

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

## CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. OF 2020

...Petitioner

Versus

...Respondent

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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

## CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.

OF 2020

Nidhi Nilesh Jadhav

...Petitioner

Versus

# State of Maharashtra

...Respondent

## SYNOPSIS

Petitioner is 26 weeks pregnant and has been barred from seeking medical termination of pregnancy in spite of having diagnosed with hydrocephalus with bilateral feet anomaly in the foetus.

## LIST OF DATES

Date	Event
27.01.2020	Copy of the Foetal Malformation Scan
11.02.2020	Copy of the obstetric USG report by the KEM Hospital showing “Dilated Lt. Lateral ventricle, cerebral atrophy, & genu valgum”
	Petitioner is now in 26 weeks of pregnancy and is barred from seeking Medical Termination of Pregnancy under the Medical Termination of Pregnancy Act, 1971.

## POINTS TO BE URGED

- A. That it is the Constitutional obligation of the Respondents to protect the Petitioner's reproductive rights, including the right to life and health enshrined in Article 14 and 15. That inasmuch as reproductive rights include the right to terminate a pregnancy, Section 3 (2)(b) of the MTP Act, 1971 violates this right.

B. That forcing the Petitioner to continue with an unwanted pregnancy, amounts to her losing her right to safeguard the privacy of procreation, motherhood and childbearing because ostensibly the MTP Act, 1971 is making those choices for her.

**ACTS TO BE REFERRED:**

1. The Constitution of India Act, 1950.
2. The Medical Termination of Pregnancy Act, 1971.

**AUTHORITIES TO BE CITED:**

To be relied upon at the time of arguments.

Advocate for the Petitioner

Afreen Khan / Rachita Padwal

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.                      OF 2020

In the matter of Article 14,  
15, 21 and 226 of the  
Constitution of India

-AND-

In the matter of the  
Medical Termination of  
Pregnancy Act, 1971

-AND-

In the matter of the  
Universal Declaration of  
Human Rights, 1948

-AND-

In the matter of  
International Covenant on  
Civil and Political Rights,  
1966

-AND-

In the matter of  
International Covenant on  
Economic, Social and  
Cultural Rights, 1976

-AND-

In the matter of The  
Convention on the

Elimination of all Forms of  
Discrimination Against  
Women, 1979

Nidhi Nilesh Jadhav	)... Petitioner
Versus	
State of Maharashtra	)
through the Principal Secretary,	)
Public Health Department,	)
Mantralaya, Mumbai 23.	)...Respondents

TO

THE HONOURABLE CHIEF JUSTICE AND THE  
HONOURABLE PUISNE JUDGES OF THE HONOURABLE  
HIGH COURT OF JUDICATURE AT BOMBAY

THE HUMBLE PETITION OF THE  
PETITIONER ABOVENAMED

MOST RESPECTFULLY SHEWETH:

1. The Petitioner herein, a resident of Ratnagiri, is 26 weeks pregnant, and has been barred from seeking a Medical Termination of her pregnancy in spite of the diagnosis of foetal abnormality which renders the possibility of survival of the foetus negligible.
2. The Respondent herein is the State of Maharashtra through the Principal Secretary, Public Health Department, the nodal department for matters relating to health services in the State.
3. The present writ petition is being filed under Article 226

of the Constitution of India seeking directions from this Hon'ble Court to permit the Petitioner who is presently pregnant with a gestational age corresponding to 26 weeks, to undergo medical termination of her pregnancy.

**FACTS OF THE CASE:**

4. The Petitioner is aged 27 years old, original resident of Ratnagiri currently residing with her paternal Uncle in Panvel to have easy access to health facilities. Hereto marked and annexed as **EXHIBIT A** is a copy of the identification proof of the Petitioner. **EXHIBIT B** is a copy of the address proof of her current residence. On 27.01.2020, during an Ultrasound Obstetrics Examination conducted it was found for the first time that the foetus of the Petitioner having a gestational age of 22 weeks suffered from hydrocephalus with bilateral feet and anomaly. Hereto annexed and marked as **EXHIBIT C** is a copy of the Foetal Malformation Scan dated 27.01.2020.
5. The USG report dated 11.02.2020 performed by Dr. Ashwini at KEM Hospital, made the following observation:

“Dilated Lt. Lateral ventricle, cerebral atrophy, & genu valgum”

Hereto annexed and marked as **EXHIBIT D** is a copy of the obstetric USG report dated 11.02.2020 by the KEM Hospital, Mumbai.
6. This Petitioner is undergoing her third pregnancy where the first two full term pregnancies resulted in stillbirth due to multiple fetal anomalies. Hereto

annexed and marked as **EXHIBIT E** colly are the copies of post delivery discharge summary of the Petitioner dated 18.11.2018 and 17.12.2013 respectively.

