

**IN THE SUPREME COURT OF INDIA**

**CIVIL ORIGINAL JURISDICTION**

**WRIT PETITION (CIVIL) NO. \_\_\_\_\_ OF 2014**

**(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)**

In the matter of:

MRS. X AND MRS. Y

...Petitioners

Versus

UNION OF INDIA & Ors.

...Respondent

PAPER BOOK

I.A No. of 2014-Application for Interim Direction

I.A No. of 2014-Application for masking names and  
details of Petitioners

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ADVOCATE FOR THE PETITIONER: JYOTI MENDIRATTA

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True copy of Government may increase legal time limit on abortions, issued by Indian Health News, dated 10 September 2008.

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True copy of Unsafe Abortion: The Missing Link in Global Efforts to Improve Maternal Health, issued by the Guttmacher Policy Review, dated Spring 2011.

11. **Annexure P-8:**

True copy of India Will Miss 2015 Millennium Development Goals, issued by Times of India, 2 July 2012.

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True copy of Rare Birth Defect Poses a Challenge to Doctors, issued by The Hindu, dated 7 October 2012.

16. **Annexure P-13:**

True copy of Mrs. X's in-patient hospital record, dated 18 October 2012 – 23 October 2012.

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True copy of One Woman Dies of Abortion Every 2 Hours, issued by the Times of India, dated 20 November 2012.

19. **Annexure P-16:**

True copy of the Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, issued by the United Nations Human Rights Council, dated 1 February'13

20. **Annexure P-17:**

True copy of the Draft Note on Proposed Amendments to the Medical Termination of Pregnancy Act 1971, issued by the National Commission for Women, dated 3 February 2013.

21. **Annexure P-18:**

True copy of Doctors Focused Too Much on Savita's Fetus, issued by The Hindu, dated 2 April 2013.

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True copy of Baby Born to El Salvador Woman Denied Abortion Dies After C-section, issued by the Guardian dated 4 June 2013.

23. **Annexure P-20:**

True copy of Fetal Pain is a Lie: How Phony Science Took Over the Abortion Debate, issued by Salon dated 7 August 2013.

24. **Annexure P-21:**

True copy of list of the countries and their abortion laws compiled January 2014.

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**LISTING PROFORMA  
IN THE SUPREME COURT OF INDIA**

1. Nature of the matter: CIVIL
2. Name(s) of Petitioner: MRS. X & MRS. Y
3. Name(s) of Respondent: UNION OF INDIA
4. Number of Case: W.P. (c).No
5. Advocate(s) for Petitioner: JYOTI MENDIRATTA
6. Advocate(s) for Respondent:
7. Section dealing with the matter:  
32 OF THE CONSTITUTION
8. Date of impugned Order/Judgment:
- 8A. Name of Hon'ble Judges:
- 8B. In Land Acquisition Matters:
  - i) Notification/Govt. Order No. (u/s 4, 6) NA
  - ii) Exact purpose of acquisition & village involved: NA
- 8C. In Civil Matters: NA
  - i) Suit No., Nature of Lower Court:  
Date of Judgment:
- 8D. In Writ Petitions:  
"Catchword" of other similar matters
- 8E. In case of Motor Vehicle Accident Matters:  
Vehicle No. NA
- 8F. In Service Matters:
  - i) Relevant service rule, if any NA
  - ii) G.R./Circular/Notification, if applicable or in question:  
NA
- 8G. In Labour Industrial Disputes Matters:  
I.D. reference/Award No., if applicable: NA
9. Nature of Urgency:
10. In case it is a Tax Matter:
  - (a) Tax amount involved in the matter: NA
  - (b) Whether a reference/statement of the case was called

	for or rejected.	NA
	(c) Whether similar tax matters of same parties filed earlier (may be for earlier/other Assessment Year)?	NA
	(d) Exemption Notification/Circular No.:	NA
11.	Valuation of the matter:	NA
12.	Classification of matter:	NA
	(Please fill up the number & name of the relevant category with sub category as per the list circulated)	
	No. of Subject Category with full name:	NA
	No. of sub-category with full name:	NA
13.	Title of the Act involved (Centre/State):	
14.	(a) Sub-Classification (indicate Section/ Article of the same):	NA
	(b) Sub-Section involved:	NA
	(c) Title of the Rules involved (Central/State):	NA
	(d) Sub-classification (indicate Rule/Sub-Rule of the Statute):	NA
15.	Point of Law and question of Law raised in the case:	NA
16.	Mention the name of the Hon'ble Judge:	NA
17.	Particulars of identical/similar cases, if any:	
	(a) Pending cases:	NA
	(b) Decided cases with citation:	NA
17A.	Was S.L.P./Appeal/Writ filed against same impugned? Judgment/ Order earlier? If yes, particulars:	NA
18.	Whether the petition is against interlocutory/final order/decreed in the case:	NA
19.	If it is a fresh matter, please state the name of the High Court and the Coram in the impugned Judgment:	NA
20.	If the matter was already listed in this Court:	
	(a) When was it listed?:	NA
	(b) What was the Coram:	NA
	(c) What was the direction of the Court:	NA

21. Whether a date has already been fixed either by Court or on being mentioned, for the hearing of matter? NA  
If so, please indicate the date fixed:
22. Is there a caveator? If so, whether a notice has been issued to him: NA
23. Whether date entered in the Computer: NA
24. If it is a criminal matter, please state:
- (a) Whether accused has surrendered: NA
- (b) Nature of Offence, i.e., Convicted under Section with Act: NA
- (c) Sentence awarded: NA
- (d) Sentence already undergone by the accused: NA
- (e) i) FIR/RC/etc.:  
Date of Registration of FIR etc.: NA  
Name & Place of the Police Station: NA
- ii) Name & Place of Trial Court:  
Case No. in Trial Court and Date of Judgment: NA
- iii) Name of Place of 1<sup>st</sup> Appellate Court  
Case No. in 1<sup>st</sup> Appellate Court & date of Judgment: NA

Bombay

Date: \_\_.\_\_.2013

JYOTI MENDIRATTA  
ADVOCATE FOR PETITIONER



## **SYNOPSIS**

1. This petition is identical to Nikhil D. Datar Vs. Union of India (SLP (C) 5334 of 2009) in which this Hon'ble Court on 13.2.09 made the following order:

“Delay condoned.

Issue notice.

Petitioner is permitted to produce additional documents.”

2. This petition challenges the constitutional validity of section 3 (2) (b) of the Medical Termination of Pregnancy Act, 1971 (MTP) restricted to the ceiling of 20 weeks stipulated therein. This challenge is to the effect that the 20 weeks stipulation for a woman to avail of abortion services under section 3(2) (b) may have been reasonable when the section as enacted in 1971 but has ceased to be reasonable today where technology has advanced and it is perfectly safe for a woman to abort even up to the 26<sup>th</sup> week and thereafter. Secondly, determination of fetal abnormality in many cases can only be done after the 20<sup>th</sup> week and by keeping the ceiling artificially low, women who obtain reports of serious fetal abnormality after the 20<sup>th</sup> week have to suffer excruciating pain and agony on account of the deliveries that they are forced to go through. The ceiling of 20 weeks is therefore arbitrary,

harsh and discriminatory and violative of Articles 14 and 21 of the Constitution of India.

