



## ENSURING REPRODUCTIVE RIGHTS

REFORM TO ADDRESS  
WOMEN'S AND GIRLS' NEED FOR  
ABORTION AFTER 20 WEEKS IN INDIA

## MISSION AND VISION

**The Center for Reproductive Rights** uses the law to advance reproductive freedom as a fundamental human right that all governments are legally obligated to protect, respect, and fulfill.

Reproductive freedom lies at the heart of the promise of human dignity, selfdetermination, and equality embodied in both the U.S. Constitution and the Universal Declaration of Human Rights. The Center works toward the time when that promise is enshrined in law in the United States and throughout the world. We envision a world where every woman is free to decide whether and when to have children; where every woman has access to the best reproductive healthcare available; where every woman can exercise her choices without coercion or discrimination. More simply put, we envision a world where every woman participates with full dignity as an equal member of society.

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### Center for Reproductive Rights

199 Water Street, 22nd Floor  
New York, NY 10038  
United States  
Tel +1 917 637 3600  
Fax +1 917 637 3666

[publications@reprorights.org](mailto:publications@reprorights.org)

[ReproductiveRights.org](http://ReproductiveRights.org)

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## Glossary

**Committee against Torture (CAT):** United Nations body charged with monitoring the implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by its State parties.

**Convention on the Elimination of Discrimination Against Women:** Multilateral treaty adopted by the United Nations General Assembly defining what constitutes discrimination against women and setting up an agenda for national action to end such discrimination.

**Committee on the Elimination of All Forms of Discrimination against Women (CEDAW):** United Nations body charged with interpreting and monitoring states parties' implementation of the Convention on the Elimination of all Forms of Discrimination Against Women.

**Convention on the Rights of the Child:** Human rights treaty which sets out the civil, political, economic, social, health, and cultural rights of children.

**European Court of Human Rights (ECHR):** International court established by the European Convention on Human Rights charged with hearing applications alleging that a contracting state has breached one or more of the human rights provisions concerning civil and political rights set out in the Convention.

**International Covenant on Civil and Political Rights (ICCPR):** Multilateral treaty adopted by the United Nations General Assembly recognizing the inherent dignity of the human person and all equal and inalienable civil and political rights.

**Medical Termination of Pregnancy:** The terms “medical termination of pregnancy” (MTP) and “abortion” are both used in this briefing paper. Courts have used the term MTP to include terminations at advanced stages of pregnancy.

**Medical Termination of Pregnancy Act of 1971 (MTP Act):** Law enacted by the Indian Parliament with the intention of providing legal clarity for the termination of certain pregnancies by registered medical practitioners.

**Minor:** For the purposes of this paper, a minor is a human who has not yet attained the age of majority, which legally demarcates childhood from adulthood. Under the Indian Majority Act, the age of majority is 18 years except in special cases.

**Son Preference:** An attitude founded on the belief that girls are of lesser value than boys and reinforced through social norms and laws that perpetuate gender stereotypes, which shapes the desire to give birth to a boy rather than a girl.

**Therapeutic abortion:** An abortion induced following a diagnosis of medical necessity; such abortions are carried out in order to avoid the risk of substantial physical, mental, or emotional harm to the pregnant woman.

**Universal Declaration of Human Rights (UDHR):** Document adopted by the United Nations General Assembly consisting of 30 articles affirming an individual's rights.

# I. INTRODUCTION

In May 2017, the Supreme Court of India denied a medical termination of pregnancy (MTP)<sup>1</sup> to Z., a 35-year old woman from Patna, Bihar living with HIV who became pregnant as a result of rape.<sup>2</sup> Z. was homeless and discovered that she was 17 weeks pregnant and HIV positive when she was admitted into a government shelter. Although Indian law permits MTP until 20 weeks on several grounds, including rape and risks to the pregnant woman's health, Z.'s request for an abortion was denied by a government hospital which improperly demanded spousal and parental consent, despite the fact that the law requires neither for adult women.<sup>3</sup> The hospital's refusal led Z. to file for permission from the High Court of Judicature at Patna, which denied her permission on reasoning that the Supreme Court on appeal stated was "completely erroneous."<sup>4</sup> Although the Supreme Court recognized that Z.'s rights had been violated as the result of improper requirements imposed on her, she was ultimately denied an abortion because she was nearly 26 weeks pregnant by the time she was able to file the appeal.<sup>5</sup> In a decision granting Z. compensation for the emotional suffering she had been forced to endure, Justice Dipak Misra expressed:

*[T]he victim in a state of anguish may even think of surrendering to death or live with a traumatic experience which can be compared to have a life that has been fragmented at the cellular level. It is because the duty cast on the authorities under the Medical Termination of Pregnancy Act, 1971 . . . is not dutifully performed, and the failure has ultimately given rise to a catastrophe; a prolonged torment.<sup>6</sup>*

Z.'s case is one of over 30 petitions submitted to the Indian Supreme Court and high courts since 2009 by women and girls seeking judicial authorization to obtain an MTP. Most of these cases center on terminations requested after the 20-week gestational limit for rape or fetal impairment grounds as prescribed by the Medical Termination of Pregnancy Act of 1971 (MTP Act). The vast majority of these cases – over 25 – have been decided between 2015 and 2017.

While outcomes in individual cases have varied, these rulings have brought groundbreaking recognition of the grave physical and mental health harms and violations of rights – including the right to reproductive autonomy – caused by the denial of MTPs after 20 weeks. However, India has yet to reform its laws to address this issue. Instead, the courts have utilized a case-by-case review whereby women are required to approach a court

to have their individual situation reviewed by a government-established medical board. This has resulted in an extra-legal third-party authorization requirement that disempowers women and girls and leads to unnecessary delays, denials, and inconsistencies in the application of the law, as well as a chilling effect on access to MTPs even at earlier stages of pregnancy.

This briefing paper examines various Supreme Court and high court decisions in post-20 week cases filed since 2015 and analyzes the current understanding and status of the law from a human rights perspective. Additionally, the report provides comparative legal perspectives, and recommends legal reforms that recognize women and girls as the appropriate decision-makers over their own bodies.



## II. CURRENT LEGISLATIVE FRAMEWORK ON MTP

The MTP Act was adopted nearly five decades ago with the aim of “provid[ing] for the termination of certain pregnancies by registered medical practitioners.”<sup>7</sup> The law does not frame abortion from a women’s rights perspective, but instead focuses on establishing where registered medical providers are exempt from penalties under the Indian Penal Code (IPC) with regard to causing miscarriage and fetal death.<sup>8</sup>

Under the MTP Act, a registered medical provider is authorized to provide an abortion to a woman whose pregnancy does not exceed 12 weeks if the provider has formed a “good faith opinion” that the continuation of pregnancy would involve a risk to the woman’s life or mental or physical health, or if there is a substantial risk that the child would be born with “physical or mental abnormalities as to be seriously handicapped.”<sup>9</sup> When the woman’s pregnancy exceeds 12 weeks and is less than 20 weeks, at least two providers are needed to form this opinion.<sup>10</sup> When the pregnancy exceeds 20 weeks, Section 5 authorizes an abortion only when the provider has formed a “good faith” opinion that an abortion is “immediately necessary” to save the life of the pregnant woman.<sup>11</sup>

There is no judicial authorization requirement in the MTP Act. Rather, the law establishes that “. . . a registered medical practitioner shall not be guilty of any offense . . . if any pregnancy is terminated by him in accordance with the provisions of this Act.”<sup>12</sup> The law thus exempts the provider from damages if he or she has provided an abortion based on a “good faith” belief that it falls within the purview of the law. Despite this, providers continue to fear legal penalties under the MTP Act and often require women to seek judicial authorization to terminate their pregnancies beyond 20 weeks.<sup>13</sup> These fears are compounded by providers’ concerns of investigation and harassment for performing MTP under other laws.<sup>14</sup>



## Draft Amendments Proposed by the Government

In October 2014, the Ministry of Health and Family Welfare (MoHFW) proposed amendments to the MTP Act.<sup>15</sup> These proposed amendments sought to reduce procedural barriers for abortion services and to extend gestational limits for women and girls who were beyond 20 weeks of pregnancy. They also aimed to increase the gestational limit for abortion from 20 to 24 weeks where there is a risk to the life of the pregnant woman or of grave injury to her physical or mental health, and to maintain an exception throughout pregnancy for life-threatening cases.<sup>16</sup> In addition, the proposed amendments would allow abortion until 24 weeks for “serious fetal abnormalities” and remove the gestational limit where the fetus suffers from “substantial abnormalities.”<sup>17</sup> Furthermore, the amendments would provide for abortion to be carried out at the request of a pregnant woman until 12 weeks, and thereafter would only require the opinion of only one provider rather than two.<sup>18</sup> These amendments also sought to expand the base of health care providers authorized to perform abortions by including mid-level and non-allopathic healthcare providers as those eligible to provide abortion services.<sup>19</sup>

The proposed amendments have been stalled for over three years, in part due to opposition by some medical associations on broadening the provider base for MTP.<sup>20</sup> In June 2017, the draft amendments were returned to the MoHFW by the Prime Minister’s Office.<sup>21</sup> This action followed investigations into the death of a woman in Maharashtra from an unsafe abortion performed by an unregistered provider, which uncovered evidence of sex selective abortions being performed in the same facility.<sup>22</sup> As a result, rather than her death serving as a call to action to urgently address barriers in access to safe providers, it led to a halt on law reform efforts.





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# SHEETAL'S STORY

## **SHEETAL, A 28-YEAR-OLD WOMAN FROM MUMBAI, WAS NEARING THE END OF HER FIFTH MONTH OF PREGNANCY WHEN A FETAL ANOMALY WAS DETECTED.**

She explained in an interview, “The doctor didn’t tell us anything. Just asked us to do another sonography and after a month, I had doubts, I decided to consult a private doctor.”<sup>1</sup> Within a week, Sheetal learned that her fetus had Arnold Chiari syndrome, a condition which prevents the normal development of the brain and spine. Her doctor explained that the fetus’s chance of survival was unlikely as its brain had failed to develop. Because Sheetal’s pregnancy was past 20 weeks, she was told she needed a court order before she could receive an abortion.

Sheetal was 27 weeks pregnant when she was finally able to petition the Supreme Court to allow her to end her pregnancy. The Supreme Court ordered that Sheetal be examined by a medical board of seven doctors to decide whether the pregnancy posed a threat to her life or that of her fetus. The medical board focused its report on the likelihood of fetal survival, and was unable to predict how long the baby would survive after birth, if it were to survive at all.

However, even with information showing that the fetus’ chances of survival were negligible, the doctors still advised against an MTP. The Court, relying on the Medical Board’s opinions, completely dismissed the possibility of mental anguish this would cause Sheetal, and denied her an abortion.

After being denied her MTP, Sheetal explained, “I have not slept, neither has he,” pointing to her husband. She planned on writing to the Chief Justice of India, and further explained, “It is the hardest decision I had to take. But what option do I have?” Her doctor explained that the system is failing poor patients in India, such as Sheetal: “Poor patients like her are forced to visit the court for abortion because usually diagnosis in their cases gets delayed.”<sup>2</sup>

## III. WHY WOMEN AND GIRLS NEED ACCESS TO MTP AFTER 20 WEEKS

Abortions later in pregnancy are extremely rare. Although recent data is lacking, a 1996 study in rural Maharashtra has found that only 3% of MTPs took place after 20 weeks.<sup>23</sup> However, for each woman or girl who seeks such an abortion, the denial of safe and legal abortion carries serious and foreseeable risks to her physical and mental health by forcing the continuation of pregnancy or leading her to resort to a clandestine or unsafe abortion. Women and girls need access to MTPs after 20 weeks for several reasons, including where there have been procedural barriers causing delays in accessing services and in circumstances where pregnancy or pregnancy-related risks were only recognized after the 20-week mark.

### Delays in Accessing Safe Abortions Caused by Legal and Practical Barriers

Legal and practical barriers are a serious impediment to women's and girls' ability to access safe abortion services without delays. In spite of being legal, approximately 50 percent of abortions in India are estimated to be unsafe,<sup>24</sup> and unsafe abortion is estimated to account for nine to 20 percent of all maternal deaths.<sup>25</sup> This percentage is similar to the incidence in countries where abortion is completely illegal.<sup>26</sup> As illustrated in Z.'s case, legal and practical barriers can prevent women and girls from obtaining an abortion before 20 weeks even if they had attempted to access those services earlier in their pregnancies.

#### Practical Barriers

A significant barrier women and girls face in accessing safe, timely and legal abortion services is the inadequate numbers of registered health care providers trained to provide abortion services and a dearth of facilities that are properly equipped to perform the procedure. These shortages remain throughout India, despite policy guarantees requiring abortion services be available in all government health facilities.<sup>27</sup> Women in poor, rural areas are disproportionately affected by these barriers.<sup>28</sup> Women and girls

also face delays in accessing abortion early in pregnancy due to lack of awareness about their legal rights, confusion about the law, and societal stigma surrounding abortion.<sup>29</sup> In some areas, such as Bihar, up to 75 percent of women are unaware that abortion is legal.<sup>30</sup>

## Legal Issues and Barriers

A review of case law as well as medical studies show that misconceptions concerning the law also contribute to delays in accessing abortions, including improper requests by providers for spousal consent despite it not being required under the law, and courts' imposition of requirements that rape survivors prove their allegations before being permitted to access abortion.<sup>31</sup> Delays are also caused by providers' misconceptions that abortions before 20 weeks also require judicial authorization.<sup>32</sup>

Further, studies have repeatedly documented that providers' fear of prosecution under other laws, such as the Pre-Conception and Pre-Natal Diagnostic Techniques Act (PCPNDT Act) and the Protection of Children from Sexual Offenses Act of 2012, lead to denials of abortion or requests for judicial authorization.<sup>33</sup> The PCPNDT Act of 1994, which prohibits sex determination but intentionally does not regulate abortion on any grounds, has been improperly implemented to target MTP providers in government crackdowns on sex-selection.<sup>34</sup> The chilling effect caused by the PCPNDT Act particularly leads to the denial of abortion requested during the second trimester, which is when many severe and fatal fetal impairments are detected, despite studies showing that only a small proportion of these abortions are sex-selective.<sup>35</sup>

Providers also fear backlash or investigation arising from a provision in the Protection of Children from Sexual Offenses Act of 2012 that calls for mandatory reporting by providers of sexual assault of a minor. The law recognized any sexual activity involving a minor as rape, without exception, leading providers to interpret it as requiring mandatory reporting of any pregnant adolescent patient, even where she is seeking an abortion.<sup>36</sup> Providers also report a heightened fear of providing abortions to unmarried adolescent girls, due in part to concerns of backlash from girls' families.<sup>37</sup>

