assam and others, I.A.(Civil) 1032 of 2021.

131 XXX v. State of Haryana, 2024 PHHC 087175.

132 See- Chapter 7 Foetal Viability which discusses X v. Union of India in detail, page 81.

133 X v. State of Odisha, 2021 SCC OnLine Ori 1964.

134 X v. State of Odisha, 2021 SCC OnLine Ori 1964, para 14.

acknowledged the petitioner's mental, physical, and emotional suffering, as well as the grave impact of forcing her to continue an unwanted pregnancy. However, this empathetic acknowledgement stands in sharp contrast to the court's ultimate decision, which rigidly adhered to the legal threshold of the MTP Act without upholding the fundamental rights of the victim in the process. On the one hand, the judgment noted the lack of timely guidance provided to the victim by law enforcement and other authorities, which could have mitigated her suffering. On the other hand, it declined to act decisively to redress the systemic failures that compounded the petitioner's trauma, citing statutory constraints under the MTP Act. This decision is part of a pattern in one too many cases where courts often acknowledge the victim's suffering in words but fail to translate that acknowledgement into meaningful action.

In *P v. State and Ors* (2024),[135] the Delhi High Court denied MTP to a 16-year-old rape victim, based on the opinion of the Medical Board. While the board emphasised the viability of the foetus, it did not address the psychological trauma, physical risks of teenage pregnancy, and reasonably foreseeable circumstances of the minor compelled to carry an unwanted pregnancy resulting from rape. The court directed the survivor to give the child up for adoption and asked the state to bear the financial burden for the pregnancy. In doing so, it revealed insensitivity to the profound impact on women compelled to carry such pregnancies to term, even if only to relinquish the child for adoption, and reduced her lived experience to a procedural formality.

The MoHFW has issued guidelines on medico-legal care for survivors of sexual violence, which envisage that rape survivors are to be provided with the option of undergoing an abortion, subject to the legal mandate.[136] These guidelines also propose a balancing act between mandatory reporting and providing emergency services to survivors. As stated above, due to legal barriers in accessing abortion, rape survivors are forced to seek authorisation from courts even when they are clearly permitted to undergo abortion under the MTP Act and to access abortion services without judicial intervention.[137] For instance, in *Victim A v. State of Madhya Pradesh* (2024),[138] a minor rape survivor was



135 P v. State and Ors., W.P. 1899 of 2024.

136 Ministry of Health and Family Welfare. (2014). *Guidelines and protocols: Medico-legal care for survivors of sexual violence* (p. 34). Government of India. https://mohfw.gov.in/sites/default/files/953522324.pdf

137 See- Figure 6- Structural Barriers to Abortion for Rape Survivors.

138 In Victim A v. State of Madhya Pradesh, 2024 SCC OnLine MP 4096., the petitioner was a minor seeking permission for abortion. In another striking instance, Manubhai Ramjibhai Sodarva v. State of Gujarat, Guj. HC SCrA No. 4291 of 2022., the court was approached by a minor rape

forced to approach the court at just six weeks of gestation, despite the law permitting abortion up to 24 weeks for rape victims. The court went so far as to set up a Medical Board, despite the same not being required by the law, resulting in unnecessary delays.

Given the immense trauma and marginalisation a rape victim already faces, abortion should be treated as an essential emergency service for her. Courts, which should be discouraging the filing of cases such as that of Victim A, have failed to do so. Consequently, a message is conveyed that court authorisation is indeed required, even in such clear-cut cases. This not only prolongs the survivor's suffering but also undermines their right to dignified and timely healthcare.

As stated above, abortion within 20 weeks of gestation requires the consent of only one RMP, regardless of the circumstances surrounding conception. The law under 20 weeks does not differentiate based on how the pregnancy occurred. A single RMP's opinion suffices for accessing abortion within this gestational limit. In Victim A's case, not only was the court's decision to adjudicate a case at six weeks of gestation legally erroneous and unwarranted, but by establishing a Medical Board — a panel of multiple doctors — the court contravened the statutory requirement, which mandates the approval of only a single RMP in such cases.



Similarly, in *Prosecutrix v. State of Madhya Pradesh and Others* (2021),[139] the victim was compelled to approach the court at around 13 weeks of pregnancy. The petitioner had been in a relationship with the accused, who refused to marry her after she became pregnant. She sought to terminate the pregnancy on the grounds that the accused had coerced her into sexual relations under the false promise of marriage. However, a single-judge bench denied her request for abortion, stating that

> *2. ...since the petitioner involved herself in consensual sex knowing fully well the consequences of such an act, and the allegations made in the FIR do not prima facie make out a case of consent obtained by misrepresentation of fact, medical termination of pregnancy cannot be permitted."*[140]

Although the judgment was later overruled by a Division Bench, the reasoning adopted by the Single Judge merits critique, as it frequently recurs in similar cases. The reasoning was deeply troubling, based on the view that the First Information Report

survivor who was reported to be merely three days pregnant at the time of filing.

139 Prosecutrix v. The State of Madhya Pradesh and Others, W.P. 14658 of 2021.

140 Prosecutrix v. The State of Madhya Pradesh & Ors, W.P. 14658 of 2021, para 2.

(FIR) did not establish a clear case against the accused and that the petitioner, having engaged in consensual sex outside of marriage, should bear the consequences of her actions. This approach blatantly contradicts the provisions of the MTP Act, which do not mandate that a case of rape be established, proven, or even accompanied by an FIR

to allow abortion.[141] Unfortunately, courts have overstepped by tying abortion access to the verification of rape or the filing of an FIR, prioritising criminal adjudication over the petitioner's urgent medical needs and reproductive rights. Such reasoning not only misinterprets the law but also amounts to the moral policing of women's choices, thereby contravening their fundamental rights.

In *X v Principal Secretary GNCT, Delhi* (2022), the Supreme Court held that:

> *76. In order to avail the benefit of Rule 3B(a), the woman need not necessarily seek recourse to formal legal proceedings to prove the factum of sexual assault, rape or incest. Neither Explanation 2 to Section 3(2) nor Rule 3B(a) require that the offender be convicted under the IPC or any other criminal law for the time being in force before the pregnant woman can access an abortion. Further, there is no requirement that an FIR must be registered or the allegation of rape must be proved in a court of law or some other forum before it can be considered true for the purposes of the MTP Act. Such a requirement would be contrary to the object and purpose of the MTP Act. In fact, Explanation 2 triggers the legal presumption as to mental trauma "where any pregnancy is alleged by the pregnant woman to have been caused by rape."*

In the same judgment, for the first time, the court also recognised the phenomenon of marital rape, observing that "*[i]t is not inconceivable that married women become pregnant as a result of their husbands having raped them.*"[142] Besides this, it held:

> *75. Notwithstanding Exception 2 to Section 375 of the IPC, the meaning of the words "sexual assault" or "rape" in Rule 3B(a) includes a husband's act of sexual assault or rape committed on his wife. The meaning of rape must therefore be understood as including marital*

141 X v. The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr., (2022) SCC OnLine SC 905.

142 X v. The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr., (2022) SCC OnLine SC 905, para 73.

*rape, solely for the purposes of the MTP Act and any rules and regulations framed thereunder. Any other interpretation would have the effect of compelling a woman to give birth to and raise a child with a partner who inflicts mental and physical harm upon her."*

Marital rape was not a ground to seek abortion in any case between 2019 to 2024, although it was contended in the case of *Sumanpreet Kaur v. State of Punjab and Others* (2024).[143] Here, the Punjab and Haryana High Court briefly discussed marital rape as an aspect in granting abortion to a woman who had been coerced into marriage after being kidnapped and subsequently sexually assaulted, resulting in pregnancy. This case also falls in the category of those where rape victims are compelled to file petitions despite being covered under the MTP Act. The petitioner had a pregnancy of just over 15 weeks, and doctors had refused to provide abortion services without authorisation from the court. Again, the court unnecessarily constituted a Medical Board. Yet, the redeeming aspect of this judgment was the recognition of marital rape and intimate partner violence while allowing the petitioner to undergo abortion.[144]

## Adolescents and Abortion in India

Under the POCSO Act, all adolescents (aged below 18) are presumed to be incapable of providing consent to any sexual activity, and all sexual activity by adolescents has been criminalised.[145] The POCSO Act mandates all healthcare providers to report such cases to the police; failing to do so can result in punishment.[146] Reporting has to be done irrespective of the wishes of the patient or guardian. In practice, when an adolescent girl (or a woman, for that matter) approaches healthcare providers for abortion, and the pregnancy is a result of sexual violence, RMPs refuse abortion due to fear of punishment under criminal law[147] or ask for court authorisation.[148] Although the framework of the POCSO Act does not recognise consensual sexual relationships between adolescents, adolescents do engage in such activities, a phenomenon well

143 Sumanpreet Kaur v. State of Punjab and Others, 2024 SCC OnLine P&H 3805.

144 Sumanpreet Kaur v. State of Punjab and Others, 2024 SCC OnLine P&H 3805.

145 The Protection of Children from Sexual Offences Act. (2012). Section 2.

146 The Protection of Children from Sexual Offences Act. (2012). Section 19.

147 Bhartiya Nyaya Sanhita. (2023). Section 88.

148 Chandra, A., Satish, M., Shree, S., Saxena, M.(2021). *Legal barriers to accessing safe abortion services in India: a fact finding study*. Center for Reproductive Rights, Centre for Constitutional Law, Policy, and Governance, NLU Delhi, & National Law School of India University, Bengaluru. . https://www.nls.ac.in/wp-content/uploads/2021/08/Legal-Barriers-to-Accessing-Safe-Abortion-Services-in-India.pdf

documented[149] and recognised in the Supreme Court decision in *X v Principal Secretary GNCT, Delhi* (2022).[150] For minor girls, it becomes nearly impossible to access safe abortion services without going through the criminal justice system. Minors are required to be accompanied by a guardian when seeking abortion, and consent of the guardian is mandatory for abortion.[151] A 'guardian' in such circumstances has been defined under the MTP Act, as "a person having care of the minor."[152] In the Indian context, where sex is a taboo subject, adolescents most often seek abortion services in a manner that does not involve their parents or having to face police or other authorities. This pushes many who seek to access these services into unsafe environments.[153] The Supreme Court in *X v Principal Secretary GNCT, Delhi* (2022) observed,

> *78. The absence of sexual health education in the country means that most adolescents are unaware of how the reproductive system functions as well as how contraceptive devices and methods may be deployed to prevent pregnancies. The taboos surrounding pre-marital sex prevent young adults from attempting to access contraceptives. The same taboos mean that young girls who have discovered the fact that they are pregnant are hesitant to reveal this to their parents or guardians, who play a crucial role in accessing medical assistance and intervention."*[154]

> *80. When a minor approaches an RMP for a medical termination of pregnancy arising out of a consensual sexual activity, an RMP is obliged under Section 19(1) of the POCSO Act to provide information pertaining to the offence committed, to the concerned authorities. An adolescent and her guardian may be wary of the mandatory*

149 Pitre, A., & Bandewar, S. S. (2024). Law Commission of India report on the age of consent: Denying justice and autonomy to adolescents. *Indian Journal of Medical Ethics*, 9, 3–6.

150 X v. The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr., (2022) SCC OnLine SC 905. para 77- "*The proscription contained in the POCSO Act does not – in actuality – prevent adolescents from engaging in consensual sexual activity. We cannot disregard the truth that such activity continues to take place and sometimes leads to consequences such as pregnancy. The legislature was no doubt alive to this fact when it included adolescents within the ambit of Rule 3B of the MTP Rules.*"

151 The Medical Termination of Pregnancy (Amendment ) Act. ( 2021). Section 2(a).

152 The Medical Termination of Pregnancy (Amendment ) Act. ( 2021). Section 2.

153 X v. The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr., (2022) SCC OnLine SC 905, para 78- 80.

154 X v. The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr., (2022) SCC OnLine SC 905, para 78.

> *reporting requirement as they may not want to entangle themselves with the legal process. Minors and their guardians are likely faced with two options – one, approach an RMP and possibly be involved in criminal proceedings under the POCSO Act, or two, approach an unqualified doctor for a medical termination of the pregnancy. If there is an insistence on the disclosure of the name of the minor in the report under Section 19(1) of POCSO, minors may be less likely to seek out RMPs for safe termination of their pregnancies under the MTP Act."*[155]

While the POCSO Act aims to protect children from exploitation, it is blind to these realities, thereby threatening a young person's safety and access to timely healthcare.

## Protecting Victims' Identities in Medical Reports and Court Judgments

Troublingly, 109 judgments on abortion where rape victims' identities and personal information have been mentioned are publicly available.[156] This, despite a strict provision in law that prohibits naming or publishing any of the identifiable information of rape victims.[157] MoHFW guidelines also require protecting personal identifiable information of survivors while submitting Medico Legal Case (MLC) reports to the police, including noting of "informed refusal" by an adult survivor.[158] However, when the Medical Board gives its opinion, it often does not redact or anonymise the name of the victim. Exacerbating this, while reproducing these reports in judgments, courts have failed to redact this information, thereby exposing victims' identities. Such disclosure can cause significant harm to victims and their families. In one such instance, the Delhi

High Court called out the Medical Board for not responding to the specific directions



155 X v. The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr., (2022) SCC OnLine SC 905, para 80.

156 In the interest of safeguarding the identities of the victims, the relevant judgments have not been cited here.

157 See, Bhartiya Nyaya Sanhita, (2023). Section 72(1) – Whoever prints or publishes the name or any matter which may make known the identity of any person against whom an offence under Section 64 or Section 65 or Section 66 or Section 67 or Section 68 or Section 69 or Section 70 or Section 71 is alleged or found to have been committed shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine., Nipun Saxena v. Union of India, (2019) 2 SCC 703.

158 Ministry of Health and Family Welfare. (2014). Guidelines and protocols: *Medico-legal care for survivors of sexual violence* (p. 34). Government of India. https://mohfw.gov.in/sites/default/files/953522324.pdf

that were issued to it to anonymise the name of the minor rape victim:[159]

> *3. The report overlooks that particulars of the victim need to be anonymised. Accordingly, Medical Superintendent, Safdarjung Hospital, New Delhi is directed to ensure that the guidelines in this regard are followed and the name of the victim is kept confidential and suitably redacted."* [160]

As illustrated above, one of the major barriers for rape survivors to access abortion is the criminalisation that enmeshes the process in complex medico-legal requirements. These circumstances persist despite a general normative understanding that decriminalisation of abortion is essential for the full realisation of sexual and reproductive health and rights.[161] Notably, the UN Human Rights Committee's General Comment No. 36[162] on the Right to Life explicitly mandates that State parties ensure access to abortion in cases of rape and incest—a standard that, as demonstrated through data findings and judicial decisions discussed in this Chapter, is inconsistently applied in India. Survivors of rape and incest are first compelled to approach the courts to seek permission for an abortion. Yet, even then, they cannot rely on the courts to consistently grant such relief.



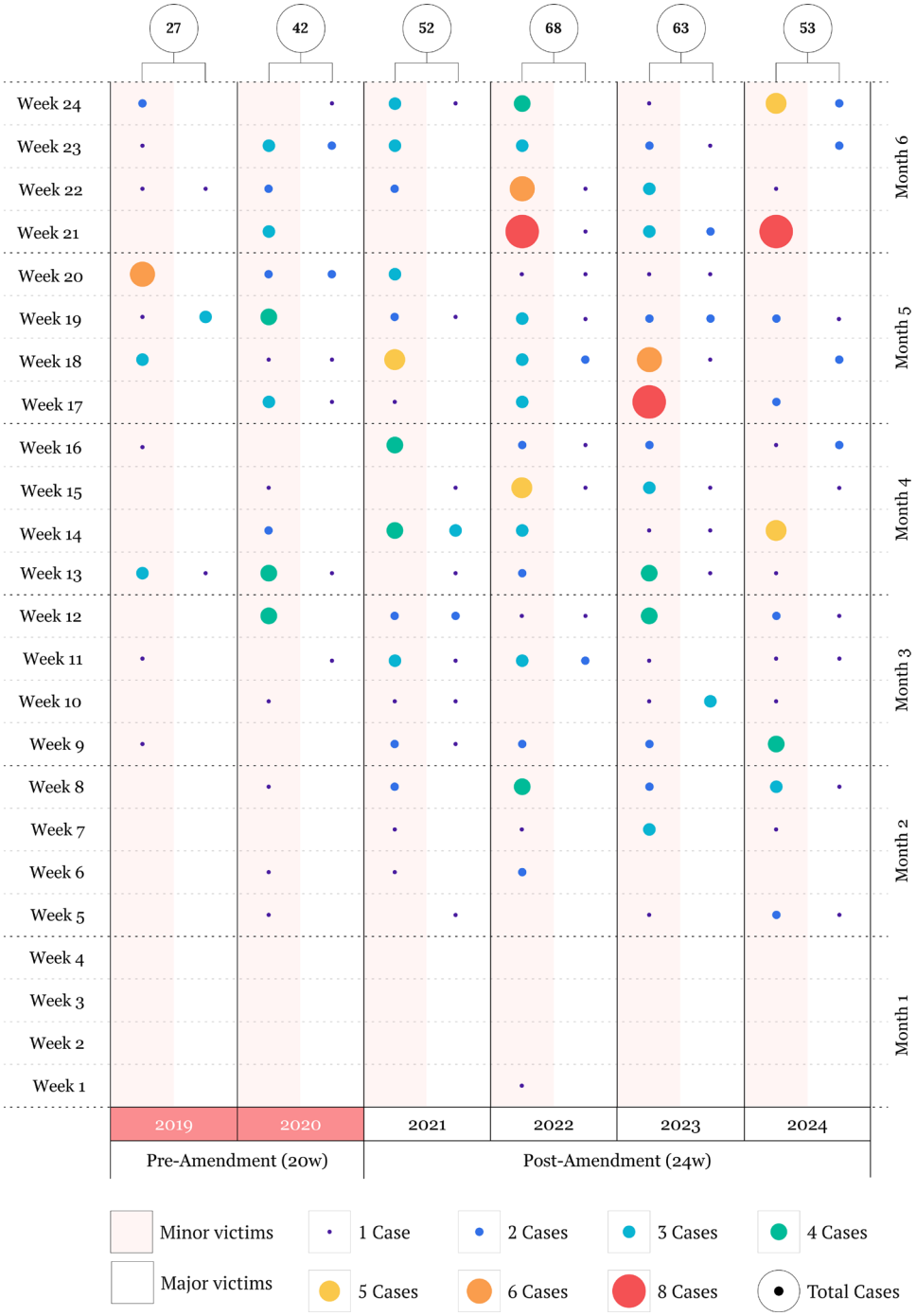
159 Minor N. v. State (NCT of Delhi), 2024 SCC OnLine Del 6341.

160 Minor N. v. State (NCT of Delhi), 2024 SCC OnLine Del 6341, para 6.

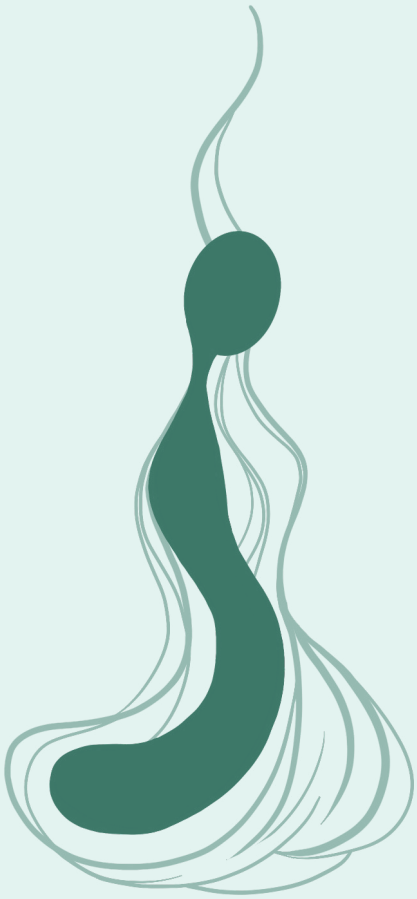
161 World Health Organization. (2022). Abortion care guideline. https://www.who.int/publications/i/item/9789240039483 "*[r]emoving abortion from all penal/criminal laws, not applying other criminal offenses (e.g. murder, manslaughter) to abortion, and ensuring there are no criminal penalties for having, assisting with, providing information about, or providing abortion, for all relevant actors.*"

162 Human Rights Committee. *General comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights: The Right to Life* (CCPR/C/GC/36, 30 October 2018), United Nations, https://docs.un.org/en/CCPR/C/GC/36

*Fig 8:* ***Cases where rape victims approached courts within the legal limit: A week-by-week breakdown***




DESCRIPTION: This figure shows the gestational stage, week by week, at which rape victims were compelled to seek court authorisation for abortion, despite fitting into the criterion given under the MTP Act. Noticeably, the data includes one petition filed



Chapter 5

# Foetal ‘Abnormality’

at less than one week of gestation. This points to unnecessary judicialisation of such cases, systemic barriers, and quid pro quo of abortion denial followed by some services providers to rape victims.

The MTP Act allows abortion in cases of foetal anomaly (termed as 'foetal abnormality' under the Act, and often in judgments). It specifically provides that a pregnancy up to 24 weeks can be terminated if there is a substantial risk for a child to be born with a 'serious physical or mental abnormality'.[163] The Act also provides that the length of the pregnancy is irrelevant where it is necessitated by the presence of any of the '*substantial foetal abnormalities*' diagnosed by a Medical Board.[164]

On a plain reading, these provisions seem emancipatory as they provide pregnant women an opportunity to make reproductive choices even in later stages of pregnancy. However, the choice to abort in such cases lies solely with RMPs under the law. Without a medical opinion diagnosing a serious physical or mental abnormality under Section 3(2) (ii) or a substantial foetal abnormality under Section 3(2B), a woman is unable to exercise her agency.