7. Although the Petitioner desires to terminate the pregnancy, the Petitioner has been barred from doing as per section 3 of the Medical Termination of Pregnancy Act, 1971 that does not allow for the termination of a pregnancy beyond 20 weeks. The continuation of the pregnancy and enforcement of the Act has led the Petitioner to undergo severe psychological, physical, mental and emotional trauma.
8. Pertinently, in the matter of Dr. Nikhil D. Datar v. Union of India & Ors., [S.L.P. (C) 5334/2009] the Hon'ble Supreme Court vide order dated 15.12.2016 directed the Union of India to file an Affidavit to indicate what steps it proposed to take in cases of requests for termination of pregnancy beyond 20 weeks of gestation. In compliance with the said order, the Union of India filed a Compliance Affidavit dated 11.09.2019. Referring to the Supreme Court's earlier instructions to the Ministry of Health and Family Welfare to form Permanent Medical Boards in States / UTs for considering the cases for termination of pregnancy beyond 20 weeks. Pursuant thereto, permanent medical boards came to be constituted in some states. The Affidavit states that on receiving, the Affidavit stated that pursuant thereto instruction had been issued to all the States / Union Territories to constitute Permanent Medical Boards. The Affidavit further stated that upon order/ directions from the Hon'ble Courts, these Medical Boards will examine such cases where there is a request for termination of



pregnancy beyond 20 weeks and submit its opinion to the Hon'ble Courts. At Annexure B to the said Affidavit are Technical and Operational Guidelines framed by the Ministry of Health and Family Welfare. The Technical and Operational Guidelines set out a list of major fetal abnormalities that experts on the medical boards may refer to while reviewing a case for late termination of pregnancy referred to by the courts. The said list includes the deformities that the foetus of the Petitioner has been diagnosed with.

Hereto annexed and marked as **EXHIBIT F** is a copy of the Affidavit of Compliance dated 11.09.2019 filed by the Ministry of Health and Family Welfare in the matter of Dr. Nikhil D. Datar v. Union of India & Ors., [S.L.P. (C) 5334/2009].

9. The Petitioner has been informed of the outcome of the said pregnancy and they wish to medically terminate the pregnancy.
10. Section 3(2)(b) of the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as '*MTP Act*') allows women to have an abortion where the length of the pregnancy "does not exceed twenty weeks, if not less than two registered medical practitioners are of the opinion, formed in good faith, that-
  - (i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health;
  - (ii) there is substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously

handicapped.”

The MTP Act also allows for termination in the case of rape and contraceptive failure in married couples. Sec. 5 (2) provides only one exception to the 20 week limit when “the termination of such pregnancy is immediately necessary to save the life of the pregnant woman” No explanation is given for the MTP Act’s 20 week cut-off, which severely jeopardizes the physical and mental health of the Petitioner who faces the substantial risk that if their child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. A true copy of the MTP Act, 1971 is annexed hereto and marked as **EXHIBIT G.**

11. The Federation of Obstetric and Gynecological Societies of India (FOGSI), a body comprising of 24,000 plus members, stated: “[the] risk to the mother in case of termination of pregnancy at 25 weeks is not significantly higher than the risk at 20 weeks.” FOGSI advised that “in case of fetal abnormality which has been detected late and which leads to an extremely serious handicap at birth, such foetus should be allowed to be terminated, even after 20 weeks.”
12. A report by Dr. R.M. Saraogi of Cooper Hospital and Seth G.S. Medical College in Special Leave Petition 5334/2009, Dr. Nikhil D. Datar v. Union of India 2009, found that the “abortion process at 20 weeks and 25 weeks carries the same risk”.
13. In 2008, the Union of India MTP Review Committee

consisting of Health Secretary Naresh Dayal and former `Director General of the Indian Council of Medical Research, Dr. N.K. Ganguly concluded that the cut-off time should be extended to 24 weeks. The Respondents have not released this report.

14. In this regard, it is imperative to state that some fetal impairment cannot be detected or fully evaluated until 20 weeks. A 2006 study in the American Journal of Obstetrics & Gynecology found, "Advances in fetal magnetic resonance imaging (MRI) have allowed detection of increasingly subtle cerebral anomalies, particularly in the posterior cranial fossa." "Embryologically, the cerebellum is one of the first brain structures to arise and one of the last to reach its mature configuration." Thus, prenatal diagnosis for these anomalies was made at a median gestational age of 21 weeks (with range of 19-26 weeks).
15. An article published by the Australian Medical Journal states, "The uterus is indeed the best intensive care unit; fetuses with the most terrible abnormalities usually do not die before birth. Denying abortion may only delay the inevitable and extend the suffering of the family." Because the MTP Act forbids the Petitioner from terminating her pregnancy once doctors diagnosed her fetal abnormality, the continuation of the pregnancy in spite of the knowledge of the inevitable death of the foetus, the suffering of the Petitioner is being inhumanly prolonged. A study by the American Psychological Association Task Force on Mental Health and Abortion found that women who terminate a previously wanted pregnancy, even late in the

pregnancy, experience less severe psychological harm than women who deliver a child with severe abnormalities. The study also found that eight weeks after pregnancy, women who had terminated their pregnancy expressed significantly less grief than those who had a spontaneous child loss. The ability to terminate a pregnancy prior to loss of a child had a significant influence on a woman's mental and emotional health. In this case, the Petitioner's suffering could be significantly reduced if she was permitted to terminate the pregnancy.