## Recognition of the Need for MTP Only After 20 Weeks

Women and girls also seek abortions after 20 weeks when circumstances shift significantly or where there are delays in recognizing pregnancy.<sup>38</sup> Certain health complications for the pregnant woman may only come to

light after 20 weeks, as has been the case for many of the petitioners in the post-20 week cases in India. Frequently, in the case of rape victims, the pregnancy itself may not even be discovered until well into the second or third trimesters. For women and girls in this situation, the forced continuation of pregnancy is linked to foreseeable and preventable physical and mental health harm.<sup>39</sup>

### Pregnancy Resulting from Rape

Due to stigma and personal risks surrounding reporting, many victims of rape only come forward to request an abortion, either directly or through their parents, once their pregnancy is identified through medical testing or made public.<sup>40</sup> A review of the post-20 week cases shows that many petitioners, particularly minors, do not even realize they are pregnant until beyond the 20 week mark because of a lack of awareness of the possibility of becoming pregnant from rape or the symptoms of pregnancy.<sup>41</sup> Furthermore, the case law shows that delays in detecting pregnancy may be compounded where state authorities fail to properly respond to, and investigate, charges of rape; fail to offer pregnancy testing kits to rape victims as required under national guidelines; or question petitioners' rape allegations.<sup>42</sup>

Several petitioners in cases seeking approval for abortion after 20 weeks have emphasized the psychological trauma and suffering, including suicidal thoughts, caused by being forced to continue their pregnancy.<sup>43</sup> Indian courts have recognized the severe physical and mental health risks that pregnancy can cause women and girls.<sup>44</sup> These risks are compounded for younger girls for whom pregnancy is twice as likely to result in maternal mortality.<sup>45</sup>

### Health Risks Caused by Fetal Impairments Diagnoses

Fetal impairments often cannot be detected until after the 20-week mark, since the fetus is not sufficiently developed for many conditions to be diagnosed,<sup>46</sup> even in the most developed healthcare settings. The Royal College of Obstetricians and Gynecologists in the United Kingdom has clarified that “the majority [of fetal impairments] will only be identified on an anomaly scan at 18-20 weeks.”<sup>47</sup> Restricting legal abortions to 20 weeks' gestation may deny women the time they need to make a well-informed decision. For example, Mrs. X, one of the two petitioners in the currently pending Supreme Court case entitled *Mrs. X and Mrs. Y v. Union of India*, was forced to terminate a pregnancy without a confirmed diagnosis of a fetal impairment at 19 weeks because the proper testing could be done only after the legal limit.<sup>48</sup> The Royal College of Obstetricians and Gynecologists has emphasized that “the emotional

impact of a diagnosis of abnormality is highly significant and causes considerable distress” and that women facing a diagnosis of fetal impairment “must not feel pressured to make a quick decision, but once a decision has been made, the procedure should be organized with minimal delay.”<sup>49</sup>

Often, there is no quantifiable way to assess the potential severity or treatability of the fetal impairment, meaning that decisions concerning whether to continue a pregnancy cannot be made solely on a fetus-based analysis.<sup>50</sup> A report cited by the British Medical Association found that in the United Kingdom, parents faced with this decision tended to focus on their perception of their own ability to cope, rather than on any “weighing up [of] the various options in any mathematical sense.”<sup>51</sup> Given the central role that parents’ self-perception of their abilities plays in such situations, the decision to terminate a pregnancy must be made not by a third party but by the pregnant woman, as she stands to be the most affected by the outcome of the pregnancy.<sup>52</sup> Assessing the mental health impact of pregnant women in these situations necessarily entails considering what the Committee on Social, Economic and Cultural Rights has recognized as the “social determinants of health,” such as nutrition, housing, and economic and gender equality, given how much all these elements will influence women’s mental health when faced with a diagnosis of this nature.

## Other Life and Health Risks

Terminations of pregnancy after 20 weeks can be medically indicated and are recognized as an essential health service for women. In an amicus brief filed in a U.S. court case that successfully challenged a law seeking to ban abortion after 20 weeks, the American College of Obstetricians and Gynecologists emphasized that

There are many circumstances in which it will not become clear to the doctor or patient before 20 weeks that continued pregnancy threatens the patient’s health, or that the doctor cannot manage the risks of a pre-existing condition within parameters acceptable to the woman. Patients seeking abortions at, or after, 20 weeks often do so because they are experiencing a potentially life-threatening medical condition that is either caused or worsened by the pregnancy, or because they need to obtain treatment for a condition such as cancer but cannot do so while pregnant.<sup>53</sup>



# R'S STORY

## **R, WAS ABOUT 14 YEARS OLD WHEN SHE WAS RAPED. HER RAPIST TOOK VIDEOS OF HER AND USED THEM TO COERCE R INTO STAYING QUIET FOR FOUR MONTHS AS HE CONTINUED TO SEXUALLY ABUSE HER.**

On February 29, 2016, he abducted her while she was staying at a friend's house. Her parents finally found her in March 2016 and attempted to report her rapist to local authorities. R faced significant barriers in filing charges of rape due to alleged police corruption by the accused rapist, leading to R being pressured to sign statements that she had gone willingly with the rapist. Her father filed a petition to have a magistrate court order the local health officer conduct the medico-legal exam. Although the exam was ordered, the medical officer at a government hospital failed to conduct a pregnancy test as required under government guidelines.

R was 21 weeks pregnant by the time her pregnancy was finally detected. She was refused an abortion by her doctors, due to their fear of prosecution.

R filed a petition to the High Court of Punjab and Haryana for authorization to terminate her pregnancy just one week over the MTP gestational limit. The High Court recognized that the government hospital's failure to conduct a pregnancy test during her initial exam led to her crossing the 20-week limit before requesting the MTP. Although her case came up for hearing just days after she filed the petition, the High Court waited two weeks before passing an order stating that R was at liberty to appear for medical examination by a medical board.

The two-week delay from when the petition was filed until the order was issued meant that R was examined by a medical board at 22 weeks. R underwent two days of exams by a board of doctors at Seth Sukhlal Karnani Memorial Government Medical College, Nalhar. Without explaining why, the board stated that termination would be harmful to R's life, and that an MTP could not be provided due to the gestational limit established in the law.

The High Court clarified that the Supreme Court had allowed MTP in a similar case after 20 weeks and ordered another medical board at the Postgraduate Institute of Medical Education and Research (PGIMER) to examine R. This board was asked to assess if there was a serious risk to her life from MTP and the potential psychological effect on R if the pregnancy was not terminated. R was once again subjected to physical exams, ultrasounds, and radiological exams by a panel of unfamiliar doctors. The medical board recognized that R would likely face harm from the social and emotional consequences of continuation of pregnancy, but again refused to perform the abortion due to the legal limit.

R was now 23 weeks pregnant. She was devastated by the news. She told her lawyer that she was contemplating suicide if she were forced to continue the pregnancy. Her lawyer reported this to the court, which responded by ordering the medical board at PGIMER to reassess R's case to assess the possibility of MTP given her mental state. Again, the medical board recognized the risks, but reiterated that they could not provide R with the abortion because she was 25 weeks pregnant and over the legal limit.

The High Court criticized the unwillingness of doctors to provide the MTP due to “fear of prosecution,” but ultimately stated that it could not allow the MTP given the lack of favorable medical board opinion. Although it issued a final decision dismissing the case, the High Court provided permission for a medical board at All India Institute of Medical Science Hospital in Delhi review R's case to reassess the “possibility of termination of pregnancy” in the best interest of R.<sup>3</sup> As the High Court had dismissed the case, there are no further court documents reflecting whether AIIMS approved the MTP.

## IV. UNDERSTANDING RECENT CASES ON MTP AFTER 20 WEEKS

Although the MTP Act does not require judicial authorization for abortion, the Supreme Court and high courts across the country have been undertaking a case-by-case analysis to approve or deny abortions for women and girls beyond 20 weeks of pregnancy. There have been at least 25 such cases since 2015. These cases typically involved pregnant women who received a diagnosis of fetal impairment or pregnant adolescents who were victims of rape. The decisions have been mixed – even in cases with petitioners seeking terminations in seemingly similar circumstances – leading to confusion about the law and the need for reform. This section discusses key aspects of the judiciary’s decisions in recent post-20-week cases in order to provide greater clarity on the current status of the law, positive findings from the courts, and areas of concern.

Indian courts have permitted MTP after 20 weeks gestation in multiple instances. In the face of individual petitions, courts have repeatedly recognized the need to ensure that women and girls are not forced to continue pregnancies that may jeopardize their physical or mental health. Furthermore, the Supreme Court has, at times, issued compensation to petitioners after they have been denied an abortion, recognizing that the government’s negligence and inaction led to the forced continuation of pregnancy and has caused “incalculable harm and irreversible injury giving rise to emotional trauma.”<sup>54</sup>

However, there have also been contradictory judgments, leading to a lack of clarity as to when a woman or girl is legally permitted to obtain an MTP beyond 20 weeks. Courts have not established a clear framework to determine when an MTP is legal beyond 20 weeks, how to eliminate the need for judicial and medical board authorization, and how to address the underlying issue of providers’ unwillingness to authorize legal abortions. This is despite the fact that there have been multiple petitions filed to courts nationally requesting comprehensive law and policy reform, including one that has been pending before the Supreme Court since 2008.<sup>55</sup> These petitions include requests to the Court to consider: introducing language that recognizes the link between fetal impairment and a women’s physical and mental health; extending the health exception to match the life exception, which does not have a limit; and establishing an appeals process for women who have been improperly denied abortions, among various other claims involving reform of the law.<sup>56</sup>

The following section will discuss key aspects of the judiciary's decisions in the post-20 week cases over the last two years in order to provide greater clarity on where the law currently stands, including positive findings of the court and areas of concern.

## Establishment of Third Party Authorization for MTP After 20 Weeks

Under the MTP Act, women and girls are not required to seek judicial authorization or to obtain prior approval by a court-appointed medical board. Yet, in determining whether to grant an abortion, the decisions in the post-20 week cases have effectively created a procedural system in which each woman or girl seeking an abortion is required to file a legal petition and must then have her case referred to a medical board, consisting of a panel of health care providers that typically does not include the woman's own physician.<sup>57</sup> Courts have generally deferred to these boards' medical findings when approving or denying an abortion.<sup>58</sup>

Courts have yet to issue any order to establish that women can directly approach medical boards without first filing a petition – which would position medical boards as appeals mechanisms for women and girls who have been denied MTPs by their own providers – or alternatively to clarify that medical board approval is required in all cases beyond 20 weeks. The requirement of an examination by medical boards has led to women and girls facing repeated invasive medical scrutiny by panels of doctors as large as 11, and on several occasions created further delays that ultimately have led to the denial of abortions.<sup>59</sup>

In July 2017, the Supreme Court urged the Government of India to create permanent committees to take cases of girls and women who have been denied post-20 week abortions.<sup>60</sup> In August 2017, the MoHFW issued a circular that directed each state to establish permanent medical boards that would be tasked with responding to requests by the judiciary to prepare medical reports in cases seeking authorization for abortion after 20 weeks.<sup>61</sup> The circular did not mention whether medical boards could receive appeals without judicial involvement. In October 2017, the Supreme Court agreed to hear a plea for putting in place a permanent mechanism for the expedient termination of pregnancies beyond 20 weeks in cases involving rape survivors and fetal abnormalities, and has issued a notice to the central government seeking its response on this matter.<sup>62</sup>

## Recognition that Denial of MTP Beyond 20 Weeks May Violate Fundamental Rights

In hearing women's and girls' petitions for MTPs beyond 20 weeks, courts have repeatedly emphasized the rights of pregnant women as decision makers over their own bodies. In a case from July 2017 in which the Supreme Court granted a petition for an abortion to a woman who was more than 20 weeks pregnant, the Court stated,

[T]he right of a woman to have reproductive choice is an integral part of her personal liberty, as envisaged under Article 21 of the Constitution. She has a sacrosanct right to have her bodily integrity.<sup>63</sup>

The Punjab and Haryana High Court also held that denying MTP and counseling services to pregnant survivors of rape could constitute violations of the right to freedom from inhuman and degrading treatment.<sup>64</sup> Several other High Court and Supreme Court decisions in post-20 week cases have also recognized that compelling a woman or girl to continue a pregnancy against her will violates her fundamental rights to bodily integrity, privacy, and dignity, as well other basic rights, such as the right to work and the right to receive an education.<sup>65</sup>

These post-20 week decisions that recognize fundamental rights violations echo a growing body of judgments on issues ranging from maternal health, coerced and unsafe sterilization, child marriage and marital rape, and MTP that interpret Article 21 to include women's and girls' rights to survive pregnancy and childbirth and decision-making over their own bodies.<sup>66</sup>

## Decisions Allowing MTP Beyond 20 Weeks Reflect Concerns about Mental Health Harm from Forced Continuation of Pregnancy

The courts' willingness to consider a broader interpretation of the MTP Act in more than 25 petitions for MTPs after 20 weeks gestation on fetal impairment and rape grounds since 2015 – and authorize at least 15 MTPs – reflects a growing understanding of the harm that can come from the forced continuation of pregnancy.<sup>67</sup> Courts and court-appointed medical boards have repeatedly raised concerns about the health risks linked to the forced continuation of pregnancies from rape and involving fetal impairment.<sup>68</sup> Health risks, specifically mental suffering, have been a central consideration in almost every ruling permitting abortion beyond 20 weeks.<sup>69</sup>

In cases concerning rape victims' requests for MTP beyond 20 weeks, courts have echoed the MTP Act's existing recognition of the "grave anguish" that may be caused by pregnancies resulting from rape.<sup>70</sup> For example, mental health suffering was an integral finding of the Supreme Court in its decision to allow a 13-year-old girl to terminate her pregnancy at 32 weeks in September 2017.<sup>71</sup> However, other cases have recognized the trauma, psychological harm, and social ostracism that can result from forcing a rape survivor to carry an unwanted pregnancy to term, but still denied petitioners MTPs.<sup>72</sup> As a result, it is unclear if this finding is sufficient on its own as a legal ground for abortion beyond 20 weeks in rape cases, and how this is balanced with other factors considered by medical boards and the courts.<sup>73</sup>

Decisions allowing MTP after 20 weeks in cases of fetal impairment have also emphasized the impact on a petitioner's mental health should she be forced to carry the pregnancy to term. For instance, in February 2017, the Supreme Court allowed a petitioner to terminate her pregnancy after being diagnosed with a severe fetal impairment, stating, "From the point of view of the petitioner the report has observed risk to the mother since the continuation of pregnancy can endanger her physical and mental health."<sup>74</sup> In another Supreme Court case from August 2017, the Court allowed a petitioner to terminate her pregnancy with a fatal fetal impairment at 25 weeks, explaining, "the report of the Medical Board, which we have produced, in entirety, clearly reveals that the mother shall suffer mental injury if the pregnancy is continued and there will be multiple problems if the child is born alive."<sup>75</sup> The Court also cited a medical board's findings, which emphasized the knowledge that her fetus was unlikely to survive had caused her "immense mental agony."<sup>76</sup> Decisions allowing termination at even more advanced states, such as at 32 weeks gestation, have similarly expressed significant concern for the petitioner's mental health if forced to continue the pregnancy.<sup>77</sup>

Court decisions recognize that denial of abortions in these cases lead to violations of the right to life, and have allowed abortions on mental health grounds after 20 weeks.<sup>78</sup> However, courts have yet to issue a decision that clarifies how the MTP Act must be modified or interpreted to allow terminations in these cases. For example, in approving an abortion for an 18-year-old rape victim who was 24 weeks pregnant,<sup>79</sup> the High Court of Gujarat stated that since her "mental status" would be affected, she "falls under the criteria set out in the MTP Act."<sup>80</sup> However, the High Court did not state whether Section 3 or 5 was the basis for the decision. Various other Supreme Court and High Court decisions have also suggested a broad reading of the MTP Act to allow abortions beyond 20 weeks, particularly in cases of mental and physical health risks.<sup>81</sup>

# Y'S STORY

**Y,<sup>4</sup> A 10-YEAR-OLD GIRL LIVING IN A CHANDIGARH, BECAME PREGNANT AFTER SHE WAS RAPED. Y HAD BEEN ABUSED FOR OVER SEVEN MONTHS BY TWO OF HER MATERNAL UNCLES. HER PREGNANCY WAS NOT DISCOVERED UNTIL SHE COMPLAINED TO HER PARENTS ABOUT HER STOMACH HURTING, AT WHICH POINT SHE WAS ALREADY SEVERAL MONTHS PREGNANT.**

Y's parents took her to a government hospital – the same one where she had undergone surgery in 2013 to repair a hole in her heart. They were told that Y was over 20 weeks pregnant and that although the pregnancy and delivery could pose a grave risk to her physical health due to her age and history of cardiac surgery, an MTP would be illegal under the law.