In *Suparna Debnath & Anr. v. State of West Bengal & Ors.* (2019),[165] the Medical Board opined that there were chances of birth of a child with Down syndrome, gastrointestinal malformation, and cardiac abnormality, which needed surgical intervention. It stated that the outcome of such procedures was unpredictable, as was the quality of life of the prospective child, and concluded against the abortion as the anomalies were not *prima facie* fatal. In doing so, the board focused solely on foetal life and gave no consideration to the mother's health.

The court, however, took a holistic approach and allowed abortion. It arrived at its decision having noted that the pregnancy would not only involve a risk to the life of the woman and cause grave injury to her physical and mental health, but also that the prospective child would have a compromised life. Relying on the Statement of Objects and Reasons in the MTP Act, the court noted that the purpose of the Act was to preserve the health and life of a pregnant woman. Observing that the Act allows abortion based on eugenics, it noted that the woman's personal life and liberty were inextricably linked with the foetus and would be so even after she became a mother.



163 The Medical Termination of Pregnancy Act. (1971). Section 3(2)((ii) -there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

164 The Medical Termination of Pregnancy Act. (1971). Section 3(2B) -The provisions of sub-section (2) relating to the length of the pregnancy shall not apply to the termination of pregnancy by the medical practitioner where such termination is necessitated by the diagnosis of any of the substantial foetal abnormalities diagnosed by a Medical Board.

165 Suparna Debnath & Anr v. State of West Bengal & Ors., 2019 SCC OnLine Cal 9120, para 19-20.

In *Pallavi Bhoi v. State of Chhattisgarh* (2019),[166] medical reports stated that the high chances of mental retardation and possible mortality in the child upon birth were causing great mental agony to the woman. The court allowed abortion, holding that:

> *10. In these circumstances, there is no doubt that the petitioner has a right to protect and preserve her life and also has a right to see a healthy baby is born which may not subject to neglect and abuse of society. The child also has a right to be healthy and not live his life with scolding and censure of others. The child born with infirmity both mental and physical for all practical purposes would be a burden to himself and hiding spots would not help and expectation of normal behaviour by the society would be contrary to general expectation. When the cutting edge medical technologies have affirmed lack of development of the fetus and viability is also on doubt, in such cases the mother of the child in the womb would have the right to call for medical termination of pregnancy to address the problem. Taking into account the medical reports in the interest of justice, it is appropriate to permit the petitioner to undergo the termination of her pregnancy under the provisions of the Act, 1971."*

On the other hand, in *Indulekha Sreejith v. Union of India* (2021),[167] the Kerala High Court denied abortion on a contrary viewpoint. It held that the determination of a Medical Board that a pregnancy could result in a live birth and that foetal abnormalities were not life-threatening, would override the constitutionally protected reproductive rights of the woman in favour of the "unborn child's" right to life. The court ruled that while the amended MTP Act permitted abortion for severe abnormalities beyond the legal timeframe, this was not applicable if the Medical Board found the abnormalities not to be significant. Similarly, in *Akhila K. v. Union of India* (2021),[168] the Kerala High Court once again denied abortion as per the Medical Board's report that the foetal abnormality was correctable through surgeries. It stated that,

> *...permitting a medical termination of pregnancy contrary to the findings of the medical board which found the chances of the baby being born alive, would amount to grant of permission for foeticide which is not permissible."*

166 Pallavi Bhoi v. State of Chhattisgarh, 2019 SCC OnLine Chh 68.

167 Indulekha Sreejith v. Union Of India, W.P.(C) NO. 17036 OF 2021.

168 Akhila K. v. Union of India, 2021 SCC OnLine Ker 804 , para 9.

In *X v Principal Secretary GNCT, Delhi* (2022),[169] the Delhi High Court was called upon to determine whether the abnormality in the foetus constituted "substantial foetal abnormality" under the MTP Act. In this case, the Medical Board had advised against abortion, as the foetus was "compatible with life". However, the report expressed an inability to predict the quality of life or the degree of handicap in the child after birth. The court stated that the risks involved in such medical conditions, the likelihood of immediate surgery and the unpredictability of the quality of life amounted to 'substantial foetal abnormality.' Most importantly, it ruled that even if significant foetal abnormality was present, the woman's physical and mental health was a primary consideration and needed to be taken into account while adjudicating such cases.

In the same year, in *Swati v. State of Gujarat* (2022),[170] the Gujarat High Court denied abortion to a specially abled pregnant woman on the basis that the medical opinion reported no threat to her life or mental health. It noted,

> *21. So far as the contention raised by the learned advocate for the petitioners with regard to the petitioners being a specially abled persons, it will be adding a further burden for them to raise child with deficiencies, is concerned, in my view, from the facts of the present case, it seems that it is not a case of chance pregnancy or a forced pregnancy, but it is a case of plan and thoughtful pregnancy. In the past also, the petitioners have attempted and unfortunately, failed because of the miscarriages. Under the circumstances, this Court would not allow the petitioners to terminate the pregnancy at such an advanced stage on that ground. This Court fails to understand what could be the probable reason, which prevented the couple from approaching the Court at the threshold when the fetus was diagnosed with Jackson – Weiss syndrome, deafness and contradiction of Aortic Arch. Be that as it may. The contention of the learned advocate for the petitioners with regard to difficulties/incapability in raising a child is, therefore, not worth accepting."*

The callous approach of the court is self-evident in the language. Seemingly, disability is only a concern for the court when it is detected in a foetus and not when it is a lived reality for a woman. Moreover, in this case, the court inserts its subjective view and asserts that only chance or forced pregnancies can be unwanted, suggesting that circumstances around conception are more important than decisional autonomy and

169 X v. GNCTD & Anr., 2022 SCC OnLine Del 4274, para 41-44 and 47.

170 Swati v. State of Gujarat, R/Special Criminal Application No. 10048 of 2022.

bodily integrity of a pregnant woman. A woman's decision to terminate pregnancy may evolve in the light of medical findings around foetal abnormality as mandated under the MTP Act. Hence, her material circumstances and health cannot be dismissed simply because a pregnancy was planned.

In *Jyotsna Shingwani v. Union of India* (2020),[171] the Delhi High Court was uncaring of the pregnant woman's mental health. In allowing abortion, it focused solely on the reported prognosis of the potential child requiring invasive surgeries. The woman's mental agony was based on not wanting to see her child suffer. Yet, the court paid attention only to the prospective child's future:

> *20. We have been informed that this is the first pregnancy of the couple. Though the petitioner/mother, has categorically stated that she is not in a mental frame of mind to proceed ahead with the pregnancy and the very thought of the baby, having to undergo a major operation, immediately on birth, is causing her immense and unbearable mental trauma, the Status Report mentions that there is no risk to her mental or physical health on continuation of the pregnancy. Therefore, it cannot be said that continuation of the pregnancy will result in putting the mental health of the petitioner to risk. What is significant is that there is a substantial risk that if the child is born, it would suffer from a physical abnormality that would be seriously detrimental to its healthy and normal life. As stated earlier, the child would be required to undergo a major operation, immediately after birth. The child will be exposed to numerous intra operative and post operative complications and if any such problems arise, it would affect the quality of its life. The lack of compatibility of the foetus with a healthy and normal life is therefore looming large."*

While, in essence, the concern of the woman and the court was the same, i.e., the well-being of the prospective child, the court revealed its paternalism in trivialising the mother's mental health concern against its own concern for the prospective child. The exercise effectively supplanted the guardianship from the woman to the hands of the court and shifted the discussion from agency and choice to ostensible emancipation. In the larger debate, such judgments add to the vilification of pregnant women seeking self-preservation, even if they are informed by the need to protect the interests of potential life.

171 Jyotsna Shingwani v. Union of India, 2020 SCC OnLine Del 561.

Through the cases referred to above, a few aspects emerge. For one, there is no fixed understanding of what constitutes 'significant' or 'severe' foetal abnormality. Secondly, while the MTP Act makes a special case for allowing abortion on the grounds of abnormality in the foetus, it keeps the choice away from the pregnant woman and vests it with Medical Boards. Courts seem to take varied positions in deciding such cases. Further, though statutorily required to take account of a pregnant woman's actual or reasonably foreseeable environment for determining whether the continuance of pregnancy involves risk of injury to the health of the woman, Medical Boards and the courts often fail to do so.[172]

DESCRIPTION - Together, Figures 9, 10 and 11 highlight sub-categorisation in cases of foetal anomalies and the extent to which Medical Board opinions are relied on. In cases of lethal foetal abnormality, courts generally conform to the finding of Medical Boards. However, in cases of significant foetal abnormality and foetal abnormality, courts take varied positions. This is especially notable since the three categorisations are not defined under the Act, making medical diagnosis central to the discussion, while sidelining the pregnant woman's rights.

*Fig 9:* ***Cases where foetal abnormality was made a ground***

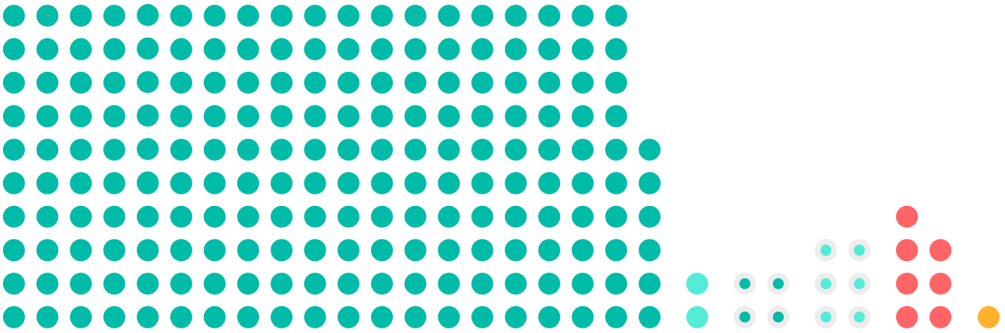
**73** Total no. of cases where foetal abnormality was made a ground

| **Cases where MB & court allowed abortion** | **49** | **Cases where MB & court denied abortion** | **20** | **Misc. Outcomes** | **4** |
|---|---|---|---|---|---|
| As per MB's opinion | 44 | As per MB's opinion | 19 | Other | 4 |
| Despite MB's opinion | 2 | MB's opinion was unclear/absent | 1 | | |
| MB's opinion was unclear/absent | 3 | | | | |



172 The Medical Termination of Pregnancy Act. (1971). Section 3(3)- In determining whether the continuance of pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or reasonably foreseeable environment.

*Fig 10:* ***Cases where significant foetal abnormality was made a ground***



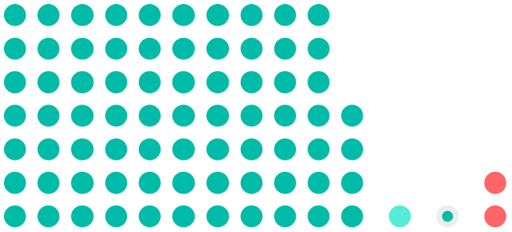
**216** Total no. of cases where significant foetal abnormality was made a ground

| **Cases where MB & court allowed abortion** | **208** |
|---|---|
| As per MB's opinion | **196** |
| Despite MB's opinion | **2** |
| MB's opinion was unclear/absent | **6** |
| Left up to MB's discretion | **6** |

| **Cases where MB & court denied abortion** | **7** |
|---|---|
| As per MB's opinion | **7** |

| **Misc. Outcomes** | **1** |
|---|---|
| Other | **1** |

*Fig 11:* ***Cases where lethal foetal abnormality was made a ground***



**76** Total no. of cases where legal foetal abnormality was made a ground

| **Cases where MB & court allowed abortion** | **74** |
|---|---|
| As per MB's opinion | **72** |
| Despite MB's opinion | **1** |
| MB's opinion was unclear/absent | **1** |

| **Cases where MB & court denied abortion** | **2** |
|---|---|
| As per MB's opinion | **2** |

Terminating an unwanted pregnancy is a choice which is based on autonomy and agency, rooted in actual and reasonably foreseeable circumstances of a woman's life. This includes financial implications, lifelong physical and mental health considerations and unpaid care that she is expected to provide as per her gender role. While what qualifies as an ideal life for a prospective child can be critiqued from the viewpoint of disability rights, and ethical and moral standpoints, the decision to put a child through intrusive medical procedures and the financial, physical and mental readiness for the care needs of such a child is a personal decision of the pregnant woman.

The High Court of Bombay deliberated on these issues in a case of foetal anomaly in *ABC v. State of Maharashtra, Through Principal Secretary Public Health Department* (2023).[173] It stated:

> *25 … In these conditions, a rejection of the Petition based only on the opinion of the Medical Board — in itself contrary to law would rob the Petitioner of not only her reproductive autonomy but her fundamental right to privacy, her right to self-determination, and her right to make an informed choice about herself and her body. A refusal to grant relief would effectively strip the Petitioner of all agency as a mother and as a woman; and more importantly as a human being capable of carrying a pregnancy to term.*
>
> *…*
>
> *31. Another question has greatly troubled us. What if after carrying t31. Another question has greatly troubled us. What if after carrying this foetus to term, the Petitioner finds she cannot tend to it? Is she then to be forced to make the next decision, to give up a child in adoption? How is that to be done? More importantly, why should that have to be done? The opinion of the Medical Board is oddly silent on this. It only addresses itself to medical interventions, the availability of incessant and ongoing treatments and nothing more. It does not take into account the social and economic position of the Petitioner and her husband. It ignores their milieu entirely. It does not even attempt to envision the kind of life — one with no quality at all to speak of — that the Petitioner must endure for an indefinite future if the Board's recommendation is to be followed. The Board really does only one thing: because late, therefore no. And that is plainly wrong, as we have seen. Given a severe foetal abnormality, the length of the*

173 ABC v. State of Maharashtra, Through Principal Secretary Public Health Department, 2023 SCC OnLine Bom 175.

*pregnancy does not matter.*

*32. In cases such as these, we believe Courts must calibrate themselves to not only the facts as they stand but must also consider that what these cases present are, above all, profound questions of identity, agency, self-determination and the right to make an informed choice. We will not ignore the Petitioner's social and economic condition. We cannot. We believe Ms Saxena is correct in her submissions. The Petitioner takes an informed decision. It is not an easy one. But that decision is hers, and hers alone to make, once the conditions in the statute are met. The right to choose is the Petitioner's. It is not the right of the Medical Board. And it is also not the right of the Court to abrogate the Petitioner's rights once they are found to fall within the contemplation of the law."*

Understandably, medical opinion is critical for the purpose of assessing foetal anomalies or significant foetal anomalies. However, such an assessment should help inform the reproductive choice of the pregnant woman, not limit it. As pointed out by the Bombay High Court, basing adjudication solely on the Medical Board's opinion without considering the rights of the pregnant person goes against the intent behind the Act and violates pregnant women's rights under Article 21, placing unjustifiable power in the hands of the board.

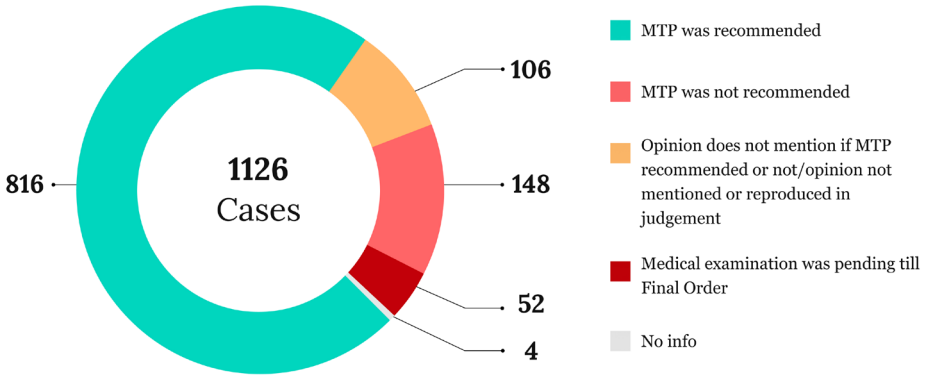
Without getting into debates around selective abortion and what fits the notion of severe/substantial foetal abnormality, it should be irrefutable that motherhood is and should remain a choice protected under the Constitution. An unwanted pregnancy deeply hurts the mental and physical health of a pregnant woman and various dynamics of her life, including the financial, material and emotional. Motherhood is a continuum; these concerns do not necessarily end with childbirth. A dignified life is one in which a person is treated as an autonomous human being who has agency and control over their life and decisions. Forcing continuation of an unwanted pregnancy, childbirth and motherhood on a woman is furthest from this ideal, and amounts to reproductive violence.[174]

174 UN Women, Global Justice Center, Graham, T., & Alag, A. (2024). Documenting Reproductive Violence-https://www.unwomen.org/sites/default/files/2024-09/research-paper-documenting-reproductive-violence-en.pdf

Chapter 6

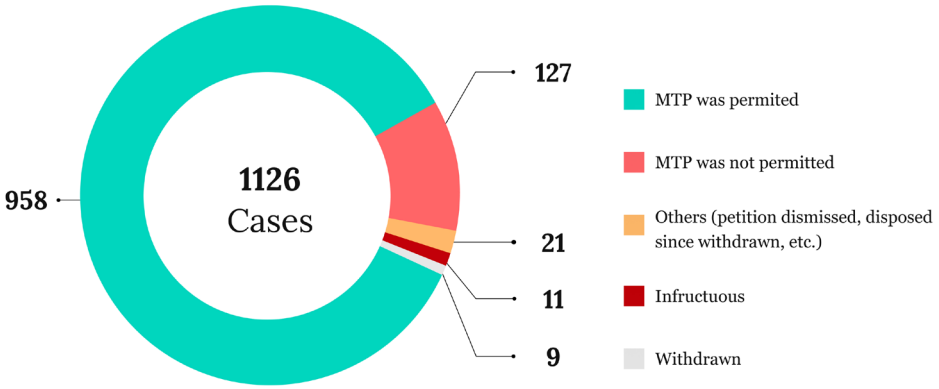
# Medical Boards

*Fig 12:* ***Opinion of Medical Board***

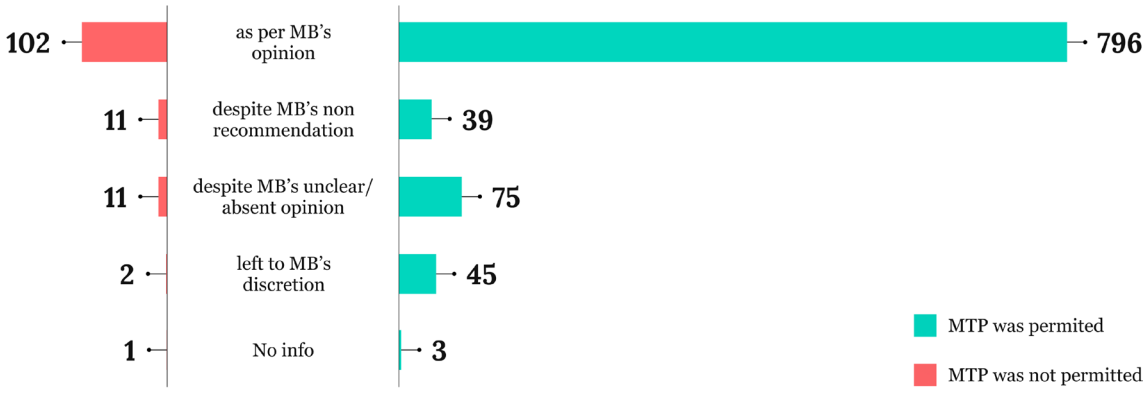



DESCRIPTION: In a total of 1,126 cases, Medical Boards recommended abortion in 816 instances. In 148 cases, they advised against it. In 106 cases, the opinion either did not state whether abortion was recommended or was not reproduced in the judgment. In 52 cases, the Medical Board's recommendation was still pending at the time of the final order, and in 4 cases, no information was available.

*Fig 13:* ***Final order by Court after Medical Board's opinion***




***Court rulings on MTP: permitted vs. denied***



DESCRIPTION: Out of 1,126 total cases, courts permitted abortion in 955 cases, denied it in 127, and disposed of 21 matters through other means (such as dismissal or settlement). Eleven cases became infructuous, and nine were withdrawn.

When mapped against Medical Board (MB) recommendations: in 798 cases, courts permitted abortion in line with MB advice. In 39 cases abortions were allowed despite the MB advising against it, and 11 were denied despite MB recommending it. In 75 cases, courts ruled without an MB opinion, while 48 decisions came where the MB's view was absent or unclear.

As discussed above, if a pregnant woman is unable to obtain an abortion at a medical facility due to an advanced stage of gestation or for other reasons by which RMPs may refuse abortion, her only recourse is to approach the court for further action.[175] In such cases, courts task Medical Boards to provide their opinion upon an evaluation of the overall fitness of the woman to undergo an abortion.



The 2021 amendments to the MTP Act gave statutory recognition to Medical Boards. The Supreme Court nudged the government towards establishing a permanent Medical Board in 2017 in its decision in *Alakh Alok Shrivastava v. Union of India* (2017).[176] In this case, it had noted that such a board was required, as crucial time gets lost when abortion cases come before the judiciary, which could be addressed through a quick review by such a permanent body.