IMPACT OF RESTRICTIVE ABORTION  
LEGISLATION ON THE PETITIONER:

16. Dr. Nikhil Datar v. Union of India & Ors., [W.P. (L) 1816/2008] provides another example of victims of the MTP Act. In her 20th week of pregnancy, Niketa Mehta's sonography showed her foetus to be normal. However, in the 22nd week the gynecologist found that the foetus had a congenital complete heart block which would lead to a poor quality of life and could be fatal. Because the condition of Mrs. Mehta's foetus was not discovered until the 22nd week of her pregnancy, she sought permission to terminate the pregnancy from the Bombay High Court. The Court refused to allow an abortion and Mrs. Mehta was forced to continue with her pregnancy. She ultimately miscarried after months of grief and torment and at risk to her own personal health and safety. Because situations like Mrs. Mehta's are on the rise, Dr. Datar filed a special leave petition, Dr. Nikhil D. Datar v. Union of India & Ors., [S.L.P. (C) 5334/2009], before the Hon'ble Supreme Court

challenging the order passed by the Bombay High Court.

17. It is pertinent to note that the Hon'ble Supreme Court of India permitted medical termination of pregnancy at the 26th week in the matters of Sarmishtha Chakraborty & Anr. V. Union of India & Ors. [W.P.(C) 431/2017] and while doing the same observed as under:

“Frankly speaking, cases of this nature have to rest on their own facts because it shall depend upon the nature of the report of the Medical Board and also the requisite consent as engrafted under the Medical Termination of Pregnancy Act, 1971. In the instant case, as 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. That apart, the Medical Board has categorically arrived at a conclusion that in a special case of this nature, the pregnancy should be allowed to be terminated after 20 weeks. In the case of Suchita Srivastava & Anr. vs. Chandigarh Administration [(2009) 9 SCC 1], the Court has expressed the view that the right of a woman to have reproductive choice is an insegregable part of her personal liberty, as envisaged under Article 21 of the Constitution. She has a sacrosanct

right to have her bodily integrity. The case at hand, as we find, unless the pregnancy is allowed to be terminated, the life of the mother as well as that of the baby to be born will be in great danger. Such a situation cannot be countenanced in Court. Regard being had to the aforesaid and keeping in view the 11 report of the Medical Board, we are inclined to allow the prayer and direct medical termination of pregnancy of the 1st petitioner at the IPGMER-SSKM Hospital.”

A copy of the order of Hon’ble Supreme Court of India in Sarmishtha Chakraborty & Anr. V. Union of India & Ors. [W.P.(C) 431/2017], dated- 03.07.2017 is annexed hereto and marked as **EXHIBIT H.**

18. That this Hon’ble Court in the matter of *Shaikh Ayesha Khatoon vs. Union of India & Ors. (W.P. 628 of 2018)* has held that that the contingencies and the parameters laid down in clauses (i) & (ii) of subsection (2)(b) of Section 3 shall have to be read in Section 5 except the bar of limitation as provided in Section 3(2)(b) of the Act of 1971. This Hon’ble Court held as follows-
- ‘It would not be appropriate to overlook the contingencies laid down in clauses (i) & (ii) of subsection (2) (b) of Section 3 while considering the request of a pregnant woman for termination of the pregnancy if the conditions laid down in clauses (i) & (ii) of subsection (2)(b) of Section 3 are satisfied it would provide a good ground for exercise of jurisdiction under Section 5 of the Act of 1971.’*

Hereto annexed and marked as **EXHIBIT I** is a copy of judgment/order dated 09.01.2018 passed by this Hon'ble Court.

19. That this Hon'ble court in common judgment in matters WP (civil) No. 10835/ 2018 with writ petition (civil) No. 9748 of 2018 with Writ Petition (L) No. 3172 of 2018 has held that,

*“ a) We hold that a registered medical practitioner may medically terminate pregnancy which has exceeded 20 weeks without permission from the High Court, only where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman, which means that the registered medical practitioner is of the opinion that unless pregnancy is terminated immediately, the pregnant woman might succumb (die);*

*(b) We hold that a registered medical practitioner is not entitled to terminate pregnancy exceeding 20 weeks, where such termination is not immediately necessary to save the life of the pregnant woman i.e. there is no immediate danger of the pregnant woman succumbing, in case the pregnancy is not terminated;*

*(c) We hold that where a pregnant woman, the length of whose pregnancy has exceeded 20 weeks seeks to terminate such pregnancy on the ground that its continuance would involve grave injury to her physical or mental health or where there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped, such pregnant woman*

*will have to seek permission from the High Court and unless such permission is granted, no registered medical practitioner can terminate such pregnancy, inter alia on the basis of the interpretation of the provisions in section 5 of the MTP Act;...”*

The Petitioner craves leave to refer to and rely upon the said judgment as and when required.