Y's family submitted a plea to the district court of Chandigarh seeking permission for an MTP. The court ordered Y to be examined by a panel of court-appointed doctors from the Government Medical College and Hospital, who found her to be at least 28 weeks pregnant. On July 18, the district court held that she must carry her pregnancy to term due to the finding of the medical board that the MTP would be too risky.

Y's family appealed to the Supreme Court. On July 28, 2017, as Y reached her 32<sup>nd</sup> week of pregnancy, the Supreme Court again denied her plea on the same basis. Y had been subjected to yet another examination by a new panel of doctors. She gave birth in August by a caesarean section. Y's plight has left her family subject to intense media scrutiny, which has continued for months as journalists continue to cover the investigation into the rape and adoption of her child. Fearful of the trauma Y might experience, Y's parents sought to shield her from what was happening to her by telling her she needed surgery to remove a large stone from her stomach. Y's baby was taken by child welfare authorities for adoption, on the wishes of Y's parents. A follow up petition was filed to seek compensation for Y, and the Supreme Court ordered Y to receive Rs 1 lakh (approximately \$1,500) in immediate compensation and Rs 9 lakh (approximately \$13,500) in the form of a fixed trust.<sup>5</sup>



## V. WHAT DECISIONS REVEAL ABOUT NECESSARY LAW REFORM

Decisions issued in post-20 week cases clearly recognize that the denial of MTP can lead to mental and physical suffering and constitute a fundamental rights violation. However, even within this body of decisions, it is clear that the establishment of a dual system of third party authorizations by the judiciary and medical boards undermines the promise of reproductive autonomy and bodily integrity. An analysis of the Supreme Court and High Court decisions in these cases confirms that this requirement has forced women and girls, already in traumatic situations, to seek legal counsel, risk public scrutiny, submit to multiple physical exams by panels of unfamiliar doctors, and ultimately experience significant delays and even denials at the end of the process. It is also critical to note that both high courts and the Supreme Court have recognized the need for reform of the law, although the Supreme Court has stated that it cannot amend the MTP Act as this is in the legislature's purview.

The following section takes a closer look at why reform is necessary in order to ensure access to safe abortion and to destigmatize reproductive health services for women and girls in India.

### Need to Eliminate Third-Party Authorization for MTP Beyond 20 Weeks

The practice of requiring women and girls to petition a court to be authorized for an MTP after 20 weeks is not required under the MTP Act and only creates additional barriers and procedural delays in access to timely and safe abortions. One petitioner, for instance, learned that her fetus had severe impairments following exams spanning from May 25-30, 2017.<sup>82</sup> Weeks passed as she navigated the legal system,<sup>83</sup> and it was not until July 3 that the Court reached an ultimate decision to allow the woman to terminate her pregnancy. These procedural delays exist in a significant number of post-20-week abortion pleas.<sup>84</sup>

Although the Supreme Court did urge the government of India to set up permanent medical boards,<sup>85</sup> there has been no Supreme Court order or government circular clearly affirming that approval by a woman's own provider is sufficient or that judicial authorization is not required for MTPs beyond 20 weeks. Not only do these authorization requirements by courts and court-appointed medical boards cause severe procedural delays for women and girls who need urgent care, but they can also lead to repeated invasive examinations that compound trauma and humiliation. For example, in 2016, a rape survivor of approximately 14 years of age was subjected to three rounds of examination by medical boards, in addition to an initial post-rape examination, as the court refined directions to the medical boards to ensure that they meaningfully considered the mental health risks of forcing the continuation of pregnancy and that they did not refuse to perform the MTP just because of the legal limit in the law.<sup>86</sup> The court denied the MTP because it did not have any medical opinion indicating that it should be performed, but directed yet another medical board in Delhi to consider the case and "do the needful as soon as possible and inform the Court about the actions taken...in the best interest of the petitioner-victim."<sup>87</sup>

## Need to Clarify that Registered Providers Will Not Be Prosecuted for Performing Post-20 Week Abortions on Health Grounds in Good Faith

While it is commendable that the judiciary is attempting to resolve the cases of women and girls who have been denied MTPs, the courts have failed to lay down a clear set of criteria under which providers can perform abortions beyond 20 weeks without fear of prosecution. Providers' fear of being prosecuted has led to a chilling effect on the provision of abortion both before and after 20 weeks without prior judicial authorization.<sup>88</sup> Courts have recognized that providers are reluctant to provide MTPs to girls even if it would spare them trauma because they are afraid of being prosecuted, and, in at least one case, called for the issuance of procedural guidelines.<sup>89</sup> In 2016, a Punjab and Haryana High Court decision directed the government of India to clearly state that doctors will not be "unnecessarily prosecuted if they act in accordance with the rules in good faith to save the life of a victim of rape or to prevent grave injury to her physical and mental health."<sup>90</sup> Courts have also emphasized the responsibility of providers to recognize the urgency of such cases and to "conduct themselves with accentuated sensitivity so that the rights of a woman are not hindered."<sup>91</sup>

Fears of investigations and harassment for providing MTP under other laws, such as those on prenatal sex determination and child sexual offences, also must be addressed. There is also a need to clarify that an individual provider's opinion should be sufficient to grant an abortion and that women and girls seeking an abortion do not require a medical board's approval for abortions under the MTP Act. The delays, stress, and expense associated with medical board approval means it is not a practical primary requirement for making time-sensitive decisions concerning MTP. This compounds existing barriers that courts have recognized are faced by girls from households living below the poverty line.

## Need for Clear Guidance on Relevant Factors to Consider in Providing Medical Opinions on MTP

Court orders and judgments in these cases rarely outline the relevant criteria under which an MTP can be legally provided beyond 20 weeks, or clearly articulate which MTP Act provision allows a termination to be performed at this stage. Recent high court judgments have included positive language highlighting that a woman's health should be prioritized in the decision to terminate a pregnancy.<sup>92</sup> However, in several cases, medical boards have returned opinions that neglect entirely to discuss the health risks of continuing a pregnancy for a woman or girl, or improperly prioritize the fetus' survival over a woman or girl's well-being.<sup>93</sup>

Courts particularly need to ensure consistency and clarity in issuing directions to medical boards to avoid arbitrary violations of women's and girls' reproductive rights. Vague standards used by medical boards have led to further delays when courts have to follow up on medical reports that are unclear or incomplete.<sup>98</sup> These delays sometimes take weeks, and lead to petitioners being denied abortions.<sup>99</sup> It has also led to inconsistencies in the way similarly seeming cases are decided and ambiguity in understanding what are relevant factors to consider in giving an opinion on MTP. For example, in some cases, the Court and medical board consider and emphasize the mental agony of a rape victim or a pregnant woman who received a diagnosis of fetal impairment if she is forced to continue an unwanted pregnancy. Yet in other instances, risks of continuation of pregnancy are largely dismissed, and the main focus is on the fetus rather than the pregnant woman. The two sets of cases discussed below demonstrate irreconcilable outcomes in seemingly similar circumstances.

## Need to Clarify that Women's and Girls' Rights Must Take Priority Over Interests in Fetal Survival

Judicial decisions on MTP beyond 20 weeks often appear to turn on two major factors – whether the court or medical board considers the mental distress caused to women and girls from a forced continuation of pregnancy, and whether concerns about survival of the fetus, if born, are prioritized over women's and girls' well-being and rights.

Notably, in January 2017, the Supreme Court of India held in a post-20 week case that women's and girls' rights must be the focus of decisions on MTP. The decision stated, “This Court, as at present being advised, would not enter into the medico-legal aspect of the identity of the fetus but consider it appropriate to decide the matter from the standpoint of the right of the petitioner to preserve her life in view of the foreseeable danger to it, in case she allows the current pregnancy to run its full course.”<sup>94</sup> This framing echoes the principles articulated in a 2016 High Court of Bombay decision, which states that “According to international human rights law, a person is vested with human rights only at birth; an unborn foetus is not an entity with human rights.”<sup>95</sup>

However, in prior and subsequent decisions, courts have echoed concerns by medical boards regarding the potential of a live birth, despite the fact that in countries where abortion is legal beyond 20 weeks, the process itself ensures that a live birth does not occur.<sup>96</sup> In India, there is not training on this protocol, nor is there training on a surgical procedure known as dilatation and evacuation (D&E) which is also used for later gestational terminations.<sup>97</sup> This jurisprudence reveals a need to engage with the judiciary to disseminate the Supreme Court and High Court of Bombay decisions establishing the constitutional obligation to prioritize women's rights over interests in fetal survival, as well as the importance of capacity building and stronger protocols for health care providers on abortion procedures.

## Different Outcomes for Two Minor-Aged Rape Victims in Similar Stages of Pregnancy

In hearing two factually similar cases involving young victims of rape seeking MTP at 30-32 weeks of pregnancy within two months of each other, the Supreme Court considered significantly distinct factors. In July 2017, the Supreme Court refused to authorize the termination of pregnancy for a ten-year-old rape victim because, according to a medical board, it would have been unsafe to perform a MTP at 30-32 weeks.<sup>100</sup> Neither the Court nor the medical findings cited in the decision discussed risks to the child's mental health.<sup>101</sup> The Court's specific instructions to the medical board were to affirm whether the health of the child concerned, and also that of the fetus, would be adversely affected, if the pregnancy was brought to term.<sup>102</sup> In denying the MTP, the Court cited the medical report, explaining that the fetus is "doing well," and that "[C]ontinuation of pregnancy is less hazardous for the girl child and fetus than termination of pregnancy at this stage."<sup>103</sup> Neither the Court nor the medical board discussed any possibility of mental trauma to the ten-year old girl from being forced to give birth or the mental harm that has been caused by her rape.

Two months later, the Court allowed a 13-year-old to terminate her pregnancy at 32 weeks with authorization from a medical board. The Court stated, "Considering the age of the petitioner, the trauma she has suffered because of the sexual abuse and the agony she is going through at present and above all the report of the Medical Board . . . we think it appropriate that termination of pregnancy should be allowed."<sup>104</sup> Further, the Court wrote, "[I]t has also been opined that termination of pregnancy at this stage or delivery at term will have equal risks to the mother."<sup>105</sup> It is also critical to note that the Court's instructions in this case to the medical board were to "submit a report about the condition and advisability of permitting a medical termination of pregnancy..."<sup>106</sup> Thus, in the second case, the Court appears to be giving broader instructions to the medical board, and there is no mention of the condition of the fetus for the examination.

## Different Outcomes in Two Pleas on the Ground of Fetal Impairment

Divergent decisions on another set of similarly situated cases illustrates the need for clarity in assessing under what circumstances a woman may terminate her pregnancy in cases of fetal impairment. In one 2017 case, the Supreme Court denied a petitioner's request to terminate her pregnancy when she was beyond 27 weeks, dismissing the severe mental harm that carrying an unwanted pregnancy to term would have on her.<sup>107</sup> The Court based its decision on the advice of the medical board, which advised

against the abortion because the fetus might be “born alive” and survive for a variable amount of time.<sup>108</sup> The claimant’s mental health appears to have been absent from the discussion on whether to allow the MTP, and emphasis was placed on the fetus over the woman.<sup>109</sup>

In a similar case decided by the Supreme Court that same year, the Court granted the petitioner a medical termination of pregnancy when she was 25 weeks pregnant, relying on a medical board’s report to explain that the petitioner was at risk of “severe mental injury” if the pregnancy continued after being diagnosed with a severe fetal abnormality.<sup>110</sup> Both the Court and the medical board cited, among other factors, mental health suffering to the petitioner should she be forced to continue her pregnancy.

## Need to Clarify That Terminations After 20 Weeks Can Be Safely Provided

Although termination of pregnancy has been recognized as safe at all gestational stages when performed according to established medical standards, several rulings from Indian courts have denied MTPs on the premise that an abortion past 20 weeks would pose medical risks.<sup>111</sup> However, the World Health Organization (WHO) has stated that induced abortion is a “very safe medical procedure” when performed in accordance with medical standards.<sup>112</sup> The Royal College of Obstetricians and Gynecologists in the United Kingdom has stated that, “Abortion is a safe procedure for which major complications and mortality are rare at all gestations.”<sup>113</sup> There is a growing body of clinical research suggesting that terminations after 20 weeks are as safe, and may even be safer than, delivery at term if performed by a trained provider.<sup>114</sup> Commenting on the Indian context, Dr. Rishma Dhillon Pai, president of the Federation of Obstetrics and Gynaecological Societies of India, has noted that currently in India, “There is greater focus on the time frame than what needs to be done in the best interest of the mother and the baby. You can’t say that abortion is safe at 19-and-a-half weeks, but unsafe at 20-and-a-half weeks.”<sup>115</sup>

# MEERA'S STORY

**MEERA, A 22-YEAR OLD WOMAN FROM MAHARASHTRA WAS PAST 20 WEEKS PREGNANT WHEN SHE LEARNED HER FETUS HAD ANENCEPHALY, A FATAL AND UNTREATABLE CONDITION THAT LEAVES FETAL SKULL BONES UNFORMED, CAUSES AND OTHER SERIOUS BRAIN DEFECTS.**

Meera faced risks to her life from the complications of delivery in a full term pregnancy with anencephaly, and also due to complications from polyhydramnios, which is an excess of fluid in the amniotic sac.

