PRATIGYA

Campaign for Gender Equality and Safe Abortion.

Assessing the Judiciary's Role in Access to Safe Abortion

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

Executive Summary

ABOUT PRATIGYA CAMPAIGN FOR GENDER EQUALITY & SAFE ABORTION

Pratigya Campaign for Gender Equality and Safe Abortion is a network of individuals and organisations working towards protecting and advancing women's rights and their access to safe abortion care in India. The campaign advocates with governments, organisations and media at the national and state levels on issues of women's empowerment and women's access to healthcare services. Foundation for Reproductive Health Services India hosts the secretariat and a dedicated eight member Campaign Advisory Group guides and offers strategic direction to the coalition and its advocacy efforts.

The Campaign focuses on four areas:

a) Extending support to the providers to ensure they continue to provide abortion services
b) Ensuring continued availability of Medical Abortion (MA) drugs in the markets and support to women using MA out of facility
c) Understanding and engaging with the legal landscape, particularly the jurisprudence in abortion related cases
d) Building strong alliances with organisations and individuals to sharpen the collective voice of the Campaign.

METHODOLOGY

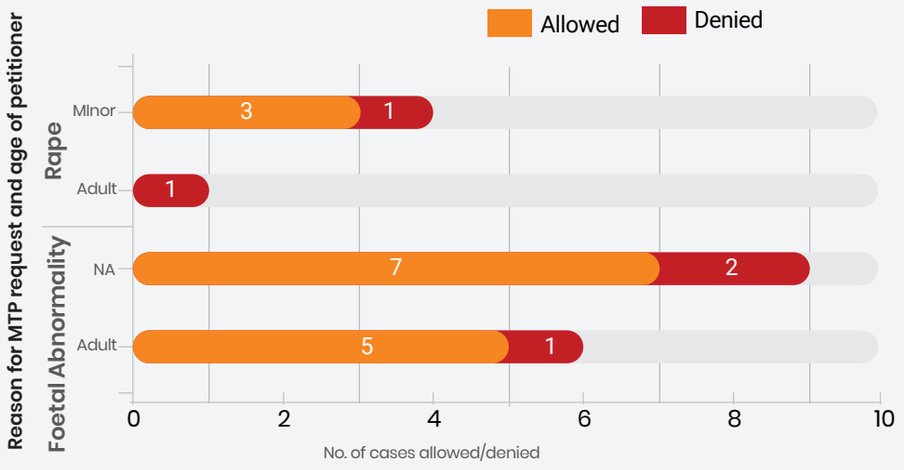
Pratigya Campaign undertook a research to analyse the role of judiciary in ensuring and protecting women's right to access safe abortion. This executive summary outlines the key findings and recommendations from the study.

This report uses website databases of the Supreme Court, High Courts, Supreme Court Cases Online and Manupatra, with key search terms/filters such as “abortion” and “medical termination of pregnancy”, to procure relevant judgements. The timeline for this search was 1 June, 2016 to 30 April, 2019. Each case is of a pregnant woman who has, either directly or through a representative, approached the judiciary to seek permission to terminate her pregnancy during this period. Various parameters were added in this analysis, such as the age of the pregnant woman, duration of pregnancy, reasons cited for permission, reasons cited in the judgement, etc. It is important to note that the analysis is limited to the stated timeline and cases where permission is sought from the court. This analysis was complimented by secondary research on the Act and its implementation. The study used only available information from sources stated above and did not attempt to reach out to litigants or their lawyers, as the intention was only to analyse the judgments. Another caveat is that the information across High Courts and the Supreme Court is inconsistent and, in several cases, not fully specified. The authors and researchers have tried their best to retrieve as much information as possible and made informed estimations with respect to certain timelines.