20. As submitted, the MTP Act encourages desperate women who learn about a fetal abnormality after the 20th week to seek out unsafe abortions from untrained medical personnel. Illegal abortions are the third leading cause of maternal death in India and account for 13% of maternal deaths worldwide. Expanding the exceptions allowed under the MTP Act to include protection of maternal health could easily eliminate any of these senseless deaths.
21. Inadequate access to health care, poor quality services, and outdated abortion restrictions contribute to India’s high Maternal Mortality Rate of 212. Improving maternal health and reducing the Maternal Mortality Rate (MMR) is a United Nations Millennium Development Goal (MDG). India is expected to have an MMR of 139 deaths per 1 lakh live births in 2015, missing the MDG by 30 percentage points.
22. When abortion laws like India’s MTP Act do not provide exceptions to protect the health and welfare of the mother, these laws violate the Petitioner’s fundamental right to life, health and dignity under the domestic and international norms.



23. Noting deficiencies in the MTP Act, the National Commission for Women proposed the following changes to Sec. 3 (2)(b):

“Provided that where the pregnant woman is minor; pregnancy is a result of rape or incest, pregnant woman is physically challenged; or continuance of pregnancy would involve risk to the life of the pregnant woman; or grave injury to her physical or mental health; or there is a substantial risk that if the child were born it would suffer physical or mental abnormalities; then the upper limit on gestational time shall not apply to the termination of pregnancy.”

VIOLATION OF THE PETITIONER’S FUNDAMENTAL  
RIGHT TO LIFE:

24. Article 21 of the Constitution of India guarantees the right to life and personal liberty. In Pt. Parmanand Katara v. Union of India & Ors. [1989 SCR (3) 997], this Hon’ble Court held that Article 21 of the Constitution obligated the State to preserve life, This Hon’ble Court held that because the obligation to preserve life is “total, absolute and paramount,” laws of procedure [like the Medical Termination of Pregnancy Act] which “interfere with the discharge of this obligation cannot be sustained and must, therefore, give away.”
25. Without an exception to the ban on abortion to protect the health and welfare of the pregnant mother, the MTP Act forces pregnant women, like the Petitioner herein, who learn about fetal abnormalities after the 20th week

of pregnancy, to compromise their own personal safety and welfare by carrying abnormal foetuses to term, a violation of the Petitioner's right to life. Alternatively, the MTP Act restrictions encourage desperate women to seek out unsafe abortions from untrained medical personnel, putting their lives in extreme danger. Unsafe abortion is the third leading cause of maternal death in India. Thus, enforcement of the MTP Act without exception denies Petitioner No.1's protection of life in violation of Article 21.

VIOLATION OF THE PETITIONER'S RIGHT TO BE FREE FROM INHUMAN AND DEGRADING TREATMENT:

26. This Hon'ble Court has recognized that the right to life includes the right to be free from inhuman and degrading treatment. As described in *Francis Coralie Mullin v. Union Territory of Delhi & Ors.* [1981 SCR (2) 516]: “ There is implicit in Article 21 the right to protection against torture or cruel, inhuman or degrading treatment which is enunciated in Article 5 of the Universal Declaration of Human Rights and guaranteed by Article 7 of the ICCPR.”
27. Article 7 of the ICCPR states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. This imposes an obligation on the State to protect individuals from ill treatment and to protect women from unnecessarily prolonged physical or mental suffering. Because it not medically necessary, forcing Petitioner to carry a foetus knowing it would not survive amounts to the inhuman and

degrading treatment prohibited by Article 7 of the ICCPR.

28. The United Nations Human Rights Committee (HRC) found such violation in K.L. v. Peru where a woman in Peru was forced to carry a severely malformed foetus to term even though doing so posed risk to her health. On 17 November 2005, the HRC found that because depression and emotional distress caused by the denial of a therapeutic abortion was a foreseeable harm, the State violated Article 7 of the ICCPR.
29. In February 2013, the United Nations Special Rapporteur Juan E. Mendez identified reproductive rights practices that are tantamount to torture or ill-treatment including denial of information about a woman's medical condition and restricting legally available health services. "The Committee against Torture has repeatedly expressed concerns about restrictions on access to abortion and about absolute bans on abortion as violating the prohibition of torture and ill-treatment."
30. The anguish of women forced to carry a foetus that will not survive or will be severely handicapped amounts to cruel, inhuman and degrading treatment. Thus, restrictive abortion laws like the MTP Act violated the Petitioner's fundamental rights protected by Article 21 of the Constitution.