3. This petition also impugns the constitutional validity of section 5 of the Act limited to the phrase "the termination of such pregnancy is immediately necessary to save the life of the pregnant woman" on the ground that this clause is unduly restrictive and is arbitrary, harsh and discriminatory and violative of Articles 14 and 21 of the Constitution. This phrase is interpreted in a very literal and narrow way giving rise to the constitutional challenge. The present interpretation by government hospitals and practitioners is that the abortion services can only be provided after 20 weeks in circumstances where, if the abortion is not done, the woman would surely die. This section is unconstitutional first, because it does not provide for severe fetal abnormalities discovered after the 20<sup>th</sup> week and secondly, it does not recognize the physical and mental health and well being of the woman as being part of the expression "life". The physical and mental trauma involved in delivering a fetus with severe abnormalities is today not concerned ground enough for abortion post 20 weeks under section 5.

4. Hence it is prayed that the section be struck down as unconstitutional or read down to make the section compatible with Articles 14 and 21 of the Constitution.
5. The present writ petition is being filed under Article 32 of the Constitution of India seeking relief for the Petitioners, Mrs. X and Mrs. Y who suffered immense mental and physical anguish as a result of the unreasonable 20 week restriction under Sections 2(b) of the Medical Termination of Pregnancy (MTP) Act. An SLP regarding the arbitrary and dangerous restrictions in the MTP Act has been filed before this Hon'ble Court, *Nikhil Datar vs Union of India & Ors.* (SLP (C) 5334/2009). This petition seeks compensation for violations of the right to life, health, and dignity enshrined in Article 21 and a declaration by this Hon'ble Court that the term 'save the life of the pregnant woman' in Section 5 of the MTP Act be read to include the protection of the mental and physical health of the pregnant mother after 20 weeks of gestation, especially in cases where any serious abnormalities in the fetus are detected after the 20<sup>th</sup> week of pregnancy.
6. The Petitioners wish to remain anonymous because of the extreme stigma attached to medical termination of pregnancy and because of the intensely personal and

private decisions and injuries the Petitioners sustained and continue to experience. The Petitioners' affidavits contain their identities and the Petitioners humbly request this Hon'ble Court to maintain their anonymity.

7. Mrs. X's physical and mental health was put in serious risk because of the 20 week time limit in Section 2(b) of the MTP Act. Mrs. X comes from a poor economic background and helps her husband with his tailoring job. At 26 weeks of pregnancy, she received her first sonography which diagnosed her fetus with an untreatable medical condition called Anencephaly, where the organs of the fetus develop, but the head and brain never form. Because the fetus had a substantial anomaly with no probability of independent survival, Mrs. X and her family requested an abortion. Her doctor explained that at 26 weeks, termination of pregnancy is medically possible and safe, but that the MTP prohibits medical termination post 20 weeks. The procedure would be legal under the MTP Act if there was a risk to the mother's life, but that at 26 weeks, MTP is illegal if there is a substantial risk of serious handicap to the fetus. Although her doctor knew delivery might threaten Mrs. X's health, MTP was illegal unless her life was at risk. Mrs. X was forced to continue with her pregnancy, visit the hospital regularly, and participate in

social events to celebrate the birth of her child, all while carrying a fetus that she knew could never survive. Hence, the MTP Act denied Mrs. X her right to an abortion, caused her extreme anguish and forced her to continue her pregnancy when she knew that the fetus would never survive.

8. She was forced to endure three days of excruciating labor.

Excess fluid in the womb and the fetus' breeched position, which are both medically known to occur in cases of Anencephaly, made the delivery especially painful and difficult. There was a high risk of excessive bleeding during and after delivery and Mrs. X was told that she may need a cesarean section surgery. After hours of pain, doctors finally managed with great difficulty to deliver a baby boy who died less than three hours later. In addition to her excruciating and dangerous labor, Mrs. X endured the grief and sorrow caused by losing a child. The MTP Act's Section 2(b) 20 week restriction forced her to undergo severe psychological, physical, and emotional trauma from going through a full term pregnancy just to have her fetus die immediately afterwards.

9. Mrs. Y, an advocate from Mumbai, became pregnant for the first time in June 2012 and regularly visited her doctor for antenatal care and underwent necessary tests including sonographies which were reported to be normal. As per standard norms, she underwent a sonography in her 19<sup>th</sup> week. The sonography detected a high possibility of abnormalities such as inferior vermian agenesis, choroid plexus cyst (in the brain), and bilateral SVC (Superior Vena Cava) which her doctor explained may lead to mental retardation and lack of muscle control and counseled Mrs. Y to undergo a specific test namely Fetal MRI. Thus, Mrs. Y hurriedly subjected herself to an expensive fetal Magnetic Resonance Imaging (MRI) test. The report read as under: Absent inferior cerebellar vermis. There is communication between the fourth ventricle and cistern magna. These findings are suggestive of Dandy Walker Variant. No other intracranial malformations seen. Mrs. Y sought out opinion from senior pediatric neurologist Dr. Vrajesh Udani from Hinduja Healthcare Surgical Hospital. In view of the sonography report and MRI test results, Dr. Udani gave Mrs. Y a very guarded prognosis, stating that the unborn foetus had "Dandy Walker Variant". Mrs. Y was explained that there are significant chances of the baby being mentally retarded and having problem with balancing the body. Mrs. Y was further advised to rule out the

chromosomal abnormality in the fetus by undergoing Amniocentesis whereby fluid around the fetus in utero is drawn with a needle and sent for genetic testing. This testing could take three weeks to properly evaluate.

10. Dr. Ujwala, the Obstetrician of Mrs. Y reiterated the need of ruling out Chromosomal abnormality to give a more precise prognosis. However, Mrs. Y was informed that the test results of amniocentesis test would be available only after three weeks. . By the time the test results would be available, Mrs. Y's pregnancy would have exceeded the MTP Act's 20 week limit. Mrs. Y was left with two options, either to terminate the pregnancy with insufficient information or to run the risk of giving birth to a baby with a substantial anomaly. The MTP Act forced Mrs. Y to make a traumatic and ill-informed decision on abortion without a full understanding of the medical facts. Enforcement of the Act as it stands violated Mrs. Y's right to health, life, dignity, informed choice, and reproductive autonomy.

11. Out of the 26 million births that occur in India every year, approximately 2-3% of the fetuses have a severe congenital or chromosomal abnormality. Many suffer Intrauterine Fetal Death (IUFD) or are stillborn. With new

3-D and 4-D sonographic technology, it is possible to detect abnormalities before 20 weeks, while other abnormalities can be detected only after 20 weeks. Many of these defects create risks to a woman's health during pregnancy and delivery. In India, where many women do not have access to antenatal care, fetal abnormalities may only be detected during the first antenatal check-up late in the pregnancy. Section 3(2)(ii) of the MTP Act allows for termination in the case of fetal "physical or mental abnormalities." Where women do not have access to adequate antenatal care during the first 20 weeks of pregnancy, they lose the protection of the MTP Act. As a result, the MTP Act causes severe mental anguish and trauma to the mother's mental health by forcing her to carry a fetus that will not survive.