ANALYSIS OF RECENT MTP JUDGEMENTS

1. SUPREME COURT CASES

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



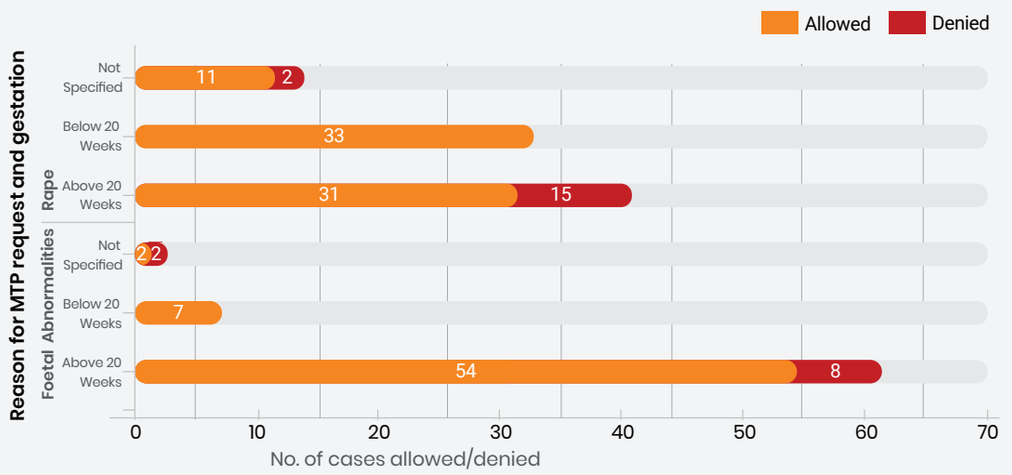
Graph No. 1: Supreme Court figures categorised by the reason for the MTP request
**Information of one case is not available. All cases are above 20 weeks. There were no cases below 20 weeks in this timeline*

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

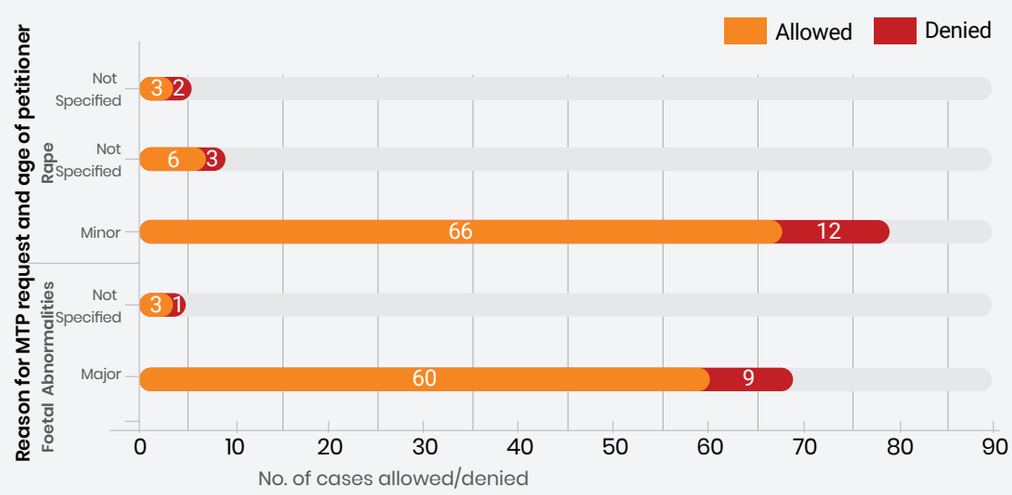
2. HIGH COURT CASES

The High Courts of India have seen 173* cases in the stated timeline. However, these cases are not evenly distributed among all High Courts. The Bombay High Court has heard the lion's share, with 88 cases. With 22 cases, Madhya Pradesh comes in as a distant second, which highlights a disproportionate number of MTP requests coming to the Bombay High Court. Graphs below offer

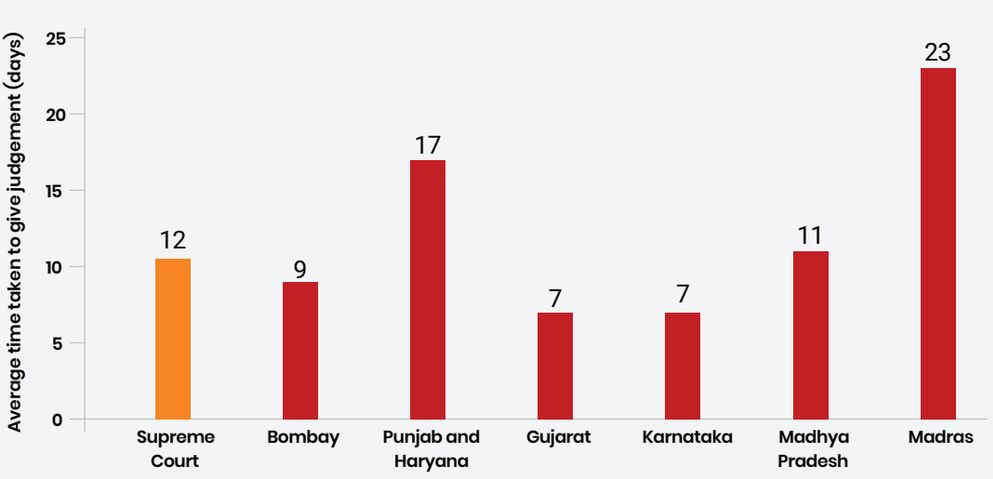
insights on the reasons forwarded by women to have their pregnancy medically terminated, the age of litigants, whether the MTP was permitted by the courts, and how many pregnancies crossed the 20 week threshold:



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



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



Graph No. 3: *Figures comparing the average time taken by the Supreme Court and select High Courts to decide MTP requests. Note that the figures are in days. Only High Courts that have adjudicated five or more cases have been analysed.*

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

KEY FINDINGS AND IMPLICATIONS

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

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

Inconsistencies within the judiciary:

In cases over 20 weeks, the MTP Act only refers to a vague "immediately necessary to save the life of the pregnant woman" standard, deviating from the mental and/or physical health standard used in cases under 20 weeks. Mental and/or physical health could also threaten life in the short or long term, which is further complicated by inconsistent deliberations on the text of the Act across High Courts. This has led to doctors, who would otherwise interpret circumstances more broadly and in the woman/girl's benefit, to apply narrow standards employed by the judiciary. Several cases allow for MTP, noting that severe mental trauma cannot be ignored and must be a major factor to consider, especially if the pregnancy is the result of rape. On the flip side, certain judgements rule that an MTP over 20 weeks is exceptional and can rarely be permitted. It is vital to remember that these thresholds were drawn when the legislation was first enacted in 1971 and found their basis in the medical technology available at the time. Therefore, applying such standards verbatim, without having definitional clarity, and with an inadequate consideration of mental health and its implications is severely problematic. This is made worse by the fact that the determination does not account for a woman's financial capacity for child-rearing, which can have a drastic impact on the

future of the woman and her family. Lastly, little attention is paid to the possible societal stigma associated with carrying a pregnancy to term for a minor, widow, or survivor of rape and the implications this stigma may have on mental health. The determination of injury to mental health and the impact of mental trauma is therefore seen to be severely lacking in the Indian judiciary.

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

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

- **Parameters across states do not work consistently:**
  It is unlikely that the state of Maharashtra has four times as many unwanted/unplanned pregnancies as the state of Madhya Pradesh, yet the data reveals that the Bombay High Court hears four times the number of cases as its Madhya Pradesh counterpart. This is a worrying observation and further corroborates the inconsistency with which such cases are addressed across India. Without a rationalised framework across the country, women seeking MTP are forced to have their fates sealed by the prevailing standards of the state they reside in.

- **Selective use of 'reproductive rights':**
  Reproductive rights find mention in various judgements where women do not want an MTP, but the same rights do not find frequent mention when the decision of the woman is to medically terminate the pregnancy. There is, therefore, a selective application of these

rights favouring women seeking to bear and raise children, rather than otherwise. If the courts have identified women's rights over their bodies then it needs to encompass all consequences of decision making by women and not selectively value certain decisions over others. Such an interpretation defeats the purpose of valuing choice in the first place.

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

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

- **In cases with feotal abnormalities, attention to the pregnant woman's caring abilities have been ignored:** Nearly half the cases heard by the High Courts involved foetal abnormalities, seven of which were below the 20 week threshold and therefore should not have ended up in courts at all. The Supreme Court heard 15 such cases, of which it rejected three. Among the total of 88 cases (Supreme Court

and all High Courts), 32 cases involved foetuses whose gestation had exceeded 24 weeks. This observation bolsters the longstanding argument for an increase in the 20 week threshold, since most abnormalities are undetectable before 20 weeks. Furthermore, most cases turned on the viability of the foetus, whereas little or no attention was paid to the reasonable and foreseeable future of the pregnant woman to be able to take care of a child born with special needs.

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

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

RECOMMENDATIONS

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

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

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

- **Table and Pass the MTP Amendment:**

  Table the MTP Amendment Bill, 2014 in the Houses of Parliament for deliberation and pass the amendments listed: a) Liberalise access to MTP by expanding the definition of RMPs to include non-doctors who have undergone specified training to perform an MTP; b) Recognise MTP as a right of the woman, by allowing it on-demand in the first trimester and put mental trauma, physical trauma, and the threat to life on the same footing; c) Expanding the threshold in cases of foetal abnormalities – this way the courts would not have to intervene in a number of cases; d) Revise the 20 week threshold to 24-26 weeks for any other cases. The MTP Amendment Bill proposes several other changes, which will increase access to safe abortion. Additionally, the report proposes adding a provision to allow abortion for pregnancies arising out of rape at any stage, considering the serious injury to mental health such pregnancies can cause.

- **Harmonise the framework with other Acts:**

  Harmonise the Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994, the Protection of Children from Sexual Offences Act, 2012, the Drugs and Cosmetics Act, 1940 and the MTP Act.

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

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

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

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