VIOLATION OF THE PETITIONER'S FUNDAMENTAL  
RIGHT TO HEALTH:

31. The Hon'ble Supreme Court held that Article 21 of the Constitution included a fundamental right to health, and that this right is a "most imperative constitutional goal" in *Consumer Education and Research Center v. Union of India* [ 1995 SCC (3) 43]. The right to health has been construed to mean both physical and mental well-being and health. The MTP Act itself recognizes the importance of mental health, as Section 1 allows for termination before 20 weeks if a doctor determines a pregnancy would cause a woman mental anguish. Women who require a termination after 20 weeks have no choice but to take on the physical and psychological risks.
32. The MTP Act's 20 week restriction also places a traumatic sense of urgency on Petitioner, forcing her to undergo significant emotional distress in deciding whether to go forward with an abortion when adequate medical information is not available. At grave risk to the emotional and psychological well being, the Petitioner chose to obtain a termination. Enforcement of the MTP Act is a clear violation of the right to health under Article 21 of the Constitution of India.
33. India is a signatory to the International Covenant on Economic, Social and Cultural Rights (ICESCR) which, in Article 12, requires States to "recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." The ICESCR treaty monitoring body, the committee on Economic, Social and Cultural Rights (ICESCR) further clarifies the right to health, explaining that: "The right to health is

not to be understood as a right to be healthy. The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom."

34. The MTP Act takes complete control over the Petitioner's reproductive freedom and choice at 20 weeks of pregnancy. ICESCR has expressly advised State parties to permit or consider permitting abortion for medical reasons including high risk pregnancies. Here, this exception would entail allowing the Petitioner to make the best choice for her mental and physical well-being. An exception to the MTP Act's ban on abortion for the health of the pregnant mother is imperative to ensure India's compliance with its international obligations under ICESCR.

35. Article 2 of the ICESCR requires states to undertake steps to the maximum of their available resources to achieve full realization of the rights recognized. According to General Comment 14, violations of this obligation include those State actions, policies or laws that contravene the standards set out in Article 12 of the Covenant and are likely to result in bodily harm, unnecessary morbidity and preventable mortality. Furthermore, the General Comment No. 22 (2016) on the Right to sexual and reproductive health enunciates that;

"the right to sexual and reproductive health is also indivisible from and interdependent with other human rights. It is intimately linked to civil and political rights underpinning the physical and mental integrity of individuals and their

autonomy, such as the right to life; liberty and security of person; freedom from torture and other cruel, inhuman or degrading treatment; privacy and respect for family life; and non-discrimination and equality. For example, lack of emergency obstetric care services or denial of abortion often lead to maternal mortality and morbidity, which in turn constitutes a violation of the right to life or security, and in certain circumstances can amount to torture or cruel, inhuman or degrading treatment.”

36. Enforcement of the MTP Act as it stands greatly impacts the health of the pregnant mother and results in preventable mortality of pregnant mothers who have no choice but to resort to unsafe abortion services. The Petitioner is forced to undergo severe psychological stress and trauma and is needlessly being compelled to carry a foetus to term when the foetus has a substantial anomaly and has no probability of independent survival. Thus, the State’s enforcement of the MTP Act clearly violates its obligation to enforce the rights of women under Article 12 of ICESCR.
37. Enforcement of the MTP Act’s ban on abortion after the 20th week endangers women’s physical and mental health and in cases of substantial fetal abnormalities, prolongs the suffering of the mother when she is aware of the prognosis and is compelled to continue the pregnancy against her will.
38. The NCW’s proposed amendments to Sec 3(2)(b) of the MTP Act provides guidance on how the MTP Act must

be revised to protect the lives and health of pregnant women, particularly where there is a substantial risk of physical or mental fetal abnormality.

ENFORCEMENT OF THE MTP ACT VIOLATES THE  
PETITIONER'S RIGHT TO LIVE WITH DIGNITY:

39. The right to live with dignity has also been enshrined in Article 21 of the Constitution of India and accepted as a fundamental right protected under international law. In *Francis Coralie Mullin v. Union Territory of Delhi & Ors.* [1981 SCR (2) 6] this Hon'ble court has held as under:

“Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live.”

40. Furthermore, under international law, Article 12.1 of the ICESCR states that “every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.”

41. Forcing the Petitioner to carry a severely deformed foetus for months knowing that it would not survive has caused her acute mental anguish, despair and physical pain. She is being deprived of dignity by not being able to make decisions about her own health, by having no control over her own body and by being forced to continue with her pregnancy.

42. Enforcement of the MTP Act has deprived the Petitioner of the dignity of making an informed decision about her own body and health.