In practice, two distinct types of Medical Boards have emerged. The first is prescribed under the Act and is mandated to evaluate cases involving pregnancies beyond 24 weeks, specifically where the foetus is diagnosed with abnormalities.[177] These statutory Medical Boards are meant to provide opinions in such cases and are required to be established permanently by state governments in each state, as per the Act and its Rules.[178]

The second type of Medical Board, however, is not prescribed under the Act but is constituted by courts on an ad hoc basis. These court-appointed boards are set up to

175 The Medical Termination of Pregnancy Act. (1971). Section 3 (2B), 3(2-BC).

176 Alakh Alok Shrivastava v. Union of India, (2018) 17 SCC 291.

177 The Medical Termination Pregnancy Act.(1971). Section 3(2-B).

178 The Medical Termination Pregnancy Act. (1971). Section 3(2-B). The Medical Termination of Pregnancy Rules. (2021). Rule No. 3.

assist courts in deciding a broader range of cases beyond 24 weeks, including those unrelated to foetal abnormalities. In the present analysis of over 1000 judgments, it is observed that even for cases of foetal abnormality, women are first compelled to seek permission from the court for abortion, rather than directly approach permanent Medical Boards established for such purpose.[179] Thus, there are two, often parallel, mechanisms in place for handling late-term pregnancy cases - one rooted in statutory requirements and the other in judicial discretion.

Beyond this, neither the Act nor the Rules establishes specific criteria for the Medical Board to base its decision. Even when courts appoint Medical Boards, they either provide a set of instructions or points for the board to consider, or simply request the board's opinion without any clear directions for it. This leaves the board's opinion to be highly discretionary, uncircumscribed by objective and transparent criteria on which to base its decision. Notably, the questions framed by courts, or where there are no specific questions and Medical Boards are allowed an open-ended investigation, there is a disproportionate focus in decision-making on foetal health, and if the abortion is "needed", which often overrides the woman's autonomy. This focus on evaluating foetal health is based on an incorrect understanding of Rule 3A and 3B, which do not apply to ad hoc Medical Boards since such Medical Boards are constituted by courts to apprise them of medical aspects that can aid in considering abortion pleas. These boards, thus, are different from the permanent board established under the MTP Act. The broad and undefined role assigned to Medical Boards has significant implications for jurisprudence and reproductive rights, which are discussed below.

The MTP Act provides for the composition of Medical Boards based on specified expertise, with additional members to be added at the discretion of the state government or Union Territory.[180] However, there is a lack of transparency in selection and representativeness on boards. Such opacity creates the potential for conscientious objections to influence decisions, as Medical Board members may impose their personal or moral beliefs on the decisions.[181] In the absence of strict oversight or clear accountability mechanisms, the risk of these factors interfering with a woman's right to safe and timely abortion increases.



179 This has been criticised by the Bombay High Court in Sau. Ashwini Ghanshyam Pali v. State of Maharashtra, 244 SCC OnLine Bom 1663.

180 The Medical Termination of Pregnancy Act. (1971). Section 3 (2-D).

181 Chandra, A., Satish, M., Shree, S., Saxena, M.(2021). *Legal barriers to accessing safe abortion services in India: a fact finding study*. Center for Reproductive Rights, Centre for Constitutional Law, Policy, and Governance, NLU Delhi, & National Law School of India University, Bengaluru. . https://www.nls.ac.in/wp-content/uploads/2021/08/Legal-Barriers-to-Accessing-Safe-Abortion-Services-in-India.pdf

Medical Boards often provide unsolicited advice on continuing pregnancies, even when courts have framed specific and focused questions for their consideration. In some cases, courts have altered their initial decisions based on additional "clarificatory" emails[182] or opinions submitted by board members after the formal report has already been provided. This reveals the undue importance courts place on Medical Board recommendations (even when those recommendations exceed the scope of their inquiry), and the arbitrary nature with which Medical Board processes and protocols are framed.

The decision in *X v. Union of India* (2023)[183] is a case in point where the Supreme Court denied abortion to a woman suffering from severe mental health issues and postpartum depression. A member of the Medical Board, through an unsolicited email, framed the issue in moralistic terms, emphasising the *viability* of the foetus and seeking judicial direction to stop the *foetal heartbeat*—a routine procedure for late-term abortions. This framing influenced the government to file a recall application, leading the court to overturn its initial order permitting abortion.[184]

Similarly, in *XXX v. State of Haryana* (2024),[185] the decision of the High Court of Punjab and Haryana to deny the rape survivor's request for aborting a 26-week pregnancy was based on a vague medical opinion. The petitioner, a rape survivor enduring severe mental trauma, approached the court under Article 226 seeking abortion after the late detection of her pregnancy. While the Medical Board confirmed her physical and mental fitness to undergo the procedure, it hesitated to approve abortion unequivocally, citing "risks" and the "possibility of live birth" without fully clarifying how these risks differed from those inherent in delivering at term or the threat to her mental health due to an unwanted pregnancy conceived through rape.

Instead of critically assessing the Medical Board's vague reasoning, the court chose to defer to its ambivalence. Even though a second opinion that was sought by the petitioner from her doctor suggested minimal risks to her and low chances of live birth, the court prioritised concerns of foetal viability (citing a 50-70% survival rate beyond 25 weeks) and "foeticide."[186] Thus, the court prioritised theoretical risks, potential complications and foetal viability in the decision. Its reasoning—that there were no "compelling and



182 See- X v. Union of India, 2023 SCC OnLine SC 1338, para 6, R v. Union of India, 2024 SCC OnLine Del 440, para 6-7.

183 X v. Union of India, 2023 SCC OnLine SC 1338.

184 Discussed in detail in Chapter 7 Foetal Viability, page 73.

185 XXX v. State of Haryana, 2024 PHHC 087175.

186 XXX v. State of Haryana, 2024 PHHC 087175, para 17.

convincing reasons" to allow the abortion—was devoid of any consideration for the petitioner's right to bodily autonomy.

Women seeking abortion generally approach courts through writ petitions, invoking their fundamental rights under Part III of the Constitution.[187] However, in some cases, once Medical Boards provide their opinions, courts tend to defer to these "expert opinions" without independently applying their judicial mind. This abdication of judicial responsibility reduces the court's role to that of mere endorsers of Medical Board recommendations, rather than adjudicators of constitutional rights. This is problematic also due to the inherent power imbalance between the multimember Medical Board and the individual woman. Women rarely have the opportunity to challenge or influence the board's opinions, stripping them of agency in matters of their own health and bodies.

Medical Boards comprise doctors who operate within a legal framework where the criminalisation of abortion has created a documented[188] chilling effect, leading to overly cautious or restrictive decision-making. Consequently, when reviewing a pregnant woman's request, Medical Boards frequently fail to consider her socio-economic circumstances, mental health, or personal autonomy. Even in cases involving rape and sexual assault victims, boards have repeatedly denied abortion requests, often citing advanced gestational age and foetal viability as their primary concerns. Indeed, their focus is disproportionately placed on the foetus, its viability, and the pregnancy's progression. This approach not only overlooks the woman's mental health and socio-legal context but also reduces her to a secondary stakeholder in decisions concerning her own body.

The judgment in *Dipshikha Midya v. The State of West Bengal and Ors.* (2021)[189] is another instance that illustrates an undue reliance on the Medical Board's opinion. The petitioner, 28 years old and 32 weeks pregnant with a foetus diagnosed with severe congenital cardiac defects, sought abortion. While the Medical Board acknowledged a poor prognosis for the foetus, including high risks of mortality and morbidity, it vaguely emphasised risks of premature termination and its impact on the petitioner's future



187 The Constitution of India. (1950). Article 32.

188 Chandra, A., Satish, M., Shree, S., Saxena, M.(2021). *Legal barriers to accessing safe abortion services in India: a fact finding study*. Center for Reproductive Rights, Centre for Constitutional Law, Policy, and Governance, NLU Delhi, & National Law School of India University, Bengaluru. . https://www.nls.ac.in/wp-content/uploads/2021/08/Legal-Barriers-to-Accessing-Safe-Abortion-Services-in-India.pdf

189 Dipshikha Midya v. The State of West Bengal and Ors., 2021 SCC OnLine Cal 2848.

pregnancies. Crucially, the board did not provide a clear comparison of the risks of continuing the pregnancy versus the risks associated with abortion. The court did not interrogate the board's ambiguous opinion and denied abortion, forcing the petitioner to deliver a child with a poor foetal prognosis.

In some cases, when courts frame questions for the consideration of the Medical Board, they are often biased towards the foetus, rather than protecting the constitutional or reproductive rights of the pregnant woman. This is illustrated well in the decision of the Bombay High Court in *X v. State of Maharashtra* (2023).[190]

In this case of a minor victim of rape, the court instructed the Medical Board to provide its opinion on whether "*the child with a beating heart is likely to be born if a medical termination of pregnancy is permitted.*"[191] This highly problematic framing centres on the potential life of the foetus rather than giving primacy to the pregnant minor's physical, mental, and reproductive health. Subsequently, the Medical Board's opinion denied the abortion request, citing the lack of foetal abnormalities and the statutory limitations of the MTP Act.[192] The board's response should have focused on evaluating the "health" aspect of the pregnancy rather than on legalistic issues.[193] It was also bereft of the nuanced humanitarian and social considerations that the case demanded in evaluating the mental health risks mandated by the Act.

Similarly, in *P v. State of Rajasthan* (2023)[194] the Rajasthan High Court denied abortion to a 16-year-old rape survivor. In this case, the court issued instructions for the Medical Board to "*furnish opinion as to whether the termination of pregnancy is safe or not and the consequential status of the unborn child.*"[195] The board gave an opinion against abortion, preoccupying itself with concerns of the "unborn child", and stating that there was "risk" involved for the survivor in undergoing abortion.[196]



190 X v. State of Maharashtra , 2023 SCC OnLine Bom 1544.

191 X v. State of Maharashtra , 2023 SCC OnLine Bom 1544, para 3.

192 X v. State of Maharashtra , 2023 SCC OnLine Bom 1544, para 6.

193 X v. State of Maharashtra , 2023 SCC OnLine Bom 1544. See- para 6- "*Justification for the decision: 1) As per recent MTP amendment act, under rule and regulation for rape case termination is allowed up to 24 weeks of gestation. 2) As there is no any foetal congenital anomaly in anomaly scan. 3) Medical Board can give decision of termination beyond 24 weeks of pregnancy only for foetal abnormalities castes; hence Medical Board denies termination of pregnancy.*"

194 P v. State of Rajasthan, 2023 SCC OnLine Raj 4163.

195 P v. State of Rajasthan, 2023 SCC OnLine Raj 4163, para 1.

196 P v. State of Rajasthan, 2023 SCC OnLine Raj 4163, para 2.

When the Medical Board opines that the abortion involves risks, it routinely omits a clear explanation of the nature and extent of these risks, or fails to contextualise whether such risks are greater than those associated with delivery at term. According to the WHO, termination of pregnancy is considered safe regardless of gestational age, provided that appropriate methods are used for the specific stage of pregnancy and that the procedure is carried out or supported by trained healthcare providers.[197] Given this, vague opinions from Medical Boards on the 'risks' leading to the denial of abortion to a rape survivor are particularly arbitrary parameters to follow. This lopsided focus on the risks of abortion for the 'foetus', while conveniently ignoring the obvious risks of being pregnant results in ironic outcomes even in cases involving rape survivors (or in other circumstances where the pregnancy is unwanted or traumatic), with life-long repercussions for the woman.

In contrast to this, there have been cases where such an approach has been criticised by courts on more than one occasion. One such important judgment has been the Supreme Court's decision in *A (Mother of X) v. Union of India* (2024).[198] Here, the court critiqued the lack of consideration for mental health in the evaluation of abortion requests, particularly when Medical Boards issue "*clarificatory opinions*" that fail to address the pregnant person's overall well-being.[199] The court emphasised that Medical Boards have a responsibility to evaluate not only the physical but also the mental health of the pregnant person, especially in traumatic cases such as sexual assault. Merely citing advanced gestational age or foetal viability is insufficient. Instead, it asserted that the impact of continuing the pregnancy on the pregnant person's overall well-being must be central to the boards' analysis: "*The opinion of the Medical Board... must reflect the effect of the pregnancy on the pregnant person's physical and mental health*".[200] The court stressed that Medical Boards must ensure their decisions are transparent and grounded in sound reasoning, noting that, "*[t]he uncertainty caused by changing opinions of the Medical Board must therefore balance the distress it would cause to the pregnant person by providing cogent and sound reasons.*"[201]

In acknowledging the chilling effect of potential prosecution under the BNS, the court highlighted how this fear impedes medical practitioners, resulting in restrictive opinions that deny access to safe abortions. It noted, "*[t]he fear of prosecution among RMPs*

197 World Health Organization. Abortion (2024). https://www.who.int/news-room/fact-sheets/detail/abortion

198 A (Mother of X) v. State of Maharashtra, (2024) 6 SCC 327.

199 A (Mother of X) v. State of Maharashtra, (2024) 6 SCC 327, para 29.

200 A (Mother of X) v. State of Maharashtra, (2024) 6 SCC 327, para 20.

201 A (Mother of X) v. State of Maharashtra, (2024) 6 SCC 327, para 29.

*acts as a barrier for pregnant people in accessing safe abortion*".[202] It emphasised that courts must not merely defer to Medical Boards but should exercise independent judicial scrutiny over their opinions. The court also clarified that Medical Boards must not be confined to the restrictive criteria outlined in the MTP Act.[203] They are required to evaluate the pregnant person's health comprehensively, aligning their opinions with the constitutional mandate to protect reproductive autonomy and well-being: "*The opinion of the RMPs and the Medical Board must balance the legislative mandate of the MTP Act and the fundamental right of the pregnant person seeking a termination of the pregnancy.*"[204] The court stressed that delays arising from inefficiencies within Medical Boards or the judicial process must not undermine the pregnant person's fundamental rights: "*The delays caused by a change in the opinion of the Medical Board or the procedures of the court must not frustrate the fundamental rights of pregnant people.*"[205]

Similarly, in *ABC v. State of Maharashtra* (2023)[206] the Bombay High Court criticised the Medical Board's opinion, which had denied abortion in a case of severe foetal anomaly, citing advanced gestational age. The court emphasised that while the Medical Board's opinion must be considered, they are not bound by it and must make an independent decision.

The cases discussed above clearly establish that Medical Boards are required to assess various aspects of a pregnant woman's physical and mental health.[207] These judgments clarify that the role of Medical Boards extends beyond merely applying the narrowly framed provisions of the Act.[208] However, given the restrictive nature of the Act's current framework, Medical Boards often remain confined to these limited statutory provisions. Therefore, a legislative amendment mandating Medical Boards to be holistic in their assessment of the pregnant woman's health and circumstances, as underscored by the Supreme Court in *A (Mother of X) v State of Maharashtra* (2024), is essential to ensure such comprehensive assessments.



202 A (Mother of X) v. State of Maharashtra, (2024) 6 SCC 327, para 25.

203 The Medical Termination of Pregnancy Act. (1971). Section 3(2-B).

204 A (Mother of X) v. State of Maharashtra, (2024) 6 SCC 327, para 25.

205 A (Mother of X) v. State of Maharashtra, (2024) 6 SCC 327, para 31.

206 ABC v. State of Maharashtra, 2023 SCC OnLine Bom 175.

207 A (Mother of X) v. State of Maharashtra, (2024) 6 SCC 327.

208 The Medical Termination of Pregnancy Act. (1971). Section 3 (2B). The Medical Termination of Pregnancy Rules. (2021). Rules 3A-3B.

In *Sau. Ashwini Ghanshyam Pali v. State of Maharashtra* (2024)[209] the Bombay High Court raised concerns about unnecessary judicial involvement in abortion cases involving foetal abnormalities. In this case, the petitioner, 32 weeks pregnant with a foetus diagnosed with severe abnormalities, sought relief under Article 226 of the Constitution. The Medical Board permitted abortion, citing risks to her physical and mental health. However, the court questioned why the petitioner had to approach the judiciary despite the clear framework established under the MTP Act as amended in 2021.

Referring to the Act, the court emphasised that "*there is no such requirement of seeking any permission from the court by any woman who intends to get her pregnancy terminated even if the pregnancy is beyond twenty-four weeks*."[210] It questioned why the petitioner was not referred directly to the Medical Board as stipulated under the Act, instead of being advised to approach the court.[211] The court criticised the unnecessary additional layer of scrutiny imposed on women, calling for the process to be streamlined to avoid delays and distress.[212] In response, the court directed the state government to formulate a Standard Operating Procedure (SOP) for government hospitals and medical colleges, ensuring that cases involving advanced pregnancies with foetal abnormalities are referred directly to the Medical Board, bypassing judicial intervention.[213]

This decision sheds light on the contradiction between the framework established by the MTP Act and all-too-common current practice, which has led to the overjudicialisation of abortion requests. While the judgment raises critical questions about this discrepancy, it remains unclear how reproductive autonomy and justice will be truly facilitated, particularly given the problematic functioning of Medical Boards in such cases.

Apart from the issues highlighted above, Medical Boards appear to have brought in problematic discourse in the jurisprudence on abortion. For example, in India, cultural and religious contexts had previously played little role in prioritising 'pro-life' or 'anti-choice' arguments.[214] However, recent judgments appear to have placed undue

209 Sau. Ashwini Ghanshyam Pali v. State of Maharashtra, 244 SCC OnLine Bom 1663.

210 Sau. Ashwini Ghanshyam Pali v. State of Maharashtra, 244 SCC OnLine Bom 1663, para 8.

211 The Medical Termination of Pregnancy Act. (1971). Section 3 (2C).

212 Sau. Ashwini Ghanshyam Pali v. State of Maharashtra, 244 SCC OnLine Bom 1663, para 10.

213 Attempts to find this SOP were not fruitful, and it is unclear whether the same have been issued.

214 Kalia, S. (2023, October 22). A reproductive rights academic decodes the Supreme Court's verdict, the 'pro-life-pro-choice' debate in India and the future of reproductive justice discourse in India. The Hindu.https://www.thehindu.com/news/national/what-does-supreme-courts-

emphasis on this perspective. A key factor contributing to this shift is the way Medical Boards frame their opinions on foetal viability, which is then judicially appropriated and becomes part of the legal framework. Medical Boards often suggest carrying the pregnancy to term so the "*foetus may survive the childbirth*", and often deny abortion requests, citing foetal viability or the chances of survival of the unborn child — factors that have no statutory backing. By providing opinions on the medical viability of the foetus, boards have unwittingly contributed to this legal trend, with courts adopting these opinions and establishing them as jurisprudential precedent. This issue is explored in more detail in the Chapter on Foetal Viability.[215]

The Medical Board's operation is rooted in medical paternalism that takes away decision-making power from women and places it in the hands of doctors. Requiring Medical Board approval for abortion beyond 24 weeks effectively forces women to seek third-party authorisation for healthcare decisions that should be within their sole discretion. It also dilutes the doctor-patient relationship by making the pregnant woman a mere subject in concerns involving her own health. Such treatment undermines the autonomy of competent adults by treating them as though they lack decision-making capacity.



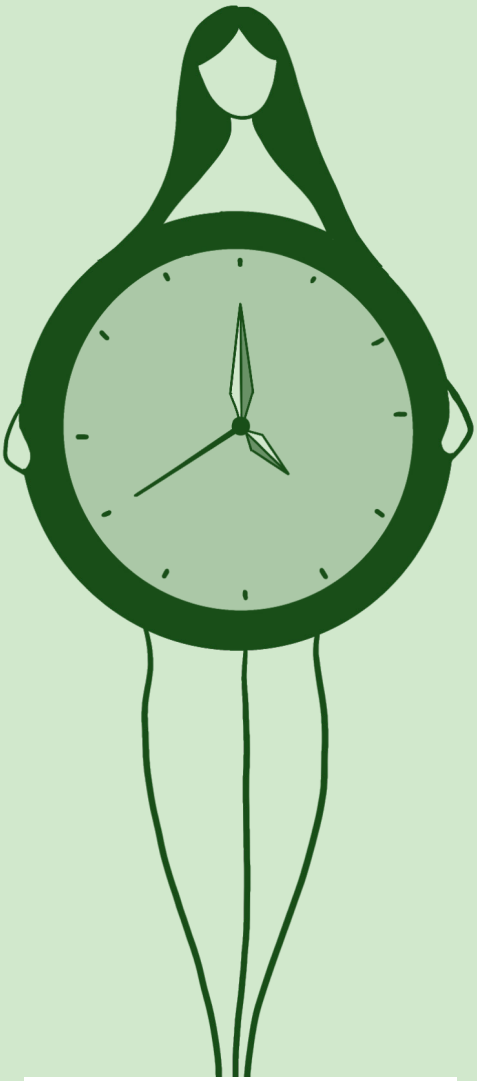
Abortion is a private, intimate decision which should be based on self-determination and autonomy. It is an informed choice based on a woman's material circumstances; it is also healthcare. The WHO describes health as "*a state of complete physical, mental, and social well-being*."[216] Abortion allows women to achieve the desired level of well-being. Denying women the right to prioritise their health is dehumanising, and this is especially true given the life-long morbidities that women face due to childbirth and pregnancy.[217]

abortion-verdict-mean-for-reproductive-justice-in-india/article67437168.ece

215 See– Chapter 7 Foetal Viability. page 73.

216 World Health Organization. (2022, June 17). *Mental health: Strengthening our response.* https://www.who.int/news-room/fact-sheets/detail/mental-health-strengthening-our-response

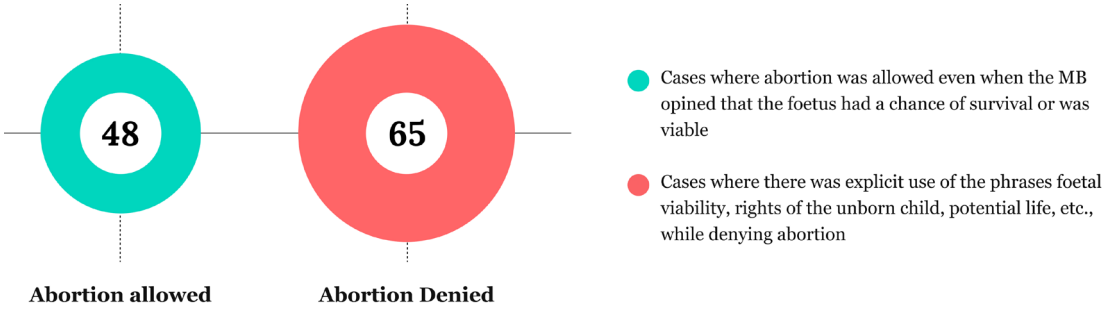
217 Vogel, J. P., Bohren, M. A., Brizuela, V., Tuncalp, □., Oladapo, O. T., Gülmezoglu, A. M., & Temmerman, M. (2024). Neglected medium-term and long-term consequences of labour and childbirth: A systematic analysis of the burden, recommended practices, and a way forward. *The Lancet Global Health*, 12(2), e317–e330. https://doi.org/10.1016/S2214-109X(23)00481-2



Chapter 7

# Foetal Viability

*Fig 14:* ***Foetal Viability Considerations in Court Cases***




DESCRIPTION - In 48 cases, courts permitted abortion despite Medical Boards stating that the foetus was viable or had a chance of survival. This is significant because viability is increasingly cited by Medical Boards as a ground to deny abortion in their reports. In contrast, in 65 cases courts denied abortion explicitly on the basis of foetal viability– invoking the rights of the foetus, the "unborn child" under the Constitution, and the need to protect potential life.



