IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL JURISDICTION

WRIT PETITION NO. OF 2020

District- Mumbai

Punam Shah) … Petitioner

Nee Punam Jejurkar

Versus

State of Maharashtra) … Respondent

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Advocate for the Petitioner

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SYNOPSIS

The Petitioner seeks permission to undergo a medical procedure as she is barred from seeking medical termination of pregnancy due to the efflux of the time period.

LIST OF DATES

Date	**Event**
13th June 2020 and 19th June 2020	Petitioners medical tests inform her of an anomaly in the Foetus.
19th June 2020	Petitioner while seeking a second medical opinion expresses a desire to undergo an MTP. The Doctor advises her to approach this Hon'ble Court for permission as she is in her 28th Week.
19.06.2020	Hence this Petition, as a matter of abundant

	caution to undergo a medical termination of pregnancy.

POINTS TO BE URGED

a. That the technological basis of the MTP Act's abortion limit to 20 weeks (section 3(2)(b)) is outdated and arbitrary.

b. That this Court has held that a woman has absolute right to her bodily integrity

c. That not allowing the petitioner to undergo a medical termination of her pregnancy amounts to violation of her rights enshrined at Article 14 and 21 of the Constitution of India.

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.

Rachita Padwal / Aditi Saxena

Advocate for the Petitioner

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL 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 order dated 09.10.2017 passed by the Hon'ble Supreme Court in Sonali Kiran Gaikwad v. Union of India & Ors. [W.P. (C) 928 of 2017]

-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

Punam Shah) … 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 Mumbai and is 28 weeks pregnant and is barred from seeking a Medical Termination of her pregnancy as the fetus has been detected with Arnold Chiari -II Malformation.

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 to undergo a medical procedure pertaining to her pregnancy i.e. akin to a termination of her pregnancy.

FACTS OF THE CASE:

4. The brief facts leading to the filing of this Writ are as follows:

    a. The Petitioner, aged 29 years old, residing with her husband in Mumbai. Hereto marked and annexed as **EXHIBIT A** and **EXHIBIT B** are a copy of the Adhaar card of the Petitioner and the marriage photograph. **EXHIBIT C** is a copy of Aadhar card of Petitioner's husband for address proof.

    b. On 13.06.2020, during an Ultrasonography of gravid uterus conducted at Yashashri Diagnostic Centre, it was found for the first time that the foetus of the Petitioner having a gestational age of 27 weeks 1 day suffered from serious anomalies like that of Chiari II malformation. It was observed as follows-

> *"Fetal congenital anomalies are seen-*
> *Fetal spine shows multiple spinae bifidae and open neural tube defect.*
> *Small head, Lemon shaped skull seen with narrow posterior fossa, small cerebellum.*
> *Mild ventriculomegaly.*
> *This is suggestive of Chiari - II malformation."*

Hereto annexed and marked as **EXHIBIT D** is a copy of the Ultrasonography of gravid uterus dated 13.06.2020.

    c. Thereafter, the Petitioner approached Dr. Harish Shetty who suggested another test. An USG of gravid uterus was conducted on 19.06.2020. The report of the

said examination confirmed the findings of multiple anomalies and noted as follows:

> *"The spinal canal in the lumbar and sacral region is open posteriorly. Lemon sign is noted, the skull is small, the cerebellum has herniated via the foramen magnum. (arnold chiari malformation)*
> *Single live fetus in cephalic presentation of 28 weeks 1 days."*

Hereto annexed and marked as **EXHIBIT E** is a copy of the Ultrasonography of gravid uterus dated 19.06.2020.

d. Accordingly the Petitioner seeks to approach this Hon'ble Court to undergo a medical procedure akin to a Medical Termination of Pregnancy;

GROUNDS

5. The Petitioner has approached this Hon'ble Court on the following amongst other grounds which are without prejudice to one another:

a. That the Petitioner is seeking termination of pregnancy as the fetus is detected with Arnold chiari - II malformation.
b. 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.

c. That the technological basis of the MTP Act's abortion limit to 20 weeks (section 3(2)(b)) is outdated and arbitrary.

d. 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 basis.

e. 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.

f. 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 is bound to have poor quality of life with serious handicap , a violation of Article 7 of the ICCPR's right to be free from inhuman and degrading treatment.

g. That the right to health is protected by Article 21 of the Indian Constitution and this right includes both emotional and mental health.

h. That forcing the Petitioner to undergo a full pregnancy 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 terminate her pregnancy.

i. 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.

j. 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.

k. 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.

l. 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.