Meera petitioned the Supreme Court for authorization to terminate her pregnancy, as she was past the 20-week mark. The Court ordered Meera to be examined by a panel of seven doctors. When the report came back, she was reported to be 24 weeks pregnant. The medical board concluded that the fetus would not be able to survive outside of the uterus. The Court largely focused on the severe harm that would be caused to Meera if she were forced to continue her pregnancy, and explained, “Importantly, it is reported that the continuation of pregnancy can gravely endanger the physical and mental health of the petitioner...and the risks of her termination of pregnancy is within acceptable limits with institutional back up.”

The Court allowed Meera to terminate her pregnancy, explaining that it would not enter into the “medico-legal aspect of the identity of the fetus but consider it appropriate to decide the matter from the standpoint of the right of the petitioner ... to preserve her life in view of the foreseeable danger to it...” The Court emphasized the need to preserve the right to reproductive autonomy, bodily integrity, and Meera’s physical and mental well-being.<sup>6</sup>



## VI. INDIA'S HUMAN RIGHTS OBLIGATIONS TO REFORM LAWS AND POLICIES ON MTP

All women and girls are entitled to autonomy over their reproductive health. International human rights treaties signed and ratified by India support the recognition of women's and girls' reproductive rights including the right to safe and legal abortion.<sup>116</sup> Under human rights law and in accordance with Article 51(c) of the Constitution of India, which requires the government of India to respect international law, all branches of government are obligated to respect, protect, and fulfill reproductive rights.<sup>117</sup> Indian courts have themselves referenced international human rights treaties in judgments on reproductive rights, including in cases centering on post-20 week MTPs.<sup>118</sup>

Restrictive readings of the MTP Act by providers and courts, and the government's failure to reform the law, contributes to significant anguish among women and girls in need of abortion.<sup>119</sup> Arbitrary gestational limits, ambiguity in procedural frameworks, stigma resulting from criminal law and other restrictions, and reliance on medical boards over women's and girls' own decisions have led to forced continuations of pregnancy. In addition, the judiciary's establishment of third-party authorizations has led to unnecessary delays and denials. Human rights law establishes several legal obligations that are violated under India's current legal framework on abortion.

### Obligation to Ensure Access to Safe and Legal Abortion, Including to Prevent Health Risks

Several United Nations (UN) bodies have urged India to provide women: access to quality and safe abortion services; access to legal abortion in practice; and the "guarantee that the views of pregnant teenagers are always heard and respected in abortion decisions."<sup>120</sup> Human rights law requires state parties to ensure that abortion is accessible wherever it is legal,<sup>121</sup> including by ensuring adequate numbers of skilled providers and facilities.<sup>122</sup> States parties must also guarantee that women and girls are not denied access to legal abortions due to restrictive interpretation

of laws,<sup>123</sup> imposition by providers of extra-legal requirements<sup>124</sup> such as spousal consent, or discrimination against vulnerable subgroups such as rape victims or adolescents.<sup>125</sup>

## Modify and Broadly Interpret Abortion Laws to Prevent Suffering

Under human rights laws, governments have an obligation to modify and broadly interpret abortion laws to ensure that women and girls are not denied safe and legal abortions.<sup>126</sup> See box, *U.N. Human Rights Bodies: Governments Must Prevent Women and Girls from Suffering Physical Health Risks and Mental Anguish from Denial of Abortion*, p. 34.

UN bodies have stated that restrictive abortion laws violate a range of human rights, including the rights to health, life, privacy, freedom from gender discrimination and gender stereotyping, and freedom from ill-treatment.<sup>127</sup> Human rights law requires that states modify restrictive abortion laws and interpret legal grounds for abortion expansively, including health exceptions.<sup>128</sup> When women and girls are denied abortions due to restrictive laws or interpretations, this constitutes a violation of the state's obligations to prevent and prohibit forced pregnancy.<sup>129</sup> The obligation to ensure reproductive rights is heightened for vulnerable subgroups of women, including adolescent girls, survivors of violence, and rural or low income women.<sup>130</sup>

## Eliminate Arbitrary Time Limits

In its General Recommendation 24, the Committee on the Elimination of Discrimination against Women (CEDAW) establishes that states parties must ensure women's right to access reproductive health services and refrain from imposing barriers for women in pursuit of their health goals.<sup>131</sup> The WHO has recognized gestational limits that are not medically indicated as a barrier to abortion access,<sup>132</sup> and therefore a human rights concern. UN bodies have repeatedly held governments accountable for failing to modify or clarify abortion laws where it has led to the denial of an abortion, including in several cases where women or girls have requested an abortion beyond 20 weeks.<sup>133</sup> Human rights scholars have emphasized that absolute gestational age cut offs can lead to arbitrary denials of rights, due in part to the fact that gestational age typically cannot be precisely calculated as well as rush women's decision-making.<sup>134</sup>

## Prioritize Women’s Rights Over Protections for Prenatal Life

International human rights standards maintain that human rights begin at birth. While states may have a legitimate interest in protecting prenatal life, such interests cannot be prioritized over the legal rights granted to women and girls under human rights law. The Universal Declaration of Human Rights states that “[a]ll human beings are born free and equal in dignity and rights.”<sup>135</sup> The document’s history of negotiations suggests that the word “born” was used specifically for the purpose of excluding a prenatal application of the rights protected in the Declaration.<sup>136</sup> The history of negotiations of the right to life provision of the International Covenant on Civil and Political Rights as well as the definition of child under the Convention on the Rights of the Child also make clear that human rights begin at birth.<sup>137</sup>

## Ensure a Legal and Procedural Framework that Respects Women’s Reproductive Decisions

Women are deprived of dignity and autonomy when they are restricted from decision-making in their sexual and reproductive health.<sup>138</sup> UN experts have called for laws to recognize “the superior ability of women to make a judgment call regarding their reasons for not being able to continue the pregnancy.”<sup>139</sup> The rights to health, freedom from torture and ill treatment, and privacy require governments to take appropriate measures to ensure that women have the necessary information and ability to make crucial decisions about their reproductive lives. States parties must “adopt legal and policy measures to ... liberalize restrictive abortion laws, guarantee women and girls access to safe abortion services... [and] respect women’s right to make autonomous decisions about their sexual and reproductive health.”<sup>140</sup> The Human Rights Committee has found that the failure to act in conformity with a woman’s decision to undergo a legal abortion is a violation of her right to privacy, including when the judiciary interferes with such a decision.<sup>141</sup>

To prevent “arbitrary interferences” in women’s reproductive decision-making, and resulting violations of their right to privacy, international human rights law requires clear legal and procedural frameworks for abortion, including guidelines to determine whether legal conditions for abortion are met and mechanisms to challenge physicians’ refusal to perform the procedure.<sup>142</sup> Such frameworks must allow for “rapid decision-making, with a view to limiting to the extent possible risks to the health of the pregnant

mother, [and ensure] that her opinion be taken into account, that the decision be well-founded and that there is a right to appeal.”<sup>143</sup> In cases on abortion for health risks from fetal impairment, the European Court of Human Rights has stated that “it is not [the court’s] function to question the doctors’ clinical judgment as regards the seriousness of the applicant’s condition” and has found that states with fetal impairment exceptions have an obligation to set in place “an adequate legal and procedural framework to guarantee that relevant, full and reliable information on the foetus’ health is available to pregnant women.”<sup>144</sup>

## Eliminate Third Party Authorizations, Including by Courts and Medical Boards

Third party authorizations violate women’s equality and constitute a form of discrimination against women; creating a barrier in accessing reproductive health services.<sup>145</sup> Further, the CEDAW Committee, for instance, has urged states to repeal requirements of third-party authorizations, including those by spouses, parents, health authorities, and judges.<sup>146</sup> The CEDAW Committee and the UN Special Rapporteur on the Right to Health have expressed concern over requirements of multiple medical authorizations for abortion services, such as permission from panels of doctors.<sup>147</sup> And the Committee against Torture has found that requirements that women obtain judicial authorization before accessing an abortion may constitute an “insurmountable obstacle” to accessing abortion, and that when denial of such judicial authorization occurs for victims of rape, it may constitute torture or ill-treatment.<sup>148</sup>

The European Court of Human Rights has specifically rejected judicial authorization for abortion in cases of health risks arising from fetal impairment, stating,

The Court does not consider that the constitutional courts are the appropriate forum for the primary determination as to whether a woman qualifies for an abortion which is lawfully available in a State. In particular, this process would amount to requiring the constitutional courts to set down on a case-by-case basis the legal criteria by which the relevant risk to a woman’s life would be measured and, further, to resolve through evidence, largely of a medical nature, whether a woman had established that qualifying risk.<sup>149</sup>

## UN Human Rights Bodies: Governments Must Prevent Women and Girls from Suffering Physical Health Risks and Mental Anguish from Denial of Abortion

For women and girls whose pregnancies involve health risks arising from fetal impairments or pregnancy as a result of rape, access to abortion may be the only way to avoid a lifetime of suffering. The Human Rights Committee has repeatedly found that governments must ensure that their laws and policies do not force women and girls to continue pregnancies in cases of fatal fetal impairment, including the provision of appropriate and expansive interpretations of exceptions related to life and health. The failure to do so violates many rights, including the rights to privacy, equality, and freedom from cruel, inhuman, and degrading treatment.

**K.L. v. Peru.** In 2001, 17-year-old K.L. was denied permission to end her pregnancy despite receiving a diagnosis of anencephaly, a fatal fetal impairment. K.L. was anguished by the thought of continuing her pregnancy only to watch her baby die soon after birth. Although Peru's law permitted abortion to preserve a pregnant woman's life or health, hospital officials interpreted the law restrictively and compelled K.L. to carry her pregnancy to term; she was then forced to breastfeed her baby for four days until the baby died.<sup>153</sup> The Human Rights Committee ruled on K.L.'s case in 2005, finding that K.L.'s resulting depression and emotional distress were foreseeable consequences of the state's restrictive interpretation of the life and health exception in the law.<sup>154</sup> Its decision recognized that the government's failure to ensure K.L.'s access to an abortion constituted cruel, inhuman, and degrading treatment. It also noted that her status as a minor made her more vulnerable to human rights violations.<sup>155</sup>

**L.M.R. v. Argentina.** L.M.R., a 20-year-old woman in Argentina with intellectual disabilities, sought to terminate a pregnancy resulting from rape as is permissible under the law. Nevertheless, a lower court prohibited L.M.R. from terminating her pregnancy.<sup>156</sup> Although the Supreme Court of Justice subsequently overturned the case, the public hospital maintained its refusal to perform the abortion, claiming that the now 20-week pregnancy was too advanced.<sup>157</sup> These judicial delays and

denials forced L.M.R. to resort to an illegal abortion.<sup>158</sup> In 2011, the Human Rights Committee held that the state's failure to ensure L.M.R.'s access to a legal abortion constituted ill treatment because it amounted to the forced continuation of pregnancy and caused her physical pain and mental suffering.<sup>159</sup> It also found that Argentina had violated L.M.R.'s right to privacy when it interfered with her decision to terminate her pregnancy, which had been made in consultation with her physician.

**Amanda Mellet v. Ireland and Siobhán Whelan v. Ireland.** Amanda Mellet, an Irish woman, was 21 weeks pregnant when she was informed of a fatal fetal impairment. She decided not to continue with the pregnancy; however, because Irish law outlaws abortion except when the life of the pregnant woman is at risk, she was prohibited from accessing abortion services in Ireland<sup>160</sup> and was forced to travel abroad. In 2016, the Human Rights Committee ruled that by legally preventing a woman with a diagnosis of fetal impairment from accessing an abortion, Ireland had caused “a condition of intense physical and mental suffering” and violated Amanda’s rights to privacy, equality before the law, and freedom from cruel, inhuman, and degrading treatment.<sup>161</sup> The Human Rights Committee echoed this decision in the 2017 case of Siobhán Whelan, who was 20 weeks pregnant when she was informed of a fatal fetal impairment and denied an abortion in Ireland. The decision held that the state’s legal restriction “caused her mental anguish and constituted an intrusive interference in her decision as to how best to cope with her pregnancy.”<sup>162</sup>

## Eliminate Barriers Arising from the Criminalization of Abortion

The criminalization of abortion is recognized as a form of “gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment and also violate women’s rights to health, dignity, autonomy, and equality.”<sup>150</sup> The Committee on the Rights of the Child has called state parties to decriminalize abortion in all circumstances.<sup>151</sup> Moreover, UN human rights experts have recognized the stigma and chilling effect that criminalization on health care providers, even where exceptions exist, particularly in the “absence of transparent and clearly defined procedures to determine whether the legal conditions for a therapeutic abortion are met.”<sup>152</sup>

# B'S STORY

**IN FEBRUARY 2016, B, AN 18-YEAR-OLD GIRL LIVING IN GUJARAT, PETITIONED THE STATE HIGH COURT AT 24 WEEKS FOR A TERMINATION OF PREGNANCY THAT HAD RESULTED FROM RAPE. SCARED OF THE STIGMA AND OSTRACIZATION EXPERIENCED BY VICTIMS OF RAPE AND WOMEN WHO BECOME PREGNANT OUTSIDE OF MARRIAGE, SHE ATTEMPTED SUICIDE BY CONSUMING ACID.**

B survived, but required surgery to treat the harm to her esophagus, which was so damaged that she could not swallow any solid food. However, her doctors told her that they could not perform the surgery because she was pregnant and that MTP was prohibited beyond 20 weeks under the law.

In response to B's petition, the High Court appointed a medical board to assess her stage of pregnancy and her physical and mental condition. Further, the Court asked the medical board to determine whether there would be a substantial risk to B's life were she to give birth, and whether, if born, "the child would suffer from such physical or mental abnormalities as to be seriously handicapped."

B was subjected to an examination by six court-appointed doctors who ultimately recognized that "continuation of pregnancy will adversely affect her mental status." While the board expressed concern about possible risks of termination at this gestational stage, they prioritized preventing harm to her mental health and stated that termination of pregnancy could be carried out if "permitted by the Court[']s order."