Time plays a fundamental role in abortion regulation across many jurisdictions in the world.[218] The MTP Act (as amended in 2021) does not mention the term *foetal viability*, nor is it a ground to disallow abortion. Yet, the 24-week threshold for abortion has been correlated with the point in gestation after which courts concern themselves with 'viability', instilling 'an implicit viability threshold.'[219]

As mentioned earlier, abortion is increasingly restricted with the progression of pregnancy in the MTP Act.[220] It is allowed up to 24 weeks, on satisfying statutory provisions, and beyond 24 weeks on the basis of a Medical Board's opinion. However, a majority of women are compelled to approach courts beyond 24 weeks of gestation, and it is in these cases that courts have denied abortion, citing "foetal viability."

As discussed earlier, courts deal with late-term abortion requests, particularly those

218 Romanis, E. C. (2020). Is 'viability' viable? Abortion, conceptual confusion and the law in England and Wales and the United States. *Journal of Law and the Biosciences*, 7(1). https://doi.org/10.1093/jlb/lsaa059 Halliday, S., Romanis, E. C., de Proost, L., & Verweij, E. J. (2023). The (mis)use of foetal viability as the determinant of non-criminal abortion in the Netherlands and England and Wales. *Medical Law Review*, 31(4), 538–563. https://doi.org/10.1093/medlaw/fwad015

219 The Medical Termination of Pregnancy Act. (1971). Section 3.

220 The Medical Termination of Pregnancy Act. (1971). Section 3.

beyond 24 weeks of gestation, on grounds such as foetal abnormality, rape, incest, changes in marital status, late diagnosis of pregnancy, and threats to mental health. Among these, foetal abnormality enjoys a somewhat established legal framework under the MTP Act, which allows for exceptions to the 24-week gestational limit if a significant abnormality is detected by the Medical Board.[221] Apart from foetal abnormality, abortion can be conducted to save the "life" of the pregnant woman in cases of gestational age beyond 24 weeks, as discussed in the previous Chapter.[222] In both of these cases, courts generally defer to the Medical Board's opinion on the severity of the abnormality or medical necessity to save the "life" of the pregnant woman, often allowing the abortion without delving into issues of foetal viability.

However, pregnant women approach courts beyond 24 weeks of gestation for reasons apart from foetal abnormality or the immediate threat to physical health.[223] Some of these circumstances include but are not limited to rape, incest, change in marital status, domestic violence, marital rape, divorce, medical conditions, late diagnosis of pregnancy, and threat to mental health.[224] It is primarily in these types of cases that the Medical Board and courts have engaged themselves with concerns of foetal viability. A significant percentage of such requests are denied, with courts citing foetal viability in many of their decisions.[225]

In contrast to this, there have been cases where courts have allowed abortion under similar circumstances and without the presence of foetal abnormalities or an immediate threat to the physical health of the pregnant woman. In such cases, courts have not concerned themselves at all with foetal viability, instead rightly prioritising women's reproductive and decisional autonomy.[226] These are cases where the gestational age of the foetus is well above the 24-week period, with no congenital abnormalities found in it or threat of death to the pregnant woman.



221 The Medical Termination of Pregnancy Act. (1971). Section 3; The Medical Termination of Pregnancy Rules.(2021). Rule 2-A & 3-B.

222 See– Chapter 2 Saving life, page 17.

223 The Medical Termination of Pregnancy Act. (1971). Section 3(2B), Section 5.

224 Some of these grounds are explicitly covered in the MTP Act. See: The Medical Termination of Pregnancy Act .(1971). Section 3.

225 See- Figure 14- Foetal Viability Considerations in Court Cases.

226 See- Figure 14- Foetal Viability Considerations in Court Cases.

## When Courts Permit Abortion Beyond 24 Weeks: Legal Justifications and Analysis

The Bombay High Court decision in *XYZ v. Union of India and Others* (2019)[227] is a landmark for its establishment of guidelines regarding late-term abortions and the steps to be taken if the foetus is born alive following an abortion. In this judgment, the court held that the interests of the woman have primacy over those of the prospective child. It clarified that "*the foetus cannot have an independent existence outside the womb of the mother,*" and therefore, "*the life of the mother who independently exists, is entitled to greater protection.*"[228] This prioritisation is consistent with the court's broader interpretation that

> *...there can be no compelling state interest[229] in insisting upon continuance [of] pregnancy beyond 20 weeks (as was the outer limit prior to the 2021 amendments to the Act) where it would involve a grave injury to the mother's physical or mental health".*[230]

The court noted that the MTP Act's framework, which prioritises the health and autonomy of the mother, is grounded in the view that "*a person is vested with human rights only at birth, [and] an unborn foetus is not an entity with human rights*".[231] This judgment also acknowledges that medical risks and complications do not always occur within the Act's 20-week timeframe,[232] thus recognising the need for late abortion beyond the legal limit given under the Act. Accordingly, if a foetus is born alive despite an attempt at abortion, the court outlined a duty of care for all involved parties; medical professionals and facilities are primarily responsible for ensuring that the child receives "*the best medical treatment available in the circumstances*" to support healthy development of such a newborn.[233] Additionally, the court stressed the State's duty to preserve human life[234] and, if the mother or family were unable or unwilling to care for the child, mandated that the State "*assume full responsibility*" to support the



227 XYZ v. Union of India and Anr. 2019 SCC OnLine Bom 560.

228 XYZ v. Union of India and Anr. 2019 SCC OnLine Bom 560, para 18.

229 See– Chapter 2 Saving Life, page 17.

230 XYZ v. Union of India and Anr. 2019 SCC OnLine Bom 560, para 90.

231 XYZ v. Union of India and Anr. 2019 SCC OnLine Bom 560, para 99

232 XYZ v. Union of India and Anr. 2019 SCC OnLine Bom 560, para 106.

233 XYZ v. Union of India and Anr. 2019 SCC OnLine Bom 560, para 126

234 XYZ v. Union of India and Anr. 2019 SCC OnLine Bom 560, para 127.

child's well-being.[235] Through these directives, the court reinforced the principle that a mother's decisional autonomy is paramount, even when the foetus has potential for survival, with the State assuming responsibility in cases where abortion results in a live birth. In accordance with this ruling, then, there should be no denial of late-term abortions based on the premise of a "potentially alive foetus".

In *XYZ v. State of Gujarat* (2023)[236] the Supreme Court heard an appeal arising from a Gujarat High Court decision where the lower court had denied abortion to a rape survivor, strictly relying on the MTP Act's ceiling. The petitioner, more than 27 weeks pregnant as a result of rape under the false pretext of marriage, sought abortion due to threats to her mental health due to an unwanted pregnancy.

The Supreme Court elaborated on the Constitutional implications of reproductive rights, affirming that the "*right of dignity entails recognising the competence and authority of every woman to take reproductive decisions, including the decision to terminate the pregnancy.*"[237] It emphasised that while human dignity is an inherent right, it is "*susceptible to violation by external conditions and treatment imposed by the State.*" Thus, the court asserted that depriving women of access to necessary reproductive healthcare injures their dignity and disregards their autonomy in a manner inconsistent with the principles of justice and human rights.

The Supreme Court examined the role of High Courts when petitioned under Article 226[238] of the Constitution, noting that "*the whole object of preferring a Writ Petition under Article 226 of the Constitution of India is to engage with the extraordinary discretionary jurisdiction of the High Court*".[239] This constitutional power obliges High Courts to act judiciously by considering all relevant facts. The Supreme Court found that the Gujarat High Court, in its denial of the petitioner's plea, had failed to adequately engage with her unique circumstances and her rights under the Constitution, simply reiterating statutory limits without fully addressing the issues at hand.

Here, the court did not place any reliance on foetal viability, although the pregnancy was in the 27th week of gestation. Instead, it directed that, "*in the event the foetus is found to be alive, the hospital shall give all necessary medical assistance, including*



235 XYZ v. Union of India and Anr. 2019 SCC OnLine Bom 560, para 131- 138j.

236 XYZ v. State of Gujarat, 2023 SCC OnLine SC 1573.

237 XYZ v. State of Gujarat, 2023 SCC OnLine SC 1573, para 18.

238 The Constitution of India. (1950). Article 226.

239 XYZ v. State of Gujarat, 2023 SCC OnLine SC 1573, para 19.

*incubation…in order to ensure that the foetus survives.*"[240] This is in line with Bombay High Court guidelines given in *Xyz v. Union of India* (2019)[241] discussed above. Thus, the court established a precedent that late-term pregnancy and "foetal viability" as given in the medical reports cannot override a woman's right to terminate an unwanted pregnancy.

In *ABC v. State of Maharashtra* (2023),[242] the Bombay High Court was faced with a 32-week pregnant major, married woman, where severe foetal anomalies were detected. The decision in this case is important in the context of foetal viability because it casts aside the Medical Board's opinion in this respect. The board had suggested continuation of pregnancy in this case despite a poor prognosis for the foetus with an anomaly. The court noted,

> *Another question has greatly troubled us. What if after carrying this foetus to term, the Petitioner finds she cannot tend to it? Is she then to be forced to make the next decision, to give up a child in adoption? How is that to be done? More importantly, why should that have to be done? The opinion of the Medical Board is oddly silent on this. It only addresses itself to medical interventions, the availability of incessant and ongoing treatments and nothing more. It does not take into account the social and economic position of the Petitioner and her husband. It ignores their milieu entirely. It does not even attempt to envision the kind of life — one with no quality at all to speak of — that the Petitioner must endure for an indefinite future if the Board's recommendation is to be followed. The Board really does only one thing: because late, therefore no. And that is plainly wrong, as we have seen. Given a severe foetal abn ormality, the length of the pregnancy does not matter."*[243]

This paragraph is particularly important as the court makes it clear that, though the Medical Board might provide a negative opinion on abortion by citing foetal viability, the court is not bound by it. While emphasising the profound impact of forcing the petitioner to carry the pregnancy to term, the court also criticised the Medical Board's recommendation, which dismissed the petitioner's socio-economic context and long-term burden, basing its position solely on the length of the pregnancy.



240 XYZ v. State of Gujarat, 2023 SCC OnLine SC 1573, Para 21.

241 XYZ v. Union of India and Anr. 2019 SCC OnLine Bom 560.

242 ABC v. State of Maharashtra, W.P. (ST) NO. 1357 of 2023.

243 ABC v. State of Maharashtra, W.P. (ST) NO. 1357 of 2023, para 31.

In the case of *X v. State of Uttarakhand* (2022),[244] the Uttarakhand High Court allowed abortion to a 16-year-old rape survivor who was over 27 weeks pregnant, despite the Medical Board's opinion against it, which cited "viability" of the foetus.[245]

Instead, the court focused on the violation of the fundamental right to life and dignity of the minor in forcing her to continue an unwanted pregnancy.[246] Here, it decided the petition with a focus on 'unwanted pregnancy' and its repercussions for the petitioner, without concerning itself with foetal viability or the length of the pregnancy.

In *A (Mother of X) v. State of Maharashtra & Anr* (2024),[247] the Supreme Court allowed the abortion of a 30-week pregnancy of a 14-year-old minor who was a victim of sexual assault, reversing an earlier decision by the Bombay High Court against it.

The Supreme Court held that the primary consideration in cases involving requests for abortion of pregnancies beyond 24 weeks is the mental and physical health of the pregnant individual.[248] The court stated unequivocally that, "*the sole and only consideration which must weigh with the Court at this stage is the safety and welfare of the minor.*"[249] Thus, it made clear that foetal viability has no relevance in deciding such cases. It criticised the Medical Board's "*clarificatory report,*" which merely relied on the gestational age and the absence of foetal abnormalities to deny abortion without considering the physical and mental health implications for the minor.[250] The court highlighted that the "*right to abortion is a concomitant right of dignity, autonomy, and reproductive choice*" and that this right must not be compromised except where necessary to protect the physical or mental health of the pregnant individual.[251]

Crucially, the court affirmed that the MTP Act places the autonomy of the pregnant person at its core. It observed that the decision to terminate a pregnancy, even at an advanced stage, is ultimately the pregnant individual's prerogative, as long as it does not endanger their health.[252]



244 X v. State of Uttarakhand, 2022 SCC OnLine Utt 61.

245 X v State of Uttarakhand, 2022 SCC OnLine Utt 61, para 6.

246 The Constitution of India. (1950). Article 21.

247 A (Mother of X) v. State of Maharashtra, (2024) 6 SCC 327.

248 A (Mother of X) v. State of Maharashtra, (2024) 6 SCC 327, para 20.

249 A (Mother of X) v. State of Maharashtra, (2024) 6 SCC 327, para 19.

250 A (Mother of X) v. State of Maharashtra, (2024) 6 SCC 327, para 25.

251 A (Mother of X) v. State of Maharashtra, (2024) 6 SCC 327, para 21.

252 A (Mother of X) v. State of Maharashtra, (2024) 6 SCC 327, para 26.

Moreover, the judgment underlined the importance of considering the "*foreseeable environment*" of the pregnant individual under Section 3(3) of the MTP Act.[253] The failure to account for these factors may result in decisions that unduly prioritise foetal viability over the pregnant person's rights and well-being.

The above-discussed decisions uphold a few key principles. First, that a woman's health, dignity, and autonomy take precedence over the State's interest in protecting "*potential life*". Second, a foetus has no independent legal rights, making it clear that a woman's rights cannot be overridden by a viable foetus. Third, courts have laid down guidelines for late-term abortions, ensuring State responsibility in case the foetus is born alive in the process of abortion. Fourth, the mechanical approach in rejecting abortion petitions based solely on the MTP Act ceiling without considering women's constitutional rights is untenable. And fifth, that the State has a role in respecting the petitioner's original intent to terminate the pregnancy.

However, these principles have not found resonance in many other decisions that have emanated from the Supreme Court and High Courts. In factually similar cases, the jurisprudence has been highly inconsistent across the years. Below are some of these cases from the same time period where abortion was denied, citing foetal viability, prioritising it over the woman's reproductive autonomy, and with a strict interpretation of the MTP Act.



## Foetal Viability Overriding Women's Fundamental Rights

The decision in *X v. Union of India* (2023)[254] by the Supreme Court warrants a detailed discussion for the highly problematic precedent that it set for reproductive rights in the country. India is largely understood to have had no religious, legal or cultural context that considers a foetus to be an entity with rights, or recognises a "foetal interest" doctrine.[255] However, in this case, the Supreme Court denied a married woman an abortion by elevating the foetus to a level of prioritisation over her, and rejecting her agency to choose the course of her life. The decision not only justified the Medical Board's preoccupation with the health of the foetus but also inserted the hitherto

253 A (Mother of X) v. State of Maharashtra, (2024) 6 SCC 327, para 30.

254 X v. Union of India, 2023 SCC OnLine SC 1338.

255 Siddiqui, A. (2023). A womb of one's own: Exploring decisional privacy vis-à-vis abortion rights in India and the *US. IUP Law Review,* 13(1), 12. https://openurl.ebsco.com/EPDB%3Agcd%3A10%3A29783130/detailv2?sid=ebsco%3Aplink%3Ascholar&id=ebsco%3Agcd%3A163064264&crl=c&link_origin=scholar.google.com

unknown notion of "foetal interest" in abortion jurisprudence in the country.
It came in the backdrop of a recall application filed by the government after "*an email that a member of the Medical Board*" sent to the Additional Solicitor General (ASG) stating that "*the foetus has a strong chance of survival and seeking directions from the Court as to whether the foetal heartbeat ought to be stopped.*"[256]

To provide some context, initially, a division bench of the Supreme Court had allowed abortion after considering the threat to the petitioner's mental health. However, after the email of the Medical Board member, the government sought a recall of the order that allowed abortion, citing the "*chance for survival of the foetus.*"[257] The Medical Board member sought directions specifically to stop the "*foetal heartbeat*" and stated that "*if the foetal heartbeat was not stopped, the 'baby' would be placed in an intensive care unit and that there was a high possibility of immediate and long-term physical and mental disability.*"[258] Further, that "*AIIMS sought a direction from the Court as to whether a 'foeticide should be carried out'.*"[259]

Thereafter, the division bench pronounced a split verdict, with one of the judges citing "*judicial conscience*" in prohibiting "*stopping of the foetal heartbeat.*"[260] The fellow judge held that the order for abortion ought not to be overturned in the interest of the mother, her socio-economic conditions, her mental health status and that "*the decision of the petitioner must be respected and must not be substituted by the decision of this Court.*"[261] Additionally, this judge opined that "*a foetus is dependent on the mother and cannot be recognised as a personality apart from that of the mother as its very existence is owed to the mother.*"[262]

After the split verdict, a fresh three-judge bench was formed to consider the recall application. The latter bench, among other things, asked the Medical Board to apprise it "*if the Petitioner is found to be suffering from postpartum psychosis and whether any alternate administration of medication consistent with the pregnancy would be available so as to neither jeopardise the well-being of the petitioner or the foetus in*



256 X v. Union of India, 2023 SCC OnLine SC 1338, para 6.

257 X v. Union of India, 2023 SCC OnLine SC 1338, para 6.

258 X v. Union of India, 2023 SCC OnLine SC 1338, para 6.

259 X v. Union of India, 2023 SCC OnLine SC 1338, para 6.

260 X v. Union of India, 2023 SCC OnLine SC 1338, para 9.

261 X v. Union of India, 2023 SCC OnLine SC 1338, para 9.

262 X v. Union of India, 2023 SCC OnLine SC 1338, para 9.

*that regard.*"[263] The three-judge bench subsequently denied abortion to the petitioner, citing the following reasons:

> *a) Having crossed the statutory limit of twenty-four weeks, the requirements in either of Section 3(2B) or Section 5 must be met;*
> *b) There are no "substantial foetal abnormalities" diagnosed by a Medical Board in this case, in terms of Section 3(2B). This Court called for a second medical report from AIIMS to ensure that the facts of the case were accurately placed before it and no foetal abnormality was detected; and*
> *c) Neither of the two reports submitted by the Medical Boards indicates that a termination is immediately necessary to save the life of the petitioner, in terms of Section 5.*[264]

It further observed:

> *if a medical termination were to be conducted at this stage, the doctors would be faced with a viable foetus. One of the options before this Court, which the email from AIIMS has flagged, is for it to direct the doctors to stop the foetal heartbeat. This Court is averse to issuing a direction of this nature."*[265]

The court's final decision and observations in this case are in sharp contrast to its own decision in *Xyz v. State of Gujarat* (2023),[266] a mere two months earlier, where it observed that any unwanted pregnancy would cause a grave injury to the mental health of the woman while allowing abortion at 28 weeks of gestation. In *X v Principal Secretary GNCT, Delhi* (2022), too, the Supreme Court had held that, while considering abortion requests, courts should give paramount importance to the mental and physical health of the woman, and nothing should compromise this.[267]

This case brought to light several significant concerns surrounding the application of the MTP Act and its interpretation by courts. Abortion, especially at a late gestational age, involves a medical process where the foetus's heart is stopped through intrauterine



263 X v. Union of India, 2023 SCC OnLine SC 1338, para 10.

264 X v. Union of India, 2023 SCC OnLine SC 1338, para 29.

265 X v. Union of India, 2023 SCC OnLine SC 1338, para 30.

266 XYZ v. State of Gujarat, 2023 SCC OnLine SC 1658.

267 X v. The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr., (2022) SCC OnLine SC 905.

injection — an accepted procedure, even in pregnancies as late as 37 weeks[268] where foetal anomalies are present. Yet, in this instance, the routine medical procedure was framed in moralistic language by the Medical Board and the government, which was subsequently adopted by the court.