12. *Dr. Nikhil D. Datar v. Union of India & Ors.*, [SLP (C) 5334 of 2009)] provides another example of victims of the MTP Act. In her 20<sup>th</sup> week of pregnancy Niketa Mehta's sonography showed her fetus to be normal. However, in the 22<sup>nd</sup> week, the gynaecologist found that the fetus 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 fetus was not discovered until the 22<sup>nd</sup> 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, increasing the need for the MTP Act to be amended, Dr. Datar filed a special leave petition, *Dr. Nikhil D. Datar v. Union of India & Ors.*, before this Hon'ble Court to appeal the Bombay High Court decision.

13. The Federation of Obstetric and the 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 "[i]n case of fetal abnormality which has been detected late and which leads to an extremely serious handicap at birth, such fetus should be allowed to be terminated, even after 20 weeks."

14. As written, the MTP Act encourages desperate women who learn about a fetal abnormality after the 20<sup>th</sup> 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. A 2013 article published by Times of India reported that unsafe abortions contribute to at least 8% (4,600 deaths) of all maternal deaths in India each year.

15. A news article on India Health News on 10 September, 2008 states that the Government MTP Committee report from Health Secretary Naresh Dayal and former director-general of Indian Council of Medical Research Dr. N K Ganguly encouraged increasing the time limit of legal abortion to 24 weeks, but no such report was ever made public.

16. The National Commission for Women (NCW) recently proposed that the MTP Act be amended to state:

“Provided that where pregnant woman is minor; pregnancy is result of rape or incest, pregnant woman is physically or mentally 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.” (Annexure P-17) This revision would protect

the physical and mental health of pregnant women and permit termination after the severity of the fetal abnormality can be determined.

17. Without such an exception to protect the health of pregnant women throughout pregnancy, the MTP Act violates fundamental and human rights guaranteed by the Constitution of India and international law. Although the MTP Act has provisions for protecting a woman's physical and mental health, the 20 week restriction causes women extreme physical and mental trauma. As such, judicial intervention is necessary to redress the continuous human and fundamental rights violations experienced by the Petitioners. Urgent and immediate relief is requested from this Hon'ble Court to ensure that the Petitioners' dignity, equality, and humanity are restored.

18. In conformity with international laws respecting women's rights to life, equality and health Albania, Australia, Belgium, Canada, China, Croatia, Denmark, Iceland, Israel, Luxembourg, Nepal, Netherlands, Slovakia, South Africa, United Kingdom, and United States do not include absolute time limits in their abortion laws. Instead, these countries consider the woman's physical and mental health and

doctors' expert opinions in determining whether a medical termination of pregnancy can be performed post 20 weeks.

Hence this Petition.

## LIST OF DATES AND EVENTS

- 1971 The Indian Parliament enacted the Medical Termination of Pregnancy Act (Act No. 34 of 1971).
- 1975 The implemented rules and regulations of the Medical Termination of Pregnancy Act were revised in 1975 to make abortion services more readily available and to eliminate time consuming procedures for the approval of the place of the abortion.
- 10.04.79 The Government of India ratified the International Covenant on Civil and Political Rights (ICCPR), which includes the right to be free from torture or cruel, inhuman or degrading treatment (Article 7).
- 10.04.79 The Government of India ratified the International Covenant on Economic Social and Cultural Rights (ICESCR), which guarantees the right to the highest attainable standard of health (Article 12).
- 13.01.81 *Francis Coralie Mullin v. Union Territory of Delhi & Ors*, [1981 SCR (2) 6]. This Hon'ble Court held that the right to protection against torture and

cruel, inhuman or degrading treatment is implicit in Article 21 of the Indian Constitution.

28.08.89 *Pt. Parmanand Katara v. Union of India & Ors.*, [1989 SCR (3) 997]. This Hon'ble Court held that Article 21 of the Constitution casts the obligation on the State to preserve life.

09.07.93 The Government of India ratified the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) guaranteeing women the highest standard of reproductive health.

27.01.95 *Consumer Education and Research Centre v. Union of India*, [1995 SCC (3) 43]. This Hon'ble Court held that Article 21 of the Constitution of India includes a fundamental right to health, and that this right is a "most imperative constitutional goal."

18.12.96 *PUCL v. Union of India* [1996 SCC]. This Hon'ble Court held that the right to privacy is enshrined within the rights to life and liberty under Article 21 of the Constitution.

1999 The Convention on Elimination of All Forms of Discrimination Against Women issued General Recommendation 24 to clarify that Article 12 requires recognition of women's right to self-

determination in reproductive decisions.

20.01.99 *Apparel Export Promotion Council v. Chopra*, [AIR 1999 SC 625]. This Hon'ble Court held that gender equality is one of the "most precious Fundamental Rights guaranteed by the Constitution of India."

2002 The Medical Termination of Pregnancy Act was amended to decentralize site registration, allow district level approval of sites to perform MTPs, and impose stricter penalties for MTPs being done in un-approved sites or by un-permitted persons.

24.10.05 The United Nations Human Rights Committee (HRC) issued the decision on *KL v. Peru* which found that forbidding a woman to obtain an abortion when her health was in jeopardy violated Article 7 (right to be free from torture or cruel, inhuman, or degrading treatment) of the International Covenant on Civil and Political Rights (ICCPR).

April 2006 The American Journal of Obstetrics & Gynecology published a study entitled Diagnosis of Inferior Vermian Hypoplasia by Fetal Magnetic Resonance Imaging reporting that diagnosis for

cerebral anomalies often cannot be made until at least the 22<sup>nd</sup> week of pregnancy.

2008 The Australian Medical Journal issued *Pregnant Women with Fetal Abnormalities: The Forgotten People in the Abortion Debate*, reporting that the accuracy of prenatal testing is compromised in jurisdictions where access to abortion is limited to 20 weeks or prior. The report also finds that in cases of fetal abnormalities, denying abortion may only delay the inevitable death of the child and extend the suffering of the family.

2008 The American Psychological Association published a report on *Mental Health and Abortion* finding that women who had terminated their pregnancy expressed significantly less grief than those who had a spontaneous child loss.

16.01.08 In *Samira Kohli v. Dr. Prabha Manchanda and Anr.*, [Appeal (civil) 1949 of 2004], this Hon'ble Court established the obligations of doctors in obtaining informed consent for medical procedures.

31.07.08 The Federation of Obstetric and the



Gynecological Societies of India (FOGSI) issued a report on fetal abnormalities finding there is no difference in health impact on the mother in an abortion at the 20<sup>th</sup> week versus an abortion at the 25<sup>th</sup> week.

- 02.08.08 Dr. R. M. Saraogi issued a medical opinion for Special Leave Petition 5334, *Dr. Nikhil D. Datar v. Union of India* of 2009, reporting that the abortion process at 20 weeks and 25 weeks carries the same risk.
- 04.08.08 Impugned judgment and final order passed by the Hon'ble High Court of Bombay in Writ Petition (L) No. 1816 of 2008, *Dr. Nikhil D. Datar v. Union of India* 2008, denying relief for Niketa Mehta after the MTP Act prohibited her from terminating her pregnancy at 22 weeks when doctors found that the fetus had a congenital complete heart block.
- 21.01.09 Special Leave Petition 5334, *Dr. Nikhil D. Datar v. Union of India* 2009, submitted to this Hon'ble Court.
- Spring 2011 Guttmacher Policy Review found that unsafe abortion is the third leading cause of maternal death in India.