The High Court recognized that B's "poor health" and the "poverty stricken condition" of her family led to delays in her family and her approaching the court, triggering "statutory constraints," but explained that her best interests must also be considered especially given her young age. Recognizing how the trauma of rape had impacted her physical and mental health, the High Court granted B an MTP.<sup>7</sup>

## VII. COMPARATIVE PERSPECTIVE: INDIA'S LAWS DENY WOMEN'S AND GIRLS' RIGHTS THAT ARE PROTECTED WORLDWIDE

Although India was one of the first countries to adopt legislation allowing abortion, the government's failure to implement and amend the law, compounded by the judiciary's refusal to clarify that women and girls can access an MTP on health grounds without judicial authorization, means that meaningful access to these services are not guaranteed to women and girls in India. India's failure to allow abortion where women and girls experience health risks beyond 20 weeks of pregnancy, including in cases of rape and fetal impairment, has left the nation out of step with countries across South Asia, Europe, Africa, Latin America, and other Commonwealth states, thus denying Indian women the same rights that millions of other females throughout the globe enjoy.

As discussed above, various court decisions involving post-20 week abortion pleas have emphasized the mental and physical health risks that can result from a forced continuation of pregnancy in cases of fetal impairment or rape. Courts have recognized that preventing violations of rights requires ensuring legal access to abortion on health grounds throughout pregnancy, and that health grounds must include rape – as is already established in the law – as well as fetal impairment. Around the world, countries have structured their abortion laws to reflect the fact that physical and mental health harm can result from pregnancy at any stage and that such harm must be prevented, including by allowing abortion after 20 weeks in cases of fetal impairment and rape. This section offers an analysis of global trends, uncovering several useful approaches that can strengthen the realization of reproductive rights in India.

### Threats to Women's Physical and Mental Health Should be Specifically Recognized as a Legal Ground for Abortion at any Point in Pregnancy

Countries around the world – including Nepal in South Asia and more than 20 European countries – have recognized threats to physical and mental health as a ground for abortion without a gestational limit.<sup>163</sup> In addition to these countries,



the Constitutional Court of Colombia has specifically rejected the imposition of gestational limits for abortions where the pregnant woman’s life or physical or mental health is at risk and has stated that the only requirement for accessing an abortion under the law is a medical certificate verifying the threat to the woman’s health.<sup>164</sup> It has also stated that women seeking an abortion have a right to a timely medical assessment that includes mental health, and that any additional requirement is a breach of their right to abortion.<sup>165</sup> Further, in Canada, the Supreme Court has struck down restrictions on abortion, permitting abortion on any ground throughout pregnancy, in recognition of the implications of legal restrictions on women’s mental and bodily integrity.<sup>166</sup>

Health exceptions are frequently permitted throughout pregnancy on par with life exceptions. In many countries, the life and health grounds are established in a single provision, reflecting the fact that distinctions between life and health risks often cannot be meaningfully drawn in the clinical context.<sup>167</sup> In the United Kingdom, abortion legislation treats health identically to life, allowing the termination of pregnancy under either ground throughout the entire pregnancy.<sup>168</sup> In Turkey, the life exception has been interpreted to permit abortion on broader health grounds, including “illnesses,” without gestational limits.<sup>169</sup>

## Health Grounds Should Include Mental Health Risks from Pregnancies Involving Rape or Fetal Impairment

To ensure that women and girls do not need to seek further interpretation of the law from courts, there should be clarity that the health exception permits abortions in all cases of fetal impairment as well as in situations of rape in which the mental health of the pregnant woman is at risk, as already recognized under the MTP Act.

### Health Risks Arising from Pregnancies Involving Fetal Impairment.

The government’s proposed amendments to India’s MTP Act include an exception for “serious fetal abnormalities” up to 24 weeks and an exception for “substantial fetal abnormalities” at any stage of pregnancy, but they do not link these exceptions to a broader health exception beyond 20 weeks. Laws from many countries reflect the obligation to prevent harm to women’s physical and mental health in cases of fetal impairment.<sup>170</sup> For example, in the United States – a country that India has looked to in the past for comparative legal perspectives and that shares India’s English common law tradition – fetal impairment is not consistently articulated as an exception in state abortion laws, but abortions on these grounds are understood to be permitted under the mental health exception, which is required to be in place throughout the entire pregnancy.<sup>171</sup> Furthermore,

U.S. courts have struck down laws imposing a 20-week limit on access to abortion in cases when a woman's health is at risk. And in Italy, women may receive an abortion "where the pathological processes constituting a serious threat to the woman's physical or mental health, such as those associated with serious abnormalities or malformations of the fetus, have been diagnosed."<sup>172</sup> Similarly, Brazil's Federal Supreme Court has recognized that striking down as unconstitutional a law denying the termination of pregnancy in cases of anencephaly was "a measure protective of the physical and emotional health of women, avoiding psychological disorders she would suffer were she forced to carry on a pregnancy that she knew would not result in life."<sup>173</sup>

Globally, many countries' laws also enumerate an explicit exception to permit MTP in cases of fetal impairment diagnoses throughout pregnancy,<sup>174</sup> which reflects the related risks for women's health. Laws and jurisprudence from more than 18 countries in Europe<sup>175</sup> and other countries, including Nepal, South Africa, Canada, and Colombia, contain provisions that articulate women's rights to access abortion in cases of fetal impairment at any stage of pregnancy, at a minimum in the case of fatal fetal impairments.

### Health Risks from Pregnancies Involving Rape

India's MTP Act already recognizes the health risks of forced continuation of pregnancy from rape. Proposed amendments to the MTP Act limit abortion on the grounds of rape to 24 weeks, which is more regressive than current jurisprudence, and fails to reflect barriers in access that lead to delays. Reflecting the challenges that survivors of rape often face in accessing abortion, many countries include a clause specifically allowing abortion past 20 weeks on stand-alone rape or incest grounds,<sup>176</sup> or interpret the life or health exception broadly to allow abortions after 20 weeks in cases of rape or incest.<sup>177</sup> In Sweden, while the grounds of rape and incest are not explicitly provided for under the law, rape or incest may be considered special circumstances as part of the medical and psychological evaluation for an abortion.<sup>178</sup> In New Zealand, rape is a factor that may be considered when determining whether a woman's continuance of her pregnancy would result in serious danger to her life or physical or mental health, thus permitting abortion after 20 weeks.<sup>179</sup>

## India's Laws Should Be Framed to Protect Women's and Girls' Right to Bodily Autonomy

In addition to broadening the definition of the life exception and taking into account fetal impairment to allow medical terminations of pregnancies after

20 weeks, India's legal system should emphasize women's decision-making power over their own bodies. For instance, several European countries have abortion laws containing specific language on women's rights to dignity and free and autonomous decision-making when requesting abortion services. The Netherlands, for example, places the final determination specifically within the hands of the woman, stating that an abortion shall be permitted "if the woman is of the opinion that there is no other way to end her distressed situation" and the physician is convinced that she has made this decision of her own free will.<sup>180</sup> Norway's abortion legislation strongly emphasizes women's autonomy and active participation throughout the process of obtaining an abortion. Norwegian law expressly provides that the woman "shall personally reach a final decision to terminate the pregnancy."<sup>181</sup>

It is important to note that judicial authorization requirement is typically not required by countries for abortion in cases of health risks – and it is critical for India to follow suit. It is also essential that Indian law allow a woman to seek an abortion from local health care providers, and that decisions regarding termination of pregnancy remain between the pregnant woman and her own health care provider. Several countries have rejected the requirement of medical board authorizations for abortion. In Canada, for example, the Supreme Court struck down abortion restrictions that required women seeking abortions to obtain approval from a hospital's therapeutic abortion committee, noting that such restrictions caused delays and unequal access and therefore violated women's right to security of the person.<sup>182</sup> And in Italy, where a pathological condition poses a serious threat to a pregnant woman's mental health, the woman may terminate her pregnancy upon having a physician diagnose and certify the condition.<sup>183</sup> Globally, many countries also allow abortion with the approval of only one health care provider even after the second trimester, as proposed in the draft amendments to the MTP Act.<sup>184</sup> Medical boards have, however, been established as appeals mechanisms for denials of requests. In Slovakia, a physician chosen by the pregnant woman will determine whether the conditions for abortion are satisfied; if the physician finds that the conditions are not satisfied, the woman may make a request for re-assessment by the director of the health facility.<sup>185</sup>

These various policies from throughout the world affirm that women should have the final say in whether to terminate a pregnancy and in contrast to the MTP Act, emphasize that the law is meant to protect the pregnant woman and not merely the provider performing the service. Further, these laws ensure that the decision to pursue an abortion is made between a woman and her provider – not third parties.







## VIII. CONCLUSION

The need for law reform is urgent. The post-20 week cases reflect the dichotomy in India's legal framework on abortion, with judges on one hand recognizing reproductive rights to be "sacrosanct," and on the other establishing a third-party authorization procedure that arbitrarily interferes with pregnant women's and girls' reproductive decision making and, at times, leads to the forced continuation of pregnancy. Each day that passes without reform contributes to the "incalculable harm" and "prolonged suffering" that courts themselves have recognized pregnant women and girls seeking MTP after 20 weeks experience under the current legal framework.<sup>186</sup> The Indian government must act to end this grave human rights violation.

The judiciary's case-by-case approach has led providers to continue referring women and girls to the courts. Yet only those women and girls who have access to financial and legal resources can consider pursuing judicial channels; others are left with no other recourse but to continue an unwanted pregnancy or risk their lives by going to an unsafe provider. Furthermore, even those who can file petitions are then subject to public scrutiny and stigma, invasive and often repetitive medical exams by medical boards, and distress from the uncertainty of their rights during an already difficult time.

Several decisions, those including both pre-20 and post-20 week abortion pleas, have specifically discussed the need to reform the MTP Act. For instance, in May 2016, the High Court of Punjab and Haryana specifically directed the Government of India to, among others, consider making amendments to the MTP Act, 1971, calling the law "inadequate."<sup>187</sup> And, in a June 2017 case concerning a 25-weeks-pregnant woman's plea for termination after a diagnosis of potentially fatal fetal impairments, the Supreme Court emphasized that a more "holistic" approach is needed in dealing with such cases.<sup>188</sup> The justices explained, "You have to also see the quality of life of the mother after pregnancy. The mother will have to live under

the constant threat of losing her child. The law must be stretched to make it meaningful.”<sup>189</sup> In August of 2017, the Supreme Court explained:

[T]he legislature intended to liberalize the existing provisions relating to termination of pregnancy keeping in view the danger to the life or risk to physical or mental health of the woman; on humanitarian grounds, such as when pregnancy arises from a sex crime like rape or intercourse...where there is substantial risk that the child, if born, would suffer from deformities and diseases.<sup>190</sup>

However, as recently as October 2017, the Supreme Court stated that it would not pass an order directing the government to amend the MTP Act, but agreed to hear a plea for framing guidelines on abortions beyond 20 weeks.<sup>191</sup> Specifically, in response to the petitioner’s request to direct the Government of India to amend Section 3 of the MTP Act to permit termination of pregnancies beyond 20 weeks in cases involving rape survivors and women who have been diagnosed with fetal impairments, the Court explained that this “is in the legislative realm.”<sup>192</sup> Several public interest petitions seeking similar reform are still pending before the Supreme Court.<sup>193</sup> The National Commission for Women and the MoHFW have both also affirmed the need for reform.<sup>194</sup>

To ensure women’s and girls’ rights to reproductive autonomy, Indian courts, policymakers, and legislators must make efforts to ensure that women and girls can make reproductive decisions in consultation with a trained local health care provider without needing to hire legal counsel to file lawsuits or travel long distances for a medical board’s approval. While permanent medical boards can play an important role as an appeals mechanism in cases where a woman or girl faces denials or barriers in accessing an abortion, requiring judicial or medical board authorizations in all cases contravenes the state’s constitutional and human rights obligations to create a legal and procedural framework that respects reproductive autonomy.

Further, reform is needed to end delays and denials caused by inadequate numbers of registered abortion providers, women’s lack of awareness of the law, providers’ fear of prosecution, insufficient guidance on how to safely perform abortions (including after 20 weeks), and the lack of clear guidelines for providers on appropriate clinical factors for opinions in abortion cases. Despite the legality of the procedure, many women who seek an MTP before 20 weeks are stymied in their efforts due to procedural barriers and lack of clear standards and guidelines. Although there will always be a need for women and girls to access abortion after 20 weeks due to unforeseen or unknown risks to their physical or mental health, addressing these issues would allow more women and girls to avoid the onerous process of gaining legal permission for abortion after 20 weeks.



## VIV. RECOMMENDATIONS

### Parliament of India:

- Urgently amend the MTP Act to incorporate a rights-based and women-centric approach, including by
  - providing for the legal termination of pregnancy at any gestational stage when the pregnant woman's life or physical or mental health is at risk, including when the pregnancy is the result of rape or involves fetal impairment;
  - adopting the amendments proposed by the Ministry of Health and Family Welfare that would allow for abortion on request before 12 weeks; abortion with just one provider's opinion throughout pregnancy; and would increase the number of providers who can legally perform abortions; and
  - clarifying that judicial and medical board authorizations are not required for an abortion, even beyond 20 weeks.
- Amend the Section 19(1) of the Protection of Children from Sexual Offenses Act to ensure that pregnant adolescents are able to access abortion without risking their confidentiality being violated by mandatory reporting requirements.
- Amend the Indian Penal Code to decriminalize abortion, with the goal of reducing stigma of abortion and expanding access to safe, legal procedures.

### Supreme Court of India and State High Courts:

- Strike down as unconstitutional the 20-week gestational limit in Section 3 of the MTP Act on abortions performed for health risks.
- In light of the Constitution's requirements that women and girls not be subject to preventable physical and mental health risks, interpret Section 5 of the MTP Act (regarding the life exception) to take an expansive view of "life" that includes risks to the pregnant woman's mental and physical health, including from rape and diagnoses of fetal impairment.
- Recognize that the requirement of third-party authorizations for abortions before and after 20 weeks gestation, both from the courts and medical boards, violates women's fundamental rights under Article 21 of the Constitution.

- Establish that judicial authorization is not required under the law for women and girls to obtain an abortion.

### Prime Minister's Office:

- Prioritize reform of the MTP Act to address the significant incidence of unsafe abortion and specific barriers for women and girls seeking MTP beyond 20 weeks.
- Ensure that efforts to address son preference or gender-biased sex selection do not result in barriers in access to abortion, especially beyond 20 weeks.