This inconsistency results in discriminatory outcomes, as it introduces an artificial difference between cases where the court has previously allowed abortion at comparable stages of gestation without referencing the "*well-being of the foetus*." Notably, in earlier judgments, courts acknowledged that forcing a woman to carry an unwanted pregnancy to term is traumatic and undignified, emphasising that it should be her prerogative to decide.[269] They also recognised the structural barriers women face in accessing abortion, which often forces them to seek judicial intervention. However, in *X v. Union of India*, the court failed to consider the specific circumstances under which the petitioner sought relief, especially considering her medical condition of lactational amenorrhea, which prevented early detection of the pregnancy. Moreover, the court deviated from its prior precedents, interpreting the MTP Act narrowly, contrary to its previous liberal interpretation.[270] This led to the denial of abortion for a woman suffering from severe mental health issues and postpartum psychosis.



Concerningly, in this case, the Supreme Court invoked its powers under Article 142,[271] which allows it to pass orders for rendering thorough justice. It noted:

> *"This is not an ordinary civil case. Rather, it is one which concerns the viability of a medical termination of a pregnancy and the course of action to be adopted by the doctors on the basis of the development of the foetus."* [272]

This reliance on Article 142 gives the impression that the court's extraordinary

268 Gulfsha Wasim Sheikh v. State of Maharashtra, 2021 SCC OnLine Bom 5015.

269 XYZ v. State of Gujarat and Ors., 2023 SCC OnLine SC 1573. X v. The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr., 2022 SCC OnLine SC 905.

270 XYZ v. State of Gujarat and Ors., 2023 SCC OnLine SC 1573. X v. The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr., (2022) SCC OnLine SC 905.

271 The Constitution of India. (1950). Article 142 (i)- The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.

272 X v. Union of India, 2023 SCC OnLine SC 1338, para 22.

jurisdiction was exercised in the interest of the foetus, rather than in the interest of reproductive justice for the woman. It represents a regression from the jurisprudence where courts invoked Article 142 to bypass the statutory limitation period in order to deliver justice to women seeking late-term abortions. The invocation of Article 142 here legitimises bypassing women-centric provisions under the MTP Act to advance the so-called competing interest of the unborn child, which upends the framework of law.

Additionally, as noted above, a recall application from the government was made in this case opposing the abortion prayer of the petitioner. The Supreme Court took it on record and reversed its earlier decision, duly passed by a division bench. The recall application, as it happened in this case, and also in *R v. Union of India* (2024)[273] discussed below, warrants brief discussion. Recall applications are allowed under Section 151 of the Civil Procedure Code (1908), where the court can exercise its power in the "interest of justice".[274] However, in *X v. Union of India* (2023)[275] the ground for recall was a "*medically viable*" foetus. When the division bench allowed abortion, it did so on the grounds that continuing with an unwanted pregnancy could seriously imperil the mental health of the woman. However, after the recall application, the verdict of the freshly constituted three-judge bench was devoid of any consideration for the woman's mental health issues, with foetal viability taking centre stage.

In *R v. Union of India* (2024),[276] the Delhi High Court followed a similar trajectory to *X v. Union of India* (2023).[277] Here, the petitioner, who was grieving her husband's death, sought an abortion due to her changed marital status and the risks to her mental health. She was diagnosed with severe depression accompanied by suicidal thoughts. The Delhi High Court initially granted permission to the woman to undergo abortion, reasoning its decision on the threat to her mental health due to the unwanted pregnancy.[278] However, when the All India Institute of Medical Sciences (AIIMS) declined to proceed with the abortion without explicit instructions for "*foeticide*" and the respondent state subsequently raised concerns about the foetus being "normal", the court's stance shifted. The petitioner, who had previously been deemed at serious risk to both herself and the foetus due to her mental health issues, was now assessed as not facing any severe mental health threat if the pregnancy continued, directly



273 R v. Union of India, 2024 SCC OnLine Del 440.

274 The Civil Procedure Code. (1908). Section 151.

275 X v. Union of India, 2023 SCC OnLine SC 1338.

276 R v. Union of India, 2024 SCC OnLine Del 440.

277 X v. Union of India, 2023 SCC OnLine SC 1338.

278 R v. Union of India, 2024 SCC OnLine Del 8555.

contradicting the court's earlier determination of her psychological distress in its initial ruling.[279]

In its final order, the Delhi High Court relied on the Supreme Court in *X v. Union of India* (2023), observing that abortion beyond 24 weeks was not permissible in the absence of significant foetal abnormalities, as opined by the Medical Board.[280] The court specifically noted that, "*a bench of three judges of the Apex Court did not permit the termination of pregnancy beyond 24 weeks since there were no substantial foetal abnormalities involved.*"[281] It further stated that "*the contentions of the learned Counsel for the Petitioner that the AIIMS Hospital must be directed to go ahead with the foeticide cannot be accepted.*"[282] In this case, the Supreme Court dismissed the Special Leave Petition (SLP) which was filed after the Delhi High Court denied the petitioner abortion, continuing its foetal interest-centred trajectory.

That same year, the Delhi High Court refused the plea of an unmarried 20-year-old woman for abortion in *H v. Union of India* (2024)[283] while observing that "*the Petitioner is already seven months pregnant with a healthy and viable foetus.*"[284] It noted that "*the prayer sought for by the Petitioner for a direction for premature termination of pregnancy/delivery of the child cannot be acceded to*" since her case did not fall within the "*four walls*" of the MTP Act and Rules.[285] Hence, in the absence of foetal abnormalities, the court effectively denied abortion due to concerns around a viable foetus.[286] In this case too, the Supreme Court dismissed an SLP filed by the woman challenging the Delhi High Court's decision.[287]

Similarly, in *P v. State and Ors* (2024),[288] the Delhi High Court examined an abortion request of a 16-year-old rape survivor at 26-28 weeks of gestation. Despite the severe trauma endured by the minor, the court anchored its decision primarily on the



279 R v. Union of India, 2024 SCC OnLine Del 440.

280 R v. Union of India, 2024 SCC OnLine Del 440, para 10.

281 R v. Union of India, 2024 SCC OnLine Del 440, para 10.

282 R v. Union of India, 2024 SCC OnLine Del 440, para 22.

283 H v. Union of India, 2024 SCC OnLine Del 3383.

284 H v. Union of India, 2024 SCC OnLine Del 3383, para 14.

285 H v. Union of India, 2024 SCC OnLine Del 3383, para 14.

286 H v. Union of India, 2024 SCC OnLine Del 3383, para 14.

287 H v Union of India & Anr, SLP (CIVIL) Diary No(s). 22763 of 2024.

288 P v. State and Ors., W.P. 1899 of 2024.

report submitted by the AIIMS Medical Board,[289] which stated "*moderate chances of survival*"[290] of the foetus if supported by neonatal intensive care (NICU). The board's assessment, however, rested solely on foetal viability, noting the absence of detectable malformations, while disregarding the psychological, physical, and emotional burdens on the petitioner. The court, too, by relying uncritically on this report, prioritised the "*potential of survival*" of the foetus over the mental and physical well-being of the minor who had conceived the pregnancy as a result of sexual violence.[291] The denial of the abortion request in this manner points to an approach that effectively equates foetal viability with an absolute barrier to the exercise of reproductive rights.

Moreover, in this case, the court's decision to encourage the petitioner to carry the pregnancy to term, with the option of placing the newborn for adoption, failed to acknowledge the life-long impact that forced continuation of pregnancy can have on a minor, especially one already traumatised by rape. By placing undue emphasis on the foetus's potential life, the judgment disregarded the petitioner's autonomy, bodily integrity, and the right to make decisions regarding her own health and future, reducing her to a vessel for the supposed interest of the State in preserving foetal life.

Prior to this series of rulings, in *ABC v. State of Chhattisgarh* (2020)[292] the Chhattisgarh High Court refused an abortion plea for a 26-week pregnancy of a 20-year-old unmarried rape survivor, despite her severe mental distress. The court prioritised the foetus's right to life over the petitioner's right to reproductive choice, going as far as reading the right to life for the foetus under Article 21 of the Constitution and stating that this right of the foetus should take precedence.[293]

This reasoning highlights a problematic hierarchy that elevates the foetus's potential life above the woman's fundamental rights. These judgments not only highlight the judiciary's inconsistent application of reproductive rights but also reflect a troubling trend of subordinating women's Constitutional rights to those of the unborn, despite the absence of explicit legal recognition of foetal personhood in Indian law.

These judgments denying abortion on the basis of foetal viability have shown a notable departure from progressive legal principles established in previous decisions, leaving



289 P v. State and Ors., W.P. 1899 of 2024, para 4.

290 P v. State and Ors., W.P. 1899 of 2024, para 4.

291 P v. State and Ors., W.P. 1899 of 2024, para 5.

292 ABC v. State of Chhattisgarh, 2020 SCC OnLine Chh 797.

293 ABC v. State of Chhattisgarh, 2020 SCC OnLine Chh 797, para 22.

several critical issues unresolved. In *X v. Union of India* (2023),[294] the Supreme Court declined to issue an order stopping the "*foetal heartbeat*" as requested by AIIMS, to proceed with abortion. If the threshold for foetal viability is based on the presence of a foetal heartbeat, a highly problematic reasoning would be given credence, since a foetal heartbeat can be detected even at six weeks[295] of pregnancy, well before the statutory 24-week limit for abortion in India.

A series of questions arises in this context. What precisely determines when a foetus is deemed viable? Despite its recurring use in judicial decisions in India, there appears to be no clear scientific or legal definition underpinning this concept. If viability is not a ground in the MTP Act for denying abortion, why does it often serve as a basis for judicial decisions? Does viability imply a foetus's ability to survive independently outside the womb, or merely with the aid of advanced NICU technology? If the latter is true, does this mean that as medical technology advances, the gestational limit for legal abortion should also change? If not, the supposed viability standard cannot factor into the 24-week cap set by the MTP Act.



Further complicating the matter is the question of whether viability is a strict legislative threshold (however, implicit) or merely an ill-defined judicial/Medical Board construction in India. Is it tailored to the specific condition of each foetus, or applied uniformly based on gestational age? It is clear from the BNS that life is considered to begin only once any part of the child's body is delivered.[296] Further, the foetus is not recognised as an independent rights-bearing entity in law, a fact also recognised by the judiciary.[297] For courts to then read a foetus' rights into the Constitution, while denying women reproductive rights, is a matter of grave concern.

The MTP Act, as intended, centres on the woman's health, consent, and autonomy, as established in cases like *Suchitra Srivastava & Anr. v. Chandigarh Administration*

294 X v. Union of India, 2023 SCC OnLine SC 1338.

295 Forte, D. F. (2013). Life, heartbeat, birth: A medical basis for reform. *Ohio State Law Journal,* 74(1), 121–148. https://csuohio.elsevierpure.com/en/publications/life-heartbeat-birth-a-medical-basis-for-reform

296 Section 100, Explanation 3 Bhartiya Nyaya Sanhita, 2023. The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

297 See- High Court on Its Own Motion v. State of Maharashtra 2017 Cri LJ 218 (Bom HC) paras 15, 22. & XYZ v. Union of India, 2019 SCC OnLine Bom 560, para 90.

(2009).[298] However, the increasing emphasis on 'foetal viability' runs counter to these objectives. By prioritising the foetus — often referred to in court judgments as the "*unborn baby*"[299] or "*child yet to be born*"[300] — courts shift the focus away from the woman's rights, skewing it towards the supposed rights of the foetus.

Although some rulings have rightly upheld women's reproductive rights by emphasising principles of bodily autonomy and reproductive justice, there is inconsistency in how these principles are applied across various courts, including by the Supreme Court itself.

Restricting abortion access based on viability perpetuates unfairness by compelling Medical Boards to focus on it. This shift in focus leads them to prioritise gestational age and the foetus over the needs and well-being of the pregnant person.[301] Research shows that women typically seek abortions as early as possible.[302] Those who approach the courts beyond the 24-week limit often do so due to valid reasons, such as structural barriers, late detection of the pregnancy, lack of awareness, or prolonged legal proceedings. The WHO explicitly advises against laws that restrict abortion based on gestational age, noting that such limits lead to delays, increased unsafe abortions, and higher maternal morbidity and mortality rates.[303] Along with United Nations Special Rapporteurs, the WHO advocates for the decriminalisation of abortion and the removal of gestational limits, underscoring that criminal regulation of abortion harms women and impedes access to necessary healthcare.[304]

The concept of foetal viability has remained fluid and inconsistent in both medical and legal contexts, which raises questions about its legitimacy as a foundation for



298 Suchita Srivastava v. Chandigarh Administration, 2009 SCC OnLine SC 1562.

299 ABC v. State of Gujarat, 2024 SCC OnLine Guj 1656.

300 X v. State of Maharashtra, 2023 SCC OnLine Bom 1544.

301 Horn, C. (2020). Gestation beyond mother/machine: *Legal frameworks for artificial wombs, abortion and care* (Doctoral dissertation, Birkbeck, University of London).

302 Visaria, L., Ramachandran, V., Ganatra, B., & Kalyanwala, S. (2020). Abortion use and practice: Evidence, challenges and emerging issues. In L. Visaria, V. Ramachandran, B. Ganatra, & S. Kalyanwala (Eds.), Abortion in India (pp. 1–26). Routledge India.

303 World Health Organization. (2024, May 17). Abortion. https://www.who.int/news-room/fact-sheets/detail/abortion#:~:text=Restrictive%20abortion%20regulation%20can%20cause,positive%20contribution%20to%20GDP%20growth

304 World Health Organization. (2022). *Abortion care guideline*. https://www.who.int/publications/i/item/9789240039483

regulating abortion.[305] Moreover, its application often indicates a tension between moral reasoning and legal principles.[306] While it has been argued that viability is not an appropriate legal metric for determining abortion rights,[307] it remains enshrined as a tool of legal compromise, restricting access to abortion after a foetus is deemed viable.[308]

The "*viability compromise,*" which supposedly balances the State's interest[309] in potential life with a pregnant person's bodily autonomy, does not perform its intended function.[310] Instead, it serves to "*place some (symbolic or real) limits on pregnant people's rights,*" forcing them to justify their need for an abortion even in cases where their autonomy and health should take precedence.[311] It has been argued that this imbalance is evident in the way viability thresholds "*penalise pregnant people likely to submit for abortion later because of circumstances that have already marginalised them,*" labelling them as individuals "*in need of regulation*" to prevent them from making "*bad*" choices.[312] As a result, the viability threshold operates less as a meaningful compromise and more as a political construct designed to control reproductive decisions.[313]



305 Romanis, E. C. (2020). Is 'viability' viable? Abortion, conceptual confusion and the law in England and Wales and the United States. *Journal of Law and the Biosciences*, 7(1), 21. https://doi.org/10.1093/jlb/lsaa059

306 Romanis, E. C. (2020). Is 'viability' viable? Abortion, conceptual confusion and the law in England and Wales and the United States. *Journal of Law and the Biosciences*, 7(1), 2. https://doi.org/10.1093/jlb/lsaa059

307 Romanis, E. C. (2020). Is 'viability' viable? Abortion, conceptual confusion and the law in England and Wales and the United States. *Journal of Law and the Biosciences*, 7(1), 24. https://doi.org/10.1093/jlb/lsaa059

308 Romanis, E. C. (2020). Is 'viability' viable? Abortion, conceptual confusion and the law in England and Wales and the United States. *Journal of Law and the Biosciences*, 7(1), 22. https://doi.org/10.1093/jlb/lsaa059

309 For more elaborate discussion on this point, see– Chapter 8 State Interest, page 91.

310 Romanis, E. C. (2020). Is 'viability' viable? Abortion, conceptual confusion and the law in England and Wales and the United States. *Journal of Law and the Biosciences*, 7(1), 22. https://doi.org/10.1093/jlb/lsaa059

311 Romanis, E. C. (2020). Is 'viability' viable? Abortion, conceptual confusion and the law in England and Wales and the United States. *Journal of Law and the Biosciences*, 7(1), 23. https://doi.org/10.1093/jlb/lsaa059

312 Romanis, E. C. (2020). Is 'viability' viable? Abortion, conceptual confusion and the law in England and Wales and the United States. *Journal of Law and the Biosciences,* 7(1), 24. https://doi.org/10.1093/jlb/lsaa059

313 Romanis, E. C. (2020). Is 'viability' viable? Abortion, conceptual confusion and the law in

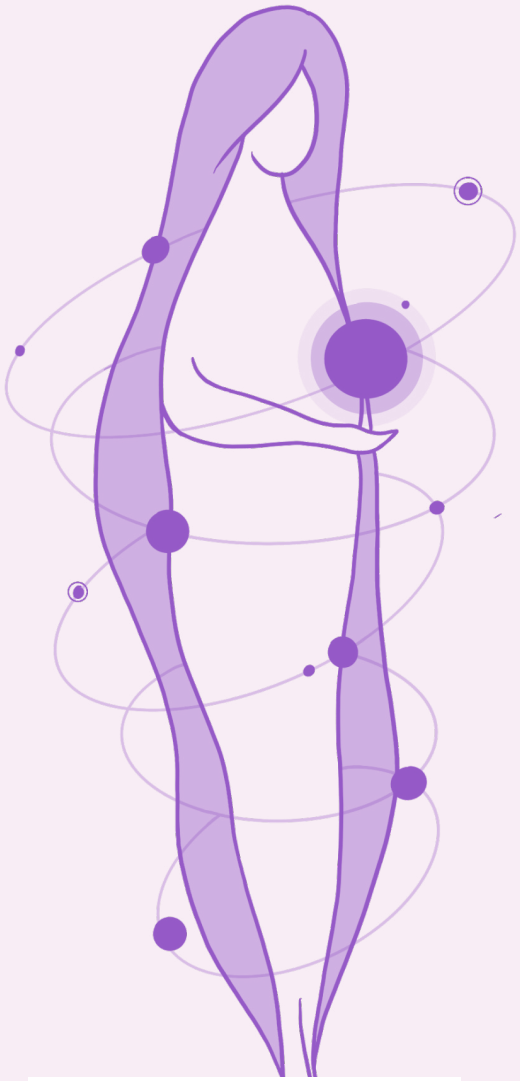
It has also been argued that restrictions based on gestational limits surpass the evidence available and hinder the safe delivery of healthcare services to pregnant individuals.[314] Evidence from countries where abortion laws do not impose viability thresholds or gestational cut-offs shows that the absence of such restrictions has not led to a significant increase in abortions, particularly late-term abortions. Rather, it makes for safer, more accessible women-centric health.[315] Without clearly articulating the "State's interest" in enforcing a viability threshold, it appears that such limits serve primarily to exert control—both literally and symbolically—over women's bodies and their choices. Constitutional courts are duty-bound to interpret any statute in a way that expands rights wherever possible rather than restricting them, a function that courts seem to have foregone in viability-based judgments that deny abortion.



England and Wales and the United States. *Journal of Law and the Biosciences*, 7(1), 25. https://doi.org/10.1093/jlb/lsaa059

314 Romanis, E. C. (2020). Is 'viability' viable? Abortion, conceptual confusion and the law in England and Wales and the United States. *Journal of Law and the Biosciences*, 7(1). https://doi.org/10.1093/jlb/lsaa059

315 Horn, C. (2020). *Gestation beyond mother/machine: Legal frameworks for artificial wombs, abortion and care* (Doctoral dissertation, Birkbeck, University of London).



Chapter 8

# State Interest

The State has shown interest in regulating and protecting the woman's body due to its reproductive potential. This is evident in the Statement of Objects and Reasons of the MTP Act, which has the stated goal of wanting to prevent "*avoidable wastage of mother's health, strength and sometimes, life*."[316] While there has been considerable critique of protectionism and lack of rights in the Act,[317] its focus has primarily been on women and preservation of their health. Lately, however, courts have been raising the 'State interest in potential life' for consideration in abortion adjudications, seemingly adopting it from other jurisdictions. An instance of this is ruling in *ABC v. State of Chhattisgarh* (2020).[318] In the absence of any clarity on when State's interest in potential life starts, and to what extent it justifies the harm that the denial of abortion inflicts, scrutiny is warranted.

One way in which State interest has made its way into adjudication is through the use of the c*ompelling State interest* doctrine. This Chapter examines and critiques the same.

The '*compelling State interest*' doctrine finds its origin in American jurisprudence, and requires the State to meet two standards - of strict scrutiny and narrow tailoring - to justify infringement on a right.[319] Strict scrutiny requires the State to prove that

316 The Medical Termination of Pregnancy Act. (1971). Statement of Objects and Reasons. - The provisions regarding the termination of pregnancy in the Indian Penal Code which were enacted about a century ago were drawn up in keeping with the then British Law on the subject. Abortion was made a crime for which the mother as well as the abortionist could be punished except where it had to be induced in order to save the life of the mother. It has been stated that this very strict law has been observed in the breach in a very large number of cases all over the country. Furthermore, most of these mothers are married women, and are under no particular necessity to conceal their pregnancy. 2. In recent years, when health services have expanded and hospitals are availed of to the fullest extent by all classes of society, doctors have often been confronted with, gravely ill or dying pregnant women whose pregnant uterus have been tampered with, view to causing an abortion and consequently suffered very severely. 3 There is thus avoidable wastage ofthe mother's health, strength and, sometimes. life. The proposed measure which seeks to liberalise certain existing provisions relating to termination of pregnancy has been conceived (1) as a health measure - when there is danger to the life or risk to physical or mental health of the women, (2) on humanitarian grounds - such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman, etc.; and (3) eugenic grounds - where there is substantial risk that the child, if born, would suffer from deformities and diseases

317 Jain, D., & Deora, Y. S. (2023). Law makers debating the right to abortion in India: Deconstructing progress. Indon. J. Int'l & Comp. L., 10, 161.