- 02.07.11 The Times of India announced that India will fall 30 percentage points short of its Millennium Development Goal regarding maternal mortality.
- 01.08.12 At 26 weeks of pregnancy, Mrs. X's sonography revealed that her fetus had Anencephaly, an untreatable condition where the head and brain do not develop.
- 06.08.12 After three sonographies and consultations with multiple doctors, Mrs. X met with Dr. Gadam who informed her that her pregnancy presented substantial health risks. Dr. Gadam also told her that although termination would be safe and medically possible, the procedure could not be done because of the 20 week restriction in the MTP Act.
- 06.08.12 Mrs. X wrote two letters to Dr. Gadam, Head of the OBGYN Department at R N Cooper Hospital of Brihan Mumbai Mahanagar Palika, asking for help to terminate the pregnancy. Dr. Gadam expressed his inability to perform the abortion as it would have been illegal.
- 07.10.12 The Hindu published Rare Birth Defect Poses a Challenge to Doctors, reporting that doctors agree that in certain cases of fetal abnormality

such as Anencephaly, a medical termination of pregnancy is the only safe option for the mother.

16.10.12 Based on insufficient information, Mrs. Y was forced to make a painful decision to terminate her pregnancy in her 20<sup>th</sup> week of gestation before the MTP Act would forbid the procedure.

18.10.12 Mrs. X was admitted to Oshiwara Hospital for delivery with excess fluid in her womb and the fetus in a breech position.

21.10.12 Mrs. X delivered a baby boy who died less than three hours later.

06.11.12 Three weeks after delivery, on her third follow-up visit to the hospital, Mrs. X continued to suffer from continuous bleeding and pain.

20.11.12 The Times of India published One Woman Dies of Abortion Every 2 Hours, reporting that unsafe abortions constitute 8% (4,600 deaths) of India's Maternal Mortality Rate.

2012 Mrs. X drew up an affidavit explaining the challenges and trauma she faced as a result of the ban on abortion after the 20<sup>th</sup> week under the Medical Termination Act, 1971.

01.02.13 The United Nations Human Rights Council

published the Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, identifying denial of medical termination of pregnancy as a violation of the right to be free from torture and other cruel, inhuman or degrading treatment.

03.02.13 The National Commission for Women drafted proposed amendments to the MTP Act to protect women's lives where there is a substantial risk of physical or mental fetal abnormality.

02.04.13 The Hindu published Doctors Focused Too Much on Savita's Fetus, reporting on the danger of overly restrictive abortion laws that do not provide exceptions for the protection of the life and health of the pregnant mother.

04.06.13 The Guardian published Baby Born to El Salvador Woman Denied Abortion Dies After C-section, reporting on the denial of an abortion of a fetus diagnosed with Anencephaly to a 26-week-pregnant woman who suffers from Lupus.

07.08.13 Salon published Fetal Pain is a Lie: How Phony Science Took Over the Abortion Debate, reporting on the danger of abortion laws that have a 20 week limit and only nominal

exceptions for the health and life of the mother.

“These laws can make otherwise safe abortions *dangerous* by forcing doctors to wait until their patient’s condition deteriorates before they can legally act to terminate a pregnancy and save their lives.”

Hence this Petition.

**IN THE SUPREME COURT OF INDIA**

**CIVIL ORIGINAL JURISDICTION**

**WRIT PETITION (CIVIL) NO. \_\_\_\_\_ OF 2014**

**(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)**

In the matter of:

MRS. X ...Petitioner No. 1

MRS. Y ...Petitioner No. 2

Versus

1. UNION OF INDIA ...Respondent No. 1

THROUGH THE SECRETARY, MINISTRY OF

LAW AND JUSTICE,

SHASTRI BHAWAN,

C-WING, NEW DELHI-110001

2. STATE OF MAHARASHTRA, ...Respondent No. 2

THROUGH THE CHIEF SECRETARY,

MANTRALAYA,

MUMBAI-23

**WRIT PETITION FOR VIOLATION OF ARTICLE 21 OF THE  
CONSTITUTION OF INDIA UNDER ARTICLE 32 SEEKING  
DIRECTIONS AGAINST THE RESPONDENTS**

TO:

THE HON'BLE CHIEF JUSTICE AND HIS OTHER  
COMPANION JUSTICES OF THE HON'BLE SUPREME  
COURT OF INDIA

THE HUMBLE PETITION  
OF THE PETITIONERS

MOST RESPECTFULLY SHOWETH THAT:

1. By the present petition, the Petitioners are seeking relief and a declaration that the term 'save the life of the pregnant woman' in Section 5 of the MTP Act be read to include the protection of the mental and physical health of the pregnant mother, especially in cases where any serious abnormalities in the fetus are detected after the 20<sup>th</sup> week of pregnancy. Such revisions would eliminate the severe mental anguish and trauma suffered by the Petitioners and women who are forced to carry fetuses with serious abnormalities that are detected after the 20<sup>th</sup> week.

1.A. The Petitioners have not approached the concerned authorities for the same reliefs in this Hon'ble Court or any other Court.

2. The Petitioner No. 1 is Mrs. X, the wife of a tailor from a poor economic background, and Petitioner No. 1 is Mrs. Y, an advocate from Mumbai. Enforcement of the MTP Act forced Petitioner No. 1 to undergo severe psychological, physical, and emotional trauma by denying her an abortion when her fetus was diagnosed with Anencephaly, a fatal condition, at 26 weeks of pregnancy and forcing her to continue the pregnancy only to watch her child die within hours of birth. Petitioner No. 2 had to make the decision to terminate her pregnancy before the MTP 20 week mark. Because the results of Petitioner No. 2's amniocentesis tests, which would determine the extent of her fetus' abnormalities, could not be made available prior to her 20<sup>th</sup> week of pregnancy, she was forced by the MTP Act's strict constraints to make a traumatic and ill-informed decision on abortion without a full understanding of the medical facts. The Petitioners continue to suffer from mental anguish and trauma and therefore wish to remain anonymous.

3. The Respondent is the Union of India who is responsible for maintaining the MTP Act. By refusing to include an exception to the MTP Act's ban on abortion after the 20<sup>th</sup> week to protect the mental and physical health of the pregnant mother, the Respondents have violated the Petitioners' rights to life, health, dignity, informed choice,



reproductive autonomy, equality, and to be free from inhuman and degrading treatment.

