

SYNOPSIS

The writ jurisdiction of this Hon'ble Court under Article 32 is being invoked by means of the present writ petition since it raises issues of National importance affecting the fundamental right to safe abortions, right to health , reproductive choice and right to privacy of women of the country. The issue of safe abortion and restriction on the reproductive choice of women and other incidental issues require consideration and urgent resolution by this Hon'ble Court since it severely, drastically and irreversibly affects all women of the country and is not a regional issue pertaining to any particular State.

The present Writ Petition under Article 32 of the Constitution is filed challenging Section 3(2) ; Explanation 2 to Section 3(2), Section 3(4) and Section 5 of the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as the Act) being violative of Article 14 & 21 of the Constitution.

Section 3 & 5 of the Act are reproduced below :-

“3. When Pregnancies may be terminated by registered medical practitioners.- (1) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.

(2). Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,-

(a). where the length of the pregnancy does not exceed twelve weeks if such medical practitioner is, or

(b). where the length of the pregnancy exceeds twelve weeks but 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 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.

Explanation 1.-Where any, pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation 2.-Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

(3). In determining whether the continuance of pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or reasonable foreseeable environment.

(4)(a). No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a lunatic, shall be terminated except with the consent in writing of her guardian.

(b). Save as otherwise provided in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman.

5(1). The provisions of section 4, and so much of the provisions of sub-section (2) of section 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioners, shall not apply to the

termination of a pregnancy by a registered medical practitioner in a case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.

(2). Notwithstanding anything contained in the Indian Penal Code (45 of 1860), the termination of pregnancy by a person who is not a registered medical practitioner shall be an offence punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years under that Code, and that Code shall, to this extent, stand modified.

(3). Whoever terminates any pregnancy in a place other than that mentioned in section 4, shall be punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years.

(4). Any person being owner of a place which is not approved under clause (b) of section 4 shall be punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years.

Explanation 1.—For the purposes of this section, the expression “owner” in relation to a place means any person who is the administrative head or otherwise responsible for the working or maintenance of a hospital or place, by whatever name called, where the pregnancy may be terminated under this Act.

Explanation 2.—For the purposes of this section, so much of the provisions of clause (d) of section 2 as relate to the possession, by registered medical practitioner, of experience or training in gynaecology and obstetrics shall not apply”.

CURRENT LEGAL FRAMEWORK OF TERMINATION OF PREGNANCY IN INDIA :

The current legal framework of termination of pregnancy is governed by The Medical Termination of Pregnancy Act, 1971, Medical Termination of Pregnancy Rules, 2003 and Medical Termination of Pregnancy Regulations 2003.

HISTORY:

The Statement of Objects and Reasons sheds light on the backdrop in which the Act was enacted. It is stated in the SOR that it was enacted in view of provisions of Indian Penal Code which made abortion a crime and for which the mother as well as the abortionist could be punished except where it had to be induced in order to save the life of the mother. This law being too strict was breached in a very large number of cases all over the country. Furthermore, most of these mothers are *married* women and are under no particular necessity to conceal their pregnancy. The doctors were confronted with gravely ill or dying pregnant women whose uterus had been tampered with a view to causing an abortion and consequently suffered very severely.

It was further stated that there was thus avoidable wastage of the mother's health, strength and sometimes, life. The proposed measure which seeks to liberalise certain existing provisions relating to termination of pregnancy has been conceived (1) as a health measure – when there is danger to the life or risk to the physical or mental health of the woman ; (2) on humanitarian grounds- such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman , etc and (3) eugenic grounds – where there is substantial risk that the child, if born would suffer from deformities and diseases.

FRAMEWORK :

The salient features of the Act are as below :-

- (i). A medical practitioner will not be guilty of an offence under IPC or any other law for the time being in force if any pregnancy is terminated by him/her in accordance with provisions of the Act.

- (ii). Pregnancy may be terminated by a registered medical practitioner where the length of the pregnancy **does not exceed twelve weeks** if he/ she forms an opinion in good faith that that-
- (a). 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
 - (b). there is substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.
 - (iii). In case of pregnancy exceeding 12 weeks but not exceeding 20 weeks the said opinion will have to be formed by two registered medical practitioners.
 - (iv). Where pregnancy is alleged to be caused as a result of rape then anguish caused by such pregnancy will be deemed to be a grave injury to the mental health of the pregnant woman.
 - (v). Where pregnancy occurs **as a result of failure of any device or method** used by an **married** woman or her husband for the purpose of limiting the number of children, the anguish caused by such **unwanted pregnancy** may be presumed to constitute a grave injury to the mental health of the pregnant woman.
 - (vi). Where termination of pregnancy is immediately necessary to save the life of the pregnant woman the restrictions contained in Section 3 and 4 are not applicable.

Right of Reproductive choice is at the core of liberty and personal autonomy recognized by Article 21 of the Constitution :

The right to exercise reproductive choice i.e. the right to choose whether to conceive and carry pregnancy to its full term or to terminate is it at the core of one's privacy, dignity, personal autonomy, bodily integrity, self determination and right to health

recognized by Article 21 of the Constitution as has been held by this Hon'ble court in ***Suchitra Srivastav Vs UOI (2009) 9 SCC 1*** , ***K.S Puttaswamy (2017) 10 SCC 1*** and several other judgments of this Hon'ble Court.

Right to Health under Article 21

That Right to health recognized by Article 21 also affords Constitutional protection to the choice exercised by a woman to choose a course (to terminate or not to terminate) which is less detrimental to her physical and mental health. The State cannot compel a woman to continue a pregnancy against her will when continuance of pregnancy will entail physical, mental and socio-economic consequences which far outweigh the consequences that ensue as a result of termination of pregnancy.

STANDARD OF JUDICIAL REVIEW :

A Constitutional right can be curtailed only by a law which is just fair reasonable and proportionate as has been laid down by this Hon'ble Court in ***Maneka Gandhi Vs UOI (1978) 1 SCC 248*** and further expounded in by a 9 Judge bench of this Hon'ble Court in ***K.S. Puttaswamy Vs UOI (2017) 10 SCC 1***. A 9 Judge Bench of this Hon'ble Court held that when State intervenes with the right of privacy of a person to protect legitimate State interest, the State must put into place a robust regime that ensures a threefold requirement. These three requirements apply to all restraints on privacy. The first being existence of law, second being need in terms of legitimate State interest which ensures that the law is reasonable as mandated by Article 14 and third requirement that the means that are adopted by Legislature which are adopted by the Legislature are proportional to the objects and needs sought to be fulfilled by the law.

'310. While it intervenes to protect legitimate State interests, the State must nevertheless put into place a robust regime that ensures the fulfilment of a threefold requirement. These three requirements apply to all restraints on privacy (not just

informational privacy). They emanate from the procedural and content-based mandate of Article 21. The first requirement that there must be a law in existence to justify an encroachment on privacy is an express requirement of Article 21. For, no person can be deprived of his life or personal liberty except in accordance with the procedure established by law. The existence of law is an essential requirement. Second, the requirement of a need, in terms of a legitimate State aim, ensures that the nature and content of the law which imposes the restriction falls within the zone of reasonableness mandated by Article 14, which is a guarantee against arbitrary State action. The pursuit of a legitimate State aim ensures that the law does not suffer from manifest arbitrariness. Legitimacy, as a postulate, involves a value judgment. Judicial review does not reappraise or second guess the value judgment of the legislature but is for deciding whether the aim which is sought to be pursued suffers from palpable or manifest arbitrariness. The third requirement ensures that the means which are adopted by the legislature are proportional to the object and needs sought to be fulfilled by the law. Proportionality is an essential facet of the guarantee against arbitrary State action because it ensures that the nature and quality of the encroachment on the right is not disproportionate to the purpose of the law. Hence, the threefold requirement for a valid law arises out of the mutual interdependence between the fundamental guarantees against arbitrariness on the one hand and the protection of life and personal liberty, on the other. The right to privacy, which is an intrinsic part of the right to life and liberty, and the freedoms embodied in Part III is subject to the same restraints which apply to those freedoms'

Doctrine of Proportionality has been explained by a 5 Judge bench of this Hon'ble Court in **Modern Dental College & Research Centre Vs State of M.P. (2016) 7 SCC 353** and further

elaborated by a 5 judge bench in **KS Puttaswamy Vs UOI (2019) 2 SCC 1**. It has been held that when a law limits a constitutional right, such a limitation is constitutional if it is proportional. The law imposing restrictions will be treated as proportional if it is meant to achieve a proper purpose, and if the measures taken to achieve such a purpose are rationally connected to the purpose, and such measures are necessary.