318 ABC v. State of Chhattisgarh, 2020 SCC OnLine Chh 797.

319 Siegel, Stephen A.,(2006). The origin of the compelling state interest test and strict scrutiny. *American Journal of Legal History, Vol. 48(4)* . https://papers.ssrn.com/sol3/papers.cfm?abstract_id=934795: ; Barbara Grutter v. Lee Bollinger, 539 U.S. 306 (2003).

the 'interest' is 'compelling enough' even if it leads to a violation of rights; 'narrow tailoring' requires the State to prove that the act causing infringement is specific and limited to achieving the compelling interest without unnecessarily infringing on other rights.[320]

In India, the test was first used in *Gobind v. State of MP* (1975).[321] Here, the Supreme Court held that the fundamental right to privacy can be overridden only if there was a compelling State interest, and employed the requirement of 'narrow tailoring' of the regulation to ensure that there is no excessive infringement of rights. In *Anuj Garg v. Hotel Assn. of India* (2008),[322] the court held that a heightened level of scrutiny is the normative threshold for judicial review in cases where personal freedom is being compromised for a compelling State purpose, and that the ultimate effect of any law should not be in perpetuating the oppression of women.

Most recently in *Justice K S Puttaswamy (RETD.) v. Union of India* (2017),[323] the court held that any action limiting the right to privacy must fulfil the requirement of reasonableness and non-arbitrariness and pass the four-fold test of legality, legitimate State interest, proportionality and safeguards.



While the compelling State interest doctrine has largely evolved in relation to privacy jurisprudence, the same is increasingly being relied on in abortion cases. The first case to mention was *Suchita Srivastava v. Chandigarh Admn.* (2009)[324] There, the court held that,

> *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*

320 Miller, Robert T.(2018). What is a compelling governmental interest? *Journal of Morality and Markets, (Forthcoming). U Iowa Legal Studies Research Paper No. 2018-21.* https://ssrn.com/abstract=3149162

321 Gobind v. State of MP, 1975 SCC(2) 148.

322 Anuj Garg v. Hotel Assn. of India, (2008) 3 SCC 1.

323 Justice K S Puttaswamy (RETD.) v. Union of India, (2017) 10 SCC 1.

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

> *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."*

After *Suchita Srivastava*, this doctrine has been relied on in multiple cases, as discussed below. Yet, the use of this doctrine in the absence of a strict definition of its parameters in the context of abortion allows loose and arbitrary application.

In *XYZ v. Union of India* (2019),[325] the Bombay High Court held that compelling State interest cannot arise in cases where the potentiality for life is almost extinct. According to the court, this would occur in case of physical or mental abnormality in the foetus or where there are chances of grave injury to the pregnant woman's physical or mental health. The court held that the MTP Act puts the pregnant woman's life on a higher pedestal, given that the foetus does not have an independent extra-uterine life, and that State interest can only be argued where the contingencies provided under the Act to permit abortion do not exist.[326]



325 XYZ v. Union of India , 2019 SCC OnLine Bom 560, para 90-91.

326 The Medical Termination of Pregnancy Act. (1971). Section 3- In Section 3 of the principal Act, for sub-section (2), the following sub-sections shall be substituted, namely:— "(2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,— (a) where the length of the pregnancy does not exceed twenty weeks, if such medical practitioner is, or (b) where the length of the pregnancy exceeds twenty weeks but does not exceed twenty-four weeks in case of such category of woman as may be prescribed by rules made under this Act, if not less than two registered medical practitioners are, of the opinion, formed in good faith, that— (i) 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; or (ii) there is a substantial risk that if the child were born, it would suffer from any serious physical or mental abnormality. Explanation 1.—For the purposes of clause (a), where any pregnancy occurs as a result of failure of any device or method used by any woman or her partner for the purpose of limiting the number of children or preventing pregnancy, the anguish caused by such pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman. Explanation 2.—For the purposes of clauses (a) and (b), where any pregnancy is alleged by the

In essence, the court stated that compelling State interest comes into play when a pregnancy is no longer covered by the provisions laid down in Section 3. In effect, it still means that once pregnant, a woman's agency, autonomy and rights are compromised by being either subject to provisions of the MTP Act or as inferior to those of the foetus. Her rights as against the foetus are respected only if either the foetus's chance of survival is scant or the woman is herself dying. Critically, using State interest to prioritise potential life over the life of a woman whose quality of life is degraded raises serious legal, political and ethical questions.

In *Suparna Debnath & Anr v. State of West Bengal & Ors.* (2019),[327] the Calcutta High Court held that a child's life gets linked to the woman's life and affects the dimensions of her personal life and liberty both during pregnancy and after childbirth. The court held that the MTP Act, when read against the backdrop of Article 21, extends the right to lead a normal, healthy life - post-delivery - and not a compromised existence that affects her mental health, causes agony and pain, and cripples her economically. Therefore, motherhood cannot be forced upon an unwilling woman even in the face of State interest. Most importantly, the court held that while there is some compelling State interest in the prospective child, there is a corresponding duty to provide a quality and dignified life to the mother, whose life is paramount at the stage of pregnancy.[328]

In *Siddhi Vishwanath Shelar v. State of Maharashtra* (2020) decided on 02.06.2020[329] the court allowed abortion and held that compelling State interest cannot be extended to cases in which the pregnancy has crossed 20 weeks and is injurious to the mother's physical and mental health. The court also held that the MTP Act puts the mother's interest at a higher pedestal than prospective life as the foetus cannot have an independent extra-uterine existence; the life of the mother, who independently exists, is entitled to greater consideration.

While the aforementioned two judgments have balanced State interest and women's



pregnant woman to have been caused by rape, the anguish caused by the pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman. (2A) The norms for the registered medical practitioner whose opinion is required for termination of pregnancy at different gestational age shall be such as may be prescribed by rules made under this Act. (2B) The provisions of sub-section (2) relating to the length of the pregnancy shall not apply to the termination of pregnancy by the medical practitioner where such termination is necessitated by the diagnosis of any of the substantial foetal abnormalities diagnosed by a Medical Board.

327 Suparna Debnath & Anr v. State of West Bengal & Ors., 2019 SCC OnLine Cal 9120.

328 Suparna Debnath & Anr v. State of West Bengal & Ors., 2019 SCC OnLine Cal 9120, para 21.

329 As quoted in XYZ v. State of Maharashtra, 2021 SCC OnLine Bom 3353, para 18.

rights and held in favour of women's lives and personal liberty, in the order given by a single judge in *State of Rajasthan v. S. (Name Withheld)* (2020),[330] the abortion petition of a minor rape survivor was disallowed. The Rajasthan High Court stated that there is a compelling State interest in preserving the life of the foetus, whose right to life takes precedence over the right to life of a woman. While the decision was later overruled by a division bench,[331] the delay forced the unwilling minor to deliver.

The noticeable difference in rationalisation linked to the State interest doctrine reflects the unsettled manner in which courts are using it. The choice to terminate an unwanted pregnancy is protected within the realm of privacy. While compelling State interest allows for a reasonable restriction on a right, the restriction requires justification on the basis of need, legality, proportionality and safeguards. State interest in potential life can be meaningfully secured by aiding expectant women and reducing maternal and child mortality through policies that help women in making reproductive decisions. It is perturbing that, instead, it is used as an argument by the State and, on occasion, given credence by courts, as a means to significantly regulate women's reproductive choices. For instance, comprehensive sex education, access to contraception, measures to prevent violence against women, and provision of childcare support all can contribute to a reduction in abortion rates by empowering women to exercise their reproductive rights in a more informed way. Yet, while robust policies are lacking, forcing unwanted pregnancies on women does little to ensure welfarism and constitutional rights.[332]

The State has a positive obligation to ensure women's reproductive decisions are protected by creating an institutional framework that supports them, both under the constitutional mandate[333] and international law commitments. While State action has been statistically deficient in fulfilling its duties towards women,[334] using compelling State interest to dilute their rights is further oppressive.



330 S. (Name Withheld) v. State of Rajasthan 2019 SCC OnLine Raj 6155, para 25-31.

331 State of Rajasthan v. S. (Name Withheld), 2020 SCC OnLine Raj 860, para 6-8, 13-15.

332 Pillai, G. (2024). India's push-and-pull on reproductive rights. *Verfassungsblog*. DOI: 10.59704/41b437064b3e88d3.

333 The Constitution of India. (1950). Article 42, 46-47, 51

334 The National Family Health Survey 5, (2019-2021), Ministry of Health and Family Welfare, India Report, Government of India points out that 35 to 37 percent of men between ages 25-34 think that contraception is women's business and men need not worry about it, (Table 5.17), that teenage pregnancy rate between ages 15-19 is 23 percent, that average out-of-pocket expenditure on a delivery in a public health facility increased in 8 of 17 states, that 29 percent of women aged 18-49 have experienced physical violence since age 15, and 6 percent have ever experienced sexual violence in their lifetime. Further, 3 percent of ever-pregnant women aged 18-49 have experienced physical violence during any pregnancy. https://dhsprogram.com/pubs/pdf/FR375/FR375.pdf

On another critical note, there is no clarity on when the State's interest in potential life starts and how absolute it is. The absence of definition and reasoning around why the State has a compelling interest in prospective life over and above a woman's rights hinders discourse and accountability around the normative framework with which State policies are made on the issue.[335],[336] Declaring a particular 'interest' as 'compelling' without evidence, rationale, and rights-based scrutiny diminishes the rule of law. For example, in the beef consumption case, *Sk. Zahid Mukhtar v. State of Maharashtra* (2016)[337] the Bombay High Court specifically noted that "*the State has made no attempt to show any compelling public or State interest*" to enact a provision of law that prohibited possession of beef from animals slaughtered outside the state. Clearly, the burden is on the State to show in what manner it is trying to claim a compelling interest in any matter by restricting rights. Yet, as seen in the cases discussed above, in relation to abortion, courts have simply relied on the doctrine, without any clear articulation of compelling interest by the State.

Moreover, in the absence of any threshold to ascertain when State interest is legitimate, its application irrespective of the grounds on which and circumstances within which abortion is sought, may justifiably raise questions around equality and non-discrimination.

In conclusion, the Supreme Court's observation in *Anuj Garg v. Hotel Assn. of India* (2008)[338] remains pertinent in relation to abortion jurisprudence. In that case, the court stated that a higher level of scrutiny should be the threshold for judicial review in cases defending the doctrine of compelling State interest. The ultimate effect of law should not be the oppression of women. Personal freedom is a fundamental tenet which can only be compromised if a compelling State interest is proved.

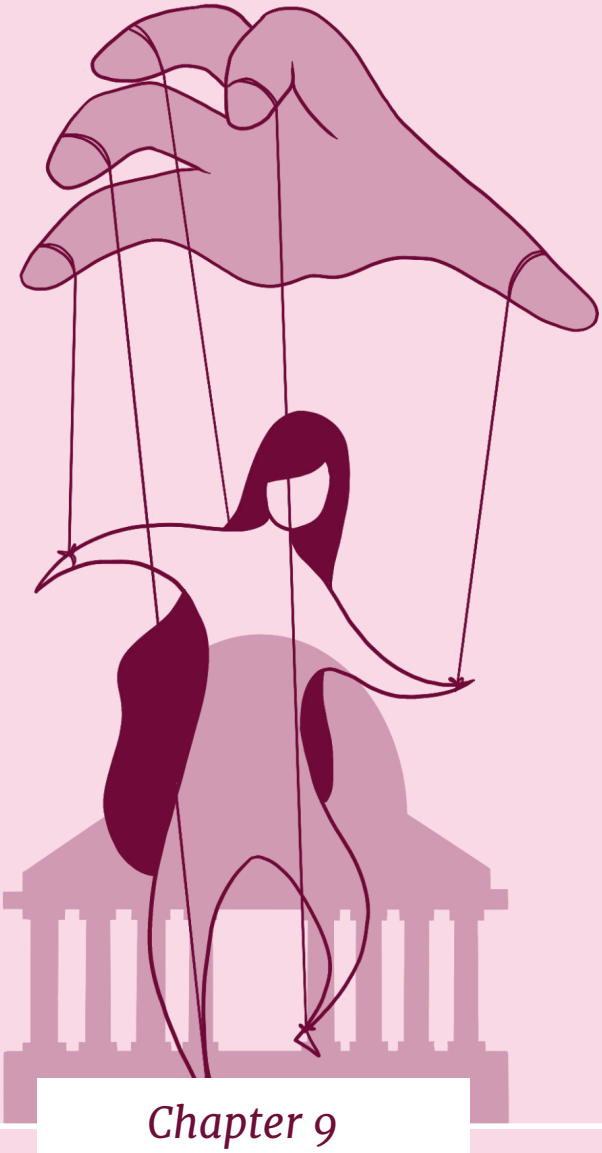


335 Miller, Robert T.( 2018). *What is a compelling governmental interest? Journal of Morality and Markets, (Forthcoming).* U Iowa Legal Studies Research Paper No. 2018-21: https://ssrn.com/abstract=3149162

336 In Grutter v. Bollinger, 539 U.S. 306 (2003), the American Supreme Court held that "the means chosen to accomplish the government's asserted purpose must be specifically and narrowly framed to accomplish that purpose." (interpretation)

337 Sk. Zahid Mukhtar v. State of Maharashtra, SCC OnLine Bom 2600.

338 Anuj Garg v. Hotel Assn. of India, (2008) 3 SCC 1.



Chapter 9

# *Parens Patriae Priniciple*

The doctrine of *parens patriae* permits the State to take the role of a guardian and make decisions for those who cannot do it for themselves, such as minors and people with intellectual disabilities.[339] Precedents mandate that this doctrine be invoked in exceptional situations for the benefit of the person in question and be harmonious with the constitutional rights of that individual.[340] However, there has been an inconsistent use of this principle in abortion cases. This Chapter highlights the same.

In S*uchita Srivastava's* (2009)[341] the Supreme Court relied on this doctrine to deny abortion to an intellectually disabled pregnant woman, respecting her reproductive choice to carry the pregnancy to term. Expanding on this doctrine, the court provided two parameters - the best interests test and the substituted judgment test.

> *19. The `best interests' test requires that the course of action chosen by the Court should serve the best interests of the pregnant woman by keeping the medical opinion on the feasibility of the pregnancy and the social circumstances faced by the victim in mind.*
>
> ...
>
> *20. The 'substituted judgment' test is to be applied in case of mentally incapable person and requires the court to make the decision which the said person would have made, if she was competent to do so."*

The best interests test was referred to in *ABC (Minor) Through Natural Guardian XYZ v. State of Chattisgarh, Through Secretary, Ministry of Public Health and Welfare and Ors* (2023),[342] where the court allowed abortion to a minor victim of rape on the basis of her reproductive rights. The *parens patriae* doctrine and best interests test were also relied on in *Rekhaben v. State of Gujarat* (2019)[343] and *Km X v. State of U.P.* (2019),[344] where abortion was allowed after taking health considerations, agony caused by rape and the pregnant woman's future into account.



339 Charan Lal Sahu Etc. Etc v. Union Of India [1990] SCC 1, 648, para 35.

340 Shafin Jahan v. Asokan K.M. (2018) SCC 16 391, para 31.

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

342 ABC (Minor) Through Natural Guardian XYZ v. State of Chattisgarh, Through Secretary, Ministry of Public Health and Welfare and Ors., 2024 SCC OnLine Chh 66.

343 Rekhaben v. State of Gujarat, 2019 SCC OnLine Guj 3239.

344 Mumtaz Begum v. State of Assam & Ors., I.A.(Civil) 1032 of 2021.

However, in *Mumtaz Begum v. State of Assam & Ors.* (2021),[345] despite referring to the doctrine, the Gauhati High Court denied abortion as there was no immediate threat to the life of the pregnant woman. Similarly, in *ABC v. State of Chhattisgarh* (2020),[346] the Chhattisgarh High Court denied abortion to a pregnant woman by applying the best interests test in favour of the foetus. In this case, the woman was a rape survivor who pleaded that she was physically and mentally not in a position to carry the pregnancy. However, ignoring the basic tenet of the *parens patriae* principle - that it be invoked for the benefit of the person in question - the court ignored the best interests of the pregnant woman, and took a position to secure the 'right to life' of a foetus.

Similarly, in *S v. State of Rajasthan* (2019),[347] the Rajasthan High Court denied the abortion based on compelling State interest and the 'right to life' of the foetus:

> *25. Given that the prospective child in the womb has no say in the present proceedings, this Court has to 'substitute itself as the parent' -the Parens Patriae and do a balancing exercise. This Court is to decide between the great mental agony that the Petitioner has to bear as against the right to life of the unborn child. The Legislature in its wisdom has not given an absolute and unfettered right to abort but has restricted it in a phase-wise and stage-wise manner.*
>
> ...
>
> *27. What constitutes an agony is subjective and only the Petitioner can feel the real pain of being a victim of an act as abhorrent as Rape. No words can describe her pain, no expressions can meet her anguish. Given the predicament at hand, this Court feels constrained in applying the judgments cited, and is forced to take up a case-specific evaluation. This balancing exercise is necessitated due to the 20 weeks threshold having been crossed, where the mental agony is a relevant factor for permitting termination of pregnancy. Post the 20 weeks threshold, the mental agony remains, may even become more excruciating, but the Court cannot be unmindful of the voice of the 'yet to be born'-a fully alive prospective child in the womb."*

345 Mumtaz Begum v. State of Assam & Ors., I.A.(Civil) 1032 of 2021.

346 ABC v. State of Chhattisgarh through Station House Officer and Another, 2020 SCC OnLine Chh 797.

347 S (name withheld) v. State of Rajasthan, 2019 SCC OnLine Raj 6155.

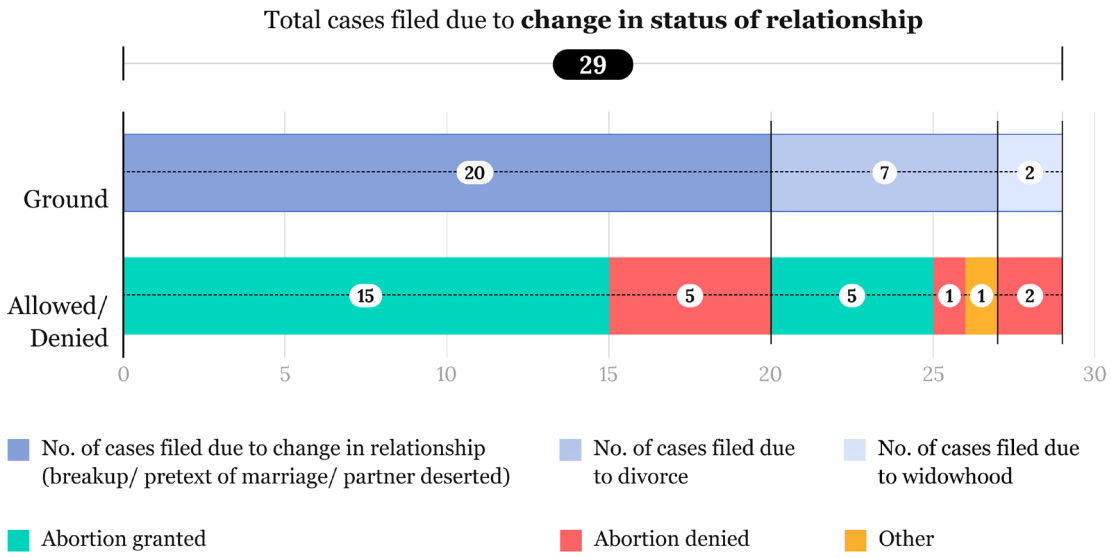
As highlighted, the application of the *parens patriae* principle has been arbitrary, and, in many cases, has failed to meet the best interests standard. Further, applying this doctrine in favour of 'prospective life' subverts the very purpose for which the doctrine is used: to protect the rights of citizens. A foetus is neither a citizen nor a human being. Using *parens patriae* jurisdiction in favour of the foetus as against the pregnant woman violates the rule of law by treating her second to an entity sans personhood.

Chapter 10

# Change in Relationship Status

Through an amendment to the MTP Rules in 2021, Rule 3B(c) provides that married women are eligible for late-term abortion in case of a change in marital status (widowhood or divorce).[348] Such a change understandably alters material circumstances in a woman's life. It impacts not only the woman's near future but also the choices and opportunities available to her in the longer term. Moreover, a change in marital status may turn an intended pregnancy into an unwanted one, given its potential impact. This is an evaluation which only the pregnant woman herself can make.

*Fig 15:* ***Abortion cases linked to change in relationship status***




DESCRIPTION - A total of 29 cases were filed before courts wherein the ground for abortion was a change in relationship in some form. 20 cases were filed either on the grounds of breakup, false pretext of marriage or partner desertion. These have been bundled together into one category. 7 cases were filed on the ground of divorce, in which 5 were allowed, 1 was denied and 1 was denied on the basis of the MB's opinion that abortion was medically not possible due to the health of the petitioner. 2 cases were filed where widowhood was argued as a ground, but both were denied.

