ENSURING WOMEN’S REPRODUCTIVE RIGHTS

KEY REFORMS TO ELIMINATE JUDICIAL AUTHORIZATION AND ADVANCE SAFE ABORTION IN INDIA
MISSION AND VISION
For more than 25 years, the Center for Reproductive Rights has used the power of law to advance reproductive rights as fundamental human rights around the world.

We envision a world where every person participates with dignity as an equal member of society, regardless of gender. Where every woman is free to decide whether or when to have children and whether to get married; where access to quality reproductive health care is guaranteed; and where every woman can make these decisions free from coercion or discrimination.

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INTRODUCTION

Z, a destitute woman from Patna, Bihar, discovered she was HIV positive and 17 weeks pregnant, as a result of rape, when she was admitted into a government shelter. Despite abortion being legal in instances of rape and risk to the pregnant woman’s health, a government hospital refused to grant Z a medical termination of pregnancy (MTP). The hospital improperly demanded spousal and parental consent from Z—neither of which is required of adult women—leading Z to have to seek permission from the High Court of Judicature at Patna. This request was also denied, and Z was forced to appeal this decision before the Supreme Court of India. Despite recognizing that Z’s rights had been violated as the result of extraneous legal requirements placed on her, the Supreme Court ultimately refused Z an abortion since by that time she was beyond the legal gestational limit for abortion in cases of rape.\(^1\)

India was once a global leader in advancing legal access to abortion, but recent judicial decisions, such as the one handed down in Z’s case, has indicated that the country is no longer at the forefront of ensuring women’s reproductive rights. The difficulties that Z faced in obtaining a legal abortion are unfortunately not unique: women across the country have been increasingly required to seek permission from a court before accessing abortion. Although the World Health Organization (WHO) has found that abortion is one of the safest medical procedures, legal and practical barriers to safe services have led unsafe abortion to be the third leading cause of maternal death in India causing 8 women to die each day.\(^2\)

This Executive Summary presents the key findings of a report published by the Center for Reproductive Rights in 2018 analyzing 35 decisions in abortion cases in India from a human rights perspective.\(^3\) Courts have taken a case-by-case approach, refraining from clarifying the legal ambiguities at the root of such petitions. With each court case, there is a growing misconception that court permission is needed for abortion—even though no such requirement exists under the Medical Termination of Pregnancy Act, 1971 (MTP Act).

The report finds that the de facto judicial authorization requirement in India endangers women’s and girls’ reproductive rights as guaranteed under international and constitutional law by leading to serious barriers to abortion and the forced continuation of pregnancies. There is an urgent need for the Government of India to address this serious human rights concern and undertake legal and policy reform to address the harm caused by this practice, as well as broader legal and practical barriers to safe abortion.
LEGAL CONTEXT

Section 3 of the MTP Act allows abortion until 20 weeks on health grounds, defined to include pregnancies resulting from rape or contraceptive failure for married couples, or where there is substantial risk that the child would be born with “physical or mental abnormalities as to be seriously handicapped.” After this point, MTP is permitted only where necessary to save a pregnant woman’s life under Section 5.

Dozens of recent cases on abortion in India involved women and girls—often facing health risks from pregnancies involving rape or serious fetal impairment diagnoses—who were denied MTPs at health facilities because they were beyond 20 weeks of pregnancy. Courts have issued inconsistent decisions in these cases. Even where the Supreme Court and high courts have permitted MTP beyond the 20-week limit in recognition of grave physical health risks and violations of rights caused by denial of MTP, they have not clearly stated whether providers have the discretion to allow MTP without judicial authorization on health grounds after 20 weeks. The Supreme Court has stated it will not extend the 20-week limit in Section 3, but has yet to discuss whether the life exception in Section 5 may be understood broadly to include health.

The ambiguity in the law post-20 weeks has led to an increasing number of providers who require that women and girls obtain judicial authorization before receiving abortion care. This climate of fear and confusion is compounded by existing legal barriers, such as:

- the continued criminalization of abortion in the Indian Penal Code,
- mandatory reporting provisions for health care providers in the Protection of Children from Sexual Offences (POCSO) Act, 2012 and
- the scrutiny on abortion providers linked to conflation with efforts to end sex selection under the Pre-Conception and Pre-Natal Diagnostic Techniques (PCPNDT) Act, 1994.