### Facts

#### THE MEDICAL TERMINATION OF PREGNANCY ACT IS OUTDATED LAW THAT ENDANGERED PETITIONERS' HEALTH

4. The Medical Termination of Pregnancy Act, 1971 (MTP Act) Sec. 3(2)(b) 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 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; or (ii) 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." The MTP Act also allows for termination in the case of rape and contraceptive failure in a married couple. Sec. 5(1) 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 both the Petitioners who each faced the substantial

risk that if their child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

5. Medical experts have published numerous studies evaluating the detriments of abortions laws with 20 week limits. The American Journal of Obstetrics & Gynecology reported that some fetal impairments cannot be detected or fully evaluated until after 20 weeks. A true copy of Diagnosis of Inferior Vermian Hypoplasia by Fetal Magnetic Resonance Imaging, dated April 2006 is herein marked and annexed as **Annexure P-1**. The Australian Medical Journal stated that the accuracy of prenatal testing is compromised in jurisdictions where access to abortion is limited to 20 weeks or prior. Furthermore, in cases of fetal abnormalities, denying abortion may only delay the inevitable death of the child and extend the suffering of the family. A true copy of Pregnant Women with Fetal Abnormalities: The Forgotten People in the Abortion Debate, dated 2008 is herein marked and annexed as **Annexure P-2**. Additionally, the American Psychological Association found that women who chose to terminate their pregnancy expressed significantly less grief than those who had a spontaneous child loss. A true copy of Report of the APA Task Force on Mental Health and

Abortion, dated 2008 is herein marked and annexed as **Annexure P-3.**

6. The Federation of Obstetric and the 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 “[i]n case of fetal abnormality which has been detected late and which leads to an extremely serious handicap at birth, such fetus should be allowed to be terminated, even after 20 weeks.” A true copy of the report submitted by the committee dated 31 July 2008 is herein marked and annexed as **Annexure P-4.**

7. 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.” A true copy of Dr. R.M. Saraogi’s medical opinion dated 2 August 2008 is herein marked and annexed as **Annexure P-5.**

8. 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. A true copy of Government may increase legal time limit on abortions, issued by Indian Health News, dated 10 September 2008 is herein marked and annexed as **Annexure P-6**.

9. The MTP Act's outdated 20 week limit encourages desperate women who learn about a fetal abnormality after the 20<sup>th</sup> week to seek out unsafe abortions from untrained medical personnel and contributes to India's high maternal mortality rate. True copies of Unsafe Abortion: The Missing Link in Global Efforts to Improve Maternal Health, issued by the Guttmacher Policy Review, dated Spring 2011 and India Will Miss 2015 Millennium Development Goals, issued by Times of India, 2 July 2011 are herein marked and annexed as **Annexure P-7** and **Annexure P-8**.

10. Today, the same medical techniques used in a medical termination of pregnancy before 20 weeks can be applied after 20 weeks. Here, the arbitrary 20 week limit caused severe mental and physical injury to the Petitioners.

THE MTP ACT FORCED PETITIONER NO. 1 TO CARRY AND  
DELIVER A FETUS WITH NO CHANCE OF SURVIVAL

11. Petitioner No. 1 comes from a poor economic background and helps her husband with his tailoring job. At 26 weeks of pregnancy, Petitioner No. 1 had her first sonography and learned that the fetus in her womb had an abnormality known as Anencephaly. As a result of this condition, the fetus had no brain, minimal skull coverage, and no chance of survival. A true copy of Petitioner No. 1's sonography report dated 1 August 2012 is herein marked and annexed as **Annexure P-9**.

12. Petitioner No. 1's doctor, Dr. Gadam, explained to her that at 26 weeks, termination of pregnancy is medically possible and safe but illegal under the MTP Act, which only allows for abortion before 20 weeks. A true copy of Petitioner No.1's antenatal record dated 6 August,2012–6 November,2012 is herein marked and annexed as **Annexure P-10**.

13. After three sonographies confirming the severe fetal condition and consultations with multiple doctors, Petitioner No. 1, her husband and family wanted to terminate the pregnancy. They wanted to protect Petitioner No. 1's physical and mental wellbeing by giving

her the dignity to make decisions about her own health, to control her own body, and to avoid the severe mental anguish and trauma of carrying an abnormal fetus to term only to watch it die within hours. Because each doctor refused to perform an abortion due to the 20 week restriction under the MTP Act, Petitioner No. 1 wrote two letters to Dr. Gadam, Head of the OBGYN Department at R N Cooper Hospital of Brihan Mumbai Mahanagar Palika, asking for help to terminate the pregnancy. Dr. Gadam explained that at 26 weeks, termination of pregnancy is medically possible and safe and would be legal under the MTP Act only if the pregnancy posed a risk to the mother's life. In a case like Petitioner No. 1's, where the fetus has a serious handicap, the Act only allows termination up to the 20<sup>th</sup> week of pregnancy. Thus, terminating Petitioner No. 1's pregnancy at 26 weeks would be punishable under the MTP Act and Section 312 of the Indian Penal Code. Hence, the MTP Act denied Petitioner No. 1 her right to an abortion, caused her extreme anguish and forced her to carry a fetus that she knew would never survive. A true copy of Petitioner No. 1's letters dated 6 August 2012 is herein marked and annexed as **Annexure P-11**.

14. An article published by The Hindu reports that situations where the abnormality is detected after the MTP Act's 20

week cutoff, "carry a lot of emotional risk for mothers because they have to live with the fact that the fetus is not going to survive." Doctors agree medical termination of pregnancy is the only alternative in Anencephaly cases like Petitioner No. 1's. A true copy of Rare Birth Defect Poses a Challenge to Doctors issued by The Hindu, dated 7 October 2012 is herein marked and annexed as **Annexure P-12**. Petitioner No. 1 was forced to continue with her pregnancy, visit the hospital regularly, and participate in social events to celebrate the birth of her child, all while carrying a fetus that she knew could never survive. Enforcement of the MTP Act caused her extreme mental anguish and poised serious risks to her health – violations of Article 21 of the Constitution of India.

15. On 18.10.2012, Petitioner No.1 was admitted into Oshiwara Hospital for delivery. Excess fluid in the womb and the fetus' breeched position, which are both medically known to occur in cases of Anencephaly, made the delivery especially painful and difficult. There was a high risk of excessive bleeding during and after delivery and Petitioner No.1 was told that she may need a cesarean section surgery. After three days of excruciating labor pains, she delivered a baby boy that ultimately died less than three hours later. Petitioner No.1 suffered extreme mental

anguish and trauma because she was denied the ability to choose to abort her pregnancy, she was forced to carry a severely abnormal fetus to term, she had to endure an extremely painful labor and delivery and ultimately watch her newborn son die within hours. A true copy of Petitioner No. 1's in-patient hospital record dated 18 October 2012 – 23 October 2012 is herein marked and annexed as **Annexure P-13**.

16. According to Petitioner No. 1's affidavit, "the whole experience of pregnancy and delivery was extremely painful and mentally exhausting. In normal circumstances mother goes through all the discomfort just for the joy of giving birth to the baby. However in my case there was no joy as I was aware of the poor outcome of the fetus. All this could have been avoided if my pregnancy was terminated in time." Petitioner No. 1's mental anguish could have been significantly reduced if the MTP Act honored her choice to terminate the pregnancy when the fetus was clearly diagnosed with a severe abnormality. A true copy of Petitioner No. 1's affidavit dated 2012 is herein marked and annexed as **Annexure P-14**.



17. An article published by the Australian Medical Journal states: “[t]he 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 forbid Petitioner No. 1 from terminating her pregnancy once doctors diagnosed the fetal abnormality, the death of the fetus and the suffering of Petitioner No. 1 and her family were inhumanely prolonged.

18. 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 has a significant influence on women’s mental and emotional health. In this case, Petitioner No. 1’s suffering could have been significantly reduced if she was permitted to terminate the pregnancy as she requested.