### Ministry of Health and Family Welfare:

- Issue a circular that clarified that the August 2017 circular requiring the establishment of medical boards does not create a requirement of judicial and medical board authorizations for abortion.
- Introduce guidelines that establish a human rights-based procedural framework for abortion, including after 20 weeks that:
  - is time sensitive;
  - allows for an MTP with the opinion of one provider at all stages of pregnancy; and
  - considers the risks to women's and girls' health from continuation of pregnancy and prioritizes women's and girls' own assessment of mental health risks.
- Introduce guidelines for practitioners clarifying that MTP can be performed safely beyond 20 weeks, as per WHO Safe Abortion Guidelines, under proper clinical conditions and outlining protocols for post-20 week terminations of pregnancy.
- Create a permanent appeals process at district level health facilities that allows women and girls to appeal denials of abortion in a timely manner.
- Providing training and follow up education to ensure that any health care provider or medical board involved in providing a medical opinion under the MTP Act is informed of the law and medical standards on the safety of abortion.
- Ensure that women and girls do not face delays or denials of MTP due to barriers in access, including by:
  - ensuring adequate numbers of trained, registered health care providers throughout India, including rural and remote areas;

- ensuring proper facilities, medications, and other materials for MTP procedures at various stages of pregnancy, including medical abortion pills and surgical facilities; and
- ensuring that local health workers, including community health workers, are trained to be able to provide women and girls with information on where MTP can be provided and their rights to access the services.
- Raise awareness amongst women and girls about their rights to MTP at all stages of pregnancy, including beyond 20 weeks in light of law or policy reform.
- Adopt a national comprehensive sexuality education program to ensure that women and girls are aware of the possibility of pregnancy after puberty, even at young ages and from rape; knowledge of their rights to MTPs and where to access safe procedures, and also have awareness of early symptoms of pregnancy.

#### Ministry of Law and Justice:

- In reviewing proposed amendments to the MTP Act and related laws and policies, ensure respect for constitutional and human rights legal standards that guarantee women's and girls' reproductive health and rights.
- Through the Law Commission, develop a report mapping legal and policy barriers to safe abortion services in India and propose recommendations for reform.

#### Ministry of Women and Child Development:

- Develop and implement awareness campaigns to raise women's, providers' and other stakeholders' awareness of women's and girls' reproductive rights, including the legal right to abortion, and to address stigma and illegal barriers such as demands for spousal consent.
- Review the proposed amendments to the MTP Act to ensure a women's rights-based approach that upholds women's rights to reproductive autonomy, privacy and confidentiality, and consent.
- Review recommendations to address gender-biased sex selection and son preference to ensure that such efforts do not interfere with women's constitutional and human rights to reproductive health and autonomy.

### National Commission for Women:

- Update its recommendations for reform of the MTP Act to include recent legal developments and reflect human rights legal standards.
- Intervene in litigation on MTP to call for legal and policy reform to remove arbitrary gestational limits and third-party authorization requirements, in line with human rights law.
- Together with the National Human Rights Commission, initiate a dialogue with relevant stakeholders on avenues for law and policy reform on MTP to ensure women's and girls' reproductive rights throughout pregnancy.

### National Human Rights Commission:

- Together with the National Commission for Women, initiate a dialogue with relevant stakeholders on avenues for law and policy reform on MTP to ensure women's and girls' reproductive rights throughout pregnancy.

### National and State Judicial Academies:

- Develop judicial training curricula on reproductive rights, including MTP, to disseminate judgments, provide conceptual clarity that MTP is a woman's right, and provide sensitization on the urgency of access to MTP for women and girls facing physical or mental health risks from pregnancy.

### National and State Legal Services Authorities:

- Train legal service providers on women's and girls' reproductive rights, including rights to MTP, under the law to allow for proper representation for women and girls forced to seek judicial authorization under the current legal framework.
- Develop a helpline for providers who have legal queries about individual MTP cases.

### Civil Society:

- Collaborate to call on government officials to urgently reform the legal framework for abortion in India, including by advocating for the elimination of third party authorization requirements for MTP and highlighting cases where women and girls face delays or denials in access to abortion as a result of the current law and jurisprudence.

- Engage with women and girls to raise awareness of their rights to MTP and provide the information necessary to access MTP services.
- Continue to build the evidence base by documenting the impact of legal and policy barriers to MTP that lead to women and girls being forced to continue unwanted pregnancies or resort to unsafe services.

### Health Care System:

- Medical education authorities must provide medical students with mandatory training on MTP as a woman's rights concern and on how to safely perform MTP at all stages of pregnancy where MTP is legal.
- Professional medical bodies and associations should support the need for law reform to remove barriers in access to MTP, and promote measures that ensure that all women and girls have access to health care providers in local health facilities that are trained to perform MTPs safely.
- Medical education and certification authorities must ensure that all providers understand that abortions can be safely performed both before and after 20 weeks gestation.
- Providers and health facility directors must ensure requests for MTP are responded to urgently and in a time-sensitive manner that respects women's and girls' rights.

# Testimony Endnotes

- <sup>1</sup> Tabassum Barnagarwala, Indian Express, *Denied abortion after foetus found abnormal, woman says: I wish my baby dies after birth* (2017).
- <sup>2</sup> Information for the compilation of this summary was taken from the case as well as a news source. See *Id.*; See also Sheetal Shankar Salvi v. Union of India, W.P.(C) 174 of 2017, S.C.C, 27 Mar. 2017.
- <sup>3</sup> Information for the compilation of this summary was taken directly from the case, including the court's summary of allegations as stated in the petition to the court. See *R v. State of Haryana*, W.P.(C) 6733 of 2016, H.C. P.& H., 30 May 2016.
- <sup>4</sup> This is a pseudonym, as petitioner's real name is confidential under the law due to her status as a rape victim.
- <sup>5</sup> Information for the compilation of this summary was taken from the case as well as a combination of news sources. See e.g. Alakh Alok Srivastava v. Union of India & Ors., W.P. (C) 565 of 2017, S.C.C. 28 July 2017; Nipun Saxena v. Union of India, Ministry of Home Affairs Diary No. 42374 of 2012, S.C.C. 2012; Hari Kumar, NY Times, *India's High Court Denies Abortion for 10-Year-Old Girl* (2017); The Indian Express, *10-year-old girl rape case: SC fix responsibility to take care of victim* (2017); The Logical Indian, *10-Yr-Old Rape Survivor Denied Abortion of 32-Week-Old Foetus By SC Citing Medical Reasons* (2017); Bhadra Sinha, Hindustan Times, *Can 10-year-old rape survivor abort? SC asks for medical examination* (2017); Tanbir Dhaliwal, Hindustan Times, *10-yr-old Chandigarh rape victim told her C-section was surgery to remove stone*, (2017); Krishnadas Rajagopal, The Hindu, *SC rejects abortion plea of 10-year-old* (2017); A Vaidyanathan, NDTV, *10-Year-Old Rape Survivor Can't Have Abortion, Says Supreme Court* (2017); The Hindu, *SC notice to Centre on PIL seeking 10-yr-old rape survivor's abortion* (2017).
- <sup>6</sup> Information for the compilation of this summary was taken directly from the case. See *Meera Santosh Pal v. Union of India* (2017) W.P.(C) 17 of 2017, at 5, S.C.C, 16 Jan. 2017.
- <sup>7</sup> Information for the compilation of this summary was taken directly from the case. See *Bhavikaben D/O. Rameshbhai Solanki v. State of Gujarat*, S.C.A.(D) 1155 of 2016, H.C. Guj., at 1-3, 16 Feb. 2016. Although the case uses her full name, her initial is used here for consistency with the law and other petitions that uphold the guarantee of confidentiality for rape victims.

# Endnotes

- <sup>1</sup> The terms "medical termination of pregnancy" (MTP) and "abortion" are both used in this briefing paper. Courts have used the term MTP to include terminations at advanced stages of pregnancy.
- <sup>2</sup> *Ms. Z v. The State of Bihar and Others*, C.A. 10463 of 2017, S.C.C. 17 Aug. 2017.
- <sup>3</sup> *Id.*
- <sup>4</sup> *Id.* ("There was no opinion that the termination could not be carried out and it was risky to the life of the appellant.")
- <sup>5</sup> *Id.*
- <sup>6</sup> *Id.*
- <sup>7</sup> Preamble, India's Medical Termination of Pregnancy Act Amendment Bill 2014.
- <sup>8</sup> S.3 India's Medical Termination of Pregnancy Act, 1971.
- <sup>9</sup> *Id.*
- <sup>10</sup> S.3(2), India's Medical Termination of Pregnancy Act, 1971.
- <sup>11</sup> *Id.*, S.5(1).
- <sup>12</sup> *Id.*, S.3(1).
- <sup>13</sup> *R v. State of Haryana*, W.P.(C), 6733 of 2016, H.C. P.& H., 74, 30 May 2016; *Ms. Z v. The State of Bihar and Others*, C.A. 10463 of 2017, S.C.C. 17 Aug. 2017 (state hospital authorities refusing to perform abortion on petitioner when she was 17 weeks pregnant); *Dr. Nikhil D. Datar, Mr. X and Mrs. X v. Union of India*, W.P.(L) 1816 of 2008, H.C. Bom. 4 Aug. 2008 (Dr. Datar thought that the pregnancy should be terminated, but because of the 20-week deadline, sought judicial authorization when the patient was 22 weeks pregnant).
- <sup>14</sup> Bhavani Giddu, The Wire, *Untangling the Legal Knots on Reproductive Rights Is a Step Towards Helping Indian Women* (2017). India's Pre-Conception and Pre-Natal Diagnostic Techniques, 1994; India's Protection of Children From Sexual Offences Act, No. 32, 2012.
- <sup>15</sup> India's Medical Termination of Pregnancy Act Amendment Bill 2014.
- <sup>16</sup> S.4(C), India's Medical Termination of Pregnancy Act Amendment Bill 2014.
- <sup>17</sup> *Id.*
- <sup>18</sup> *Id.*
- <sup>19</sup> *Id.* S.3.
- <sup>20</sup> *MTP Amendment Bill, 2014: towards re-imagining abortion care* (2015), *supra* note 15.
- <sup>21</sup> Abantika Ghosh, The Indian Express, *Abortion Law Amendments on Hold* (2017).
- <sup>22</sup> *Id.*
- <sup>23</sup> Bela Ganatra & Siddi Hirve, *Induced abortions in a rural community in Western Maharashtra: prevalence and patterns*, 10 Reproductive Health Matters 19 (2002).
- <sup>24</sup> Suchanta K. Banerjee, *An exploration of the socio-economic profile of women and costs of receiving abortion services at public health facilities of Madhya Pradesh, India*, BMC Health Services Research 2 (2017).
- <sup>25</sup> Mary Philip Sebastian, et al., Population Council, *Unintended Pregnancy and Abortion in India: Country Profile Report*, 54 (2014). [hereinafter *Unintended Pregnancy and Abortion in India: Country Profile Report*].
- <sup>26</sup> World Health Organization, *Unsafe abortion: global and regional estimates of the incidence of unsafe abortion and associated mortality in 2008*, 6th ed. (2011). See also Sumitra Debroy, Times of India, *Rules Push Women to Unsafe Abortion Options* (2017).
- <sup>27</sup> Government of India, *Framework for Implementation: National Health Mission 2012-2017 2*, 32 (2014). See also Melissa Stillman et al., *Abortion in India: A Literature Review*, 17 (2014) available at <https://www.guttmacher.org/report/abortion-india-literature-review> [hereinafter *Abortion in India: A Literature Review*].
- <sup>28</sup> Population Council, *Increasing Access to Comprehensive Abortion Care Services in India, 2006-2011*, available at <http://www.popcouncil.org/research/increasing-access-to-comprehensive-abortion-care-services-in-india>.
- <sup>29</sup> *Abortion in India: A Literature Review*, *supra* note 27.
- <sup>30</sup> *Unintended Pregnancy and Abortion in India: Country Profile Report*, *supra* note 25.
- <sup>31</sup> See e.g. *R v. State of Haryana*, W.P.(C), 6733 of 2016, H.C. P.& H., at 9, 30 May 2016 (Delays in post-rape medical exam due to negligence on the part of medical authorities); *Jamana Suthar v. State of Rajasthan*, S.B Civil Writ No. 6683/2009, at 7, (Court questioned petitioner's rape allegations); *Indu Devi v. State of Bihar*, C.W.J.C. 5286 of 2017, at 17, H. C. Bihar, 15 Apr. 2017 (Court questioned petitioner's rape allegations); *Ms. Z v. The State of Bihar and Others*, C.A. 10463 of 2017, at 19, S.C.C. 17 Aug. 2017 (Court explains, "There was no justification to obtain the consent of the father or the husband for termination of pregnancy"); Suchitra S. Dalvie, *Second Trimester Abortions in India*, 16 REPRODUCTIVE HEALTH MATTERS 31, 41 (2008), available at <http://www.tandfonline.com/doi/pdf/10.1016/S0968-8080%2808%2931384-6?needAccess=true> [hereinafter *Second Trimester Abortions in India*].
- <sup>32</sup> See e.g. *Bashir Khan v. State of Punjab*, 14058 of 2014, Punjab-Haryana High Court., August 2, 2014 (14-year-old rape victim petitioned court for termination of pregnancy, and court explains that as long as the pregnancy does not exceed 20 weeks, doctors should proceed with MTP); *Vijender v. State of Haryana and others*, CWP No. 20783 of 2014, October 7, 2014 (Petitioner petitioned the Punjab and Haryana High Court for an abortion, and court explained that after 12 weeks, court authorization for an abortion is not necessary); *R v. State of Haryana*, W.P.(C), 6733 of 2016, H.C. P.& H., at 74, 30 May 2016 (The court explains, "...[U]p until 20 weeks of pregnancy, there are no impediments in law for termination of pregnancy, if those conditions exist. Even then, there appears to be a practice of approaching the courts for termination of pregnancy before the completion of 20 weeks.")
- <sup>33</sup> Lalita Panicker, Hindustan Times, *The MTP Act 2014 Makes Safe Abortion Easier, It Should Be Passed* (2017) [hereinafter *The MTP Act 2014 Makes Safe Abortion Easier, It Should Be Passed*]; See also Roli Srivastava, Reuters, *'Not a Woman's Choice': India's Abortion Limit Puts Women at Risk, Say Campaigners* (2017). India's Protection of Children from Sexual Offences Act, No. 32, 2012.