Alarmingly, this is also leading to women’s being sent to court when they seek an abortion even before 20 weeks, where the law is clear that this is not required.

In August 2017, following a Supreme Court order, the Ministry of Health and Family Welfare set up permanent medical boards to reduce delays in court cases. Unfortunately, the circular did not mention whether medical boards could receive appeals without judicial involvement and thus has served to perpetuate the notion that judicial and medical board authorization is required for MTP.
R. was about 14 years old when she was raped and abducted. After her parents found her, they faced significant obstacles in filing charges due to alleged corruption in the police department. The court was forced to intervene, and ordered a medico-legal exam; however, the medical officer failed to conduct a pregnancy test as was required.

R was already 21 weeks pregnant before her pregnancy was finally detected. Fearing prosecution, her doctors refused to perform an abortion. R sought judicial authorization from the High Court of Punjab and Haryana, which recognized that the hospital’s failure to conduct a pregnancy test caused her to cross the 20-week limit and ruled that R was at liberty to appear before a medical board. R underwent two days of exams by a board of doctors. 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, and ordered another medical board to examine R. A new panel of doctors examined R, and while they recognized that R would likely face harm from the social and emotional consequences of continuation of pregnancy, they too claimed that they could not legally perform an abortion.

R was devastated and stated to her lawyer that she was suicidal. Her lawyer reported this to the court, which ordered a reassessment by the most recent medical board. Again, the board recognized the risks but reiterated that it could not provide her with an abortion now that she was 25 weeks pregnant. The High Court expressed concern about the system of judicial and medical board authorization, but issued a final decision dismissing the case without granting R an MTP.
HARMFUL IMPACT OF JUDICIAL AUTHORIZATION PRACTICES

The legal ambiguity around MTP post 20 weeks of pregnancy has resulted in a system of extra-legal third-party authorization requirements in which women’s own perspectives are marginalized. Once in court, women and girls face delays, public scrutiny, stigma, and repeated invasive exams by unfamiliar doctors on judicially established medical boards.10 Further, women and girls without financial and legal resources to seek judicial authorization have no recourse but to continue an unwanted pregnancy or risk their lives through unsafe abortion.

Women and girls face significant uncertainty about their rights due to inconsistent decisions.11 In some cases, the courts have set forth important recognition of women’s and girls’ reproductive rights as linked to their fundamental rights to life, health, privacy, and freedom from torture and cruel, inhuman, and degrading treatment.12 However, in many instances, women and girls have been denied terminations, including due to delays caused by having to go to court.13 Court-appointed medical boards often failed to consider the views of women and girls themselves, and the negative health impacts from physical or mental health risks from forced continuation of pregnancy. Denials were often predicated on misconceptions that post-20 week MTPs cannot be performed safely, contrary to WHO guidelines.14

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.

However, her doctor refused to provide information on the health of the fetus. Sheetal sought out a private doctor who explained the fetus had Arnold Chiari syndrome, which prevents the development of the brain and spine. Sheetal was 27 weeks pregnant when she was finally able to petition the Supreme Court to end her pregnancy. She was ordered to be examined by a board of seven doctors, which was unable to predict how long the baby would survive after birth, if it were to survive at all. Regardless, the board advised against an MTP, completely dismissing the mental anguish this would cause Sheetal, and denied her an abortion. The Court accepted this decision and denied Sheetal the MTP. After the decision, Sheetal expressed her emotional distress, stating, “I have not slept, neither has he,” pointing to her husband. Sheetal’s doctor explained that “Poor patients like her are forced to visit the court for abortion because usually diagnosis in their cases gets delayed.”
De facto judicial authorization compounds existing barriers women and girls face when seeking abortion care in India. These intersecting legal and practical barriers significantly impede access at all stages of pregnancy by creating stigma and fear of criminal penalties among providers and women alike. As court cases have shown, these barriers often cause delays that lead women to cross the 20-week limit when seeking an MTP.
NECESSARY REFORM TO ENSURE WOMEN’S AND GIRLS’ RIGHTS

Abortion access is integral to women’s rights to life, health, equality, privacy, and freedom from torture and ill-treatment. The Supreme Court of India has recognized women’s right to reproductive choice as part of the right to personal liberty and noted that decisions around procreation are protected under the right to privacy.\(^\text{16}\) As emphasised by the Bombay High Court in 2016, because pregnancy occurs in the body of a woman or girl, it is essential for her dignity, privacy, and health that she be the primary and ultimate decision-maker about whether to continue a pregnancy.\(^\text{17}\)