RESPONDENT VIOLATES WOMEN'S RIGHT TO  
PERSONAL LIBERTY AND PRIVACY:

43. The right to privacy is also implicit in Article 21 of the Constitution of India. In *K.S. Puttaswamy (retd.) & Anr. vs. the Union of India* [Writ Petition (Civil) No. 494 of 2012] a nine-judge bench of the Hon'ble Supreme Court has held that the fundamental right to privacy is intrinsic to life and liberty and thus falls under Article 21 of the Indian constitution. Vide its order dated 24.08.2017, the Hon'ble Apex Court held that "*Life and personal liberty are inalienable rights. These are rights which are inseparable from a dignified human existence. The dignity of the individual, equality between human beings and the quest for liberty are the foundational pillars of the Indian Constitution*". It is submitted that the Petitioner being forced to continue an unwanted pregnancy, amounts to her losing her right to safeguard the privacy of procreation, motherhood and childbearing because ostensibly the MTP Act is making those choices for her.
44. Additionally, CEDAW explicitly affords women the right to freely decide the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights, See Article 12 and 16 of CEDAW and General Recommendation 24. While interpreting Article 12's right to health, CEDAW in General Recommendation 24 recommends that States "require all health services to be consistent with the human rights of women, including the rights to autonomy, privacy, confidentiality, informed consent and choice."



45. It is reiterated that the Petitioner is losing her right to decide freely on the number and spacing of her children. This right is integral to the enjoyment of reproductive self-determination encompassed within the right to privacy. The Petitioner has been unable to have an abortion despite the negative impact on her health and well-being. Thus, the MTP Act violates Petitioner's rights to personal liberty and privacy, guaranteed by the Indian Government and International law.

ENFORCEMENT OF THE MTP ACT VIOLATES  
PETITIONER'S RIGHT TO CHOICE AND INFORMED  
CONSENT:

46. This Hon'ble Court in Samira Kohli v. Dr. Prabha Manchanda and Anr. [Appeal (Civil) 1949 of 2004], established the requirement that a doctor should seek and secure the consent of the patient before commencing treatment. The consent obtained must be real and valid, meaning: the patient should have the capacity and competency to consent; her consent should be voluntary, and her consent should be on the basis of adequate information. The 'adequate information' should enable the patient to make a balanced judgment as to whether she should submit herself to the particular treatment or not.

47. Congenital/ Structural Echocardiography tests are advised after a sonography detects a defect in the foetus. Such sonographies, used to find abnormalities,

can only be done after the 18th week of pregnancy. The subsequent test then requires at least two to three more weeks to be analyzed. By the time the results are available, the pregnancy is likely to have passed the MTP Act's 20 week restriction for termination. Because medical staff often cannot determine the extent of a fetal abnormality until after 20 weeks, it is impossible for women in a position such as that of the Petitioner to give informed consent when they do not have enough time to access adequate medical information.

48. Justice requires that the MTP Act be revised to allow women sufficient time to consider the results of Level-II Ultrasounds which is same as sonography but done with intent of finding out anomalies, which are only available after the 20th week. Without this information, women cannot fully and voluntarily consent to an abortion when their mental and physical health is at stake. Without such an exception, enforcement of the MTP Act allows the woman's right to consent to be overridden by uninvolved third parties with dubious moral authority. The 20 week deadline effectively bars women who learn about fetal cerebral abnormalities from accessing safe medical terminations. Under the current law, these women are deprived of their right to choice and informed consent and are often compelled to seek out abortions from untrained medical personnel.

VIOLATION OF THE PETITIONER'S RIGHT TO  
EQUALITY BEFORE THE LAW:

49. Article 14 of the Constitution of India guarantees

equality before the law and Article 15 prohibits discrimination on the grounds of religion, race, caste, sex or place of birth. This Hon'ble Court describes gender equality as one of the "most precious Fundamental Rights guaranteed by the Constitution of India." *Apparel Export Promotion Council v. Chopra*, [AIR 1999 SC 625]. This Hon'ble Court reaffirmed the government's obligation to "gender sensitize its laws" and placed the judiciary "under an obligation to see that the message of the international instruments are heard."

50. The burdens of pregnancy, delivery, and childbearing are inequitably borne by women. Accordingly, women's quality of life and ability to pursue personal development stand to be disproportionately affected by the decision to carry a pregnancy involving fetal impairment to term. Criminalization of therapeutic abortion not only constitutes discrimination against women on the basis of sex, but also discrimination on the basis of socio-economic status as lower-income groups of women tend to have less access to information and resources related to reproductive health services. Nevertheless, the MTP Act provides no exception to account for this disproportionate impact in the health and welfare of the pregnant mother and therefore, violates the right to equality before the law as guaranteed under Article 14 and 15 of the Constitution of India.