THE MTP ACT FORCED PETITIONER NO. 2, AN ADVOCATE IN  
MUMBAI, TO MAKE THE PREMATURE AND UNDERINFORMED  
DECISION TO TERMINATE HER PREGNANCY

19. Petitioner No. 2 became pregnant for the first time in June 2012 and regularly visited her doctor for antenatal care. As per standard norms, she underwent a sonography in her 19<sup>th</sup> week. The sonography detected a possibility of an absent inferior vermis, choroid plexus cyst in the brain, and bilateral Superior Vena Cava (SVC), which her doctor explained may lead to mental retardation and lack of muscle control.

20. Petitioner No. 2 understood the probable outcome and was concerned about confirming the anomaly. In addition to a substantial risk of handicap in the unborn child, raising a child with serious health impairments can severely impact a woman's quality of life by limiting her access to education, employment and other activities related to her personal development. She was equally concerned about the 20 week limit for termination of the pregnancy should there be a substantial risk of handicap in the unborn child. Thus, Petitioner No. 2 hurriedly subjected herself to an expensive fetal MRI which confirmed an enlargement of the posterior fossa of the brain and an absence of the

inferior cerebellar vermis. To better understand the condition of her fetus and make an informed decision whether to continue the pregnancy, Petitioner No. 2 sought out opinions from senior pediatric neurologist Dr. Vrajesh Udani from Hinduja Healthcare Surgical Hospital. In view of the sonography report and MRI test results, Dr. Udani gave Mrs. Y a very guarded prognoses, stating that the unborn foetus had "Dandy Walker Variant". Mrs. Y was explained that there are significant chances of the baby being mentally retarded and having problem with balancing the body. Petitioner No. 2 was further advised to rule out the chromosomal abnormality in the fetus by undergoing Amniocentesis.

21. Doctors suggested further investigations, such as an amniocentesis test, to give a more precise prognosis. However, they informed Petitioner No. 2 that the test results from amniocentesis, where fluid around the fetus in utero is drawn with a needle and sent for genetic testing, may take three weeks to evaluate. By the time the test results would be available, Petitioner No. 2's pregnancy would have exceeded the MTP Act's 20 week limit. Petitioner No. 2 was left with two options, either to terminate the pregnancy with insufficient information or to

run the risk of giving birth to a baby with a substantial anomaly.

22. The MTP Act forced Petitioner No. 2 to make a traumatic and ill-informed decision on abortion without a full understanding of the medical facts. Enforcement of the Act as it stands violated Petitioner No. 2's right to health, life, dignity, informed choice, and reproductive autonomy.

23. Some fetal impairments cannot be detected or fully evaluated until after 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 22 weeks (with a range of 19–26 weeks).

24. An article published by the Australian Journal of Medicine found that the "[a]ccuracy of ultrasound testing is enhanced if scans are routinely performed at 22–24 weeks. This is possible in the United Kingdom, where there are

clear abortion laws, but where access to abortion *is limited from 20 weeks* (or earlier)." (emphasis added).

#### THE IMPACT OF RESTRICTIVE ABORTION LEGISLATION ON THE PETITIONERS

25. *Dr. Nikhil D. Datar v. Union of India & Ors.*, [W.P. (L) 1816/2008] provides another example of victims of the MTP Act. In her 20<sup>th</sup> week of pregnancy Niketa Mehta's sonography showed her fetus to be normal. However, in the 22<sup>nd</sup> week, the gynaecologist found that the fetus 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 fetus was not discovered until the 22<sup>nd</sup> 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, increasing the need for the MTP Act to be amended, Dr. Datar filed a special leave petition, *Dr. Nikhil D. Datar v. Union of India & Ors.*, [S.L.P. (C) 5334/2009], before this Hon'ble Court to appeal the Bombay High Court decision.

26. According to an article published by the Australian Medical Journal, “[w]omen are reluctant to complain [after being refused an abortion], as it would necessitate both reliving the anguish of the diagnosis and subsequent decision making, and being judged by others for requesting later termination on the grounds of disability in their child.

27. As written, the MTP Act encourages desperate women who learn about a fetal abnormality after the 20<sup>th</sup> 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 many of these senseless deaths.

28. Inadequate access to health care, poor quality services, and outdated abortion restrictions contribute to India’s high MMR 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 a MMR of 139 deaths per 1 lakh live births in 2015, missing the MDG by 30 percentage points.

29. An article published by Times of India reports that unsafe abortions contribute to at least 8% (4,600 deaths) of all

maternal deaths in India each year. A true copy of One Woman Dies of Abortion Every 2 Hours issued by Times of India, dated 20 November 2012 is herein marked and annexed as **Annexure P-15**.

30. The denial of medical termination of pregnancy has been identified as a violation of the right to be free from torture and other cruel, inhuman or degrading treatment. A true copy of the Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, issued by the United Nations Human Rights Council, dated 1 February 2013 is herein marked and annexed as **Annexure P-16**. Accordingly, the National Commission for Women drafted proposed amendments to the MTP Act to protect women's health and lives where there is a substantial risk of physical or mental fetal abnormality. A true copy of the Draft Note on Proposed Amendments to the Medical Termination of Pregnancy Act 1971, issued by the National Commission for Women, dated 3 February 2013 is herein marked and annexed as **Annexure P-17**.

31. An article published in The Hindu on 2 April 2013 further demonstrates the danger of restrictive abortion laws that do not account for the health and welfare of the pregnant mother. In Ireland, an Indian dentist Savita Halappanavar,

was 17 weeks pregnant when she was admitted to Galway University Hospital with severe back pain. She was found to be miscarrying but doctors refused to abort citing Ireland's strict anti-abortion law. The negligent medical decision to leave the dead fetus in the mother caused an infection and a week later Savita died of septicaemia and E.coli. In response to public outrage, the Government of Ireland has since reviewed its abortion law and passed the Protection of Life During Pregnancy Act, which permits abortions where there is a substantial risk to the life of the mother. A true copy of Doctors Focused Too Much on Savita's Fetus issued by The Hindu, dated 2 April 2013 is herein marked and annexed as **Annexure P-18**.

32. Petitioner No. 1's situation is not isolated, as an article published in the Guardian on 4 June 2013 reported. A 26-week-pregnant woman petitioned the El Salvador Supreme Court for a termination of her pregnancy after the fetus was diagnosed with Anencephaly. She suffered from Lupus, a disease that can lead to hemorrhaging, kidney failure and maternal death as the pregnancy progresses. Although the fetus was likely to survive only a few hours after birth and the mother's health was at risk, the court denied her an abortion. The United Nations and the Inter-American Commission on Human Rights supported her



appeal. El Salvador's health ministry stepped in after the ruling and allowed a caesarean section in order to protect the mother's right to health. The baby, who was born without a brain, died five hours after the operation. A true copy of Baby Born to El Salvador Woman Denied Abortion Dies After C-section, issued by the Guardian dated 4 June 2013 is herein marked and annexed as **Annexure P-19**.