In **KS Puttaswamy II (2019) 1 SCC 1** following was noted:

‘157. In *Modern Dental College & Research Centre*¹⁵¹, four sub-components of proportionality which need to be satisfied were taken note of. These are:

- (a). A measure restricting a right must have a legitimate goal (legitimate goal stage).
- (b). It must be a suitable means of furthering this goal (suitability or rational connection stage).
- (c). There must not be any less restrictive but equally effective alternative (necessity stage).
- (d). The measure must not have a disproportionate impact on the right-holder (balancing stage).

A. IMPUGNED PROVISIONS:

I. Section 3(2)(a) is violative of Articles 14 & 21 of the Constitution :

1. Section 3(2)(a) of the Act deals with cases where the length of pregnancy does not exceed 12 weeks i.e. the first trimester. In a case where the length of the pregnancy does not exceed 12 weeks a pregnancy may be terminated by a medical practitioner if an opinion is formed by him/ her that the continuance of pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health or 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. . It is submitted that the provision imposes severe restriction on the exercise of the reproductive choice of the woman by providing for a

precondition of an opinion by the medical practitioner about there being a risk to the life of the lady or of grave physical or mental injury or risk of serious fetal abnormalities if the pregnancy is continued. The restriction puts an undue burden on the exercise of free reproductive choice and renders it meaningless. This provision in substance makes right to terminate pregnancy an exception which is otherwise recognized as an important facet of right to life, human dignity , autonomy and self determination.

2. It is submitted that conclusive medical evidence has established that abortion in the first trimester entails lesser risk to a person than the risks involved when pregnancy is carried to a full term. Judicial cognizance of this fact has been taken by the US Supreme Court in **Roe Vs Wade 410 US 113**. Although in later judgments of US Supreme Court it has been noted that with the advancement of science and technology safer abortions are possible even at later stages even after first trimester (See Judgement dated 27.04.2019 delivered by Supreme Court of **Kansas in Hodes & Nauser Vs. Derek Schmidt**) and held that trimester based lines have been blurred with the advancement in science.

3. Research from Guttmacher Institute and various others suggests that a first trimester abortion carries less than 0.5 percent risk of major complications requiring hospital care.

It is submitted that at this stage of pregnancy there is no legitimate interest of the State involved for interfering in the right of reproductive choice of the woman and therefore there should not be any intervention by the State curtailing the right of the lady to terminate pregnancy. Only regulatory measures aimed at safe abortions can be made. The restriction imposed by the impugned provision does not have nexus with the object of the Act which is prevention of maternal mortalities and complications associated with unsafe abortion and is excessive and disproportionate and fails to meet the test laid down in **KS Puttaswamy**.

4. It is vital to note here that even the Medical Termination of Pregnancy (Amendment) Bill, 2014 proposes to do away with the requirement of there being opinion by a registered medical practitioner that the continuance of pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health as envisaged in Section 3(2) of the Act.

5. Even the right to health recognized by Article 21 of the Constitution affords Constitutional protection to the choice of the woman to choose a course which has lesser physical, mental and socio economic adverse consequences on her.

In view of the above, it is submitted that Section 3(2) (a) fails to meet the requirement of reasonableness and proportionality and is arbitrary therefore liable to be struck down.

6. Increasingly most countries are permitting abortion on the request of the woman with varied gestational limits. An illustrative and non-exhaustive list is extracted below :-

S.NO	COUNTRY	TERM
1.	Austria	12 weeks
2.	France	14 weeks
3.	Belgium	12 weeks
4.	Netherlands	24 weeks
5.	Norway	12 weeks
6.	Sweden	18 weeks
7.	Switzerland	12 weeks
8.	Denmark	12 weeks
9.	Australia (Queensland , Victoria, Tasmania, Western Australia, Northern Territory)	14-24 weeks
10.	Canada	No gestational limits
11.	China	24 weeks
12.	Vietnam	22 weeks
13.	Russia	12 weeks

II. Section 3(2)(b) which restricts the right to seek an abortion on the ground of risk to the life of pregnant woman, grave injury to her physical or mental health or substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped to 20 weeks is violative of Articles 21 of the Constitution.

1. Section 3(2)(b) permits termination of pregnancy beyond 12 weeks and not exceeding 20 weeks provided two registered medical practitioners are of the opinion that the continuance of pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health or there is substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. It is submitted that the restricting the permissible length of pregnancy to 20 weeks is excessive and harsh. With the advent of science and technology diagnosis of fetal abnormalities is possible at subsequent stages and with the advancement of science and technology it has become possible to terminate pregnancy even at later stages. As has been noted by the Hon'ble Bombay High Court in **XVZ VS UOI 2019 Scc Online Bom 550** that *'it is not as if all contingencies express themselves only within the first 20 weeks of pregnancy. Even in cases where a pregnant mother is regularly following up her gynaecologist, double marker test is undertaken between 10th and 13th week; triple marker test between 18th and 20th week and the crucial anomaly scan in, around the 20th week. Many serious fetal anomalies may not even be diagnosable until twenty weeks as many pregnant mothers may not even have access to suitable diagnostic tools, particularly in rural areas. In many cases, complications can develop as the pregnancy advances. In such cases, as long as the medical opinion does not suggest that medical termination of pregnancy itself is a serious risk to the physical life of the pregnant mother, the law cannot*

plead helplessness particularly where circumstances set out in clauses (i) and (ii) of Section 3(2)(b) of the MTP Act manifestly exist.'

2. It is submitted that even the Medical Termination of Pregnancy (Amendment) Bill 2014 and Medical Termination of Pregnancy (Amendment) Bill 2017 have proposed to enhance it to 24 weeks. The SOR of the 2017 Amendment Bill notes that during the intervening period after the Act was enforced, several genuine cases have come up where the fact of fetuses with serious risk of abnormalities with grave risk to physical and mental risk to mother had been noticed after twenty weeks. As a result, many women were forced to move the Supreme Court for permission to end pregnancy beyond twenty weeks, leading to lot of mental and financial hardship to such pregnant women. The Bill intends to extend the permissible period for abortion from twenty weeks to twenty four weeks if doctors believe the pregnancy involves a substantial risk to the mother or the child or if there are substantial fetal abnormalities. The Bill also intends to amend the provisions of sub-section (3) of section (6) relating to laying of rules before each House of Parliament and their notification etc. by the House.

3. However, the Bill has not been passed yet and has been pending since 2014. A Division Bench of Madras High Court has vide order dated 24.04.2019 taken suo moto cognizance of the pending Bill and issued notice to the Central Government to respond on various issues pertaining to termination of pregnancy including as to when would the MTP Act be amended as per the draft Medical Termination of Pregnancy (Amendment) Bill 2014.

4. Keeping in view the fact that our country lacks robust diagnostic infrastructure especially in rural areas, complications in advance stages of pregnancy, change in physical/ mental/ socio economic situation of the pregnant woman the restriction of 20 weeks is excessive when safe abortions are possible as late as towards 26 weeks.

III. Explanation 2 to Section 3(2) is violative Article 14 of the Constitution.

1. Explanation 2 to Section 3(2) provides that where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

2. The above provision amounts to hostile discrimination against single women without any nexus to the object which is to terminate an unwanted pregnancy. The deeming provision provides that an unwanted due to failure of a contraceptive measure is presumed to cause grave mental injury to the pregnant. The object is to enable a woman to terminate an unplanned and unwanted pregnancy since a pregnancy entails several physical, mental and socio-economic consequences. Keeping the object in view there is no rationale for not affording the same protection to an unmarried woman. On the contrary an unwanted and unplanned pregnancy will invariably in the case of an unmarried woman will ensue more grave consequences. The provision treats equals unequally amounting to hostile discrimination and therefore liable to be struck down as being violative of Article 14 of the Constitution.

Studies suggest that unmarried sexually active women face considerable obstacles to contraceptive use and abortion facilities. Therefore the affording of protection only to married women is arbitrary and amounts to hostile discrimination.

3. The provision also adversely affects the sexual autonomy of the single women.

IV. Section 5 so far as it permits abortion after 20 weeks only on the ground of immediate necessity to save the life of the pregnant woman is violative of Articles 14 & 21:

1. Section 5 enables termination of pregnancy beyond 20 weeks where the registered medical practitioner is of the view that termination of such pregnancy is immediately necessary to save the life of the pregnant woman. It is submitted that this provision is arbitrary and severely restricts the right to life and right to choice envisaged under Article 21 of the Constitution in more than one ways.

- (i). It proscribes pregnancy even in the event fetal abnormalities are detected post 20 weeks. Although the High Courts and Supreme Court have time and again permitted abortions post twenty weeks where fetal abnormalities have been detected post 20 weeks.
- (ii). It proscribes pregnancy even in cases where the pregnancy is a result of rape.
- (iii). There may be change of circumstances where the continuance of pregnancy may severely jeopardize the physical or mental health of the woman though not necessarily be a threat to life of woman. For instance woman may be diagnosed with certain serious disease like cancer which may require postponing of treatment such as chemotherapy, there may be breakdown of marriage during the continuance of pregnancy and bearing the child would have serious mental and socio economic consequences , there could be a rape victim who discovers pregnancy at a stage later than the 20 week threshold or diagnosis of fetal abnormality at a later stage. In short there could be a myriad of unforeseeable situations which may present themselves which need to be accommodated and therefore the only ground of ' immediate necessity of saving the life of the woman' is too harsh and arbitrary. Even the High Courts and Supreme Courts have permitted termination of pregnancy in appropriate cases where the continuation of pregnancy would result in physical or mental injury to the woman.

2. 5 fails to meet the test of reasonableness and proportionality. There is no legitimate State interest in compelling a woman to continue her pregnancy where the continuance of pregnancy involves risk to her physical or mental health or substantial risk of fetal abnormalities. Keeping in view the legitimate State interest i.e. the health (both physical and mental) of the pregnant woman the measure of complete ban on termination on any ground other than immediate necessity of saving the life of the woman the measure is excessive, disproportionate and counter-productive. Where the termination of pregnancy itself does not involve risk to the physical life of the woman her right to choice and right to health have to be respected. It is only when there is threat to right to life in the sense of right to live literally (as understood as anthesis of death) which enjoys greater protections and is at higher pedestal in the hierarchy of the fundamental rights can the right of reproductive choice and right to privacy be overridden. This balancing of two aspects of rights emanating from Article 21 of the Constitution of the same individual has been recognized by a 5 Judge Bench of this Hon'ble Court in **Aadhaar case** i.e. KS Puttaswamy II (2019) 1 SCC 1. This court held that assuming that the Aadhaar Act minimally infringed upon the right of privacy , the socio economic right i.e. right to food etc will outweigh the right of privacy

3. Even the test that is being applied by this Hon'ble Court is whether termination of pregnancy it is not going to be more hazardous than spontaneous delivery at term. (Judgment dated 9th October, 2017 in W.P. (C) 928 of 2017 in **Sonali Kiran Gaikwad Vs UOI**)

V. Section 3(4) (a) is violative of Article 21 of the Constitution so far it makes consent of guardian mandatory in case of mentally ill persons and minors.

1. In case of minors or mentally ill persons the pregnancy cannot be terminated unless their guardian has given consent in writing. As a consequence the guardian enjoys complete autonomy over such persons. An unwilling minor or mentally ill person will be compelled to carry the pregnancy to the full term and face all the consequences and challenges which come along with the fact of being a mother owing to refusal of consent of the guardian. Especially in case of minors in the age of 16-18 , they are generally are capable of making their decisions. However, if the guardian refuses to give consent in writing then she will be forced to carry the child which will have immense adverse and irreversible consequences on her life. It is submitted that in case of minors there should be an alternative route for making safe abortions accessible in a situation where the guardian refuses consent or the minor cannot approach the guardian due to social stigma and pressure as is in the case of various legislations in other countries such as USA. Making the guardian the whole sole decision making authority for making a decision of whether to terminate pregnancy or not is arbitrary and completely reduces the autonomy of the minors and mentally ill persons envisaged by Article 21 of the Constitution which is equally afforded to them by the Constitution.

2. Section 3(4) of the Act also fails to meet the ' best interest' test which is to be applied in case of minors and mentally persons. It is submitted that as stated above minors and mentally ill persons belong to the most vulnerable section of women and making the termination of pregnancy available dependent wholly on the consent of the guardian destroys their right of reproductive choice.

3. The social stigma attached with pregnancy in unmarried woman which is mostly prevalent in minors, minors are forced to avail abortion from illegal abortion clinics which completely annihilates their right of safe abortion which is also an aspect right to health under Article 21

B. FAILURE OF STATE TO PROVIDE FOR SAFE ABORTIONS IS VIOLATIVE OF ARTICLE 21:

1. This Hon'ble Court has held that Article 21 of the Constitution imposes positive obligations on the State. It is submitted that right to safe abortions emanates from right to health envisaged in Article 21 of the Constitution. Recently Supreme Court of **Kansas in Hodes & Nauser Vs. Derek Schmidt** vide Judgement dated 27.04.2019 has held that women have a fundamental right to safe abortions.

2. The report dated 22.11.2017 by India Spend records that 56 % of abortions unsafe, 8.5 % of maternal deaths are due to unsafe abortion and 10 women die everyday due to this . It records that there is a [76.3% shortfall](#) of obstetricians and gynaecologists compared to their requirement at Community Health Centres. Private medical facilities are expensive, and financially out of the reach of most women. Stigma against premarital sex, or arising out of a romanticised notion of motherhood, leads women to “resort to secrecy”. Public and private health facilities denied women abortion beyond the prescribed 20-week gestational period, as per the study. As many as 29% of public hospitals in Bihar and 63% in Assam provided second trimester abortions, the study showed. But in Gujarat and Tamil Nadu, CHCs and PHCs did not provide second trimester abortions which made women look to informal methods of termination.

3. The report also states that 54-87% of facilities in the six study states had turned away at least one woman seeking termination of pregnancy. The reasons cited by facilities included shortage of staff, lack of supplies or for not having consent from their husbands or a family member which are not legal grounds for denying abortions.

4. The Handbook on Medical Methods of Abortion to expand Access to New technologies for Safe Abortions by Ministry of Health and Family Welfare, Government of India dated January,

2016 also records that a significant yet prevalent cause of maternal mortality in the country is unsafe abortion. Accounting for approximately 8 % of all maternal deaths, it is the third largest cause of maternal morbidity in the country and thus an area requiring focussed attention. Each day close to 10 women die on account of unsafe abortion.

5. The [report](#) published by *The Lancet Global Health* in December 2017 titled *The Incidence of Abortion and Unintended Pregnancy in India, 2015* records that access to safe, legal abortion services has lagged, so women now commonly obtain medication abortion from pharmacists, chemists, and informal vendors, and the information they receive on how to use the drugs and on recommended gestational limits is often inaccurate or absent. It further records that most primary health centres and a large proportion of community health centres do not provide abortion services, and the shortage of trained staff and inadequate supplies are the primary reasons survey respondents gave for not providing this service. A rate of 70 unintended pregnancies per 1000 women and the finding that nearly half of all pregnancies are unintended suggest that there is great need for improvements in contraceptive services for women and for couples in general and in the context of abortion care.

6. It is submitted that it is evident that current framework and infrastructure for termination of pregnancy is wholly inadequate and fails to afford safe abortions to a large section of woman especially belonging to rural area and from economically weaker sections of the society thereby infringing their right to health recognized by Article 14 of the Constitution.

LIST OF DATES

Year 1860 : Indian Penal Code was enacted including Sections 312-316 which criminalized abortion unless it was for the purpose of saving the life of the woman.

- Year 1971 : The Medical Termination of Pregnancy Act, 1971 was enacted to provide for termination of certain pregnancies by registered medical practitioners and for matters connected therewith and incidental thereto . It came into force on 01.04.1972 vide GSR 285 dated 19.02.1972 (hereinafter referred to as MTP Act, 1971).
- 22.01.1973 : The US Supreme Court in a landmark judgment in ***Roe Vs Wade 410 US 113*** while deciding the validity of law in Texas which criminalized abortion except where it was for saving the life of the mother held that privacy right is broad enough to encompass woman's decision whether or not to terminate pregnancy. It laid down a trimester based framework for termination of pregnancy. So far as first trimester is concerned it held that a woman enjoyed the greatest protection to her reproductive right.
- Year 2002 : Vide Act 64 of 2002 certain amendments were made to MTP Act which came into force on 18.06.2003. Apart from substituting the word 'lunatic' to 'mentally ill person' it made amendment in Section 4 pertaining to place where pregnancy may be terminated and also enhanced the punishment of termination of pregnancy by any person other than registered medical practitioner.
- 13.06.2003 : The Medical Termination of Pregnancy Rules, 2003 and the Medical Termination of Pregnancy Regulations, 2003 were enforced.
- 28.08.2009 : A 3 Judge bench of this Honorable Court in a landmark judgment in ***Suchitra Srivastava Vs UOI (2009) 9 SCC 1*** held that a woman's right to make reproductive choice is an aspect of personal liberty.

29.10.2014 : The Medical Termination of Pregnancy (Amendment) Bill, 2014 was released by the Ministry of Health & Family Welfare. The vital changes sought to be brought are as follows:

(i). It sought to substitute 'registered medical practitioner' by 'registered health care provider' and certain other categories of practitioners are made eligible to terminate pregnancy.

(ii). For pregnancy of upto 12 weeks it seeks to do away with the precondition of formation of opinion by a medical practitioner that the continuance of pregnancy will pose threat to the life of the woman or grave physical/ mental injury or there is substantial risk that if the child were born , it would suffer from such physical or mental abnormalities as to be seriously handicapped. It can simply be done on the request of the woman.

(iii). It seeks to enhance the period of 20 weeks to 24 weeks envisaged in Section 3(2)(b).

(iv). It has omitted the word 'married' before woman in Explanation to Section 3(2). Thereby enabling single women to seek abortion on the ground of failure of contraceptive device.

(v). In case of diagnosis of substantial fetal abnormalities the restriction of time limit is done away with.

Year 2015 : The [report](#) published by *The Lancet Global Health* in December 2017 titled *The Incidence of Abortion and Unintended Pregnancy in India, 2015* records that access to safe, legal abortion services has lagged, so women now commonly obtain medication abortion from pharmacists, chemists,

and informal vendors, and the information they receive on how to use the drugs and on recommended gestational limits is often inaccurate or absent. It further records that most primary health centres and a large proportion of community health centres do not provide abortion services, and the shortage of trained staff and inadequate supplies are the primary reasons survey respondents gave for not providing this service. A rate of 70 unintended pregnancies per 1000 women and the finding that nearly half of all pregnancies are unintended suggest that there is great need for improvements in contraceptive services for women and for couples in general and in the context of abortion care.

January, 2016 : The Handbook on Medical Methods of Abortion to expand Access to New technologies for Safe Abortions by Ministry of Health and Family Welfare, Government of India dated January, 2016 records that a significant yet prevalent cause of maternal mortality in the country is unsafe abortion. Accounting for approximately 8 % of all maternal deaths, it is the third largest cause of maternal morbidity in the country and thus an area requiring focussed attention. Each day close to 10 women die on account of unsafe abortion.

04.08.2017 : The Medical Termination of Pregnancy (Amendment) Bill, 2017 was introduced in Rajya Sabha . It sought to increase the twenty weeks limitation contained in Section 3(2) to twenty four weeks. The SOR of the Bill notes that several cases have come up wherein foetal abnormalities have been noted after twenty weeks which forced

women to approach Supreme Court and High Courts which leading to mental and financial hardship to woman.

22.11.2017 : The report dated 22.11.2017 by India Spend records that 56 % of abortions unsafe, 8.5 % of maternal deaths are due to unsafe abortion and 10 women die everyday due to this . It records that there is a [76.3% shortfall](#) of obstetricians and gynaecologists compared to their requirement at Community Health Centres. Private medical facilities are expensive, and financially out of the reach of most women. Stigma against premarital sex, or arising out of a romanticised notion of motherhood, leads women to “resort to secrecy”. Public and private health facilities denied women abortion beyond the prescribed 20-week gestational period, as per the study. As many as 29% of public hospitals in Bihar and 63% in Assam provided second trimester abortions, the study showed. But in Gujarat and Tamil Nadu, CHCs and PHCs did not provide second trimester abortions which made women look to informal methods of termination. The report also states that 54-87% of facilities in the six study states had turned away at least one woman seeking termination of pregnancy. The reasons cited by facilities included shortage of staff, lack of supplies or for not having consent from their husbands or a family member which are not legal grounds for denying abortions.

2017-2019 : That this Hon'ble Court and the High Courts have been flooded with petitions seeking termination of pregnancy beyond 20 weeks on account of risk of physical/ mental injury to the woman, substantial

risk of fetal abnormalities and by rape victims. This Hon'ble Court and several High Courts have permitted termination on these accounts even though Section 5 permits termination of pregnancy beyond 20 weeks only when termination of such pregnancy is immediately necessary to save the life of the pregnant woman. Following is an illustrative list of such cases decided by this Hon'ble Court.

(i). (2018) 14 SCC 75 A Vs UOI

Term: 25-26th week

Reason for permission for termination: foetus would not survive and can pose severe mental injury to the woman.

(ii). (2018) 14 SCC 289 Mamta Verma Vs UOI

Term : 25 weeks

Reason for permission for termination: Medical board opined that foetus would not survive and can pose severe mental injury to the woman.

(iii). (2018) 12 SCC 57 Tapasya Umesh Pisal Vs Union of India

Term : 24 weeks

Reason for permission for termination: medical board opined that baby if delivered would have to undergo multiple surgeries which is associated with a high morbidity and mortality.

(iv). Sonali Kiran Gaikwad VS UOI

(Judgment dated 9th October, 2017 in W.P. (C) 928 of 2017 in **Sonali Kiran Gaikwad Vs UOI**)

Term : 28 weeks

Reason for permission for termination: Medical Board opined serious abnormalities of the foetus, a

substantial risk of serious physical handicap and high chance of morbidity and mortality in the new born. Although mother's life was not in danger this Court held that continuing pregnancy will cause mental anguish.

(v). X Vs UOI (2017) 3 SCC 458

Term : 25 weeks

Reason for permission for termination: Medical Board opined that the condition of foetus was incompatible with extra uterine life

(vi). Sharmishta Chakraborty Vs UOI (2018)13 SCC 339

Term : Beyond 20 weeks

Reason for permission for termination: Medical boards opined that there is a risk of injury to mental health of the woman and child if born alive would require corrective surgeries associated with high morbidity and mortality.

(vi). Meera Sathosh Pal Vs UOI (2017) 3 SCC 462

Term : 24 weeks

Reason for permission for termination: Medical board opined that the continuance of pregnancy will endanger physical and mental health of the woman and the foetus wont survive.

02.11.2018 : A Division Bench of Bombay High Court vide judgment dated 02.11.2018 in **XYZ Vs UOI** reported in 2019 Scc Online Bom 560 interpreted the word ' life' in Section 5 of MTP Act, 1971 as not being mere animal existence but quality of life as is understood in its richness and fullness consistent with human dignity. It held that beyond

twenty weeks pregnancy can be terminated not only where it is necessary to save the immediate life of the woman but also where the continuance of pregnancy will involve grave physical/ mental injury to the woman or where there is substantial risk that if the child were born would suffer from deformities and diseases. However, the court held that pregnancy beyond twenty weeks sought to be terminated on the ground of grave physical/ mental injury or substantial risk of foetal abnormalities permission from High Court will have to be sought.

- 10.04.2019 : The High Court of Australia vide judgment dated 10.04.2019 in Kathleen Clubb Appellant And Alyce Edwards & Anor while upholding a law providing for safe access zones around abortion clinic held that *women seeking an abortion [...] are entitled to do so safely, privately and with dignity, without haranguing or molestation.*
- 24.04.2019 : A Division Bench of Madras High Court took suo moto cognizance of the pendency Medical Termination of Pregnancy (Amendment) Bill, 2014 and certain other issues pertaining to abortions and issued notice to Central Government. It noted that in our country 81 % of abortions are done at homes and in an unsafe manner. However, the court is not considering the issues pertaining to validity of Section 3 and 5 of the MTP ACT.
- 28.05.2019 : A Division Bench of Delhi High Court issued notice in W.P. (Crl) No. 1612 of 2019 challenging Section 3 of the MTP Act.
- 28.05.2019 : That a news paper report was published in Times of India a 28 year old woman who had filed a writ petition before the Hon'ble High Court of Bombay

seeking permission to terminate her 28 week pregnancy since the fetus had a major brain anomaly delivered the baby a day before the Medical Board gave an opinion that the terminated should be terminated due to mental agony the fetus's condition was causing her.

Approaching High Court and Supreme Court causes immense financial and other social hardships. The time taken in adjudication by courts also is detrimental to the health of the woman. The above incident is a classic example of the same.

29.05.2019 : Hence this Writ Petition

IN THE SUPREME COURT OF INDIA
(CIVIL ORIGINAL JURISDICTION)

WRIT PETITION(CIVIL) NO. _____ OF 2019

(Under Article 32 of the Constitution of India)

IN THE MATTER OF :

1. Swati Agarwal

[REDACTED]

2. Garima Sekseria

[REDACTED]

3. Prachi Vats

[REDACTED]

... Petitioners

Versus

Union of India
Through Secretary
Ministry of Health &
Family Welfare
A Wing Nirman Bhawan,
New Delhi-110011.

... Respondent

**WRIT PETITION FILED UNDER ARTICLE 32 OF
THE CONSTITUTION OF INDIA CHALLENGING
THE CONSTITUTIONAL VALIDITY OF SECTION
3 & 5 OF THE MEDICAL TERMINATION OF
PREGNANCY ACT, 1971**

To,

The Hon'ble the Chief Justice of India and his Companion
Judges of the Supreme Court of India.

The humble petition of the petitioner above named.

MOST RESPECTFULLY SHOWETH :

1. That the present writ petition has been preferred by the Petitioner under Article 32 of the Constitution of India for issuance of Writ of certiorari for quashing Section 3 & 5 of the Medical Termination of Pregnancy Act, 1971 and mandamus to implement the Medical Termination of Pregnancy (Amendment) Bill, 2014.

As the matter pertains to PIL, under Order XXXVIII, Rule 2(2) of SCR,2013 :-

(i).	The petitioners is required to disclose :	
(a).	Full Name, complete postal address, e-mail address, phone number, proof regarding identification, occupation and annual income, PAN No. and National Unique identity Card No., if any :	1. Swati Agarwal W/o Shri 2. Garima Sekseria 3. Prachi Vats

(b).	The facts constituting the cause of action.	Petitioners are challenging Sections 3 & 5 of the Medical Termination of Pregnancy Act, 1971.
(c)	The nature of injury caused or likely to be caused to the public.	Violation of Article 14 & 21 of the Constitution.
(d).	The nature and extent of personal interest, if any, of the petitioner(s).	Civil litigation, no personal interest.
(e)	Details regarding any civil, criminal or revenue litigation, involving the petitioners or any of the petitioners, which has or could have a legal nexus with the issues involved in the Public Interest Litigation and	No
(f).	Whether the concerned Government Authority was moved for reliefs sought in the petition and if so, with	No

	what result.	
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1A. That the Petitioner No. 1 is a [REDACTED]
[REDACTED]. Petitioner No. 2 is also [REDACTED]
[REDACTED]. Petitioner No. 3 is [REDACTED]
[REDACTED] by
profession.

1B. The Petitioners no have private motive or oblique reason in filing the present writ petition. However, the Petitioners have filed the present writ petition for enforcement of Fundamental Rights conferred by Article 14 and 21 of the Constitution. The present petition not only concerns the right of the Petitioners but also rights of women in the country in general.

2. BRIEF FACTS OF THE CASE :

That the facts giving to the filing all this petition.

- (i). Indian Penal Code was enacted including Sections 312-316 which criminalized abortion unless it was for the purpose of saving the life of the woman.
- (ii). The Medical Termination of Pregnancy Act, 1971 was enacted to provide for termination of certain pregnancies by registered medical practitioners and for matters connected therewith and incidental thereto. It came into force on

01.04.1972 vide GSR 285 dated 19.02.1972 (hereinafter referred to as MTP Act, 1971).

- (iii). The US Supreme Court in a landmark judgment in **Roe Vs Wade 410 US 113** while deciding the validity of law in Texas which criminalized abortion except where it was for saving the life of the mother held that privacy right is broad enough to encompass woman's decision whether or not to terminate pregnancy. It laid down a trimester based framework for termination of pregnancy. So far as first trimester is concerned it held that a woman enjoyed the greatest protection to her reproductive right
- (iv). Vide Act 64 of 2002 certain amendments were made to MTP Act which came into force on 18.06.2003. Apart from substituting the word 'lunatic' to 'mentally ill person' it made amendment in Section 4 pertaining to place where pregnancy may be terminated and also enhanced the punishment of termination of pregnancy by any person other than registered medical practitioner.
- (v). The Medical Termination of Pregnancy Rules, 2003 and the Medical Termination of Pregnancy Regulations, 2003 were enforced.
- (vi). A 3 Judge bench of this Honorable Court in a landmark judgment in **Suchita Srivastava Vs Chandigarh**

Administration (2009) 9 SCC 1 held that a woman's right to make reproductive choice is an aspect of personal liberty.

(vii). The Medical Termination of Pregnancy (Amendment) Bill, 2014 was released by the Ministry of Health & Family Welfare. The vital changes sought to be brought are as follows:

- (i). It sought to substitute 'registered medical practitioner' by 'registered health care provider' and certain other categories of practitioners are made eligible to terminate pregnancy .
- (ii). For pregnancy of upto 12 weeks it seeks to do away with the precondition of formation of opinion by a medical practitioner that the continuance of pregnancy will pose threat to the life of the woman or grave physical/ mental injury or there is substantial risk that if the child were born , it would suffer from such physical or mental abnormalities as to be seriously handicapped. It can simply be done on the request of the woman.
- (iii). It seeks to enhance the period of 20 weeks to 24 weeks envisaged in Section 3(2)(b).
- (iv). It has omitted the word ' married' before woman in Explanation to Section 3(2). Thereby enabling single

women to seek abortion on the ground of failure of contraceptive device.

- (v). In case of diagnosis of substantial fetal abnormalities the restriction of time limit is done away with.

A copy of the draft Medical Termination of Pregnancy (Amendment) Bill, 2014 is annexed as **Annexure P-1** (at page 30-34) to this Writ Petition.

- (a). The [report](#) published by *The Lancet Global Health* in December 2017 titled *The Incidence of Abortion and Unintended Pregnancy in India, 2015* records that access to safe, legal abortion services has lagged, so women now commonly obtain medication abortion from pharmacists, chemists, and informal vendors, and the information they receive on how to use the drugs and on recommended gestational limits is often inaccurate or absent. It further records that most primary health centres and a large proportion of community health centres do not provide abortion services, and the shortage of trained staff and inadequate supplies are the primary reasons survey respondents gave for not providing this service. A rate of 70 unintended pregnancies per 1000 women and the finding that nearly half of all pregnancies are unintended suggest that there is great need for improvements in

contraceptive services for women and for couples in general and in the context of abortion care. A copy of the report titled as The Incidence of abortion and unintended pregnancy in India, 2015 is annexed as **Annexure P-2**(at page 35-44) to this Writ Petition.

(b). The Handbook on Medical Methods of Abortion to expand Access to New technologies for Safe Abortions by Ministry of Health and Family Welfare, Government of India dated January, 2016 records that a significant yet prevalent cause of maternal mortality in the country is unsafe abortion Accounting for approximately 8 % of all maternal deaths, it is the third largest cause of maternal morbidity in the country and thus an area requiring focussed attention. Each day close to 10 women die on account of unsafe abortion. True copy of Relevant extracts of the handbook on Medical Methods of Abortion to expand Access to New technologies for Safe Abortions by Ministry of Health and Family Welfare, Government of India dated January, 2016 is annexed as **Annexure P-3**(at page 45 - 51) to this Writ Petition.

(c). The report dated 22.11.2017 by India Spend records that 56 % of abortions unsafe, 8.5 % of maternal deaths are due to unsafe abortion and 10 women die everyday

due to this . It records that there is a [76.3% shortfall](#) of obstetricians and gynaecologists compared to their requirement at Community Health Centres. Private medical facilities are expensive, and financially out of the reach of most women. Stigma against premarital sex, or arising out of a romanticised notion of motherhood, leads women to “resort to secrecy”. Public and private health facilities denied women abortion beyond the prescribed 20-week gestational period, as per the study. As many as 29% of public hospitals in Bihar and 63% in Assam provided second trimester abortions, the study showed. But in Gujarat and Tamil Nadu, CHCs and PHCs did not provide second trimester abortions which made women look to informal methods of termination. The report also states that 54-87% of facilities in the six study states had turned away at least one woman seeking termination of pregnancy. The reasons cited by facilities included shortage of staff, lack of supplies or for not having consent from their husbands or a family member which are not legal grounds for denying abortions. True copy of the report by India Spend dated 22.11.2017 is annexed as **Annexure P-4**(at page 52 - 61) to this Writ Petition.

(viii). The Medical Termination of Pregnancy (Amendment) Bill, 2017 was introduced in Rajya Sabha. It sought to increase

the twenty weeks limitation contained in Section 3(2) to twenty four weeks. The SOR of the Bill notes that several cases have come up wherein foetal abnormalities have been noted after twenty weeks which forced women to approach Supreme Court and High Courts which leading to mental and financial hardship to woman. True copy of the Medical Termination of Pregnancy (Amendment) Bill, 2017 is annexed as **Annexure P-5**(at page 62 - 65) to this Writ Petition.

- (ix). That this Hon'ble Court and the High Courts have been flooded with petitions seeking termination of pregnancy beyond 20 weeks on account of risk of physical/ mental injury to the woman, substantial risk of fetal abnormalities and by rape victims. This Hon'ble Court and several High Courts have permitted termination on these accounts even though Section 5 permits termination of pregnancy beyond 20 weeks only when termination of such pregnancy is immediately necessary to save the life of the pregnant woman. Following is an illustrative list of such cases decided by this Hon'ble Court.

[a] (2018) 14 SCC 75 A Vs UOI

Term: 25-26th week

Reason for permission for termination: foetus wont survive and can pose severe mental injury to the woman.

[b] (2018) 14 SCC 289 Mamta Verma Vs UOI

Term : 25 weeks

Reason for permission for termination: Medical board opined that foetus wont survive and can pose severe mental injury to the woman.

[c] (2018) 12 SCC 57 Tapasya Umesh Pisal Vs Union of India

Term : 24 weeks

Reason for permission for termination: medical board opined that baby if delivered would have to undergo multiple surgeries which is associated with a high morbidity and mortality.

[d] Sonali Kiran Gaikwad VS UOI

Term : 28 weeks

Reason for permission for termination: Medical Board opined serious abnormalities of the foetus, a substantial risk of serious physical handicap and high chance of morbidity and mortality in the new born. Although mother's life was not in danger this Court held that continuing pregnancy will cause mental anguish.

[e]. X Vs UOI (2017) 3 SCC 458

Term : 25 weeks

Reason for permission for termination: Medical Board opined that the condition of foetus was incompatible with extra uterine life

[f]. Sharmishta Chakraborty Vs UOI (2018)13 SCC 339

Term : Beyond 20 weeks

Reason for permission for termination: Medical boards opined that there is a risk of injury to mental health of the woman and child if born alive would require corrective surgeries associated with high morbidity and mortality.

[g] Meera Sathosh Pal Vs UOI (2017) 3 SCC 462

Term : 24 weeks

Reason for permission for termination: Medical board opined that the continuance of pregnancy will endanger physical and mental health of the woman and the foetus wont survive.

- (x). A Division Bench of Bombay High Court vide judgment dated 02.11.2018 interpreted the word ' life' in Section 5 of MTP Act, 1971 as not being mere animal existence but quality of life as is understood in its richness and fullness consistent with human dignity. It held that beyond twenty weeks pregnancy can be terminated not only where it is necessary to save the immediate life of the woman but also where the continuance of pregnancy will involve grave physical/ mental injury to the woman or where there is substantial risk that if the child were born would suffer from deformities and diseases. However, the court held that pregnancy beyond twenty weeks sought to be terminated on the ground of grave

physical/ mental injury or substantial risk of foetal abnormalities permission from High Court will have to be sought. True copy of the judgment delivered by the Hon'ble High of Bombay dated 02.11.2018 in W.P. 10835 of 2018 and connected writs is annexed as **Annexure P-6**(at page 66 - 96) to this Writ Petition.

(xi). A Division Bench of Madras High Court took suo moto cognizance of the pendency of the Medical Termination of Pregnancy (Amendment) Bill, 2014 and various other issues pertaining to abortion in our country and issued notice to Central Government. It noted that in our country 81 % of abortions are done at homes and in an unsafe manner. True copy of the order dated 24.04.2019 passed by the Hon'ble High Court of Madras in Suo Moto WP(MD) No. 9910 of 2019 is annexed as **Annexure P-7**(at page 97 - 100) to this Writ Petition.

(xii). A Division Bench of Delhi High Court issued notice in W.P. (Crl) No. 1612 of 2019 challenging Section 3 of the MTP Act.

(xiii). That a news paper report was published in Times of India a 28 year old woman who had filed a writ petition before the Hon'ble High Court of Bombay seeking permission to terminate her 28 week pregnancy since the fetus had a major brain anomaly delivered the baby a day before the Medical Board gave an opinion that the terminated should be

terminated due to mental agony the fetus's condition was causing her. True copy of the newspaper report dated 28.05.2019 is annexed as **Annexure P-8**(at page 101 - 104) to this Writ Petition.

3. That the Petitioner has not filed any other or similar petition in this Hon'ble Court or before any High Court seeking the same relief as prayed for in the present writ petition.

4. In the above facts and circumstances of this case the Petitioner prefers writ petition inter alia on the following grounds :

GROUND

A]. Because the issue of safe abortions and restriction on the reproductive choice of women and other incidental issues as raised in the present petition require consideration and urgent resolution by this Hon'ble Court since it severely, drastically and irreversibly affects all women of the country and is not a regional issue pertaining to any particular State. The impugned provisions and the lack of access to safe abortions affects the fundamental right to health , reproductive choice and right to privacy of women of the country.

B]. Because Section 3(2)(a) which provides for a mandatory precondition of formation of opinion by a medical practitioner that continuance of pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health or there is substantial risk that if the child were

born, it would suffer from such physical or mental abnormalities as to be seriously handicapped where a pregnancy not exceeding twelve weeks is sought is violative of right to privacy and right to reproductive choice of a woman which inhere and are recognized by Article 21 of the Constitution as settled by this Hon'ble Court *in Suchitra Srivatava Vs Chandigarh Administration (2009) 9 SCC 1* and *KS Puttaswamy Vs UOI (2017) 10 SCC 1* . It has been held by a 9 judge bench of this Hon'ble Court in *KS Puttaswamy* that **family**, marriage, **procreation** and sexual orientation are all integral to the dignity of individual. It further holds that the freedoms under Article 19 can be fulfilled where the individual can decide his/ her preferences. Read in conjunction with Article 21, liberty enables the individual to have a choice of preferences on various facets. It held that privacy is a Constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination.

C]. Because in the first trimester i.e. where the length of pregnancy does not exceed twelve weeks the risks involved in abortion are minimal when compared to the risks involved where pregnancy is carried to full term. Judicial cognizance has been taken of the said fact way back in 1973 by the US Supreme Court in *Roe Vs Wade*. Although with the advent of science and technology abortions at later stages has also

become safer but so far as first trimester is concerned there is no dispute the risks involved when pregnancy is carried to full term far outweigh the minimal and negligible risks involved when pregnancy is terminated in the first trimester. Keeping this in view the State cannot make any law restricting the right of the woman seeking abortion. It has been held by this Hon'ble Court in **KS Puttaswamy** that the State may intervene to protect legitimate State interests but it has to ensure fulfilment three fold requirement. It has held that firstly there should be a law in existence , second, there should be **need** in terms of a legitimate State interest and third the law should be proportional to the objects and needs sought to be fulfilled. It is submitted that Section 3(2) (a) fails both the second and third test. So far as first trimester is concerned there is no need to make termination of pregnancy subject to formation of opinion of medical practitioner that continuance of pregnancy poses risk to life of the woman or risk of grave physical/ mental injury to the woman or there is substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be serious handicapped since the adverse consequences of termination are negligible or nil when compared to the risks involved in carrying the pregnancy to it full term. Such a requirement reduces the fundamental right of reproductive choice to an exception. Till the first trimester the woman's reproductive

choice must enjoy complete protection and only those laws which are aimed at safer abortions can be made by the Parliament.

D]. Because it is the duty of the State to safeguard the ability to take decisions – the autonomy of those decisions and not to dictate those decisions. At the stage of the first trimester keeping in view the negligible or nil risks involved to the health of the woman the right of reproductive choice of the woman enjoys maximum protection.

E]. Because Section 3(2)(a) also infringes the right to health as recognized by Article 21 of the Constitution. Right to health guaranteed by Article 21 affords constitutional protection to the choice of a woman to make a choice to abort which entails far lesser / negligible to her health. Recently Supreme Court of **Kansas in Hodes & Nauser Vs. Derek Schmidt** vide Judgement dated 27.04.2019 has held that women have a fundamental right to safe abortions.

F]. Because Section 3(2)(a) also fails to meet the test of proportionality. The object of the MTP Ac, 1971 is primarily to prevent maternal mortalities and provide safer abortions. Such harsh restriction inflict undue burden on the right and are grossly disproportionate and arbitrary.

G]. Because the Medical Termination of Pregnancy(Amendment) Bill, 2014 also proposes to do away the harsh

restrictions contained in Section 3(2)(a) and proposes that the pregnancy not exceeding 12 weeks can be terminated on the request of the woman. Even globally termination of pregnancy on the request of the woman is permitted in several countries with varied gestational limits ranging from 12 weeks to 24 weeks.

H]. Because Section 3(2)(b) which permits termination of pregnancy beyond 12 weeks and not exceeding 20 weeks provided two registered medical practitioners are of the opinion that the continuance of pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health or there is substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped is violative of Article 14 and 21 of the Constitution. It is submitted that the restricting the permissible length of pregnancy to 20 weeks is excessive and harsh and has no nexus with the object of the Act which is affording medical care to pregnant women and preventing maternal mortalities . With the advent of science and technology diagnosis of fetal abnormalities is possible at subsequent stages and with the advancement of science and technology it has become possible to terminate pregnancy even at later stages. As has been noted by the Hon'ble Bombay High Court in **XVZ VS UOI 2019 Scc Online Bom 550** that *'it is not as if all contingencies express themselves*

only within the first 20 weeks of pregnancy. Even in cases where a pregnant mother is regularly following up her gynaecologist, double marker test is undertaken between 10th and 13th week; triple marker test between 18th and 20th week and the crucial anomaly scan in, around the 20th week. Many serious fetal anomalies may not even be diagnosable until twenty weeks as many pregnant mothers may not even have access to suitable diagnostic tools, particularly in rural areas. In many cases, complications can develop as the pregnancy advances. In such cases, as long as the medical opinion does not suggest that medical termination of pregnancy itself is a serious risk to the physical life of the pregnant mother, the law cannot plead helplessness particularly where circumstances set out in clauses (i) and (ii) of Section 3(2)(b) of the MTP Act manifestly exist.’ Therefore, the limit of 20 weeks has become unconstitutional with the advancement in science and technology in this field.

- 1]. Because Explanation 2 to Section 3(2) which provides that where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of pregnant woman is violative of Article 14 as it discriminates against single women. The above provision treats equals

unequally and the classification based on marital status is bad since it has no nexus with the object of terminating an unwanted pregnancy.

J]. Because an unwanted pregnancy has far grave mental and socio economic consequences in the case of single women than married woman and therefore the protection afforded only to married woman is discriminatory and violative of Article 14 of the Constitution. This provisions also adversely affects the sexual autonomy of single women.

K]. Because Section 3(4)(a) which mandates consent of guardian for termination of pregnancy in case of minor and mentally ill persons is arbitrary and destructive of right of bodily integrity and autonomy of such women. It is submitted that the guardian cannot be made the ultimate decision maker regarding termination or otherwise of the pregnancy given the irreversible physical, mental socio economic consequences that ensue as result of pregnancy. As a result of such a provision a minor is forced to bear the burden of pregnancy and the burden of raising a child if the guardian refuses the consent to terminate the same. It is submitted that the consequences of pregnancy on a woman are drastic and irreversible and therefore should not be left to the whims and fancies of the guardian. It is the duty of the State to enable the minors and mentally ill persons being most

vulnerable to exercise their choice. Therefore, an alternative procedure for making safe abortions accessible in a situation where the guardian refuses consent or the minor cannot approach the guardian due to social stigma.

L]. Because Section 3(4) of the Act also fails to meet the 'best interest' test which is to be applied in case of minors and mentally persons. It is submitted that as stated above minors and mentally ill persons belong to the most vulnerable section of women and making the termination of pregnancy available dependent wholly on the consent of the guardian destroys their right of reproductive choice.

M]. Because of the social stigma attached with pregnancy in unmarried woman which is mostly prevalent in minors, minors are forced to avail abortion from illegal abortion clinics which destroys their right of safe abortion which is also an aspect right to health under Article 21.

N]. Because as has been held by a 5 Judge Bench in **M. Nagaraj Vs State of Karnataka (2006) 8 SCC 212** and 9 Judge Bench of this Hon'ble Court in **KS Puttaswamy** that Article 21 is not only negative but also has positive obligations on the State. It requires that the State should enable an individual to make choices in life especially those pertaining to his/ her personal life.

O]. Because Section 5 of the MTP Act which permits termination of pregnancy beyond 20 weeks only in cases where it is necessary to immediately necessary to save the life of the pregnant woman is arbitrary, unreasonable and disproportionate and violative of Article 14 and 21 of the Constitution.

P]. Because Section 5 fails to accommodate those contingencies where the registered medical practitioner opines that the continuance of pregnancy involves grave injury to the physical health(not life threatening) or to the mental health of the mother. It also fails to accommodate contingences where medical opinion establishes that there is substantial risk that if the child were born, it would suffer from such physical and mental abnormalities as to be seriously handicapped. It also fails to accommodate where pregnancy is alleged to have been caused as a result of rape. It is submitted that no right is absolute and just fair , reasonable and proportionate restrictions can be imposed but the restriction contained in Section 5 allowing termination of pregnancy only where it is immediately necessary to save the life of the woman is excessive, arbitrary and disproportionate.

Q]. Because this Hon'ble Court and various High Courts have time and again permitted abortion beyond twenty weeks on the ground of risk of physical/ mental injury to the woman

and/ or where there is substantial risk that if the child were born, it would suffer from such physical and mental abnormalities as to be seriously handicapped. An illustrative list of few such cases is as below :-

(i). (2018) 14 SCC 75 A Vs UOI

Term: 25-26th week

Reason for permission for termination: foetus wont survive and can pose severe mental injury to the woman.

(ii). (2018) 14 SCC 289 Mamta Verma Vs UOI

Term : 25 weeks

Reason for permission for termination: Medical board opined that foetus wont survive and can pose severe mental injury to the woman.

(iii). (2018) 12 SCC 57 Tapasya Umesh Pisal Vs UOI

Term : 24 weeks

Reason for permission for termination: medical board opined that baby if delivered would have to undergo multiple surgeries which is associated with a high morbidity and mortality.

(iv). Sonali Kiran Gaikwad VS UOI (Judgment dated 9th October, 2017 in W.P. (C) 928 of 2017)

Term : 28 weeks

Reason for permission for termination: Medical Board opined serious abnormalities of the foetus, a substantial risk of serious physical handicap and high chance of morbidity and mortality in the new born. Although mother's life was not in

danger this Court held that continuing pregnancy will cause mental anguish.

(v). X Vs UOI (2017) 3 SCC 458

Term : 25 weeks

Reason for permission for termination: Medical Board opined that the condition of foetus was incompatible with extra uterine life

(vi). Sharmishta Chakraborty Vs UOI (2018)13 SCC 339

Term : Beyond 20 weeks

Reason for permission for termination: Medical boards opined that there is a risk of injury to mental health of the woman and child if born alive would require corrective surgeries associated with high morbidity and mortality.

(vii). Meera Sathosh Pal Vs UOI (2017) 3 SCC 462

Term : 24 weeks

Reason for permission for termination: Medical board opined that the continuance of pregnancy will endanger physical and mental health of the woman and the foetus wont survive.

R]. Because the Section 5 fails to apply the test of proportionality which has been consistently applied by this Hon'ble Court i.e. whether termination of pregnancy is going to be more hazardous to the woman than delivery at term (See Judgment dated 9th October, 2017 in W.P. (C) 928 of 2017 in **Sonali Kiran Gaikwad Vs UOI**)

S]. Because as a result of the current legal framework women are forced to approach Supreme Court and High Court which

causes immense financial and other social hardships. The time taken in adjudication by courts also is detrimental to the health of the woman. Most women from rural and economically background do not even have the wherewithal to move the courts for enforcement of their right.

PRAYER

In the above facts and circumstances of this case, it is most humbly prayed that this Hon'ble Court may be graciously be pleased to :

- (i). Issue a writ of certiorari or any other appropriate writ to declare Section 3(2) (a) of the Medical Termination of Pregnancy Act, 1971 to the extent it requires formation of opinion by medical practitioner that continuance of pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health or there is substantial risk that if the child were born, it would suffer from such physical or mental health abnormalities as to be seriously handicapped for termination of pregnancy where length of pregnancy does not exceed 12 weeks as unconstitutional and void as it violates Article 14 & 21 of the Constitution .
- (ii). Issue a writ of certiorari or any other appropriate writ to declare Section 3(2)(b) of the Medical Termination of Pregnancy Act, 1971 to the extent it restricts the termination

of pregnancy on the ground of risk to the life of the pregnant woman or of grave injury to her physical or mental health or there is substantial risk that if the child were born, it would suffer from such physical or mental health abnormalities as to be seriously handicapped for termination of pregnancy only to those cases where length of pregnancy does not exceed 20 weeks as unconstitutional and void as it violates Article 14 & 21 of the Constitution.

- (iii). Issue a writ of certiorari or any other appropriate writ to declare Explanation 2 to Section 3(2) of the Medical Termination of Pregnancy Act, 1971 to the extent it only applies to married women as unconstitutional and void as it violates Article 14 of the Constitution.
- (iv). Issue a writ of certiorari or any other appropriate writ to declare Section 3(4) of the Medical Termination of Pregnancy Act, 1971 as unconstitutional and void as it violates Article 21 of the Constitution.
- (v). Issue a writ of certiorari or any other appropriate writ to declare Section 5 of the Medical Termination of Pregnancy Act, 1971 to the extent it proscribes termination of pregnancy beyond 20 weeks only on the ground of immediate necessity of saving the life of the woman as unconstitutional and void as it violates Article 14 & 21 of the Constitution.

- (vi) Issue mandamus or any other appropriate writ for implementation of the Medical Termination of Pregnancy (Amendment) Bill, 2014
- (vi). Issue mandamus or any other appropriate writ directing Central Government to take steps to provide access safe abortion to all women especially those belonging to socially and economically backward sections of the society.
- (vii). Pass any other or further order as this Hon'ble court may deem fit and proper in the facts and circumstances of the present case.

DRAWN AND FILED BY

(Ms. Sansriti Pathak)
Advocate for the Petitioners.

Drawn on 29.05.2019
Filed on 29.05.2019

IN THE SUPREME COURT OF INDIA

(CIVIL ORIGINAL JURISDICTION)

WRIT PETITION (CIVIL) NO. OF 2019

IN THE MATTER OF :

Swati Agarwal & Others .. Petitioners

Versus

Union of India .. Respondent

AFFIDAVIT

I, Swati Agarwal W/o Shri Dinesh Aggarwala, [REDACTED]

[REDACTED]

[REDACTED], do hereby solemnly affirm

and state as follows :

1. That I am the petitioner in the abovementioned writ petition and am well conversant with the facts and circumstances of the case, hence competent to swear this affidavit.

2. That I state that I have gone through the contents of the accompanying Writ Petition which has been drafted under my instruction. I state that the facts stated in the accompanying Synopsis and List of Dates (Pages B to AA) , Writ Petition Paras 1 to 4 (Pages 1 to 27) , Grounds A to S and the main prayer and the accompanying Interlocutory application are true to the best of my knowledge and rest are submissions based on legal advice which I believe to be true and correct.

3. That Annexure P-1 to P-8 are true copies of their respective originals

DEPONENT

VERIFICATION :

Verified at New Delhi on this 29th day of May, 2019, that the contents of the above affidavit are true to my knowledge and believe and nothing material has been concealed therefrom.

DEPONENT

IN THE SUPREME COURT OF INDIA
(CIVIL ORIGINAL JURISDICTION)

WRIT PETITION (CIVIL) NO. _____ OF 2019

(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

PUBLIC INTEREST LITIGATION

IN THE MATTER OF :

Swati Agarwal & Others .. Petitioners

Versus

Union of India .. Respondent

PAPER BOOK
(FOR INDEX PLEASE SEE INSIDE)

ADVOCATE FOR THE PETITIONERS: MS. SANSRITI PATHAK

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PROFORMA FOR FIRST LISTING

SECTION : PIL

The Case pertains to (Please tick/check the correct box) :

- Central Act : The Medical Termination of Pregnancy Act 1971.
- Section : Section 3 & 5 the Medical Termination of Pregnancy Act 1971.
- Central Rule : (Title) N.A.
- Rule No(s) : NA.
- State Act : N.A.
- Section : N.A.
- State Rule : N.A.
- Rule No(s) :N.A.
- Impugned Interim Order : NA
- Impugned Final Order/Decree : NA
- High Court : NA
- Names of Judges : NA
- Tribunal/Authority : (Name) : NA

-
1. Nature of Matter : Civil Criminal
 2. (a) Petitioner / Appellant : Swati Agarwal & Others.
(b) E-mail ID : N.A.
(C) Mobile Phone Number : XXXXXXXXXX
 3. (a) Respondent No. 1 : Union of India
(b) E-mail ID : NA.
(c) Mobile phone number : NA.
 4. (a) Main category classification : NA
(b) Sub classification : NA

5. Not to be listed before : NA

6(a). Similar disposed matter with citation
if any and case details : N.A.

(b). Similar Pending matter with
case details : N.A.

(a) Whether accused/NA

convict has surrendered : Yes No

(b) FIR No. NA. Date : NA.

(c) Police Station : NA.

(d) Sentence Awarded : NA.

(e) Sentence Undergone : NA.

8. Land Acquisition Matters :

(a) Date of Section 4 notification : NA

(b) Date of Section 6 notification : NA

(c) Date of Section 17 notification :NA

9. **Tax Matters** : State the tax effect : NA.

10. **Special Category** (first petitioner/appellant only) :

Senior citizen > 65 years SC/ST Woman/child

Disabled Legal Aid case In custody

11. Vehicle Number (in case of Motor Accident Claim matters) :

Dated : 29.05.2019

(Ms. Sansriti Pathak)
Registration No.
Advocate for Petitioners