51. India is a signatory to the Convention on the elimination of All Forms of Discrimination against Women (CEDAW). As such, India is bound to honor the

recommendations developed by CEDAW, which serve to clarify the obligations enforced by the treaty. General Recommendation 24 declares, “State parties that have laws that criminalize medical procedures only needed by women punish women who undergo those procedures.” Abortion is a medical procedure only needed by women and it is women whose lives and health are disproportionately put at risk by the MTP Act’s restrictions. Therefore, the Petitioner is being unduly discriminated against and punished based on her sex by the MTP Act’s criminalization of abortion after the 20th weeks of pregnancy. The right to no-discrimination under CEDAW requires that abortion be lawful when necessary to protect women’s health as a measure to eliminate discrimination against women in the field of health care.

52. It is pertinent to mention that the Ministry of Health and Family Welfare has released a draft of the Medical Termination of Pregnancy (Amendment Bill), 2014 which proposes to improve access to abortion through steps that will expand the health care providers’ base and simultaneously reduce women’s dependency on health care providers during the process of seeking abortion. The amendment Bill also explicitly extends abortion care to unmarried women and aims at ensuring privacy for women seeking abortion. The gestational limit for abortion will be extended from 20 to 24 weeks and in addition, abortion will be provided for specific fetal anomalies after this period. Hereto annexed and marked as **EXHIBIT J** is a copy of the Medical Termination of Pregnancy (Amendment Bill), 2014.

53. The Respondents have failed through their acts and omissions to adhere to Constitutional obligations to protect the Petitioner's reproductive rights, including the right to life and health enshrined in Article 21 and the rights to equality and non-discrimination in Articles 14 and 15. Moreover, the Respondents have impermissibly derogated from their legal obligations under binding international human rights treaties to respect, protect, and fulfill the human rights of the Petitioner, as required under Article 51(c) of the Constitution of India. Immediate action is necessitated from this Hon'ble Court to provide necessary medical and psychological care, and to revise the MTP Act to protect pregnant women and families from suffering the physical and mental pain of carrying a foetus that cannot survive and ensure that reproductive health care is accessible and administered in a dignified, humane, equitable, and gender-focused manner. Aggrieved by the same, the Petitioner seeks to assail the same on the following grounds which are without prejudice to one and other-

**GROUND:**

A. That by enforcing the MTP Act without an exception for the health and welfare of the pregnant mother, the Respondents have failed to protect the right to life by leaving desperate women carrying severe fetal abnormalities no choice but to seek unsafe abortions, which contributes significantly to India's poor maternal mortality rate.

- B. That the technological basis of the MTP Act's abortion limit to 20 weeks (section 3(2)(b)) is outdated and arbitrary.
- C. That the Respondents have violated Petitioner's Constitutional Rights to health and life guaranteed by Article 21, by subjecting them to life-threatening or life-altering conditions without a medical need.
- D. That the Petitioner's right to dignity and to be free from cruel, inhumane or degrading treatment has been violated inasmuch as the MTP Act forced her to compromise her own personal safety and welfare to abide by the law.
- E. That the MTP Act as it stands today compels the Petitioner to suffer physical pain, bear the risk of excessive bleeding in the delivery process, and compromise her mental health due to the severe trauma of giving birth to an infant that would die immediately after delivery, a violation of Article 7 of the ICCPR's right to be free from inhuman and degrading treatment.
- F. That the right to health is protected by Article 21 of the Indian Constitution and this right includes both emotional and mental health.
- G. That forcing the Petitioner to deliver a foetus with no potential to survive, gravely endangering her mental and physical health by causing her

significantly more mental anguish, trauma and physical pain than she would have had to endure if the MTP Act does not allow her to terminate her pregnancy.

H. That forcing the Petitioner to go through an unwanted pregnancy violates her right to dignity and sexual and reproductive freedom as guaranteed under Article 21 of the Indian Constitution and ICESCR.

I. That forcing the Petitioner to continue an unwanted pregnancy has deprived her of her right to safeguard the privacy of procreation, motherhood and child- bearing, as guaranteed under Article 21 of the Indian Constitution.

J. That Indian and International human rights standards demand that India reinterpret the MTP Act to ensure justice for the Petitioner and to protect future pregnant women and families from suffering the physical and mental pain of carrying a foetus that cannot survive.

K. That it is impossible for a pregnant woman to give informed consent when she does not have sufficient time to access information on the condition and deformity of the foetus she is carrying. Justice requires that the MTP Act be reinterpreted so as to allow women sufficient time to consider the results of fetal abnormalities, which are only available after the 20th week.

L. That the enforcement of the MTP Act also violates the Petitioner's right under CEDAW requiring that men and women be treated equally in terms of reproductive services and choice.

M. That reinterpreting the MTP Act to allow for protection of the health and welfare of pregnant women would not only serve to partially redress the Petitioner's injuries but would also protect the rights of future pregnant women in India.

N. That the Respondents in enforcing the MTP Act as it stands, clearly violates the rights of the Petitioner as guaranteed by binding international treaties and conventions including ICESCR, ICCPR, and CEDAW.

54. In the circumstances, the Petitioner is entitled to reliefs including interim reliefs.

55. The Petitioner has no other efficacious alternate remedy but to approach this Hon'ble Court under Article 226 of the Constitution of India and the reliefs as prayed for if granted shall be complete.

56. The Petitioner is a resident of Pune and the Respondents offices are within the State of Maharashtra. Hence the cause of action arises within the jurisdiction of this Hon'ble Court to entertain and try this Petition.

57. The Petitioner has not filed any other Petition before this Hon'ble Court or any other High Court or Hon'ble



Supreme Court of India arising out of this subject matter.

58. The Petitioner is paying the fixed court fee of \_\_\_\_\_ for the purpose of filing this petition.
59. The Petitioner shall rely upon the documents referred to and relied upon hereinabove.
60. The Petitioner has not received any Caveat application from the Respondent side till date.
61. The Petitioner therefore prays as under:
- (a) For a writ of declaration or any other appropriate writ, order or direction in the nature of declaration, declaring that the case of the Petitioner is a fit case for exercising jurisdiction under Section 3(2)(b) r/w section 5 of the Medical Termination of Pregnancy Act, 1971 as per the judgments of this Hon'ble Court in *Shaikh Ayesha Khatoon vs. Union of India & Ors.* (W.P. 628 of 2018) and *Sudha Devgirkar vs. Union of India & Ors.* [WP (civil) No. 10835/ 2018].
  - (b) For a writ of mandamus or any other writ, order, or direction in the nature of mandamus directing the Respondent to-
    - i. constitute a Medical Committee for the examination of the Petitioner to assist this Hon'ble court in arriving at a decision on the plea of the Petitioner;
    - ii. allow the Petitioner to undergo Medical Termination of Pregnancy at a medical

facility of her choice.

(c) Pending the hearing and final disposal of this matter this Hon'ble be pleased to direct the constitution of a Medical Committee for the examination of the Petitioner to assist this Hon'ble Court in arriving at a decision on the plea of the Petitioner.

(d) For ad-interim relief in terms of prayer clause (c).

(e) For any other order/ direction that this Hon'ble Court may deem fit.

Advocate for the Petitioner  
Afreen Khan / Rachita Padwal

Petitioner

### VERIFICATION

I, Nidhi Jadhav, do hereby state and solemnly declare that what is stated in the petition in paragraph No.1 to is based on my own knowledge and whatever is stated in the remaining paras no to is stated on information and belief to be true.

Solemnly declared at Mumbai )

On this day of February 2020 ) Petitioner

Identified by me

Advocates for the Petitioner  
Afreen Khan / Rachita Padwal

Before me

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.    OF 2020

In the matter of Article 14, 15,  
21 and 226 of the Constitution  
of India

-AND-

In the matter of the Medical  
Termination of Pregnancy  
Act, 1971

-AND-

In the matter of the Universal  
Declaration of Human Rights,  
1948

-AND-

In the matter of International  
Covenant on Civil and  
Political Rights, 1966

-AND-

In the matter of International  
Covenant on Economic,  
Social and Cultural Rights,  
1976

-AND-

In the matter of The  
Convention on the  
Elimination of all Forms of

Discrimination Against  
Women, 1979

Nidhi Nilesh Jadhav	)... Petitioner
Versus	
State of Maharashtra	)
through the Principal Secretary,	)
Public Health Department,	)
Mantralaya, Mumbai 23.	) ...Respondent

To  
The Registrar  
High Court  
Mumbai - 400001

Sir,  
I, the above mentioned Petitioner do hereby appoint Afreen Khan /  
Rachita Padwal, Advocate, High court to act, appear, and plead on  
my behalf in the above matter.

IN WITNESS WHEREOF I set and subscribe my hand on this  
writing dated this \_\_\_\_ day of February, 2020.

Accepted

Afreen Bano Khan / Rachita Padwal	Petitioner
Advocate for the Petitioner	
403, 4 <sup>st</sup> Floor, Sheel Chambers,	
Cawasji Patel Road,	
Fort. Mumbai- 400001	

**IN THE HIGH COURT OF  
JUDICATURE AT BOMBAY  
CIVIL APPELLATE  
JURISDICTION**

WRIT PETITION NO.      OF  
2020

Nidhi Nilesh Jadhav

...Petitioner

Versus

State      of      Maharashtra

...Respondent

**WRIT      PETITION      NO**  
**OF 2020**

Dated this      day      of  
January 2020

Afreen    Khan    /    Rachita  
Padwal

Advocate for the Petitioner

403,    4<sup>st</sup>    Floor,    Sheel  
Chambers,

Cawasji Patel Road,

Fort. Mumbai- 400001

Advocate Code