*Note- In figure 1 the count for change in relationship status is reflected as 21. However, given that general discussion around 'change in relationship status' occurred in 8 other rulings, these have been also discussed in this section.*

348 The Medical Termination of Pregnancy Rules. (2021). Rule 3B. Women eligible for termination of pregnancy up to twenty-four weeks.— The following categories of women shall be considered eligible for termination of pregnancy under clause (b) of subsection (2) Section 3 of the Act, for a period of up to twenty-four weeks, namely:- (a) survivors of sexual assault or rape or incest; (b) minors; (c) change of marital status during the ongoing pregnancy (widowhood and divorce); ...

Data reflects that in the majority of cases involving married women, courts have liberally interpreted a change in marital status and allowed abortion. In *Sandeep Kaur v. State of Punjab* (2024),[349] the Punjab and Haryana High Court allowed abortion to a pregnant woman who was unable to initiate divorce proceedings due to the minimum waiting period.[350] She sought an abortion and requested annulment, being unwilling to return to her marital home. The court held that abortion cannot be denied merely because the finalisation of divorce was pending and that change in marital status had to be interpreted in consonance with the intention of the Act.

Prior to that, in *Mrs. B v. Union of India* (2023),[351] the Delhi High Court posited that a woman's decision to terminate her pregnancy is based on the best course of action for her life in case of a change in material circumstances. The court allowed abortion, holding that if a woman decided that she did not want to live with her husband any longer, the same should be considered as a change in her material circumstances, qualifying it as a change in marital status. Similarly, the Madhya Pradesh High Court in *Writ Petition No. 13893 of 2023*[352] allowed abortion on the ground that the pregnant woman had already filed a case of assault and dowry harassment against the husband and the relationship was irretrievable.

Earlier, in *Union of India, In re*, (2022),[353] the Kerala High Court held that divorce is not to be reduced to its literal meaning and a formal decree of separation/divorce is not required for seeking abortion. It held that "*a drastic change in the matrimonial life of a pregnant woman is equivalent to the 'change of her marital status.' The word 'divorce' cannot in any manner qualify or restrict her rights.*"

On the other hand, in *Xyz Nil. v. State Of Chhattisgarh Through The Secretary, Department Of Home Affairs (Police), New Raipur, Mantralaya, District: Raipur, Chhattisgarh,* (2023),[354] the Chhattisgarh High Court stated that allowing abortion only because the relationship between the pregnant woman and her husband had become strained, defeats the purpose of the Act. While denying abortion, the court articulated its view in moralistic undertones:

349 Sandeep Kaur v. State of Punjab, Civil Writ Petition no. 18392 of 2024.

350 The Hindu Marriage Act. (1955). Section 13B; The Special Marriage Act. (1954). Section 28.

351 Mrs. B v. Union of India, Writ Petition No. 13371 of 2023.

352 Anonymised, Writ Petition No. 13893 of 2023.

353 Union of India, In re,2022 SCC OnLine Ker 4843.

354 Xyz Nil. v. State Of Chhattisgarh Through The Secretary, Department Of Home Affairs, WPC No. 2768 of 2023.

> *3. In the instant case, since none of these grounds are made out and more particularly taking into consideration that the petitioner is a married lady and she has got conceived through her husband, the permission sought for, cannot be granted only for the sake of asking as the relationship between the two have strained."*

By downplaying the pregnant woman's assessment of her own relationship and the effect it would have on her life, the court mistakenly tied the unwantedness of pregnancy to her marital status and the circumstances around conception. Consequently, reproductive autonomy was given short shrift. The framing used by the court suggested that the 'strain' in the marital status does not qualify the metric of harm that a woman must go through to be able to use her constitutionally situated reproductive rights.

Similarly, in *R v. Union of India through Secretary Ministry of Health and Family Affairs* (2024),[355] the Supreme Court denied abortion to a widowed woman in favour of foetal viability. The court upheld the order given in the recall petition by the Delhi High Court, which limited the application of Rule 3B up to 24 weeks and denied the pregnant woman's plea that the ongoing pregnancy and delivery would cause grave injury to her mental health for lack of clinical diagnosis.

While a change in marital status makes women eligible for seeking abortion up to 24 weeks, whether abortion will be granted depends on legal and extra-legal variables such as how advanced the pregnancy is, the threat to the health of the woman, and an assessment of socio-cultural factors, as highlighted above.

Rule 3B(c) makes married women alone eligible for seeking late-term abortion in case of widowhood or divorce, excluding unmarried women from the same benefit. The provision creates an artificial distinction between married and unmarried women, making reproductive rights conditional on marriage.[356] This artificial distinction is *ultra vires* the Constitution, as marital status cannot be a rational criterion to deny abortion and related services to women. While the inconsistency in how the courts decide on the basis of a change in status of relationship existed even before the Rules were notified in 2021, Rule 3B(c) gave it a legislative nod. This inconsistency carries

355 R v. Union of India through Secretary Ministry of Health and Family Affairs, 2024 SCC OnLine Del 440.

356 The Medical Termination of Pregnancy Rules. (2021). Rule 3B- Women eligible for termination of pregnancy up to twenty-four weeks.— The following categories of women shall be considered eligible for termination of pregnancy under clause (b) of subsection (2) Section 3 of the Act, for a period of up to twenty-four weeks, namely:- (a) survivors of sexual assault or rape or incest; (b) minors; (c) change of marital status during the ongoing pregnancy (widowhood and divorce); ...

over to cases where a relationship exists outside the settled understanding of marriage.

For example, in *Siddhi Vishwanath Shelar v. State of Maharashtra* (2020)[357] the Bombay High Court allowed abortion to an unmarried woman whose relationship with her partner had ended. The court accepted her contentions that she was 'mentally not ready' to be a mother due to the stigma associated with being unwed, and her financial precarity that caused incapacity to care for a child. While allowing abortion, the court held that the scheme of the Act places the interest of the mother on a higher pedestal and that the decisional and bodily autonomy of the pregnant woman cannot be ignored because the legal threshold has passed. However, in the same year, in *Ku Asthha Pande v. State Of M.P.* (2020),[358] the Madhya Pradesh High Court made a contrary finding. While denying abortion, the court underplayed the change in the petitioner's relationship status and held:

> *10. ... The only reason given by the petitioner for termination is that the boyfriend has broken up the relationship with her. In future, there may be a possibility of re-association between them but the termination of pregnancy is an irreversible process. ...."*

The inconsistency in reasoning of the two courts was not a one-off instance. In *ABC v. State of Maharashtra* (2019),[359] the Bombay High Court allowed abortion to the pregnant woman who conceived from a relationship based on the false pretext of marriage. Focusing on the pregnant woman and the stigma and hardships she would face in the future, the court held:

> *19. ... We take the judicial notice of the fact that in India a child to an unwed mother is taken as a social stigma of a serious nature and she does not want to carry such stigma for her entire life. In our opinion, it would neither be beneficial for the petitioner nor for the fetus in her womb. In the present social milieu in India, we can visualize the future complications she may have to face in her social and married life if she would be deprived of now to exercise her reproductive choice, which has its origin in her fundamental right to life, liberty and human dignity."*

In contrast, the High Court of Madhya Pradesh, dismissing the woman's claim of sexual

357 As referred to in XYZ v. State of Maharashtra, 2021 SCC OnLine Bom 3353.

358 Ku Asthha Pande v. State Of M.P., W.P. No. 6494 of 2020.

359 ABC v. State of Maharashtra, 2019 SCC OnLine Bom 1031.

intercourse on the false pretext of marriage, denied abortion in *Prosecutrix v. State of M.P. & Ors* (2021)[360] and held:

> *This Court is of the considered opinion that since the petitioner involved herself in a consensual sex knowing fully well about the consequences of such act, and the allegations made in FIR, do not prima facie make out a case of consent obtained by misrepresentation of fact, therefore, under these circumstances, medical termination of pregnancy cannot be permitted. Accordingly, this petition fails and is hereby dismissed."*

The non-applicability of the rule to unmarried and single women was finally challenged in *X v Principal Secretary GNCT, Delhi* (2022).[361] While the Delhi High Court rejected the application, based on a literal interpretation of the provision, the Supreme Court took a purposive interpretation and allowed abortion. The petitioner in this case was an unmarried woman whose partner refused to marry her at the last moment. Relying on the doctrine of transformative constitutionalism, the court observed that it has a duty to interpret and enforce provisions of law in consonance with the Constitution and changing societal values. The court held that the distinction between married women and unmarried women for abortion violates Constitutional principles and the very purpose of the MTP Act.

The court stated that Rule 3B(c) is based on the recognition that a change in marital status of a woman changes her 'material circumstances', and such a change can happen due to reasons other than widowhood or divorce. Therefore, the rule should be read keeping the wider objective of the MTP Act in mind. The court drew a comparison between Explanation 2 of the 1971 Act with Explanation 1 of the 2021 Amendment Act and noted that "*by eliminating the word "married woman or her husband" from the scheme of the MTP Act, the legislature intended to clarify the scope of Section 3 and bring pregnancies which occur outside the institution of marriage within the protective umbrella of the law.*"

The court held that limiting the reading to married women would further the stereotype against sexual relations outside of marriage and make it more difficult for single women to get safe and legal abortions. Finally, the court held that denying access to reproductive healthcare would amount to violating women's dignity, reproductive autonomy, and the rights to equality and privacy. Recognising the unmarried woman's right to



360 Prosecutrix v. State of M.P. & Ors., WP 14658 of 2021.

361 X v. The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr., (2022) SCC OnLine SC 905.

reproductive autonomy, the Supreme Court held that the burden of an unwanted or incidental pregnancy falls squarely on the pregnant woman and affects both her mental and physical health; a woman's choice to seek abortion for preserving her health is constitutionally protected and not contingent on her marital status. Effectively, Rule 3B(c) is to be read liberally to mean change in relationship status rather than change in marital status.

This was reaffirmed in *Amandeep Kaur v. The Postgraduate Institute of Medical Education and Research* (2024),[362] wherein the High Court of Punjab and Haryana reiterated that "*there is no basis to deny unmarried women the right to medically terminate the pregnancy, when the same choice is available to other categories of women.*" The court recognised that being an unmarried mother adds to the mental agony of an unwanted pregnancy and allowed abortion for the pregnant woman whose partner had deserted her.

Despite the error of law being rectified through judicial interpretation, and unmarried women being read into Rule 3B(c), some courts continue to foist their morality on litigants by not only chastising the pregnant woman for engaging in premarital sex but also treating pregnancy as a consequence and punishment for the same.

For instance, in *X v. State of Maharashtra* (2023),[363] the Bombay High Court denied abortion to an unmarried, single minor having a 24-week pregnancy, stating that,

> *21. In the backdrop of the girl having accompanied her friend and having had physical relations with him for a couple of weeks until they were apprehended, we are of the view that the future health of the child as well its physical and mental development needs to be considered at this stage. When a live child is going to be born even today, we might as well let the child be born after 15 weeks and if the petitioner desires to give away the child to an orphanage, she shall have the liberty of doing so."*

Similarly, in *Ramsiyamol R S v. State of Kerala & Ors* (2022),[364] the Kerala High Court denied abortion based on a change in status of a live-in relationship. Without assessing the mental health and actual and reasonably foreseeable environment of the woman,

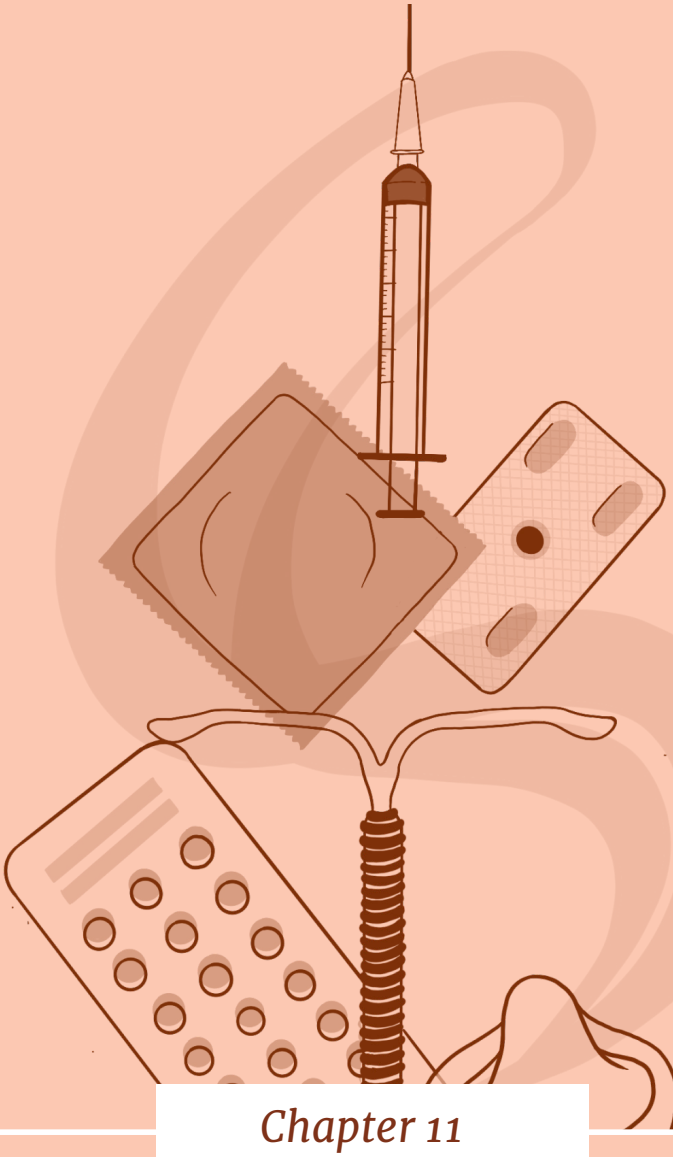
362 Amandeep Kaur v. The Postgraduate Institute of Medical Education and Research, MANU/PH/0142/2024.

363 X v. State of Maharashtra, 2023 SCC OnLine Bom 1544.

364 Ramsiyamol R S v. State of Kerala & Ors, W.P.(C) NO. 33884 OF 2022.

the court denied abortion on the basis that the legal threshold had been crossed and the pregnant woman was clinically sound and without mental health issues.

The change in status of a relationship, marital or not, can equally affect the material circumstances of a woman, informing her need to terminate a pregnancy. This could happen if the relationship ends, if the relationship started on the false pretext of marriage, due to strains, or domestic violence. It can also happen due to institutional intervention, such as in POCSO Act cases. However, a woman's rights are independent of these facts. Her reproductive rights are conditional neither on marital nor relationship status. Denying abortion on the basis of marital status violates her right to equality and creates an arbitrary hierarchy between pregnant women, treating one as a 'perfect victim' in case of widowhood or divorce, and placing others as less deserving. Such framing has serious consequences, denying dignity and equal protection of the law, and limiting access to abortion-related healthcare to unmarried women.



Chapter 11

# Failure of Contraceptive Device or Method

The MTP Act states that pregnancy caused by failure of a contraceptive device or method may be assumed to constitute a grave injury to the woman's mental health, which is a ground for abortion.[365] While it is a fair assumption that all pregnancies caused by failure of contraception may not be unwanted, the ones which are should be justifiable for abortion in and of themselves. As per Explanation 1 to Section 3(2) of the Act, a statement on failure of contraception alone should be enough to invoke an assumption favouring injury to mental health without needing to prove a risk to mental health.

However, in the only three cases in which failure of contraceptive methods was argued as a ground for abortion, only one was allowed, and two were denied. In *Aruna Sundharrao Mate v. State of Maharashtra* (2019)[366] the Bombay High Court allowed abortion by taking note of the fact that the pregnancy happened after the petitioner had undergone a sterilisation procedure under the family planning scheme and the same was causing her mental anguish. However, in contrast, in *Rubina Kasam Phansopkar v. State of Maharashtra* (2020)[367] the court denied abortion, stating that the pregnant woman was of advanced age, and her argument that she was not prepared for pregnancy as it was conceived due to failure of contraceptive methods was not valid. The court's reasoning discounted the reproductive choice made by the woman to not procreate and seemingly sided with bioessentialism, assuming every woman's ultimate wish is to reproduce. In *Guddi Ajayprakash Yadav & Anr v. State of Maharashtra & Anr* (2021),[368] decided a year later, while the failure of contraception was mentioned in the plea seeking abortion along with foetal abnormality and mental health considerations, the same court, without commenting on the said failure, allowed abortion on the ground of foetal abnormality, again putting considerations related to the foetus over those of the woman's health.

The requirement to prove injury to mental health in case of failure of contraceptive devices or methods exemplifies the medicalisation of abortion. Also, the framing of the legal provision on contraceptive failure suggests that unless a pregnant woman faces mental or physical harm, pregnancy may not qualify for the grant of abortion. Construing the provision in this manner dilutes women's bodily integrity and undermines their



365 The Medical Termination of Pregnancy (Amendment) Act. (2021). Section 3, Explanation 1.— For the purposes of clause (a), where any pregnancy occurs as a result of failure of any device or method used by any woman or her partner for the purpose of limiting the number of children or preventing pregnancy, the anguish caused by such pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

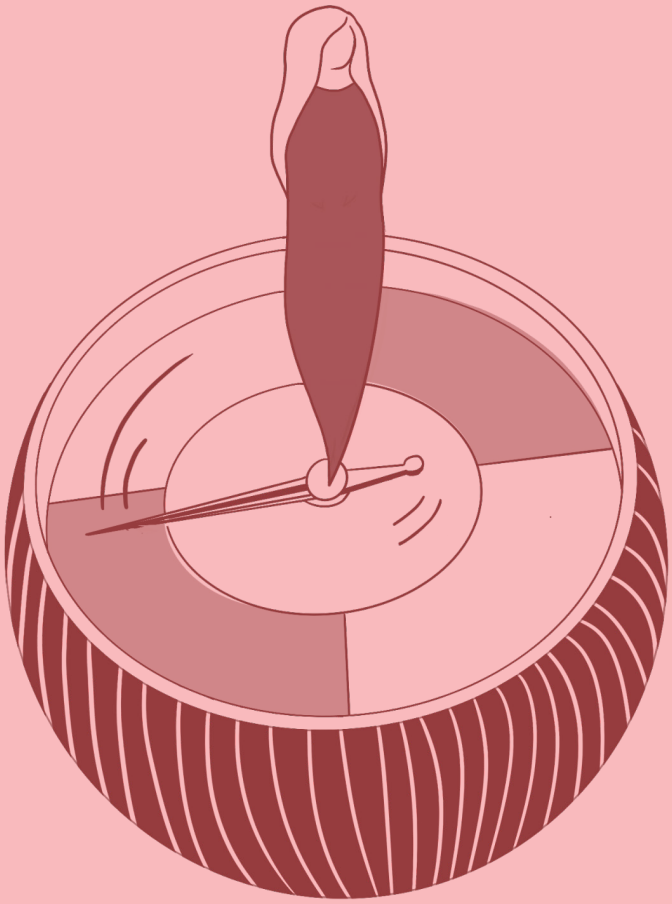
366 Aruna Sundharrao Mate v. State of Maharashtra, W.P. No. 14470 of 2019.

367 Rubina Kasam Phansopkar v. State of Maharashtra, (2020) SCC OnLine Bom 765.

368 Guddi Ajayprakash Yadav v. State of Maharashtra & Anr., W.P. (L) No. 11537 of 2021.

reproductive choices.

Commenting further on how courts adjudicate on the ground of failure of contraception is limited by the finding of only two reported judgments. However, it bears noting that contraceptive choices as part of reproductive health choices are protected under the right to privacy and bodily integrity. Making these choices conditional on proving risk to mental health, which in itself is dependent on third-party evaluation, effectively dilutes these rights.