- <sup>34</sup> Susanne Sjöstrom et. al., *Medical Students are afraid to include abortion in their future practices: in-depth interviews in Maharashtra, India*, 16 BIOMED CENTRAL MEDICAL EDUCATION 8 (2016) [hereinafter *Medical Students are afraid to include abortion in their future practices*]; Suchitra Dalvie et. al., “If a woman has even one daughter, I refuse to perform the abortion,” *Sex determination and safe abortion in India*, 23 REPRODUCTIVE HEALTH MATTERS 45, 2-3 (2015) [hereinafter *Sex determination and safe abortion in India*]. India’s Pre-Conception and Pre-Natal Diagnostic Techniques, 1994.
- <sup>35</sup> *Id.*
- <sup>36</sup> *Id.* See also Indian Penal Code, 1860; India’s Protection of Children From Sexual Offences Act, No. 32, 2012; *The MTP Act 2014 Makes Safe Abortion Easier, It Should Be Passed*, *supra* note 33 (PCPNDT Act clearly does not prohibit abortion on any grounds but rather aims to prevent disclosure of the sex of an embryo or fetus to a pregnant woman); Lata Mishra, Mumbai Mirror, *Stings Like a V* (2017).
- <sup>37</sup> *Second Trimester Abortions in India, supra* note 31.
- <sup>38</sup> *Id.*
- <sup>39</sup> *Id.* at 16.
- <sup>40</sup> *Abortion in India: A Literature Review, supra* note 27 at 17.
- <sup>41</sup> *Id.*; Alakh Alok Srivastava v. Union of India & Ors. W.P.(C) 565 of 2017, S.C.C. 28 July 2017.
- <sup>42</sup> See e.g. R v. State of Haryana, W.P.(C), 6733 of 2016, H.C. P.& H., at 9, 30 May 2016 (Delays in post-rape medical exam due to negligence on the part of medical authorities); Jamana Suthar v. State of Rajasthan, S.B Civil Writ No. 6683/2009, at 7, (Court questioned petitioner’s rape allegations); Indu Devi v. State of Bihar, C.W.J.C. 5286 of 2017, at 17, H. C. Bihar, 15 Apr. 2017 (Court questioned petitioner’s rape allegations); Government of India, Ministry of Health and Family Welfare, *Guidelines and Protocols: Medico-legal care for survivors/victims of sexual violence* (2014), available at <https://mohfw.gov.in/sites/default/files/953522324.pdf>.
- <sup>43</sup> R v. State of Haryana, W.P.(C), 6733 of 2016, H.C. P.& H., 74, 30 May 2016 (the Court stated, “Due to the less evolved society, more so in this part of the world, till date the rape victim carries more stigma than the person accused of the offence of rape. Those assaulted repeatedly at a very young age may need treatment and counselling for the rest of their lives.”).
- <sup>44</sup> See e.g. X v. Govt of NCT of Delhi, W.P.(CRL) 18262 of 2013, H.C. Del., at 3, 6 Dec. 2013 (“To carry a child in her womb by a woman as a result of conception through an act of rape is extremely traumatic, humiliating and psychologically devastating.”); Bashir Khan v. State of Punjab, W.P.(C) 14058 of 2014, P. & H. H.C., 2 Aug. 2, 2014 (the Court considered that since the victim was raped it should be presumed that the pregnancy could cause her severe mental harm); Vijender v. State of Haryana, W.P.(C) 20783 of 2014, P. & H. H.C., 7 Oct. 2014 (“A rape victim shall not be further traumatized by putting through a needless process of approaching Courts for taking permission.”).
- <sup>45</sup> See *Hallo Bi v. State of Madhya Pradesh*, W.P.(C) 408 of 2013, H.C. M. & P. 16 Jan. 2013. See also WORLD HEALTH ORGANIZATION, FACT SHEET: VIOLENCE AGAINST WOMEN: HEALTH CONSEQUENCES (2016); SEE ALSO UNITED NATIONS POPULATION FUND (UNFPA), GIVING BIRTH SHOULD NOT BE A MATTER OF LIFE AND DEATH, 2 (2012).
- <sup>46</sup> Brief for the American College of Obstetricians and Gynecologists and American Congress of Obstetricians and Gynecologists In Support of Plaintiffs-Appellants and Reversal as Amicus Curiae, *Isaacson v. Horne*, 716 F.3d 1213 (9th Cir. 2013).
- <sup>47</sup> ROYAL COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, TERMINATION OF PREGNANCY FOR FETAL ABNORMALITY IN ENGLAND, SCOTLAND, AND WALES 17 (2010) [hereinafter *TERMINATION OF PREGNANCY FOR FETAL ABNORMALITY IN ENGLAND, SCOTLAND, AND WALES*]; see also Brief for the American College of Obstetricians and Gynecologists and American Congress of Obstetricians and Gynecologists In Support of Plaintiffs-Appellants and Reversal as Amicus Curiae, *Isaacson v. Horne*, 716 F.3d 1213 (9th Cir. 2013).
- <sup>48</sup> *Mrs. X and Ors. v. Union of India*, W.P.(C) 81 of 2017, S.C.C., Feb. 7, 2017
- <sup>49</sup> *TERMINATION OF PREGNANCY FOR FETAL ABNORMALITY IN ENGLAND, SCOTLAND, AND WALES, supra* note 47.
- <sup>50</sup> British Medical Association (BMA), *Abortion Time Limits*, 25 (2005).
- <sup>51</sup> *Id.*
- <sup>52</sup> *Id.*
- <sup>53</sup> Brief for the American College of Obstetricians and Gynecologists and American Congress of Obstetricians and Gynecologists In Support of Plaintiffs-Appellants and Reversal as Amicus Curiae, *Isaacson v. Horne*, 716 F.3d 1213, at 10 (9th Cir. 2013).
- <sup>54</sup> *Ms. Z v. The State of Bihar and Others*, C.A. 10463 of 2017, at 55-56, S.C.C. 17 Aug. 2017; see also Live Law News Network, SC Notice on Plea for Rs 10L Compensation for 10 Yr Old Rape Survivor Who Delivered A Baby (2017), available at <http://www.livelaw.in/sc-notice-plea-rs-10l-compensation-10-yr-old-rape-survivor-delivered-baby/>.
- <sup>55</sup> *Mrs. X and Ors. v. Union of India*, W.P.(C) 81 of 2017, at 4, S.C.C., Feb. 7, 2017; Dr. Nikhil D. Datar, Mr. X and Mrs. X v. Union of India, W.P.(L) 1816 of 2008, H.C. Bom. 4 Aug. 2008; Dr. Nikhil D. Datar v. Union of India & Ors., S.L.P.(C) 2170 of 2009, S.C.C., pending. See also LiveMint, *SC Notice to Centre on PIL Seeking 10-Year-Old Rape Survivor’s Abortion* (2017) (after the 10-year-old girl was denied an abortion by the Chandigarh district court, a PIL was filed by advocate Alakh Alok Srivastava), available at <http://www.livemint.com/Politics/wwkldiCLDJwBQLHhHW80/SC-notice-to-Centre-on-PIL-seeking-10-year-old-rape-survivor.html>.
- <sup>56</sup> CENTER FOR REPRODUCTIVE RIGHTS AND HUMAN RIGHTS LAW NETWORK, FACTSHEET: DATAR V. UNION OF INDIA (2011).
- <sup>57</sup> See e.g., *Ms. X v. Union of India*, W.P.(C) 593 of 2016, S.C.C., 25 July 2016; *Meera Santosh Pal v. Union of India* (2017) W.P.(C) 17 of 2017, S.C.C., 16 Jan. 2017.
- <sup>58</sup> *Ms. X v. Union of India*, W.P.(C) 593 of 2016, S.C.C., 25 July 2016 (the Court allowed the Petitioner to end her pregnancy in light of the medical report that found the fetus not viable and that the petitioner’s physical and mental health would be in danger); *Meera Santosh Pal v. Union of India* (2017) W.P.(C) 17 of 2017, S.C.C., 16 Jan. 2017 (the Court states, “the report of the Medical Board clearly warrants the inference that the continuance of the pregnancy involves the risk to the life of the pregnant woman and a possible grave injury to her physical or mental health as required by Section 3 (2)(i) of the Medical Termination of Pregnancy Act, 1971.”); *Savita Sachin Patil v. Union of India*, W.P.(C) 121 of 2017, S.C.C., 28 Feb. 2017 (the Court heavily relies on the medical report to deny abortion to the petitioner after she learns her fetus has down syndrome).
- <sup>59</sup> *Ms. Chanchala Kumari v. Union of India & Anr.* 871 of 2017, at 1- 2, S.C.C. 21 Sept. 2017 (the petitioner, a 13-year-old rape victim, was forced to undergo multiple medical exams involving 11 doctors, as the Court noted the “initial report was not specific.”); *Savita Sachin Patil v. Union of India*, W.P.(C) 121 of 2017, S.C.C., 28 Feb. 2017 (the Court denied the petitioner an abortion based on the medical board’s finding that an abortion should not be performed).
- <sup>60</sup> *Krishnadas Rajagopal, The Hindu, SC rejects abortion plea of 10-year-old* (2017) [hereinafter *SC rejects abortion plea of 10-year-old*] (“In all such cases, time is very short. We are considering those cases under Article 142 (orders passed by the apex court to do complete justice). Can a permanent medical board be set up at State-level to examine the cases till the Bill is pending for amendment into the law?”).
- <sup>61</sup> Government of India, Ministry of Health and Family Welfare, Circular for Establishment of Permanent Medical Board, D.O. No. M12015/58/201-MCH (2017) [hereinafter *Ministry of Health and Family Welfare, Circular for Establishment of Permanent Medical Board*].
- <sup>62</sup> *Anusha Ravindra v. Union of India & Ors.* 934 of 2017, S.C.C. 13 Oct. 2017.
- <sup>63</sup> *Sarmishtha Chakraborty v. Union of India*, W.P.(C) 431 of 2017, at 7, S.C.C. 3 July 2017.
- <sup>64</sup> R v. State of Haryana, W.P.(C), 6733 of 2016, H.C. P.& H., 74, 30 May 2017.
- <sup>65</sup> *Ms. Z v. The State of Bihar and Others*, C.A. 10463 of 2017, at 59-60, S.C.C. 17 Aug. 2017 (“The fundamental concept relating to bodily integrity, personal autonomy and sovereignty over her body have to be given requisite respect.”); *Meera Santosh Pal v. Union of India* (2017) W.P.(C) 17 of 2017, at 5, S.C.C., 16 Jan. 2017 (“The right to bodily integrity calls for permission to terminate the pregnancy.”); R v. State of Haryana, W.P.(C), 6733 of 2016, H.C. P.& H., 74, 30 May 2016 (reading the Constitution, the High Court cited article 39(e), “the health and strength of women is not to be abused,” article 41 (work, education, public assistance), article 42 (maternity relief), 47 (improvement of public health), article 51(A)(e), “it shall be the duty of every citizen of India to renounce practice derogatory to the dignity of the women.” and article 21, “right of free enjoyment, right to human dignity, right to have access to justice, right to privacy” to conclude that no woman should be compelled to go through a pregnancy against her will); *Mrs. X and Ors. v. Union of India*, W.P.(C) 81 of 2017, at 4, S.C.C., Feb. 7, 2017 (the Court emphasizes the fact that it is a woman’s right to make reproductive choices, and that this is part of her “personal liberty as understood under Article 21 of the Constitution,” and states, “in these circumstances we find that the right of bodily integrity calls for a permission to allow her to terminate her pregnancy.”).
- <sup>66</sup> See, e.g., *Independent Thought v. Union of India*, W.P.(C) 382 of 2013, S.C.C. 11 Oct. 2017; Consolidated Decision, *Laxmi Mandal v. Deen Dayal Harinagar Hospital & Others*, W.P. (C) No. 8853 of 2008; *Hallo Bi v. State of Madhya Pradesh*, W.P.(C) 408 of 2013, H.C. M. & P. 16 Jan. 2013; *Devika Biswas v. Union of India*, W.P. (C) 95 of 2012, S.C.C. 14 Sept. 2016.
- <sup>67</sup> Complete list of cases on file with the Center for Reproductive Rights. Available upon request.
- <sup>68</sup> See *Sarmishtha Chakraborty v. Union of India*, W.P.(C) 431 of 2017, S.C.C., at 7, 3 July 2017 (risk of “severe mental injury” if the pregnancy continued); *Ms. Z v. The State of Bihar and Others*, C.A. 10463 of 2017, at 59-60, S.C.C. 17 Aug. 2017 (Court stated that the consequence of being forced to carry out pregnancy has caused “incalculable harm and irreversible injury giving rise to emotional trauma.”); *Sonali Sandeep Jadhav & Anr. V. Union of India & Ors*, W.P.(C) 551 of 2017, S.C.C., at 4, 28 July 2017 (finding that continuation of pregnancy shall pose severe mental injury to her); Cf. *Sheetal Shankar Salvi v. Union of India*, W.P.(C) 174 of 2017, S.C.C. 27 Mar. 2017 (unclear if the medical report specifically cited mental harm to the pregnant woman, but the court judgment itself dismissed it, and ultimately denied her plea for an abortion).