33. Dr. Anne Davis, Associate Professor of clinical obstetrics and gynecology at Columbia University Medical Center and consulting medical director at Physicians for Reproductive Health, remarked that abortion laws with a 20 week limit and only "nominal exceptions for the health and life of the mother in these laws can make otherwise safe abortions *dangerous* by forcing doctors to wait until their patient's condition deteriorates before they can legally act to terminate a pregnancy and save their lives." A true copy of Fetal Pain is a Lie: How Phony Science Took Over the Abortion Debate, issued by Salon dated 7 August 2013 is herein marked and annexed as **Annexure P-20**.

34. 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 Petitioners' fundamental right to life, health, and dignity under domestic and international norms.

35. Noting deficiencies in the MTP Act, the NCW recently proposed the following changes to Sec.3(2)(b):

“Provided that where pregnant woman is minor; pregnancy is result of rape or incest, pregnant woman is physically or mentally 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.”

36. That in conformity with international laws respecting women’s rights to life, equality and health Albania, Australia, Belgium, Canada, China, Croatia, Denmark, Iceland, Israel, Luxembourg, Nepal, Netherlands, Slovakia, South Africa, United kingdom, and United States do not include absolute time limits in their abortion laws. Instead, these countries consider the woman’s physical and mental health and doctors’ expert opinions in determining whether a medical termination of pregnancy can be performed post 20 weeks. True copy of list of the countries and their abortion laws are annexed herewith as **Annexure A-21**.

RESPONDENT HAS VIOLATED PETITIONERS' FUNDAMENTAL  
RIGHT TO LIFE

37. Article 21 of the Constitution of India guarantees the right to life and personal liberty.

38. In *Pt. Parmanand Katara vs. Union of India & Ors.*, [1989 SCR (3) 997], this Hon'ble Court held that Article 21 of the Constitution obligates 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 way."

39. 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 Petitioner No. 1, who learn about fetal abnormalities after the 20<sup>th</sup> week of pregnancy, to compromise their own personal safety and welfare by carrying severely abnormal fetuses to term, a violation of the Petitioners' 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 Petitioners protection of life in violation of Article 21.

RESPONDENT HAS VIOLATED PETITIONERS' RIGHT TO BE FREE  
FROM INHUMAN AND DEGRADING TREATMENT

40. 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."

41. 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 was not medically necessary, forcing Petitioner No. 1 to carry a fetus knowing it would not survive amounts to the inhuman and degrading treatment prohibited by Article 7 of the ICCPR.

42. The United Nations Human Rights Committee (HRC) found such a violation in *K.L. v. Peru* where a woman in Peru was

forced to carry a severely malformed fetus 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.

43. 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."

44. The anguish of women forced to carry a fetus 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 Petitioners' fundamental rights protected by Article 21 of the Constitution.

**RESPONDENT HAS VIOLATED THE PETITIONERS'**

**FUNDAMENTAL RIGHT TO HEALTH**

45. This Hon'ble Court held that Article 21 of the Constitution includes a fundamental right to health, and that this right is a "most imperative constitutional goal." *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.

46. Due to the MTP Act's arbitrary 20 week limit, Petitioner No. 1 was also forced to withstand an especially physically painful labor and delivery knowing her fetus would not survive. Although her doctors warned her that it could be risky, Petitioner No. 1 had no choice but to carry the pregnancy to term. The MTP Act gravely endangered Petitioner No. 1's mental and physical health.

47. The MTP Act's 20 week restriction also placed a traumatic sense of urgency on Petitioner No. 2, forcing her to undergo significant emotional distress in deciding whether to go forward with an abortion when adequate medical

information was not available. At grave risk to her emotional and psychological wellbeing, Petitioner No. 2 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.

48. 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 (CESCR) 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." (emphasis added).

49. The MTP Act took complete control over the Petitioners' reproductive freedom and choice at 20 weeks of pregnancy. CESCR has expressly advised States parties to permit or consider permitting abortion for therapeutic reasons. Here, this exception would have allowed the Petitioners and their doctors to make the best choice for

their 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.

50. 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*. (emphasis added).

51. 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. Both Petitioners were forced to undergo severe psychological stress and trauma and Petitioner No. 1 was needlessly compelled to deliver a fetus with a substantial anomaly and 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.



52. Enforcement of the MTP Act's ban on abortion after the 20<sup>th</sup> week endangers women's physical and mental health and, in cases of severe 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.

53. The NCW's proposed amendments to Sec.3(2)(b) of the MTP Act give 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 VIOLATED THE  
PETITIONERS' RIGHT TO LIVE WITH DIGNITY

54. 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. *See Francis Coralie Mullin v. Union Territory of Delhi & Ors*, [1981 SCR (2) 6]. "Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live."

55. Furthermore, under international law, Article 12.1 of 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.*" (emphasis added).

56. Forcing Petitioner No. 1 to carry a severely deformed fetus for months knowing that it would not survive caused her acute mental anguish, despair and physical pain. She was 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 and participate in social events to celebrate the birth of her child, all while carrying a fetus that she knew could never survive.

57. Enforcement of the MTP Act deprived Petitioner No. 2 of the dignity of making an informed decision about her own body and health. She was forced to make a traumatic choice on abortion before she was in possession of all relevant facts, undermining her right to full and informed consent before receiving reproductive services.

RESPONDENT VIOLATES WOMEN'S RIGHT TO PERSONAL  
LIBERTY AND PRIVACY

58. The right to privacy is also implicit in Article 21 of the Constitution of India. *See* Supreme Court case *PUCL v. Union of India*, 1997 1 SCC 301 order dated 18.12.1996. "A citizen has a right to 'safeguard the privacy of his own,

his family, marriage, procreation, motherhood, child-bearing and education among other matters.' We have, therefore, no hesitation in holding that right to privacy is a part of the right to 'life' and 'personal liberty' enshrined under Article 21 of the Constitution." When Petitioner No. 1 was forced to continue an unwanted pregnancy, she lost her right to safeguard the privacy of procreation, motherhood and child-bearing because ostensibly the MTP Act made those choices for her.

59. 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* Articles 12 and 16 of CEDAW and General Recommendation 24. In interpreting Article 12's right to health, CEDAW 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.*" General Recommendation 24. (emphasis added).

60. In being forced to carry an unwanted fetus with a substantial anomaly and no probability of independent survival, Petitioner No. 1 lost her right to decide freely on the number and spacing of her children. Similarly, when

Petitioner No. 2 was forced to make a decision on abortion without necessary information, she lost her ability to give informed consent and choice. These rights are integral to the enjoyment of reproductive self-determination encompassed within the right of privacy. Petitioner No. 2 was unable to make an informed decision before her abortion and Petitioner No. 1 was unable to have an abortion despite the negative impact on her health and well-being. Thus, the MTP Act violated Petitioner's rights to personal liberty and privacy, guaranteed by the Indian government and international law.

ENFORCEMENT OF THE MTP ACT VIOLATED PETITIONERS'  
RIGHT TO CHOICE AND INFORMED CONSENT

61. This Hon'ble Court in *Samira Kohli vs. Dr. Prabha Manchanda and Anr.*, [Appeal (Civil) 1949 of 2004], established the requirement that a doctor 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*. (emphasis added). 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.