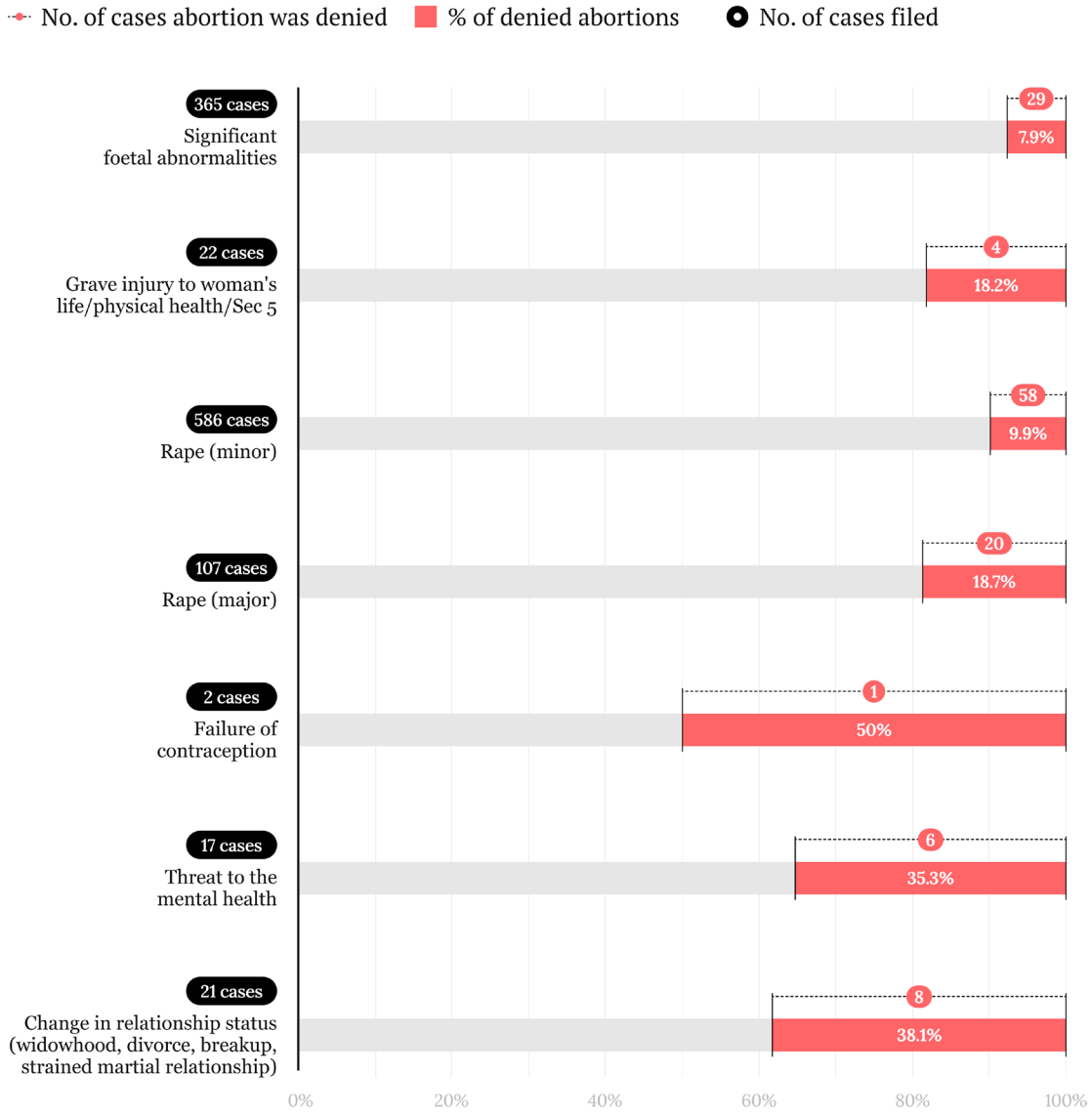


Chapter 12

# Victimhood in Court Adjudication

Data reveals that the majority of cases seeking abortion were filed either due to substantial foetal abnormality or on the grounds of rape. Data also indicates that of the cases where abortion was denied by courts, most were in relation to mental health considerations, while abortion was allowed in most cases where a significant foetal abnormality was the ground.

*Fig 16:* ***Reason to Approach the Court (Ground)***




This data is reflective of the perception that abortion in certain cases is more permissible than others, such as in cases of rape and significant foetal abnormality. Supporting abortion solely in these scenarios implies that a woman's rights are contingent on her being a 'victim'. This reframes the discourse on abortion from a rights-based issue to one where it is seen as a means to 'rescue' women—an approach that does not deem all

women as deserving.

Unmarried women/girls who engage in consensual sexual intercourse fail to evoke empathy and meet the standards of romantic paternalism.[369] In such cases, treating pregnancy as a consequence of a wrongful act on the part of the woman allows the denial of abortion as a worthy punishment. This can be seen in *XYZ v. State of Maharashtra* (2023)[370] and *X v. State of Maharashtra* (2023),[371] where the Bombay High Court denied abortion as the petitioners (minors) had engaged in consensual intercourse and accompanied their partner of their own volition.

Given that contraceptive usage in the country is abysmal[372] and reproductive coercion in forms like stealthing[373] does not find a place within the criminal laws or the MTP Act, such judgments add to the barriers that single women face while approaching the court for abortion. The denial of healthcare to a woman based on a consensual relationship has no basis in law and only furthers the moralistic control that society practices on women's sexuality.

Further, the estimation of whose abortion need is more pressing is arbitrary and a concoction of law. As every unwanted pregnancy has grave consequences and implications on the woman's rights, making suffering a benchmark to choose who is deserving of abortion services does not serve the purpose of the law and denies the rights of women. This was also discussed in the case of *A (Mother of X) v. State of Maharashtra* (2024)[374] wherein the Supreme Court observed:



369 Romantic paternalism can be defined as seeing women as powerless subjects in need of protection by the state. See more- Atrey, S. (2022). Feminist constitutionalism: Mapping a discourse in contestation. *International Journal of Constitutional Law,* 20(2), 611–641. https://doi.org/10.1093/icon/moac029; Anuj Garg v. Hotel Association of India (2008) 3 SCC 1.

370 XYZ v. State of Maharashtra, 2023 SCC OnLine Bom 1250.

371 X v. State of Maharashtra, 2023 SCC OnLine Bom 1544.

372 The National Family Health Survey 5, (2019-2021), Ministry of Health and Family Welfare, India Report. Data informs that men believe that contraception is women's business and hold view that use of contraceptives make women promiscuous. Chapter 5 on Family Planning states that Female sterilization remains the most popular modern contraceptive method in married women followed by followed by male condoms (10%) and pills (5%). Among sexually active unmarried women, male condoms are the most commonly used method (27%), followed by female sterilization (21%).

373 Stealthing is a form of contraceptive sabotage. It means intentional damaging of condom. See more- Brodsky, A. (2017). 'Rape-Adjacent': Imagining legal responses to nonconsensual condom removal. *Columbia Journal of Gender and Law*, Vol. 32(2). https://ssrn.com/abstract=2954726.

374 A (Mother of X) v. State of Maharashtra, (2024) 6 SCC 327.

> *28. The MTP Act has removed the restriction on the length of the pregnancy for termination in only two instances. Section 5 of the MTP Act prescribes that a pregnancy may be terminated, regardless of the gestational age, if the medical practitioner is of the opinion formed in good faith that the termination is immediately necessary to save the life of the pregnant person. Section 3(2-B) of the Act stipulates that no limit shall apply to the length of the pregnancy for terminating a fetus with substantial abnormalities. The legislation has made a value judgment in Section 3(2-B) of the Act, that a substantially abnormal fetus would be more injurious to the mental and physical health of a woman than any other circumstance. In this case, the circumstance against which the provision is comparable is rape of a minor. To deny the same enabling provision of the law would appear prima facie unreasonable and arbitrary. The value judgment of the legislation does not appear to be based on scientific parameters but rather on a notion that a substantially abnormal fetus will inflict the most aggravated form of injury to the pregnant person. This formed the basis for this Court to exercise its powers and allow the termination of pregnancy in its order dated 22 April 2024. The provision is arguably suspect on the ground that it unreasonably alters the autonomy of a person by classifying a substantially abnormal fetus differently than instances such as incest or rape. This issue may be examined in an appropriate proceeding should it become necessary."*

Unfortunately, the stigma and shame often enveloping abortion also find a place in the language of courts. While the right to abortion is well situated within the framework of the Constitution, in a few cases, observations made by courts have reduced it to a face-saving medical procedure, revealing a problematic paternalism instead of rights-empowering reasoning. For instance, in *Nidhi Singh v. State of Chhattisgarh* (2019)[375] the court observes:

> *12. … denying this relief to the petitioner would hound her for her entire life as it would be humiliating and embarrassing for her to give birth to a child of a rapist. The society would also not take the petitioner or her child properly and respectfully and thus the petitioner would lead a life of continuous mental anguish, which is not less than leading a miserable life and sometimes she may feel that it is better to die instead of leading life under continuous humiliation."*

375 Nidhi Singh v. State of Chhattisgarh, 2019 SCC OnLine Chh 60.

In *Munshi Singh v. State of MP* (2019),[376] the Madhya Pradesh High Court, while allowing abortion, observed:

> *... report indicates that 20 weeks have passed and carrying in womb a life, which is not acceptable to the mother, which is the result of the lust and rape committed over her, causing physical and mental agony and injury to her and she cannot lead normal life during and after pregnancy is a decision which deserves sympathetic consideration. This would constantly remind her of the agony she suffered and remind her all through her life."*

In *S v. State of Rajasthan (2019)*,[377] the court trivialised the mental agony and trauma of a rape survivor by stating: It stated:

> *17. .... Abortion is also imperative so that the victim can settle in life, and the baby does not emerge as a snag in her otherwise smooth life- termination is necessary to sever the maternal tie with the baby."*

It also observed:

> *Medical termination of pregnancy is permissible for the purpose of protecting the victim, from the trauma of being ravished, coupled with the fact that 'the baby to be born' will remain with her and continue to remind her of the offence committed. The baby, in turn, would cause and continue to cause mental agony."*

It is not difficult to imagine that pregnant women desirous of terminating unwanted pregnancies approaching courts are already aware of the concerns raised by the court. However, choosing titillating and emotive language in place of rights-based language only infantilises and revictimises them.

Another case worth mentioning is *Muskan v. State of Rajasthan* (2020)[378] where, in the case of a sex worker, the Rajasthan High Court used words and phrases like "*whorism against her wishes*", "*forced promiscuous physical relation*", "*coitus with ... the hundreds unknown*", revealing inappropriate, demeaning and moralistic language. The court assumed the *parens patriae* role for the foetus in an attempt to save it from

376 Munshi Singh v. State of MP, M.Cr.C. No.23043 of 2019, page 4.

377 S (name withheld) v. State of Rajasthan, 2019 SCC OnLine Raj 6155, para 17.

378 Muskan v. State of Rajasthan, S.B. Civil Writ Petition No. 4149 of 2020.

the shame of being born. This judgment, like others mentioned, is reflective of the 'perfect victim'[379] trope that courts play up, and the paternalistic saviour complex that allows women conditional dignity.

Additionally, the concerns with future pregnancies are dismaying. The 'future pregnancy' is not an aspect that Medical Boards are expected to opine on as a matter of course, but they do so in 1.60 per cent cases, with abortion in 5 such cases being explicitly denied due to concern for future pregnancy. Doctors appraising a woman of the overall impact of abortion on her health, including risks for future pregnancies, would be warranted in cases where the pregnant woman brings it up herself, or as a part of the doctor's duty of care. However, featuring it in the Medical Board's opinion as one of the reasons to deny abortion is unwarranted and problematic, as it is paternalistic and biologically reductive. While other side effects of the procedure are generally not given any place in the medical opinion, the loss of future reproductive capacity is unjustifiably highlighted. Courts raising it as an issue before the Medical Board and relying on it for adjudication also do not find rationale in the MTP Act.

The refusal of abortion based on such risks implies favouring the reproductive potential of a woman over reproductive harms because of a current unwanted pregnancy. This is not only dehumanising, but also violates women's rights to equality, health, life and personal liberty.

Another issue worth mentioning here is how courts treat pregnancy and childbirth. Courts in 35 cases denied abortion and ordered the child to be given up for adoption. In cases where abortion is medically not possible at all or where the procedure could end in live birth, the court's decision that the child may be handed over to State institutions for adoption is understandable. However, in cases where the court's decision requires the woman to continue pregnancy, and give birth so that the child can be given up for adoption, like in *XYZ v. State of Maharashtra* (2023),[380] and *XYZ v. State of Maharashtra* (2023)[381] are highly problematic. Such treatment trivialises childbirth and is oppressive towards women. It is reductive and furthers a very mechanical notion about childbirth wherein it does not seem to have any life-altering effects on the pregnant person.[382] Pregnancy and childbirth are both invasive processes that



379 Prasad, A. (2024). *Our response to sexual violence is governed by the myth of the perfect victim. Feminism in India*. https://feminisminindia.com/2024/08/29/our-response-to-sexual-violence-is-governed-by-the-myth-of-the-perfect-victim/

380 XYZ v. State of Maharashtra, 2023 SCC OnLine Bom 1250.

381 XYZ v. State of Maharashtra, W.P. No. 13364 of 2023.

382 Meh, C., Sharma, A., Ram, U., Fadel, S., Correa, N., Snelgrove, J. W., Shah, P., Begum, R., Shah,

compromise bodily integrity and safety[383] and should be sustained entirely based on the choice of the pregnant woman. Forcing women to deliver a child she does not want amounts to reproductive violence, even if by the dicta of the court.



M., Hana, T., Fu, S. H., Raveendran, L., Mishra, B., & Jha, P. (2022). Trends in maternal mortality in India over two decades in nationally representative surveys. BJOG : An International Journal of Obstetrics and Gynaecology, 129(4), 550–561. https://doi.org/10.1111/1471-0528.16888

383 Abalos, E., Diaz, V., Downe, S., Filippi, V., Gallos, I., Galadanci, H., Homer, C. S. E., Hofmeyr, G. J., Jung, J., Katageri, G., Kluwgant, D., Lavin, T., Morhason-Bello, I. O., Oladapo, O. T., Osoti, A., Simpson, G., Souza, J. P., Thakar, R., Thangaratinam, S., Vogel, J. P. (2024). Neglected medium-term and long-term consequences of labour and childbirth: a systematic analysis of the burden, recommended practices, and a way forward.The Lancet Global Health. Maternal Health in the Perinatal Period and Beyond. Volume 12, Issue 2, 317 - 330. ; Baguiya, A., Campbell, O., Cresswell, J., Day, L. T., Jayaratne, K., Mori, R., Moran, A. C., Mugerwa, K. Y., Oladapo, O. T., Osoti, A., Rezende-Gomes, A. C., Say, L., Souza, J. P., Tunçalp, Ö., Vogel, J. P., Zhang, J., Lumbiganon, P. (2024). A global analysis of the determinants of maternal health and transitions in maternal mortality. The Lancet Global Health, Volume 12, Issue 2, 306 - 316.

# Conclusion

This study analysed a total of 1126 judgments on abortion between 2019-2024, with the objective of examining and critically assessing judicial decision-making in this regard. It found that abortion was permitted in 85.17 per cent of cases, which appears laudatory. However, a deeper analysis highlights the many layers and complexities of the judicial process. Foremost among these is that several cases should not have been before courts in the first place, as they involved women in early stages of pregnancy. For example, as discussed in the Chapter on 'Rape', 305 survivors of rape, major and minor, were well within the gestational limits, but still had to approach courts. Courts giving relief in such instances are unexceptional. What is revealed, instead, is how the apparent necessity to approach courts has become another barrier in women's ability to access abortion services.

Another more thematic finding of the research indicates that, irrespective of the nature of the ruling, inconsistency in jurisprudence is stark. The main reasons for this are the inconsistent application of the rights framework and the often dissonant understanding of the law among various judicial benches.

Several judgments discussed in the study have clearly established the rights framework applicable to abortion. Yet, many decisions ignore this application, citing reasons such as expiry of the legal threshold, late-term pregnancy, consensual sexual activity and absence of foetal abnormality to deny abortion. This contrarian approach has often led to inconsistency in results for women in similarly situated circumstances seeking abortions. While some women get relief due to rights-based application of the law, others are denied abortion, making judicial recourse subject to uncertainty and chance.

As constitutional courts, writ courts are entrusted with the duty to protect fundamental rights, and possess the authority under Articles 226 and 32 of the Constitution to permit abortions beyond the statutory limits prescribed under the MTP Act, where such relief is necessary to uphold fundamental rights guarantees. The study found that many courts simply deny abortion on the expiry of the 24-week period, abdicating their constitutional mandate. Moreover, courts selectively pick and choose judicial precedents. Precedents that have read abortion into the constitutional guarantee of fundamental rights, and have interpreted the MTP Act in a liberal purposive manner, thus expanding its framework, are inconsistently applied by courts. Across the Supreme Court, High Courts, and even across the benches within a High Court, there has been a vast inconsistency in jurisprudence.

The interpretation of law must be in accord with fundamental rights, not opposed to them. Leaving abortion pleas to chance, dependent on the disposition of the judge or the bench, contravenes the constitutional promise of substantive equality. In their capacity as upholders of democratic values, constitutional courts are guardians of rights and responsible for enforcing the 'rule of law'.

Another aspect that is revealed in cases where abortions have been denied is the absence of any understanding of the woman's agency and autonomy. Deciding what makes a pregnancy unwanted and when it becomes unwanted is singularly the pregnant woman's decision. However, the study reveals that courts do not necessarily perceive it as such. Instead, the woman's agency is replaced with the Medical Board's opinion and courts' assessments of the ostensible metric of harm suffered by the pregnant woman.

Medical Boards tend to focus more on the health of the foetus and its quality of life rather than that of the pregnant woman. This has often led to a skewed evaluation of risk in their reports, which fail to highlight risk mitigation measures and rarely consider the reasonably foreseeable circumstances of the pregnant woman.

The study also highlights how courts and Medical Boards treat pregnancy simply as a biological function. Forcing a woman to bear a child puts all aspects of her 'person' at risk. The risk does not end with childbirth, even if the custody of the child is given to the State. The emotional toll and trauma of a compromised life can leave a lifelong impact on her person. Denying women ownership of their body and their choice to bear a child or not, especially one they cannot keep, is telling of how they are perceived as mere reproductive entities, revealing a latent misogyny. Childbirth has lifelong morbidities attached to it, and while a compromised life for a foetus is often considered by courts, similar consideration is rarely extended to women, the ones being asked to perform reproductive labour against their will.

It need hardly be stated that women have a right to life and personal liberty; the same

cannot be actualised by denying bodily autonomy, reproductive choices, privacy and the right to health. Abortion is a healthcare need and a human right. Moreover, despite the roots of criminalisation of abortion in 'chattel slavery',[384] the aspect of social control on the female body is rarely discussed by courts. As the study reveals, the hard-fought rights around reproductive justice - the right to personal bodily autonomy, the rights to have or not have children, and the right to raise children in a healthy and safe environment[385] are often ignored.

Courts must approach the issue of abortion through a gender justice and rights-based lens. However, a crucial question persists: why are women compelled to seek judicial intervention for abortion in such significant numbers? This underscores systemic deficiencies not just within the healthcare system but also the MTP Act itself.

The Act, despite its 2021 amendments, continues to centre authorisation over autonomy. It allows abortion, but only after gatekeeping the grounds, the timeline, and above all, the woman herself. The very act of approaching courts — seeking permission and not justice speaks volumes about the abortion landscape in the country. It is imperative that Indian courts cease treating abortion as an exception to be justified, and start recognising it as a right to be protected.



Finally, certain aspects related to abortion law require particular note, for which the following recommendations are made:

1. The denial by healthcare providers within statutory limits, the compulsion to move to courts, and the reference to Medical Boards within statutory limits appear to be recurring phenomena, that cause delay. All of these compound the impact on the woman. It is essential that periodic and sustained capacity-building and sensitisation of all stakeholders, including lawyers, judiciary, police, social workers and medical service providers, is undertaken to familiarise themselves with all aspects of the law.

384 Townsend H. (2023). Second Middle Passage: *How Anti-Abortion Laws Perpetuate Structures of Slavery and the Case for Reproductive Justice,* Journal of Constitutional Law. U. Pa. Vol 25(1), 187 https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1823&context=jcl ; Posey, B. M. (2023). Reproductive slavery: Historical and present-day discussions of the Black female body as a condition of confinement. *Women's Studies International Forum*, Volume 90. https://doi.org/10.1016/j.wsif.2023.102741

385 Ross L. (2007). What Is Reproductive Justice? Reproductive Justice Briefing Book: A Primer On Reproductive Justice and Social Change. https://www.protectchoice.org/downloads/Reproductive%20Justice%20Briefing%20Book.pdf ; Onwuachi-Saunders, C., Dang, Q. P., & Murray, J. (2019). Reproductive Rights, Reproductive Justice: Redefining Challenges to Create Optimal Health for All Women. *Journal of healthcare, science and the humanities*, 9(1), 19–31.

2. Procedural delays, mandating the filing of a criminal case when a pregnant woman is raped, citing the old MTP Act and its timeline, and going to lower courts for abortion adjudication, reveal that sensitisation, training and capacity-building of lawyers, police personnel and the judges is especially imperative if the goal is to enhance access to abortion services.

3. When asked to give their opinion, the MTP Rules (3A and 3B) limit the role of Medical Boards to diagnosing the presence or absence of foetal abnormality. On such occasions, Boards incorrectly invoke the condition of 'foetal malformation having substantial risk of incompatibility with life' to postulate 'foetal viability', and this is often unquestioningly reflected in court decisions unrelated to the ground of significant foetal abnormality. The language of the Rule should be changed to mandate Medical Boards to take the overall health and the reasonably foreseeable circumstances of women into account while giving their medical opinion to courts.

4. Use of identifiable information on rape survivors in judgments and the Medical Board's opinion violates Nipun Saxena & Anr v. Union of India (2019), Section 72 of the BNS, which directs the victim's identity to be protected, and the 2019 directive published by the Union Home Ministry regarding the protection of privacy of rape victims. Strict adherence to these is a must, and non-compliance by Medical Boards should be subject to penalties and strictures.

5. Use of undignified language by courts is unwarranted and often demeans not only the woman but also the institution of the judiciary. Here too, compliance and monitoring beyond simple sensitisation should be robustly undertaken. Reference may be made to the Handbook on Combating Gender Stereotypes, published by the Supreme Court of India in 2023.

6. Lastly, given that abortion is a healthcare need, and that reproductive choice is situated in autonomy, decriminalisation of abortion is of the essence. While it is self-evident that women are capable decision-makers, decriminalisation will aid in not only destigmatising abortion, but also make the process safer and quicker.

All persons, including women, have a right to the highest attainable standard of health. Especially in the context of abortion, this includes circumstances that make it conducive to living a life with dignity. Such an enabling environment can only be achieved if the State meets its obligation to assure women the liberty to make reproductive decisions.

Centre for Health Equity, Law & Policy, Indian Law Society,
Law College Road, Pune, 411004 Maharashtra, India.
https://www.c-help.org