- <sup>69</sup> See e.g., *X v. State of H.P. and Others*, W.P.(C) 2250 of 2017, 17 Oct. 2017; *Mamta Verma v. Union of India and Ors.*, W.P.(C) 627 of 2017, S.C.C., 9 Aug. 2017; *Sonali Sandeep Jadhav & Anr. v. Union of India & Ors*, W.P.(C) 551 of 2017, S.C.C., at 4, 28 July 2017; *Sarmistha Chakraborty v. Union of India*, W.P.(C) 431 of 2017, S.C.C., 3 July 2017; *Mrs. X and Ors. v. Union of India*, W.P.(C) 81 of 2017, at 4, S.C.C., Feb. 7, 2017.
- <sup>70</sup> *X v. Govt of NCT of Delhi*, W.P.(CRL) 18262 of 2013, H.C. Del., at 3, 6 Dec. 2013.
- <sup>71</sup> *Murugan Kayakkar v. Union of India & Ors.*, W.P.(C) 749 of 2017, S.C.C., at 2, 6 Sept. 2017 (considering the age of the petitioner, the trauma that she has suffered because of the sexual abuse and the agony she is going through at present and above all the report of the Medical Board constituted by this Court, we think it appropriate that termination of pregnancy should be allowed); *X v. State of H.P. and Others*, W.P.(C) 2250 of 2017, at 12 17 Oct. 2017 (the Court allows termination of 32-week pregnancy stating, "...[C]ontinuation of pregnancy involves risk to the life of the petitioner and in case she is not permitted to terminate the pregnancy, likely to suffer grave injury, not only to her physical, but mental health also." The Court also took into account other factors the medical board focused on, such as physical risks to the petitioner and risks to the "child.").
- <sup>72</sup> *Ashaben w/o. Dineshbhai Jasubhai Talsaniya (Devipujak) v. State of Gujarat*, S.C.A.(Q) 1919 of 2015, H.C. Guj., 16 Apr. 2015.
- <sup>73</sup> For more information on the need for clear criteria for MTP beyond 20 weeks, see \_\_\_\_.
- <sup>74</sup> *Mrs. X and Ors. v. Union of India*, W.P.(C) 81 of 2017, at 4, S.C.C., Feb. 7, 2017.
- <sup>75</sup> *Mamta Verma v. Union of India and Ors.*, W.P.(C) 627 of 2017, S.C.C., 9 Aug. 2017.
- <sup>76</sup> *Id.*
- <sup>77</sup> *X v. State of H.P. and Others*, W.P.(C) 2250 of 2017, H.C. H.P., 17 Oct. 2017.
- <sup>78</sup> See *Mamta Verma v. Union of India and Ors.*, W.P.(C) 627 of 2017, S.C.C., 9 Aug. 2017 (the Court explained, "Importantly, it is reported that the continuation of pregnancy can pose severe mental injury to the petitioner and no additional risk to the petitioner's life is involved if she is allowed to undergo termination of her pregnancy. In the circumstances, we consider it appropriate in the interests of justice and particularly, to permit the petitioner to undergo medical termination of her pregnancy under the provisions of the Medical Termination of Pregnancy Act, 1971.").
- <sup>79</sup> *Bhavikaben D/O. Rameshbhai Solanki v. State of Gujarat*, S.C.A.(D) 1155 of 2016, H.C. Guj., at 1-3, 16 Feb. 2016.
- <sup>80</sup> *Id.*
- <sup>81</sup> See *Ms. X v. Union of India*, W.P.(C) 593 of 2016, S.C.C., at 5-6, 25 July 2016 (Supreme Court allowed a woman at 23-24 weeks to terminate her pregnancy, the Court stated, "A perusal of Section 5 of the Act reveals, that the termination of pregnancy, which is necessary to save the life of the pregnant woman, is permissible." The Court then continued to explain, "[T]he risk to the petitioner of continuation of her pregnancy, can gravely endanger her physical and mental health. . . ." In view of this finding, the Court allowed her to terminate her pregnancy "in terms of Section 5 of the Medical Termination of Pregnancy Act, 1971."); *X v. State of H.P. and Others*, W.P.(C) 2250 of 2017, H.C. H.P., 17 Oct. 2017; *Meera Santosh Pal v. Union of India (2017) W.P.(C) 17 of 2017*, at 5, S.C.C., 16 Jan. 2017.
- <sup>82</sup> *Sarmistha Chakraborty & Anr. v. Union of India & Ors.* 431 of 2017, 19 June 2017.
- <sup>83</sup> *Id.*
- <sup>84</sup> See, e.g., *Ms. Z v. The State of Bihar and Others*, C.A. 10463 of 2017, at 11, S.C.C. 17 Aug. 2017. See also *Ashaben w/o. Dineshbhai Jasubhai Talsaniya (Devipujak) v. State of Gujarat*, S.C.A.(Q) 1919 of 2015, H.C. Guj., 16 Apr. 2015 (Petitioner became pregnant from rape after being abducted. She was 23 weeks pregnant when she escaped. Doctors insisted on judicial permission for termination of pregnancy, and she was 28 weeks pregnant by the time of the final hearing. The High Court ultimately denied her an abortion).
- <sup>85</sup> *SC rejects abortion plea of 10-year-old*, *supra* note 60; Ministry of Health and Family Welfare, Circular for Establishment of Permanent Medical Board, *supra* note 61.
- <sup>86</sup> *Id.*, W.P.(C) 6733 of 2016, H. C. P & H., at 76, 30 May 2016.
- <sup>87</sup> *Id.*, W.P.(C) 6733 of 2016, H. C. P & H., at 76, 30 May 2016.
- <sup>88</sup> *Id.* See also *Ms. Z v. The State of Bihar and Others*, C.A. 10463 of 2017, S.C.C. 17 Aug. 2017 (state hospital authorities refusing to perform abortion on petitioner when she was 17 weeks pregnant); *Dr. Nikhil D. Datar, Mr. X and Mrs. X v. Union of India*, W.P.(L) 1816 of 2008, H.C. Bom. 4 Aug. 2008 (Dr. Datar thought pregnancy should be terminated, but because of the 20-week deadline, sought judicial authorization when patient was 22 weeks pregnant).
- <sup>89</sup> *Id.*, W.P.(C) 6733 of 2016, H. C. P & H., at 76, 30 May 2016.
- <sup>90</sup> *Id.*
- <sup>91</sup> *Ms. Z v. The State of Bihar and Others*, C.A. 10463 of 2017, at 59, S.C.C. 17 Aug. 2017.
- <sup>92</sup> *X v. State of H.P. and others*, W.P.(C) 2250 of 2017, 17 Oct. 2017; (High Court of Himachal Pradesh, Shimla, allowed the termination of pregnancy of petitioner at 32 weeks. The court cites a Supreme Court decision, explaining, "Above all, in view of the ratio of the judgment of the Apex Court in *Meera Santosh Pal v. Union of India*, the petitioner has every right to take all steps necessary to preserve her own life against the avoidable danger to it. It is also necessary to protect and preserve her life." Thus, while the court did consider multiple factors – including the fetus itself – it stressed the importance of protecting the woman's life, which in the eyes of the court, included mental and physical suffering); *Meera Santosh Pal v. Union of India (2017) W.P.(C) 17 of 2017*, at 5, S.C.C., 16 Jan. 2017. See also *Priti Mahendra Singh Rawal v. Union of India And Ors.*, W.P.(C)11940 of 2017, at 4-5, 6 Nov. 2017 (Court granted abortion to petitioner with severe fetal impairments. Based its decision on medical findings, which focus on the risks to the fetus. The medical report doesn't cite any risks to the petitioner. It states, "The condition of the fetus fulfills the criteria of 'substantial risk of serious physical handicap' in the fetus. It is also clear that the petitioner has voluntarily expressed her desire to terminate the pregnancy and is well informed about the nature of the fetus and its outcome." In allowing the termination, the court explains, "In view of the above peculiar situation and having due regard to the fundamental rights conferred on the petitioner under Article 21 ... to live a life of dignity, it will be appropriate and in the interest of justice to permit the petitioner to undergo MTP under the provisions of the MTP..." It explains that in not allowing the abortion, she would lead a life of "misery.").
- <sup>93</sup> *Sheetal Shankar Salvi v. Union of India*, W.P.(C) 174 of 2017, S.C.C., at 3, 27 Mar. 2017 (doctors concluded that the fetal impairment diagnoses did not present any risk of injury to Sheetal, even though the pregnancy made her very anxious, and the Court ultimately denied the termination of pregnancy, dismissing serious risks to mental health. The main focus was in the fetus being "born alive.").
- <sup>94</sup> *Meera Santosh Pal v. Union of India (2017) W.P.(C) 17 of 2017*, at 4, S.C.C., 16 Jan. 2017.
- <sup>95</sup> *High Court on its Own Motion v. State of Maharashtra*, *Suo Moto P.I.L. No. 1 of 2016*, 19 Sept. 2016.
- <sup>96</sup> *Suchitra Dalvie, Right to Safe Abortion*, 52 *Economic & Political Weekly* 32 (2017).
- <sup>97</sup> *Id.*
- <sup>98</sup> *Ms. Chanchala Kumari v. Union of India & Anr.*, W.P.(C) 871 of 2017, S.C.C., 21 Sept. 2017; the Court ordered multiple medical examinations of the petitioner after the first was not clear, explaining, "The initial report was not specific and thereafter this Court on 18th September, 2017 passed the following order..." The Court order for the medical board stated, "When we say medical termination of pregnancy we mean to convey all the factors including the factor of life of the fetus." See also *Bhim Singh Bisht v. State Government of NCT of Delhi*, W.P.(C) 2046 of 2016, H.C. Del., 25 July 2016; (two medical boards were constituted. The court ordered the constitution of a medical board, but Court found the report not clear, meaning, "medically possible to terminate the pregnancy but not safe to terminate the same." Nevertheless, the report did conclude that X's pregnancy presented "high risk[s] [...] with increased danger of complications during pregnancy and delivery." Considering the urgency of the situation, the High Court directed another hospital to constitute a medical board. The judge ordered that if the doctors found the abortion to be necessary to save X's life, they should terminate the pregnancy without asking for Court permission).
- <sup>99</sup> See e.g. *R v. State of Haryana*, W.P.(C) 6733 of 2016, H. C. P & H., at 83, 30 May 2016 ("Taking the facts and circumstances of the case into account, this Court holds that the prayer of the petitioners for the termination of pregnancy of petitioner No. 1 cannot be granted at this stage in view of the medical reports so far submitted before the court.")
- <sup>100</sup> *Alakh Alok Srivastava v. Union of India & Ors.* W.P.(C) 565 of 2017, S.C.C. 28 July 2017 (Supreme Court denied the abortion explaining that "In view of the recommendation made by the Medical Board, we are satisfied, that it would neither be in the interest of the girl child, nor the life of fetus, which is approximately 32 weeks old, to order medical termination of pregnancy."). See also *INTERNATIONAL WOMEN'S RIGHT TO SAFE ABORTION, INDIA – SEXUAL ABUSE OF GIRLS FOLLOWED BY REFUSAL OF ABORTION: ADDING INSULT TO INJURY (2017) [HEREINAFTER INTERNATIONAL WOMEN'S RIGHT TO SAFE ABORTION, INDIA – SEXUAL ABUSE OF GIRLS FOLLOWED BY REFUSAL OF ABORTION]*.
- <sup>101</sup> *Id.* (the Court's directions to the medical board asked them to consider "whether the health of the girl child concerned...and also that of the fetus, would be adversely affected, if the pregnancy is continued for a full term." In the order denying the MTP, there was no discussion of mental suffering to the girl by the court).
- <sup>102</sup> *Id.*, at 2.
- <sup>103</sup> *Id.*
- <sup>104</sup> *Murugan Kayakkar v. Union of India & Ors.*, W.P.(C) 749 of 2017, S.C.C., at 2, 6 Sept. 2017.
- <sup>105</sup> *Id.*, at 1.
- <sup>106</sup> *Id.*, at 2.
- <sup>107</sup> *Sheetal Shankar Salvi v. Union of India*, W.P.(C) 174 of 2017, S.C.C., at 3, 27 Mar. 2017 (The Court explains, "The only other ground that appears from the observations made in the aforesaid medical report apart from the medical grounds, is that petitioner no.1 is anxious about the outcome of the pregnancy. We find that the termination of pregnancy cannot be permitted due to this reason.").
- <sup>108</sup> *Sheetal Shankar Salvi v. Union of India*, W.P.(C) 174 of 2017, S.C.C., at 3 Mar. 27, 2017.

- <sup>109</sup> *Id.* (the only discussion in the context of mental health is that the medical board stated that petitioner “is anxious about the outcome of pregnancy.” The court then said that this was not enough of a reason to permit her to terminate her pregnancy. It is also critical to note that both the Court and the Medical Board acknowledged that the baby was not “likely to survive like a normal baby,” and the Board could not determine how long it would even survive. The Court ultimately held that because there was no “danger to the mother’s life”, etc., it would not allow petitioner to terminate the pregnancy. It is also unclear what the exact instructions were that the Court gave to the medical board).
- <sup>110</sup> Sarmistha Chakraborty & Anr. v. Union of India & Ors. 431 of 2017, 19 June 2017 (the Courts instructed the medical board “to evaluate the mental and physical health” of the petitioner and also the “state of health of the fetus.”).
- <sup>111</sup> See e.g. Bhavikaben D/O. Rameshbhai Solanki v. State of Gujarat, S.C.A.(D) 1155 of 2016, H.C. Guj., at 1-3, 16 Feb. 2016 (the medical team of 6 doctors concluded that continuing the pregnancy would adversely affect petitioner’s mental health, but not her physical health. Found “same or slightly increase risk to victim if pregnancy is terminated before term than physiologically normal delivery at term.” Court granted MTP despite this); Alakh Alok Srivastava v. Union of India & Ors. W.P.(C) 565 of 2017, S.C.C. 28 July 2017 (medical report stated, “Continuation of pregnancy is less hazardous for the girl child and fetus than termination of pregnancy at this stage.”)
- <sup>112</sup> WORLD HEALTH ORGANIZATION, SAFE PREGNANCY: TECHNICAL AND POLICY GUIDANCE FOR HEALTH SYSTEMS 21 (2003) [HEREINAFTER SAFE PREGNANCY: TECHNICAL AND POLICY GUIDANCE FOR HEALTH SYSTEMS].
- <sup>113</sup> ROYAL COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, BEST PRACTICE IN COMPREHENSIVE POSTABORTION CARE (2016).
- <sup>114</sup> INTERNATIONAL WOMEN’S RIGHT TO SAFE ABORTION, INDIA – SEXUAL ABUSE OF GIRLS FOLLOWED BY REFUSAL OF ABORTION, *supra* note 100.
- <sup>115</sup> Sonali Kokra, Huffington Post, *Why Is India’s Abortion Law Failing Its Women on So Many Fronts?* (2017).
- <sup>116</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health (Art. 12)*, (22nd Sess., 2000), para. 33, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (2008). See also Committee on the Elimination of Discrimination against Women, *General Recommendation No. 24: Article 12 of the Convention (women and health)*, (20th Sess., 1999), para. 13, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (2008) [hereinafter CEDAW Committee, *Gen. Recommendation No. 24*]. See also Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, (68th Sess., 2000), U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (2008).
- <sup>117</sup> THE CONSTITUTION OF INDIA, 1950, art. 51.
- <sup>118</sup> Ms. Z v. The State of Bihar and Others, C.A. 10463 of 2017, at 59-60, S.C.C. 17 Aug. 2017 (“Before parting with the case, we must note that India has ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1993 and is under an international obligation to ensure that the right of a woman in her reproductive choices is protected.”); Consolidated Decision, Laxmi Mandal v. Deen Dayal Harinagar Hospital & Others, W.P. (C) No. 8853 of 2008; Jaitun v. Maternal Home MCD, Jangpura & Others, W.P. (C) 8853 of 2008, H.C. Del. (2010) (citing the CEDAW and the ICESCR, the Court held that “no woman, more so a pregnant woman should be denied the facility of treatment at any stage irrespective of her social and economic background...This is where the inalienable right to health which is so inherent in the right to life gets enforced.”).
- <sup>119</sup> Amar Jesani and Aditi Iyer, *Women and Abortion*, 28 ECONOMIC AND POLITICAL WEEKLY 48 (1993).
- <sup>120</sup> CRC Committee, *Concluding Observations: India*, para. 66, U.N. Doc. CRC/C/IND/CO/3-4 (2014); CEDAW, *Concluding Observations: India*, paras. 30-32, U.N. Doc. CEDAW/C/IND/CO/4-5 (2014).
- <sup>121</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 22: On the Right to Sexual and Reproductive Health (art. 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/GC/22 (2016) [hereinafter ESCR Committee, *Gen. Comment No. 22*].
- <sup>122</sup> *Id.*
- <sup>123</sup> *Id.*
- <sup>124</sup> *Id.*
- <sup>125</sup> *Id.*
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- <sup>159</sup> *Id.*, at 3.8.
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## Notes



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199 Water Street, 22nd Floor  
New York, New York 10038  
Tel +1 917 637 3600  
Fax +1 917 637 3666