m. 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.

n. 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 grievances but would also protect the rights of future pregnant women in India.

o. That the Respondent in enforcing the MTP Act as it stands, this clearly violates the rights of the Petitioner as guaranteed by binding international treaties and conventions including ICESCR, ICCPR, and CEDAW. The Petitioner crave leave to rely and refer to the provisions of the ICESCR, ICCPR and CEDAW at the additional submissions.

p. That this Hon'ble Court as well as the Hon'ble Supreme Court through a catena of Judgments have held that not only is a woman entitled to absolute autonomy of her body and that infringements on the same violate article 14 and 21 of the Constitution of India. The Petitioner craves leave to rely and refer to further submission on the same.

q. 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."

r. 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.

s. The Federation of Obstetric and Gynecological Societies of India (FOGSI), a body comprising 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."

t. 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".

u. 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.

v. 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, the prenatal diagnosis for these anomalies was made at a median gestational age of 21 weeks (with range of 19-26 weeks).

w. 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 diagnose 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 reduces if she was permitted to terminate the pregnancy.

IMPACT OF RESTRICTIVE ABORTION LEGISLATION ON THE PETITIONER:

x. 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.

y. 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."

z. Most recently, the Hon'ble Supreme Court vide common order in identical cases of "Sonali Kiran Gaikwad v. Union of India" and "Nisha Suresh Aalam v. Union of India", while allowing medical termination of pregnancy at gestational ages of 29 weeks and 30 weeks respectively, observed and directed that:

"A categorical view reflected in the above said report is that if the pregnancy of the petitioners is terminated at this stage it is not going to be more hazardous than spontaneous delivery at term. On the contrary, continuing pregnancy will cause more mental anguish to the petitioners. Having regard to the aforesaid report and the law laid down by this Court in various judgments including in judgment dated 16.01.2017 in W.P. (C) No.17 of 2017 titled as Meera Santosh Pal & Ors. vs. Union of India & Ors., the prayer made in the

writ petitions(s) is allowed to the extent the petitioners are free to undergo medical termination of their pregnancy. For this purpose, petitioners-Sonali Kiran Gaikwad and Nisha Suresh Aalam may visit the hospital on 12th October, 2017 and they would be attended immediately."

A true copy of the order of Hon'ble Supreme Court of India in W.P.(C) 928/2017 and W.P. (C) 929/2017, dated- 09.10.2017**.**

aa. Similarly in the case of Tapasya Umesh Pisal vs. the Union of India & Ors. [Writ Petition (Civil) No. 635 of 2017], the Petitioner's fetus was diagnosed as having hypoplastic right heart with tricuspid and pulmonary atresia with small size pulmonary arteries. A medical board was constituted by the Hon'ble Supreme Court vide order dated. 07.08.2017. The Medical Board stated in its report that the surgeries that will be necessary on the fetus have been reported to carry high morbidity and mortality and that in spite of the surgeries, such children do not achieve normal oxygen level and would remain physically incapacitated. The life span of these children even after corrective surgeries is limited as described in medical literature. The Supreme Court while recording that it is certain that the fetus, if allowed to be born, would have a limited life span with serious handicaps which cannot be avoided, granted the Petitioner permission to undergo medical termination of her pregnancy. The Petitioner at the time was well into her 24th week of pregnancy.

bb. 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.'

cc. 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 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 aforementioned judgments as and when required.

dd. 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.

ee. 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.

ff. 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.

gg. 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:

hh. 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."

ii. 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:

jj. 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."

kk. 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 band to protect women from unnecessarily prolonged physical or mental suffering. Because it not medically necessary, forcing Petitioner No. 1 to carry a foetus knowing it would not survive amounts to the inhuman and degrading treatment prohibited by Article 7 of the ICCPR.

ll. 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.

mm. 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."

nn. 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:

oo. 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.

pp. 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.

qq. 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."

rr. 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.

ss. 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."

tt. 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.

uu. 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.

vv. 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:

ww. 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."

xx. 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."

yy. 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.

zz. 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:

aaa. 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.

bbb. 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."

ccc. 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 laws

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

ddd. 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.

eee. 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.

fff. 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:

ggg. Article 14 of the Cvonstitution 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.”

hhh. 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.

iii. 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.

jjj. 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.

kkk. In the circumstances the Petitioner is entitled to reliefs including interim reliefs.

6. The Petitioner submits;
   a. That 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.
   b. The Petitioner is a resident of Mumbai 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.
   c. The Petitioner has not filed any other Petition before this Hon'ble Court or any other High Court of Hon'ble Supreme Court of India arising out of this subject matter.
   d. The Petitioner is paying the fixed court fee of Rs. 250 for the purpose of filing this petition.

e. The Petitioner shall rely upon the documents referred to and relied upon hereinabove.

f. The Petitioner has not received any Caveat application from the Respondent side till date.

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] for termination of pregnancy for the foetus that is diagnosed with an anomaly.

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.

b. 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.

c. For ad-interim relief in terms of prayer clause (c).
d. For any other order/ direction that this Hon'ble Court may deem fit.

Rachita Padwal / Aditi Saxena Petitioner

Advocate for the Petitioner

VERIFICATION

I, Punam Shah, do hereby state and solemnly declare that what is stated in the petition in paragraph No.1 to 4 is based on my own knowledge and whatever is stated in the remaining paras no 5 to 7 is stated on information and belief to be true.

Solemnly declared at Mumbai)
On this 22nd day of June, 2020) Petitioner
(Punam Shah)

Identified by me

Rachita Padwal

Advocate for the Petitioner BEFORE ME

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL 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 order dated 09.10.2017 passed by the Hon'ble Supreme Court in Sonali Kiran Gaikwad v. Union of India & Ors. [W.P. (C) 928 of 2017]

-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

Punam Shah) … Petitioner

Versus

State of Maharashtra)
through the Principal Secretary,)
Public Health Department,)
Mantralaya, Mumbai 23.)…Respondents

Sir,

I, the above mentioned Petitioner do hereby appoint Rachita Padwal / Aditi Saxena, 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 22nd day of June, 2020.

Accepted

Rachita Padwal / Aditi Saxena Petitioner

Advocate for the Petitioner

4th floor, 403, Sheel Chambers,
10, Cawasji Patel Street,
Opp Mumbai Masala,
Fort, Mumbai -400 001.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL JURISDICTION

WRIT PETITION NO. OF 2020

District- Mumbai

Punam Shah	)	… Petitioner
Versus		
State of Maharashtra	)	… Respondent

MEMORANDUM OF ADDRESS

Rachita Padwal / Aditi Saxena

Advocates for the Petitioner

4th floor, 403, Sheel Chambers,
10, Cawasji Patel Street,
Opp Mumbai Masala,
Fort, Mumbai -400 001.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL JURISDICTION

WRIT PETITION NO. OF 2020

District- Mumbai

Punam Shah) … Petitioner

Nee Punam Jejurkar

Versus

State of Maharashtra) … Respondent

LIST OF DOCUMENTS UPON WHICH THE PETITIONER WILL RELY UPON

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL JURISDICTION

WRIT PETITION NO. OF 2020

District- Mumbai

Punam Shah) … Petitioner

Nee Punam Jejurkar

Versus

State of Maharashtra) … Respondent

I the Petitioner above named do hereby solemnly affirm and state as under:

1. I am conversant with facts of the case and I am able to depose on the same.
2. I repeat, reiterate and confirm all that has been stated in the Petition and respectfully submit that same to be treated as part and parcel of this Affidavit to avoid repetition.
3. In the above circumstances, I say and submit that the prayers sought in the Petition be taken on record and the same may be granted.

Solemnly affirmed at Mumbai)

This 22nd day of June 2020) Petitioner

Before me

Rachita Padwal / Aditi Saxena,

Advocates for the Petitioner

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL JURISDICTION

WRIT PETITION NO. OF 2020

District- Mumbai

Punam Shah) … Petitioner

Nee Punam Jejurkar

Versus

State of Maharashtra) … Respondent

ADVOCATE'S CERTIFICATE

I, Rachita Padwal, Advocate for the Petitioner herein, do hereby certify and state that the issues involved in the Present Writ Petition is to be entertained by the Divisional Bench of this Hon'ble Court because this Petition does not challenge any judicial order as contemplated under the amended Rule 636(1) (b) of the Bombay High Court, O.S Rules. Therefore the said Petition is required to be placed before the Divisional Bench.

Dated this 22nd day of June 2020

Rachita Padwal

Advocate for the Petitioner Before me

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL JURISDICTION

WRIT PETITION NO. OF 2020

Punam Shah ...Petitioner

Versus

State of Maharashtra ...Respondent

WRIT PETITION NO. OF 2020

Dated this 22nd day of June 2020

Rachita Padwal / Aditi Saxena
Advocate for the Petitioner
4th floor, 403, Sheel Chambers,
10, Cawasji Patel Street,
Fort, Mumbai -400 001.