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.\(^\text{18}\) Several United Nations bodies have urged India to provide women access to quality and safe abortion services; ensure access to legal abortion in practice; and guarantee respect for adolescents’ views with regard to abortion decisions.\(^\text{19}\)

Restrictive readings of the MTP Act by providers and courts, and the government’s failure to reform the law, contribute to significant suffering among women and girls in need of abortion.\(^\text{20}\) Human rights law establishes several legal obligations that are violated as a result of foreseeable harm to women and girls from denial of abortion under India’s current legal framework on abortion. See Box: Understanding India’s Obligations on MTP under Human Rights Law, page 9.

The introduction of judicial authorization requirements and the failure to allow abortion where women and girls experience health risks beyond 20 weeks of pregnancy 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.\(^\text{21}\)
Every Indian woman must be ensured the autonomy to make decisions about her own body and her sexual and reproductive health, which is essential to her being an empowered and equal citizen. Respecting, protecting, and fulfilling this right requires the government of India to take immediate steps to:

### Ensure access to abortion where legal\(^\text{22}\)
- Ensure adequate numbers of skilled providers and facilities
- Guarantee women and girls are not denied access to legal abortion due to restrictive interpretation of laws or imposition of extra-legal requirements such as spousal consent

### Modify and broadly interpret abortion laws, including health exceptions, to prevent foreseeable suffering from denial of abortion\(^\text{23}\)
- Provide safe, legal, and effective access to abortion regardless of gestational stage where the life and health of the pregnant woman or girl is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering
- Eliminate barriers from criminalization of abortion
- Ensure that in law and in practice, women’s rights are prioritized over interest in protecting prenatal life

### Ensure a legal and procedural framework that respects women’s reproductive autonomy\(^\text{24}\)
- Respect women as best positioned to make judgments about their reasons for not being able to continue a pregnancy
- Guarantee women the information and ability to make decisions about their reproductive lives
- Repeal third-party authorization requirements, including those by parents, health authorities, and judges
- Establish policy frameworks that allow for rapid decision-making, and due consideration of the health risks faced by pregnant women if an abortion is denied
- Ensure the right to appeal denials by providers
CONCLUSION AND RECOMMENDATIONS FOR ACTION

Reform to India’s legal and policy framework on MTP—with women and girls’ rights and interests at the center—is the need for the hour. To ensure women’s and girls’ rights to reproductive autonomy as required under human rights law, Indian policymakers, legislators and courts must urgently undertake the following measures:

Ministry of Health and Family Welfare:

- Ensure that women and girls do not face delays or denials of MTP due to barriers in access, such as shortage of trained providers or lack of facilities, medications or supplies for abortion, including in rural areas.

- Issue a circular clarifying that the August 2017 circular on the establishment of medical boards does not create a requirement of judicial authorizations for MTP at any stage.

- Introduce guidelines that establish a human rights-based procedural framework for medical providers in giving medical opinions as required under the MTP Act at all stages of pregnancy that is (1) time-sensitive and (2) women-centric, including clarifying the importance of considering women’s and girls’ own perceptions of risk to their physical or mental health or lives from continuation of pregnancy.

- Introduce guidelines for practitioners clarifying that MTP can be performed safely beyond 20 weeks, as per WHO Safe Abortion Guidelines, under proper clinical condition, and outlining protocols for post-20 week terminations of pregnancy.

“Negotiating authorization procedures disproportionately burdens poor women, adolescents, those with little education, and those subjected to, or at risk of, domestic conflict and violence, creating inequality in access…. Third-party authorization should not be required for women to obtain abortion services.”

— World Health Organization, “Safe abortion: technical and policy guidance for health systems”
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 POCSO 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 for 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.
- 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.
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6. S. 312, 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 (PCPDNT 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); Lalita Panicker, Hindustan Times, The MTP Act 2014 Makes Safe Abortion Easier, It Should Be Passed (2017); See also Roli Srivastava, Reuters, ‘Not a Woman’s Choice’: India’s Abortion Limit Puts Women at Risk, Say Campaigners (2017).


10. Center for Reproductive Rights, supra note 3 at 8-11.

11. Id. at 11-12.


17. High Court on its own motion v. Union of India, PIL No. 1 of 2016, High Court of Judicature at Bombay, 19 September 2016.