62. Amniocentesis tests are advised after a sonography detects a defect in the fetus. Such sonographies, used to find abnormalities, can only be done after the 18<sup>th</sup> week of pregnancy. The subsequent amniocentesis test then requires at least two to three more weeks to be analyzed. By the time the results of the amniocentesis 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 the MTP Act bans abortion, it is impossible for a pregnant woman to make a balanced judgment to give informed consent when she does not have enough time to access adequate medical information.

63. The United Nations Special Rapporteur Juan E. Mendez reported: "access to information about reproductive health is imperative to a woman's ability to exercise reproductive autonomy, and the rights to health and to physical integrity."

64. Petitioner No. 2 did not have adequate information for informed consent when she decided to terminate her pregnancy. After learning that her fetus' growth was abnormal in a routine check-up during her 19<sup>th</sup> week of pregnancy, Petitioner No. 2 underwent aminocentesis,

which would provide more information on the extent of the fetus' condition. However, the results were not available as she reached her 20<sup>th</sup> week of pregnancy and, after much mental agony, the MTP Act forced her to decide on an abortion without full knowledge of the medical facts.

65. 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 an intent of finding out anomalies and Amniocentesis, which are only available after the 20<sup>th</sup> 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.

ENFORCEMENT OF THE MTP ACT VIOLATED THE PETITIONERS'  
RIGHT TO EQUALITY BEFORE THE LAW

66. 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 is not allowed to be drowned." *Id.*

67. The burdens of pregnancy, delivery, and child-bearing 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 socioeconomic 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 on the health and welfare of the pregnant mother and therefore, violates

the right to equality before the law as guaranteed under Articles 14 and 15 of the Constitution of India.

68. 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, both the Petitioners were unduly discriminated against and punished based on their sex by the MTP Act's criminalization of abortion after the 20<sup>th</sup> week of pregnancy. The right to non-discrimination under CEDAW requires that abortion be lawful when necessary to protect woman's health as a measure to eliminate discrimination against women in the field of health care.

69. The Respondents have failed through their acts and omissions to adhere to Constitutional obligations to protect the Petitioners' reproductive rights, including the right to



life and health enshrined in Article 21 and the rights to equality and nondiscrimination in Articles 14 and 15. Moreover, Respondents have impermissibly derogated from their legal obligations under binding international human rights treaties to respect, protect, and fulfill the human rights of the Petitioners, as required under Article 51(c) of the Constitution of India. Immediate action is necessitated from this Hon'ble Court to compensate the Petitioners, 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 fetus that cannot survive and ensure that reproductive health care is accessible and administered in a dignified, humane, equitable, and gender-focused manner.

### **GROUND**

70. Hence the Petitioners move before this Hon'ble Court by way of this petition on, inter alia, the following grounds:

- A. BECAUSE 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. BECAUSE, the technological basis of the MTP Act's abortion limit to 20 weeks (Section 3(2)(b)) is outdated and arbitrary.
- C. BECAUSE the Respondents have violated Petitioners' 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. BECAUSE the Respondents violated the Petitioners' right to dignity and to be free from cruel, inhumane or degrading treatment when the MTP Act forced them to compromise their own personal safety and welfare to abide by the law.
- E. BECAUSE the current MTP Act compelled Petitioner No. 1 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 or degrading treatment.

- F. BECAUSE the right to health is protected by Article 21 of the Indian Constitution and this right includes both emotional and mental health.
- G. BECAUSE forcing Petitioner No. 1 to deliver a fetus with no potential to survive gravely endangered 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 allowed her to terminate her pregnancy.
- H. BECAUSE forcing Petitioner No. 1 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. BECAUSE forcing Petitioner No. 1 to continue an unwanted pregnancy 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. BECAUSE Indian and international human rights standards demand that India reinterpret the MTP Act to ensure justice for the Petitioners and to protect future pregnant women and families from suffering the physical and mental pain of carrying a fetus that cannot survive.
- K. BECAUSE, in violation of this Hon'ble Court's order in *Samira Kohli*, the Respondent failed to ensure that Petitioner No. 2 could give full and informed consent for her decision to have an abortion, depriving her of her reproductive autonomy, encompassed within the right of privacy.
- L. BECAUSE Petitioner No. 2's inability to be fully informed before making her decision on whether to go forward with the pregnancy violated her right to sexual reproductive freedom protected under domestic and international law.

- M. BECAUSE 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 fetus she is carrying. Justice requires that the MTP Act be reinterpreted so as to allow women sufficient time to consider the results of aminocentesis, which are only available after the 20<sup>th</sup> week.
- N. BECAUSE enforcement of the MTP Act also violates Petitioners' rights under CEDAW requiring that men and women be treated equally in terms of reproductive services and choice.
- O. BECAUSE reinterpreting the MTP Act to allow for protection of the health and welfare of pregnant women would not only serve to partially redress Petitioners' injuries but would also protect the rights of future pregnant women in India.
- P. BECAUSE Respondents in enforcing the MTP Act as it stands, clearly violated rights of Petitioners as guaranteed by binding international treaties and conventions including ICESCR, ICCPR, and CEDAW.

70. The Petitioners have not filed any other petition seeking the same relief in this Hon'ble Court or any other High Court.

### **PRAYERS**

71. In light of the facts and circumstances of this case, the Petitioners pray before this Hon'ble Court as under:

- a. For a writ of declaration or any other appropriate writ, order or direction quashing section 3 (2) (b) of The Medical Termination of Pregnancy Act, 1971 to the limited extent that it stipulates a ceiling of 20 weeks for an abortion to be done under section 3, as ultra vires Articles 14 and 21 of the Constitution of India;
- b. For a writ of declaration or any other appropriate writ, order or direction quashing section 5 (1) of the Act to the limited extent that it restricts abortions under section 5 to a restricted field where it is immediately necessary to save the life of the pregnant woman;
- c. For a declaration to the effect that the expression "save the life of the pregnant woman" in Section 5 of the MTP Act includes "the protection of the mental

and physical health of the pregnant woman” and includes situations where serious abnormalities in the fetus are detected after the 20<sup>th</sup> week of pregnancy;

d. For an order directing the Union of India to reconsider the ceiling of 20 weeks prescribed for abortions under section 3 (2) (b) of the Act and take into consideration the report of the Medical Termination of Pregnancy Committee appointed by the Union of India as stated in paragraph 8 of this Petition, the recommendation of the National Commission for Women at Annexure 17 hereto, the technical literature both from India and abroad as set out in paragraphs 5 to 7, 9, 17, 18, 24, 27 and 33 of this Petition and the international standards and statutes as set out in Annexure 21 hereto and to thereafter make a report to this Court as to the course the Union of India proposes to take.

e. For a declaration that the rational ceiling for abortions being done under section 3 of the Act is 26 weeks in view of the material placed on record by the Petitioner;

f. For an order directing Respondent No. 1 to produce the report of MTP Committee which included the

Health Secretary, Mr. Naresh Dayal, former Director-General of the Indian Council of Medical Research and Dr. N K Ganguly as its members as set out in paragraph .....of this petition.

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

AND FOR THIS ACT OF KINDNESS, THE PETITIONER AS IN DUTY BOUND SHALL EVER BE GRATEFUL.

Filed by

(JYOTI MENDIRATTA)

Advocate for Petitioner

Drawn by:

Drawn on:

Place:

Filed on: