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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 10835 OF 2018

XYZ ... Petitioner
Versus
Union of India and ors. ... Respondents

Mr. D.J. Khambatta, Sr. Advocate (*Amicus Curiae*) a/w. Ms Naira Jejeebhoy and Mr. Pheroze F. Mehta.
Ms Gayatri Singh, Sr. Advocate a/w. Ms Aditi Saxena, Ms Meenaz Kakalia and Mr. Kranti L.C. for the Petitioner.
Mr. Anil C. Singh, A.S.G. a/w. Mrs. Purnima Awasti a/w Ms Anusha Pravin Amin and Ms Geetika Gandhi for Respondent Nos.1 and 3.
Mr.AB. Vagyani, Government Pleader a/w. Mr Y.S. Khochare, AGP and Mr. P.P. More, AGP and Mr. Udayan Shah for Respondent No.2.
Mr. Rajiv Chavan, Sr. Advocate a/w. Ms Priyanka Chavan, Ms Anupama Pawar I/b Mr. D.S. Shingade, Mr. Vinod Mahadik, Dr.Madhavi Patil and R.N. Cooper Hospital for MCGM.

WITH
WRIT PETITION NO. 9748 OF 2018

XYZ ... Petitioner
Versus
Union of India and ors. ... Respondents

Ms Gayatri Singh, Sr. Advocate a/w. Ms Aditi Saxena, Ms Meenaz Kakalia and Mr. Kranti L.C. for the Petitioner.
Mr.AB. Vagyani, Government Pleader a/w. Mr Y.S. Khochare, AGP and Mr. P.P. More, AGP and Mr. Udayan Shah for Respondent No.2.

WITH
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION (L) NO. 3172 OF 2018

XYZ ... Petitioner
Versus
Union of India and anr. ... Respondents
Mr. Kuldeep U. Nikam for the Petitioner.

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Ms Poornima Awasthi for Respondent No.1 – UOI.
Ms P.H. Kantharia,Government Pleader a/w. Ms Deepali Patankar, Assistant to G.P. for Respondent No.2– State.

.....

CORAM : A. S. OKA AND M. S. SONAK, JJ.

RESERVED ON : 2nd NOVEMBER 2018.

PRONOUNCED ON : 3rd APRIL, 2019.

JUDGMENT [Per M.S. SONAK, J.]

1] In all these matters, we have heard Mr. D.J. Khambatta, learned Senior Advocate who was appointed as Amicus Curiae in the matter. In this, he was ably assisted by learned counsel Ms Naira Jejeebhoy and Mr. Pheroze F. Mehta.

2] We have also heard Ms Gayatri Singh, learned Senior Advocate along with Ms Aditi Saxena, Ms Meenaz Kakalia and Mr. Kranti L.C. for the Petitioner in Writ Petition No. 10835 of 2018 and Writ Petition No. 9748 of 2018. Similarly, we have heard Mr.Kuldeep U. Nikam, learned counsel for the petitioner in Original Side Writ Petition (L) No. 3172 of 2018. In the said petition, Ms Flavia Agnes also appeared on behalf of legal Guardian-mother.

3] We have also heard Mr. Anil C. Singh, learned Assistant Solicitor General along with Mrs. Purnima Awasti, Ms Anusha Pravin Amin and Ms Geetika Gandhi for the Union of India in Writ Petition No. 10835 of 2018. We have also heard Mr.AB. Vagyani, learned Government Pleader along with Mr Y.S. Khochare, AGP and Mr. P.P. More, AGP and Mr. Udayan Shah

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for the State in Writ Petition No. 10835 of 2018 and Writ Petition No. 9748 of 2018. Similarly, we have heard Ms P.H. Kantharia, learned Government Pleader along with Ms Deepali Patankar, Assistant to G.P. for the State in original side Writ Petition (L) No.3172 of 2018.

4] We have also heard Mr. Rajiv Chavan, learned Senior Advocate along with Ms Priyanka Chavan, Ms Anupama Pawar for the respondent - MCGM.

5] In all these petitions, the petitioners had basically applied for appropriate orders to permit them to medically terminate pregnancies, even though the length of their respective pregnancies had exceeded 20 weeks. In two of the petitions, i.e., Writ Petition No. 10835 of 2018 and Writ Petition No. 9748 of 2018, declaration was sought to declare section 3(2)(b) of the Medical Termination of Pregnancy Act, 1971 (MTP Act) to the limited extent that it stipulates a ceiling of 20 weeks for an abortion to be done under section 3 of the MTP Act is *ultra vires* Article 14 and 21 of the Constitution of India. However, this relief was not ultimately pressed, because the petitioners in the said petitions had also applied for a declaration that their case was fit for exercise of jurisdiction under section 5 of the MTP Act, which, under certain circumstances, permits the medical termination of pregnancy, regardless of the ceiling of 20 weeks as prescribed in section 3 of the MTP Act.

6] Since, the consideration of reliefs sought for by the petitioners could not brook any delay, by various orders, we

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directed the constitution of Medical Boards comprising experts in various fields such as Gynecology, Medicine, Radiodiagnosis, Pediatric, Psychiatry etc. on emergent basis, in order to examine the petitioners and submit reports to this Court. In all these petitions, relying upon the reports and upon decisions of the Supreme Court in similar cases, we permitted the Petitioners to undertake medical termination of their pregnancies even though the length of the pregnancies had exceeded twenty weeks.

7] However, these Petitions were kept pending since certain important issues were raised, which in our opinion required detailed consideration. This is because several such petitions are being filed in this Court seeking urgent reliefs. In matters of this nature, every passing day produces irretrievable changes in the status of the petitioners and fetus which they carry. These changes invariably have a direct impact upon the reliefs applied for in such petitions. We therefore, appointed Mr.D.J.Khambatta, learned Senior Advocate of this Court to assist us as an *Amicus Curiae* in the matters and heard all the learned counsel representing various stake holders in the context of some important issues which arise in such matters.

8] According to us, the following issues arise in these petitions.

(A) Whether and in what circumstances can this Court, in exercise of its jurisdiction under Article 226 of the Constitution of India, permit the Petitioners to medically terminate pregnancies, the length of which exceed 20

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weeks, which is the ceiling prescribed in section 3 (2) of the MTP Act ?

(B) If permission as aforesaid, can and is to be granted, then what should be procedure and safeguards that will have to be adopted in such matters, particularly, with regard to:

(i) Constitution of medical boards to expeditiously examine such petitioners;

(ii) The hospitals/ clinics where such procedures may be permitted to be safely undertaken.

(C) What is the legal status of a child born alive, despite attempts at medical termination of pregnancy - the procedure to be followed in such cases – and the responsibility of the State in such matters?

9] The statutory regime in such matters is governed by the MTP Act which entered in force on 1st April, 1972. This is an Act to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto.

10] The Statement of Objects and Reasons (S.O.R.) refers to the provisions regarding termination of pregnancy under the Indian Penal Code, 1860 (IPC) enacted about a century prior to MTP Act entering into force. In keeping with the British Law on the subject, the IPC had criminalized the medical termination of pregnancy (abortion). The mother as well as abortionist could be punished, except where abortion had to be induced in order to save the life of the mother.

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11] The S.O.R. notes that the strict provisions of IPC were observed in breach in very large number of cases all over the country. Furthermore, most of these mothers were married women and there was no particular necessity to conceal their pregnancies. The S.O.R. then takes note of the fact that in recent years, health services had expanded and hospitals were availed of to the fullest extent by all classes of society and yet, Doctors were often been confronted by gravely ill or dying pregnant women whose pregnant uterus had been tampered with, in order to cause abortion. The S.O.R notes that this was avoidable wastage of the mother's health, strength and sometimes even life.

12] The S.O.R. then proceeds to state that the proposed measures in the MTP Act, seeking to liberalize certain existing provisions relating to termination of pregnancy have been conceived, primarily, for the following three purposes:

> *(i) As a health measure - when there is danger to the life or risk to physical or mental health of the woman;*
> *(ii) On humanitarian grounds - such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman, etc.; and*
> *(iii) Eugenic grounds - where there is substantial risk that the child, if born, would suffer from deformities and diseases.*

13] The MTP Act was amended in 2002 by Amendment Act No. 64 of 2002. Again, the Statement of Objects and Reasons to this Amendment Act refers to how MTP Act legalised termination of pregnancy on various social socio-medical grounds and how the MTP Act was aimed at eliminating abortion by untrained persons and in unhygienic conditions,

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thus reducing maternal morbidity and mortality. The Statement of Objects and Reasons to the Amendment Act then refers to the expert group which was constituted to review the provisions of MTP Act with a view to making it more relevant to the present environment. There is reference to suggestions from the National Commission for Women, in order to remove provisions discriminatory to women.

14] Since, the S.O.R. to the MTP Act makes reference to the provisions regarding termination of pregnancy in the IPC, brief reference, to such provisions becomes necessary particularly to the appreciation of background in which the provisions of MTP came to be enacted and entered into force. These provisions are mainly contained in Sections 312 to 318 of the IPC, which, as noted earlier, was a law enacted in the year 1860.

15] Section 312 of the IPC, punishes those who cause miscarriage in a pregnant woman. Even if the pregnant woman causes herself to miscarry, the same is punishable. Enhanced punishment is prescribed if miscarriage is caused after quickening (perception by the mother that movement of the fetus has started). Enhanced punishment is also prescribed where the offence is committed without consent of the woman. Section 314 of IPC deals with the offence of causing death while causing miscarriage.

16] Section 315 of the IPC punishes those who intentionally prevent the child being born alive or causing it to die after its birth. Section 316 of the IPC provides that if a quick unborn

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child dies as a result of an act amounting to culpable homicide, the offender can be punished under this section.

17] Section 317 of the IPC punishes father or mother of a child under the age of twelve years, or persons having the care of such child if they abandon such child. Section 318 of the IPC punishes those who secretly bury or otherwise dispose of the dead body of a child whether such child dies before or after or during its birth or who intentionally conceal or endeavour to conceal the birth of such child.

18] However, sections 312 and 315 of the IPC exempt and decriminalize miscarriage, if undertaken in good faith for the purpose of saving the life of the mother. This is based on the logic that the fetus cannot have an independent existence outside the womb of the mother, and the life of the mother who independently exists, is entitled to greater protection.

19] The MTP Act, as noted earlier, was an act to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto. After the MTP entered into force from 1st April 1972, the provisions of IPC referred to above, to a great extent become subservient to the special law codified in MTP Act.

20] Section 2 of the MTP Act provides for certain definitions of expressions used in the MTP Act. Since the MTP Act contemplates termination of pregnancies by "*registered medical practitioner*", section 2(d) defines this expression as meaning a

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medical practitioner who possesses any recognized medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956, whose name has been entered in a State Medical Register and who has such experience or training in gynecology and obstetrics as may be prescribed by rules made under the MTP Act.

21] The definition in section 2(d)of the MTP Act will have to be read in conjunction with Rule 4 of the MTP Rules 2003 which provides for the experience and training which '*registered medical practitioner*' must possess before she can undertake termination of pregnancies under the MTP Act.

22] Rule 4 of the MTP Rules provides that for purposes of section 2 (d) of the MTP Act, registered medical practitioner shall have one or more of the following experience or training in gynecology and obstetrics, namely:

> *(a) In the case of medical practitioner, who was registered in a State Medical Register immediately before the commencement of the Act, experience in the practice of gynaecology and obstetrics for a period of not less than three years;*
>
> *b) in the case of a medical practitioner, who is registered in a State Medical Register:-*
> *(i) If he has completed six months of house surgery in gynecology and obstetrics; or*
> *(ii) unless the following facilities are provided therein, if he had experience at any hospital for a period of not less than one year in the practice of obstetrics and gynecology; or*
> *c) if he has assisted a registered medical practitioner in the performance of twenty-five cases of medical termination of pregnancy of which at least five have*

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been performed independently, in a hospital established or maintained, or a training institute approved for this purpose by the Government.

(i) This training would enable the Registered Medical Practitioner (RMP) to do only 1st Trimester terminations (up to 12 weeks of gestation);

(ii) For terminations up to twenty weeks the experience or training as prescribed under sub-rules (a), (b) and (d) shall apply.

(d) in case of a medical practitioner who has been registered in a State Medical Register and who holds a post-graduate degree or diploma in gynecology and obstetrics, the experience or training gained during the course of such degree or diploma.

23] Thus, the immunity from prosecution under the above referred provisions of IPC will apply only to *registered medical practitioners* as defined under section 2 (d) of the MTP Act who possess experience and training as prescribed under Rule 4 of the MTP Rules, 2003. In other words, the termination of pregnancy by any person other than *registered medical practitioner* is still an offence punishable under the provisions of the IPC. In fact, the MTP Act was amended in the year 2002 and punishment for termination of pregnancy by any person other than "*registered medical practitioner*" came to be enhanced with rigorous imprisonment for a term which shall not be less than two years, but which may extend to seven years under the IPC and the corresponding provisions of IPC to that extent, were to stand modified.

24] ***In Surendra Chauhan vs. State of M.P. - AIR 2000 SC 1436,*** the Supreme Court upheld the conviction of a Doctor,

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who had a degree in Medicine, but not the experience and training in the relevant discipline of Medicine for undertaking abortions. In particular, the Doctor in question did not possess the experience and training as prescribed in Rule 4 of the MTP Rules.

25] Section 3 of the MTP Act deals with the important issue '*when pregnancies may be terminated by registered medical practitioners*'.

26] Section 3(1) of the MTP Act provides, that 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 the MTP Act.

27] Section 3 (2) of the MTP Act provides, that 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

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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.

Explanation I.- 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 II.-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. *(emphasis supplied)*

28] Section 3 (3) of the MTP Act provides, that 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.*

29] Section 3 (4) (a) of the MTP Act provides, that 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 [mentally ill person], shall be terminated except with the consent in writing of her guardian. Section 3 (4)(b) provides, that save as otherwise provided in clause (a), no pregnancy

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shall be terminated except with the consent of the pregnant woman.

30] Section 4 of the MTP Act is concerned with the *place where pregnancy may be terminated.* This section provides, that no termination of pregnancy shall be made in accordance with the MTP Act at any place other than -

> *(a) a hospital established or maintained by Government, or*
>
> *(b) a place for the time being approved for the purpose of this Act by Government or a District Level Committee constituted by that Government with the Chief Medical Officer or District Health Officer as the Chairperson of the said Committee:*
>
> *Provided that the District Level Committee shall consist of not less than three and not more than five members including the Chairperson, as the Government may specify from time to* time.

31] Section 4 of the MTP Act will have to be read and construed in conjunction with Rule 5 of the MTP Rules. This Rule provides that no place shall be approved under clause (b) of section 4,-

> *(i) unless the Government is satisfied that termination of pregnancies may be done therein under safe and hygienic conditions; and*
>
> *(ii) unless the following facilities are provided therein, namely-*
>
> *in case of first trimester, that is, up to 12 weeks of pregnancy:-*
>
> *a gynecology examination/labour table, resuscitation and sterilization equipment, drugs and parental fluid, back up facilities for treatment of shock and facilities for transportation ; and*
>
> *in case of second trimester, that is up to 20 weeks of*

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pregnancy:-

(a) an operation table and instruments for performing abdominal or gynecological surgery;

(b) anesthetic equipment, resuscitation equipment and sterilization equipment;

(c) drugs and parental fluids for emergency use, notified by Government of India from time to time.

Explanation.- In the case of termination of early pregnancy up to seven weeks using RU-486[#] with Misoprostol, the same may be prescribed by a Registered Medical Practitioner (RMP) as defined under clause (d) of section 2 of the Act and rule 4 of the MTP Rules, at his clinic, provided such a Registered Medical Practitioner has access to a place approved under section 4 of the MTP Act, 1971 read with MTP Amendment Act, 2002 and rules 5 of the MTP Rules. For the purpose of access, the RMP should display a certificate to this effect from the owner of the approved place.

32] Thus, as per the statutory regime of MTP Act, in order that medical practitioners are immunised from prosecution under the provisions of IPC, medical termination of pregnancies have to be undertaken only by *registered medical practitioner* as defined under section 2(d) of the MTP Act and further, such medical termination of pregnancies have to be made either at hospitals established or maintained by the Government or at places approved under the MTP Act in terms of section 4(d) of the MTP Act, which is to be read with Rule 5 of the MTP Rules.

33] In ***Surendra Chauhan*** *(supra)*, the Supreme Court observed that conducting of abortions without proper facility and not keeping clinic registered, was itself a punishable crime,

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\# RU-486 eliminates the element of human skill involved in an abortion and avoids surgical intervention. The abortion "pill" is actually two pills, taken on two different days. The first tablet, RU=486 or Mifepristone, acts by blocking progesterone, a hormone essential in pregnancy, and hence kills the fetus. The second pill, Misoprostol, is taken three days later. This causes uterine contractions that expel the fetus.

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even though, no health hazard may have actually ensued. Accordingly, since, the clinic in question was not an '*approved place*' in terms of section 4 of the MTP Act, the Doctor was liable for conviction under section 314 of the IPC.

34] Section 5 of the MTP Act deals with the circumstances in which the provisions of sections 3 and 4 of the MTP Act will not apply.

35] Section 5 (1) of the MTP Act provides, that the provisions of section 4, and so much of the provisions of sub-section (2) to section 3 of the MTP Act *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 the *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*.

36] Section 5 (2) of the MTP Act, as amended in 2002, provides, that notwithstanding anything contained in the Indian Penal Code, 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.

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37] Section 5 (3) of the MTP Act provides, that 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.

38] Section 5(4) of the MTP Act provides, that 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.

39] The first explanation to section 5 of the MTP Act provides, that for the purpose 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 the MTP Act.

40] The second explanation to section 5 of the MTP Act provides, that for the purpose of this section, so much of the provisions of clause (d) of section 2 of the MTP Act as relate to the possession, by the *registered medical practitioner*, of experience or training in gynaecology or obstetrics shall not apply.

41] Thus, though section 5 of the MTP Act is in the nature of an exception to the provisions in sections 3 and 4 of the MTP Act, the exceptions, do not apply to all situations. The exception

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applies only in relation to the provisions of section 4 and so much of the provisions of section 3 (2) as relate to the length of pregnancy and the opinion of not less than two *registered medical practitioners.*

42] The exception applies only to a case where *registered medical practitioner* is of the opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman. The exception will not extend to termination of pregnancy by a person, who is not a *registered medical practitioner*. The second explanation to section 5 of the MTP Act however, exempts such *registered medical practitioner* from the possession of experience or training in gynaecology and obstetrics though otherwise prescribed in clause (d) of section 2 of the MTP Act.

43] Section 6 of the MTP Act empowers the Central Government to make rules to carry out the provisions of the MTP Act. Section 7 of the MTP Act empowers the State Government to make regulations on the aspects set out in sub-clauses (a),(b) and (c) of clause (1). Section 7 (3) of the MTP Act provides that any person who willfully contravenes or willfully fails to comply with the requirements of any regulation made under sub-section (1) shall be liable to be punished with fine which may extend to one thousand rupees. Section 8 of the MTP Act finally provides that no suit or other legal proceedings shall lie against any *registered medical practitioner* for any damage caused or likely to be caused by anything which is in good faith done or intended to be done under the MTP Act.

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44] From the analysis of the aforesaid provisions of the MTP Act and the MTP Rules, the following position emerges:

(a) The provisions of IPC relating to termination of pregnancy or abortion are largely subservient to the provisions of MTP Act. This is clear from the *non-obstante* clause with which the provisions of section 3 of the MTP Act commence;

(b) As a general rule, medical termination of pregnancies may be undertaken only by *registered medical practitioner* as defined under section 2 (d) of the MTP Act who possess experience and training as prescribed in Rule 4 of the MTP Rules;

(c) Section 3(2) of the MTP Act provides, that a pregnancy may be terminated by a *registered medical practitioner,* where the length of pregnancy does not exceed 12 weeks, if such medical practitioner is, or where the length of pregnancy exceeds 12 weeks but does not exceed 20 weeks, if not less than two *registered medical practitioners* are, of opinion, formed in *good faith,* that :

(i) The continuance of pregnancy would involve risk to the life of the pregnant woman; or

(ii) The continuance of pregnancy would involve grave injury to the physical health of the pregnant woman; or

(iii) The continuance of pregnancy would involve grave injury to the mental health of the pregnant woman; or

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(iv) There is substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

(d) The first explanation to section 3(2) makes it clear that where 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.

(e) The second explanation to section 3(2) of the MTP Act 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.

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

(g) Section 3 (4) (a) of the MTP Act provides, that 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 mentally ill person, shall be terminated, except with the consent in writing of her

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guardian. Section 3 (4)(b) provides that save as otherwise provided in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman.

(h) Even to situations to which section 3(2) of the MTP Act applies, the medical termination of pregnancies will have to be undertaken only by registered medical practitioners as defined under section 2 (d) of the MTP Act. Further, such medical termination of pregnancy will have to be undertaken at the places specified under section 4 of the MTP Act.

(i) Section 4 (a) of the MTP Act refers to hospital established or maintained by the Government and section 4 (b) refers to a place for the time being approved for the purpose of the MTP Act by the Government or a District Level Committee constituted by that Government with the Chief Medical Officer or District Health Officer as the Chairperson of the said Committee. The District Level Committee shall consist of not less than three and not more than five members including the Chairperson, as the Government may specify from time to time.

(j) Section 5 of the MTP Act, is in the nature of an exception to the provision of sections 3 and 4 of the MTP Act. However, the exceptions are not blanket and relate only to the following matters:

> *(i) The requirement that length of pregnancy must not exceed 20 weeks {Section 3(2)(b)};*

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(ii) The requirement of opinion by two registered medical practitioners {Section 3 (2)(b)};

(iii) The places at which the registered medical practitioners may undertake MTP {Section 4}.

(iv) The provisions in section 2 (d) of the MTP Act insofar as they relate to possession, by registered medical practitioner of experience or training in gynaecology and obstetrics {Explanation 2 to S.5}.

(k) The aforesaid means that medical termination of pregnancy which exceeds 20 weeks can be undertaken only by *registered medical practitioner* in a case where he is of the opinion, formed in good faith, that the termination of such pregnancy *is immediately necessary to save the life of the pregnant woman.*

45] The plain reading of the provisions in section 5 of the MTP Act might suggest that the exception carved out in section 5 of the MTP Act will apply only where termination of pregnancy is immediately necessary to save the "*life*" of the pregnant woman. However, the crucial issue which arises relates to the correct meaning of the expression "*life*" as it appears in section 5 of the MTP Act. Is the expression "*life*" to be construed narrowly as merely antithetic to the expression "*death*"? Is the expression "*to save the life of the pregnant woman*" to be interpreted as "*to prevent the death of the pregnant woman*"? Is the expression "*life*" to be interpreted as "*existence*" or "*mere animal existence*" or "*physical survival*" ? Or is the expression "*life*" to be liberally

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construed so as to comprehend not only physical existence but also quality of life as is understood in its richness and fullness consistent with human dignity ?

46] If the expression "*life*" in section 5 of the MTP Act is to be construed narrowly as antithesis to death or physical survival or mere animal existence, then, it is perhaps possible to say that the exception carved out in section 5 of the MTP Act will apply only to termination of pregnancies to prevent the death of the pregnant woman. This would mean that the exception in section 5 of the MTP Act will operate only to cases where the registered medical practitioner forms an opinion in good faith that unless the pregnancy is terminated, the mother might die.

47] Such narrow construction would then mean that the exception in section 5 of the MTP Act will not operate even to contingencies where registered medical practitioners opine that the continuance of pregnancy involves grave injury to the physical health (not life threatening) or to the mental health of the mother. The exception will then not apply to cases where pregnancy is alleged to have been caused by rape. The exception will then not apply even 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. In all such cases, the pregnant mother, notwithstanding the physical and mental trauma, notwithstanding the futility arising out of almost certain knowledge that the child will have no extra uterine survival or would suffer from serious physical and mental

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handicaps, will be forced to continue her pregnancy to its full term. The moot question which therefore, arises is whether the expression "*life*" in section 5 of the MTP Act must be construed narrowly by adopting the principle of literal interpretation or liberally by adopting the principle of purposive interpretation?

48] To begin with, reference can be usefully made to several decisions rendered by the Supreme Court in which medical termination of pregnancy was permitted beyond the ceiling period of 20 weeks as prescribed in section 3 (2) of the MTP Act where the continuance of pregnancy involved grave injury to the mental health of the pregnant woman or where there was substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. This means that the principle of narrow or literal construction was not adopted when it came to interpretation of the provisions in section 5 of the MTP Act by the Supreme Court in several cases. Rather, the principle of liberal or purposive interpretation was adopted.

49] In ***Tapasya Umesh Pisal vs. Union of India – (2018) 12 SCC 57,*** the Supreme Court in interests of justice, permitted the petitioner to undergo MTP, which was in its twenty fourth week noting that "*but for the time period, it appears that the case falls under section 3 (2) (b) of the MTP Act.*". The Medical Board, in the said case, had opined that the baby if delivered alive, would have to undergo several surgeries after birth which is associated with a high morbidity and mortality. The Supreme Court on basis of such material held

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that it would be difficult to refuse the permission to medically terminate pregnancy, as it was certain that the fetus if allowed to born, would have a limited life span with serious handicaps which could not be avoided.

50] In ***Sonali Kiran Gaikwad vs. Union of India – Writ Petition © No. 928 of 2017 decided on 9th October 2017,*** the Supreme Court, had before it a case where pregnancy had advanced to twenty eight weeks. The Medical Board, which was constituted, examined the mother and indicated serious abnormalities of the fetus, a substantial risk of serious physical handicap and high chance of morbidity and mortality in the new born. Although, the mother's life was not in any danger, as report indicated that termination was no more hazardous than spontaneous delivery at term, the Supreme Court held that "..... *continuing pregnancy will cause more mental anguish to the petitioners*". The Supreme Court, then referred to its decision in ***Meera Santosh Pal Vs. Union of India – (2017) 3 SCC 462*** and permitted the petitioners to undergo medical termination of their pregnancies.

51] In ***X and ors. vs. Union of India and ors. – (2017) 3 SCC 458,*** the Supreme Court was concerned with a pregnancy which had advanced into the 24th week. The Medical Board which was constituted, had opined that the condition of fetus was incompatible with extra uterine life, i.e., outside the womb because prolonged absence of amniotic fluid results in pulmonary hypoplasia leading to severe respiratory

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insufficiency at birth. This was mainly a case where there was substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. Still, the Supreme Court, after referring to the dictum in ***Suchita Srivastava vs. Chandigarh Administration – 2009 (9) SCC 1*** that *a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution,* permitted the pregnant mother to undertake the termination of pregnancy by observing thus:

> *"9. Though the current pregnancy of the petitioner is about 24 weeks and endangers the life and the death of the foetus outside the womb is inevitable, we consider it appropriate to permit the petitioner to undergo termination of her pregnancy under the provisions of the Medical Termination of Pregnancy Act, 1971. We order accordingly."*

52] In ***A vs. Union of India – (2018) 14 SCC 75,*** the Supreme Court was concerned with pregnancy which had advanced to the 26th or the 27th week. The antenatal ultrasonography had revealed a single live intrauterine foetus of 26 weeks +/- 7 to 10 days. There was complete absence of foetal brain and skull vault suggestive of anencephaly. The Cardiothoracic Surgeon has reported that the foetus has anencephaly and polyhydramnios. He further stated that this anomaly was not compatible with life. The Paediatrician has reported that the survival rate post delivery was less than 10 to 20%. He further stated that majority of those who may survive, have serious form of morbidity and succumb within 24 to 48

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hours of birth. The Medical Board/Committee, upon evaluation, had reported *that the continuation of pregnancy can pose severe mental injury to the petitioner and no additional risk to the petitioner's life is involved if she is allowed to undergo termination of her pregnancy.*

53] In the aforesaid circumstances, the Supreme Court permitted the termination of pregnancy which had advanced in the 26th or 27th week, though, there was no danger to the petitioner's life. The termination was permitted on the ground that the condition of fetus was not compatible with life, which is the contingency referred to in clause (ii) of section 3 (2)(b) of the MTP Act. The termination was also permitted because the continuance of pregnancy posed '*severe mental injury*' to the petitioner, which is a contingency referred to in clause (i) of section 3 (2)(b) of the MTP Act. In effect therefore, the Supreme Court, read into the provisions of section 5 of the MTP Act, the contingencies referred to in clauses (i) and (ii) of section 3 (2)(b) of the MTP Act.

54] In ***Mamta Verma vs. Union of India and ors. – (2018) 14 SCC 289,*** the Supreme Court was concerned with a pregnancy which had advanced into the 25th week. The Medical Board had opined that the *"patient wants the pregnancy to be terminated as the foetus is not likely to survive. It is causing immense mental agony to her. After going through the ultrasonography reports, Committee is of opinion that there is no point to continue the pregnancy as foetus has anencephaly*

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which is non-compatible with life and continuation of pregnancy shall pose severe mental injury to her."

55] The Supreme Court, in the aforesaid facts, permitted medical termination of pregnancy by observing thus:

> ***"5.*** *We have been informed that the foetus is without a skull and would, therefore, not be in a position to survive. It is also submitted that the petitioner understands that her foetus is abnormal and the risk of foetal mortality is high. She also has the support of her husband in her decision making.*
>
> ***6.*** *Upon evaluation of the petitioner, the aforesaid Medical Board has concluded that her current pregnancy is of 25 weeks and 1 day. The condition of the foetus is not compatible with life. The medical evidence clearly suggests that there is no point in allowing the pregnancy to run its full course since the foetus would not be able to survive outside the uterus without a skull.*
>
> ***7.*** *Importantly, it is reported that the continuation of pregnancy can pose severe mental injury to the petitioner and no additional risk to the petitioner's life is involved if she is allowed to undergo termination of her pregnancy.*
>
> ***8.*** *In the circumstances, we consider it appropriate in the interests of justice and particularly, to permit the petitioner to undergo medical termination of her pregnancy under the provisions of the Medical Termination of Pregnancy Act, 1971. Mr Ranjit Kumar, learned Solicitor General appearing for the respondents, has not opposed the petitioner's prayer on any ground, legal or medical. We order accordingly".*

56] In *Mamta Verma (supra)*, there was no danger to the life of the pregnant mother. Yet, termination of pregnancy was permitted primarily on the ground that the fetus was not likely

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to survive and this was causing severe mental injury to the pregnant mother. This means that termination of pregnancy was permitted under section 5 of the MTP Act by reading into the provisions of section 5 of the MTP Act, the contingencies referred to in clauses (i) and (ii) of section 3 (2)(b) of the MTP Act.

57] In ***Sarmishta Chakrabortty and anr vs. Union of India and ors – (2018) 13 SCC 339,*** the Supreme Court was concerned with a pregnancy which had advanced beyond 20 weeks. The Medical Board had opined that the pregnant mother *is at the threat of severe mental injury, if the pregnancy is continued.* It had also opined *that the child, if born alive, needs complex cardiac corrective surgery stage by stage after birth. But there is high mortality and morbidity at every step of this staged surgeries.*

58] The Supreme Court, in the aforesaid facts, permitted medical termination of pregnancy by observing thus:

> ***"11.*** *In the instant case, as the report of the Medical Board which we have produced, in entirety, clearly reveals that the mother shall suffer mental injury if the pregnancy is continued and there will be multiple problems if the child is born alive. That apart, the Medical Board has categorically arrived at a conclusion that in a special case of this nature, the pregnancy should be allowed to be terminated after 20 weeks.*
>
> ***12.*** *In Suchita Srivastava v. State (UT of Chandigarh), the Court has expressed the view that the right of a woman to have reproductive choice is an insegregable part of her personal liberty, as envisaged under Article 21 of the Constitu-*

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> *tion. She has a sacrosanct right to have her bodily integrity. The case at hand, as we find, unless the pregnancy is allowed to be terminated, the life of the mother as well as that of the baby to be born will be in great danger. Such a situation cannot be countenanced in Court."*

59] In *Meera Santosh Pal (supra)*, the Supreme Court permitted the MTP of about 24 weeks based upon medical prognosis that fetus was without a skull and would not be able to survive outside the uterus. The Medical Board specially constituted for the purpose had opined that continuation of pregnancy could gravely endanger the physical and mental health of the mother. In such circumstances, the Supreme Court by observing that the crucial consideration was whether '*right to bodily integrity calls for a permission to allow her to termination her pregnancy*' permitted the termination of pregnancy though it had advanced to the 24th week.

60] In *Suchita Srivastava (supra)*, the petitioner was a mentally retarded rape victim whose pregnancy had advanced into the 19th week. The Supreme Court did not permit the termination of pregnancy because the petitioner was not held to be '*mentally ill*' and the petitioner had not consented to the termination of her pregnancy. However, the Supreme Court held that there is no doubt that a woman's right to make reproductive choice is also a dimension of '*personal liberty*' as understood Article 21 of the Constitution of India. It is important to recognize that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy,

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dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children.

61] From the conspectus of the decisions of the Supreme Court, it is quite clear that the Supreme Court has construed the provisions in section 5 of the MTP Act, not narrowly by adopting the principle of literal construction but liberally by adopting the principle of purposive construction. The Supreme Court has consistently permitted medical termination of pregnancies which had exceeded the ceiling of 20 weeks where medical opinion established that continuance of pregnancy involved grave injury to the mental health of the pregnant woman or where there was substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. This was despite the fact that there was no immediate danger to the life of the pregnant mother. In effect therefore, the Supreme Court read into the provisions of section 5 of the MTP Act the contingencies referred to in clause (i) and (ii) of section 3 (2)(b) of MTP Act, no doubt, upon satisfaction that the risk involved in the

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termination of such pregnancies was not greater than the risk involved in spontaneous delivery at the end of the full term.

62] However, since, in *Tapasya Pisal (supra)*, the Supreme Court in the concluding portion of its decision had used the expression "*in the interests of justice*" , it was suggested at Bar, that this was probably a case of the Supreme Court exercising its powers under Article 142 of the Constitution of India, which powers undoubtedly, this Court does not possess. Therefore, it was suggested that the decision in *Tapasya Pisal (supra)* as also the other decisions cannot be regarded as binding precedents, particularly, when it comes to this Court exercising its jurisdiction under Article 226 of the Constitution of India.

63] According to us, there is no basis for such a doubt to prevail. In the first place, none of the decisions, including the decision in *Tapasya Pisal (supra)* make any specific reference to the exercise of powers under Article 142 of the Constitution. Secondly, the context of the decisions, also does not indicate that powers under Article 142 of the Constitution were being exercised. Thirdly, in *Sonali Gaikwad (supra)* the Supreme Court, in its concluding paragraph issued the following significant clarification.

> "*However, we make it clear that any future such cases can be filed in the respective High Courts having territorial jurisdiction.*"

64] At least from clarification issued by the Supreme Court in the concluding portion of its *Sonali Gaikwad (supra)*, it is clear

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that the Supreme Court, did not intend that the permissions to medically terminate pregnancy, in cases where the length of the pregnancy had exceeded twenty weeks and where the termination of such pregnancies was not immediately necessary to save life of the pregnant woman, could be granted only by the Supreme Court in the exercise of its powers under Article 142 of the Constitution of India and not by the respective High Courts having territorial jurisdiction. Obviously, if the Supreme Court was of the opinion that the relief in '*such cases*' can be granted only under Article 142 of Constitution of India, then, there would be no question of the Supreme Court itself clarifying that in future such cases can be filed in the respective High Courts having territorial jurisdiction.

65] In fact, in ***Z vs. State of Bihar – 2018 (11) SCC 572,*** to which detailed reference is made later, the Supreme Court disapproved the dismissal of writ petition by the High Court in which the petitioner had sought for permission to terminate her pregnancy which had advanced to the 23rd or 24th week on the ground that she was a rape victim and also found to be HIV+ve. The High Court relying upon the doctrines of "*parens patriae*" and "*compelling State interest*" had declined permission for medical termination of pregnancy which had by then advanced into 23rd or 24th week. However, the Supreme Court emphatically reversed the High Court by styling the approach of the High Court as "*completely erroneous*".

66] If the provisions in section 5 are to be construed narrowly, then such interpretation, would exclude some of the most

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important objectives for which the MTP Act was enacted or some of the most important purposes for which the MTP Act permits medical termination of pregnancies in the teeth of the strict provisions in IPC. As noted earlier S.O.R to MTP Act, after tracing the ill effects of the strict implementation of the provisions in IPC, notes that in recent years (i.e. 1970s or thereabouts), when health services have expanded and hospitals are availed of to the fullest extent by all classes of society, doctors have been confronted with gravely ill or dying pregnant woman whose pregnancies have been tampered with, a view to causing abortion. There is thus avoidable wastage of mother's health, strength and, some times, life. The proposed measure (MTP Act, 1971) which seeks to *liberalize* certain existing provisions relating to termination of pregnancy has been conceived (i) As a health measure – when there is danger to life or risk to physical or mental health of the woman; (ii) On humanitarian grounds – such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman, etc.; and (iii) eugenic grounds - where there is substantial risk that the child, if born, would suffer from deformities and diseases.

67] If therefore, literal or narrow construction is to be norm, then most of the aforesaid objectives, purposes or measures, except perhaps the purpose of "*saving the life of the pregnant mother*", will stand excluded. This cannot have been the intention of the legislature. As it is, even the strict provisions of IPC had already made exceptions when it came to termination of pregnancies in order to save the life of the pregnant mother.

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68] The words of a statute, where there is a doubt about their meaning, are to be understood in the sense in which they best harmonise with the subject of the enactment and the object which the Legislature has in view. Their meaning is found not so much in a strict grammatical or etymological propriety of language, nor even in its popular use, as in the subject or in the occasion on which they are used, and the object to be attained. The courts have declined "*to be bound by the letter, when it frustrates the patent purposes of the statute*". It is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of a dictionary but to remember that statutes always have some purpose or object to accomplice who sympathetic and imaginative discovery is the surest guide to their meaning (***Cabell vs. Markham – 148 F 2d 737 (2d Cir 1945), (Judge Learned Hand).***

69] In ***R (Quintavalle) vs. Secretary of State for Health – 2003 UKHL 13,*** *Lord Bingham of Cornhill* held that the basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the

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minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.

70] In ***Seaford Court Estates Ltd. Vs. Asher – (1949) 2 KB 481 (CA) ,*** *Lord Denning* held that a Judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the Judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give "*force and life*" to the intention of the legislature.

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71] "*The mere literal construction of statute*", said Lord Selborne in ***Caledonian Railway v. North British Railway – (1881) 6 AC 114, 122,*** "*ought not to prevail if it is opposed to the intentions of the Legislature as apparent by the statute and if the words are sufficiently flexible to admit of some other construction by which that intention can be better effectuated.*" One of the rules of interpretation is that Courts are competent, in extraordinary circumstances, e.g. where the language falls short of the whole object of Legislature (***Municipal Corporation, Delhi v. Charanjit Lal – (1980) 82 Punj LR 7 (FB))***, to enlarge the meaning of an expression in statute in order to give full effect to the intention of that statute as appearing from the various provisions contained in it, if the purpose for which the legislation is brought into existence can be advanced by doing so or the mischief that it intends to curb can be curbed by it. (***Gyanchandra Mehrotra v. University of Allahabad – AIR 1964 ALL 254***).

72] In ***Abhiram Singh vs. C.D. Commachen – (2017) 2 SCC 629,*** the Supreme Court has held that the conflict between giving a literal interpretation or a purposive interpretation to a statute or a provision in a statute is perennial. It can be settled only if the draftsman gives a long-winded explanation in drafting the law but this would result in an awkward draft that might well turn out to be unintelligible. The interpreter has, therefore, to consider not only the text of the law but the context in which the law was enacted and the social context in which the law should be interpreted. The Supreme Court has

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finally approved *R. (Quintavalle) case (supra)* , in which it is observed that the pendulum has swung towards purposive methods of construction. To put it in the words of *Lord Millett* "*We are all purposive constructionists now*".

73] In *Abhiram Singh (supra)* the Supreme Court has held that another facet of purposive interpretation of a statute is that of social context adjudication. This has been the subject-matter of consideration and encouragement by the Constitution Bench of this Court in ***Union of India vs. Raghubir Singh – 1989 (2) SCC 754.*** In that decision, this Court noted with approval the view propounded by Justice Holmes, Julius Stone and Dean Roscoe Pound to the effect that law must not remain static but move ahead with the times keeping in mind the social context. It was said that like all principles evolved by man for the regulation of the social order, the doctrine of binding precedent is circumscribed in its governance by perceptible limitations, limitations arising by reference to the need for *readjustment in a changing society, a readjustment of legal norms demanded by a changed social context*. This need for adapting the law to new urges in society brings home the truth of the Holmesian aphorism that '*the life of the law has not been logic it has been experience*' and again when he declared in another study that "*the law is forever adopting new principles from life at one end*", and "*sloughing off*" old ones at the other. Explaining the conceptual import of what Holmes had said, Julius Stone elaborated that it is by the *introduction of new extra-legal propositions emerging from experience to serve as premises, or*

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by experience-guided choice between competing legal propositions, rather than by the operation of logic upon existing legal propositions, that the growth of law tends to be determined.

74] In *Raghubir Singh (supra),* the Supreme Court further observed that not infrequently, in the nature of things there is a gravity-heavy inclination to follow the groove set by precedential law. *Yet a sensitive judicial conscience often persuades the mind to search for a different set of norms more responsive to the changed social context*. The dilemma before the Judge poses the task of finding a new equilibrium prompted not seldom by the desire to reconcile opposing mobilities. The competing goals, according to Dean Roscoe Pound, invest the Judge with the responsibility '*of proving to mankind that the law was something fixed and settled, whose authority was beyond question, while at the same time enabling it to make constant readjustments and occasional radical changes under the pressure of infinite and variable human desires*'. The reconciliation suggested by Lord Reid in *The Judge as Law Maker* lies in keeping both objectives in view, '*that the law shall be certain, and that it shall be just and shall move with the times*'.

75] In, ***Maganlal Chhaganlal (P) Ltd. v. Municipal Corpn. of Greater Bombay*** – (***1974) 2 SCC 402,*** H.R. Khanna, J. rather pragmatically observed that as in life so in law, things are not static. Fresh vistas and horizons may reveal themselves as a result of the impact of new ideas and developments in

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different fields of life. *Law, if it has to satisfy human needs and to meet the problems of life, must adapt itself to cope with new situations*. Nobody is so gifted with foresight that he can divine all possible human events in advance and prescribe proper rules for each of them. There are, however, certain verities which are of the essence of the rule of law and no law can afford to do away with them. At the same time *it has to be recognised that there is a continuing process of the growth of law and one can retard it only at the risk of alienating law from life itself*.

76] In ***Badshah v. Urmila Badshah Godse*** – (***2014) 1 SCC 188,*** the Supreme Court reaffirmed the need to shape law as per the changing needs of the times and circumstances by observing that the law regulates relationships between people. It prescribes patterns of behaviour. It reflects the values of society. The role of the court is to understand the purpose of law in society and to help the law achieve its purpose. But the law of a society is a living organism. It is based on a given factual and social reality that is constantly changing. Sometimes change in law precedes societal change and is even intended to stimulate it. In most cases, however, a change in law is the result of a change in social reality. Indeed, when social reality changes, the law must change too. Just as change in social reality is the law of life, *responsiveness to change in social reality is the life of the law*. It can be said that the history of law is the history of adapting the law to society's changing needs. In both constitutional and statutory interpretation, the

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court is supposed to exercise discretion in determining the proper relationship between the subjective and objective purposes of the law.

77] Applying the principles of purposive interpretation, the expression "*life*" as it appears in section 5 of the MTP Act is to be construed liberally so as to effectuate the purpose for enactment of MTP Act as reflected in the Statement of Objects and Reasons. Such construction will advance the purpose of the MTP Act by liberalizing or decriminalizing the existing provisions relating to termination of pregnancy in IPC where medical termination of pregnancy is warranted on account of risk to the physical as well as mental health of the mother (health measure), where pregnancy arises from a sex crime like a rape or intercourse with a mentally ill woman etc. (humanitarian grounds) and where there is substantial risk that the child, if born, would suffer from deformities and diseases (eugenic grounds). Narrow or literal construction, in contrast, will force a pregnant mother to continue her pregnancy even though the same might involve grave injury to her mental health, even though the pregnancy may have arisen from a sex crime, and even though there is substantial risk that the child, if born, would suffer from deformities and diseases. Narrow or literal construction, would therefore, exclude almost altogether the humanitarian and eugenic grounds as well as the ground of grave injury to the mental health of the mother. In such circumstances, the principle of narrow or literal construction will have to yield to the principle of liberal or purposive construction.

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78] Narrow and literal construction of the expression "*life*" in section 5 of the MTP Act as restricted to mere physical existence or mere animal existence will also not be in harmony with the constitutional principles of life, personal liberty and human dignity. In *Suchita Shrivastava (supra),* the Supreme Court has already held that there is no doubt that a woman's right to make reproductive choice is also a dimension of personal liberty as understood in Article 21 of the Constitution of India. The crucial consideration in such matters is that a woman's right to privacy, dignity and bodily integrity should be respected.

79] Therefore, in a situation where the continuance of pregnancy poses grave injury to the physical or mental health of the mother or in a situation where there is substantial risk that if the child were born, would suffer from deformities and diseases, the pregnant mother is forced to continue with her pregnancy merely because the pregnancy has extended beyond the ceiling of 20 weeks, there would arise a serious affront to the fundamental right of such mother to privacy, to exercise a reproductive choices, to bodily integrity, to her dignity.

80] In contrast the adoption of the principle of liberal or purposive construction will harmonize the provision in section 5 of the MTP Act with the constitutional provisions. It is well settled principle in the interpretation of statutes that if two interpretations are reasonably possible, then the one which harmonizes the statute with the constitution must be preferred

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to the interpretation which conflicts the statute with the constitution.

81] The Supreme Court has already held that the fundamental right to life which is the most precious human right and which forms the ark of all other rights must be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person. The right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival. The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. Every act which offends against or impairs human dignity would constitute deprivation *pro tanto* of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights.(See - ***Fransis Coralie Mullin vs. UT of Delhi – (1981) 1 SCC 608).***

82] Human dignity was construed by a Constitution Bench of this Court to be intrinsic to and inseparable from human existence. Dignity, the Court held, is not something which is conferred and which can be taken away, because it is inalienable. The rights, liberties and freedoms of the individual

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are not only to be protected against the State, they should be facilitated by it. It is the duty of the State not only to protect the human dignity but to facilitate it by taking positive steps in that direction. No exact definition of human dignity exists. It refers to the intrinsic value of every human being, which is to be respected. It cannot be taken away. It cannot be given. It simply is. Every human being has dignity by virtue of his existence. (See- ***M. Nagaraj v. Union of India – (2006) 8 SCC 212).***

83] The Supreme Court has held "*that when dignity is lost, life goes into oblivion.*" The right to human dignity has many elements. First and foremost, human dignity is the dignity of each human being "*as a human being*". Another element is that human dignity is infringed if a person's life, physical or mental welfare is harmed. It is in this sense torture, humiliation, forced labour, etc. all infringe on human dignity. (See- ***Mehmood Nayyar Azam vs. State of Chattisgarh – (2012) 8 SCC 1*** and ***Shabnam v. Union of India - (2015) 6 SCC 702).***

84] The Supreme Court has quoted Aharon Barak (former Chief Justice of the Supreme Court of Israel) in the context of human dignity being a constitutional value and the constitutional goal:

> *'The constitutional value of human dignity has a central normative role. Human dignity as a constitutional value is the factor that unites the human rights into one whole. It ensures the normative unity of human rights. This normative unity is expressed in the three ways: first, the value of human dignity serves as a normative basis for constitutional rights set out in the constitution; second, it*

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> *serves as an interpretative principle for determining the scope of constitutional rights, including the right to human dignity; third, the value of human dignity has an important role in determining the proportionality of a statute limiting a constitutional right."*

(See- ***Jeeja Ghosh* v. *Union of India* – (2016) 7 SCC 761).**

85] Recently, in ***K.S. Puttuswamy vs. Union of India* – 2017 (10) SCC 1**, *Dr. Chandrachud, J.* speaking for the majority of the Supreme Court held that life is precious in itself. But life is worth living because of the freedoms which enable each individual to live life as it should be lived. The best decisions on how life should be lived are entrusted to the individual. They are continuously shaped by the social milieu in which individuals exist. The duty of the State is to safeguard the ability to take decisions — the autonomy of the individual — and not to dictate those decisions. "*Life*" within the meaning of Article 21 is not confined to the integrity of the physical body. The right comprehends one's being in its fullest sense. That which facilitates the fulfillment of life is as much within the protection of the guarantee of life. To live is to live with dignity. The draftsmen of the Constitution defined their vision of the society in which constitutional values would be attained by emphasising, among other freedoms, liberty and dignity. So fundamental is dignity that it permeates the core of the rights guaranteed to the individual by Part III. Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence.

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86] Therefore, when it comes to interpretation of the expression "*life*" in section 5 of the MTP Act, we cannot construe the same as restricted to mere physical existence or mere animal existence or mere survival of the pregnant mother. The expression cannot be confined to the integrity of the physical body alone but will comprehend one's being in its fullest sense. That which facilitates fulfillment of life as much within the protection of the guarantee of life. The expression will include the right to live with dignity and not to merely survive with indignity, not to mention the life long physical and mental trauma which such episodes invariably generate.

87] This is not to suggest that there is no rationale in providing some ceiling within which medical termination of pregnancy may be allowed. In ***Suchita Shrivastava (supra),*** the Supreme Court has explained the rationale for the provision of ceiling of 20 weeks (of gestation period) within which the medical termination of pregnancy may be allowed. The Supreme Court gave two reasons (i) That there is clear medical consensus that an abortion performed during the later stages of pregnancy is very likely to cause harm to the physical health of the woman who undergoes the same; and (ii) That there is "*compelling State interest*" in protecting the right of the prospective child or the potentiality of human life. (***Roe v. Wade, 410 US 113***).

88] The MTP Act was enacted almost five decades ago, i.e., in 1971. There is sea change in the medical opinion looking to the advancement in medical science since then. The Supreme

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Court, relying upon the dictum in *Suchita Shrivastava (supra)* that woman's right to make reproductive choice is a dimension of personal liberty under Article 21 of the Constitution and that woman's right to privacy, dignity and bodily integrity must be respected, has, in several cases permitted medical termination of pregnancies exceeding 20 weeks. This was on the basis of liberal and purpose oriented interpretation of the provisions in section 5 of the MTP Act. This was also on the basis of opinions of the medical boards specially constituted for the purpose that the risks (if any) involved in the termination of pregnancy beyond 20 weeks would be no greater than the risks involved in spontaneous delivery at full term. Thus, the first consideration for providing the ceiling, was duly addressed and not compromised in the least.

89] In all such cases, there is no doubt whatsoever that this Court will have to obtain a medical opinion on the precise issue as to whether termination of pregnancy beyond the 20th week and in circumstances set out in clauses (i) and (ii) of section 3(2)(b) of the MTP Act, would pose any risk to the life of the pregnant mother. In cases where the medical opinion is that death risk is involved in undertaking the medical termination of such pregnancies, obviously, no permission can or will be granted. Thus, liberal or purpose oriented interpretation of the provisions in section 5(1) of the MTP Act, will not, in any manner, compromise any issues relating to risks or dangers in undertaking medical termination of pregnancies post the ceiling period, where the circumstances set out in clauses (i) and (ii) of section 3(2)(b) of the MTP Act exist.

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90] In so far as the aspect of "*compelling State interest*" is concerned, again, no doubt, this is quite a weighty consideration. But such consideration cannot be stretched to some extreme extent by insisting that the State has compelling interest even in saving a pregnancy where the potentiality of human life is almost extinct or where the child, if born, were to suffer from such physical or mental abnormalities as to be seriously handicapped. Similarly, there can also be no compelling State interest, in insisting upon continuance pregnancy beyond 20 weeks where it would involve a grave injury to the mother's physical or mental health. The scheme of the MTP Act, even otherwise, places the interests of a mother on a higher pedestal than the interests of a prospective child. This is based on the logic that the fetus cannot have independent extra uterine existence and the life of the mother who independently exists, is entitled to greater consideration.

91] The issue of compelling State interest can perhaps arise in a case where circumstances set out in clauses (i) and (ii) of section 3(2) of the MTP Act do not exist and yet the pregnant mother seeks medical termination of pregnancy, whether within or beyond the ceiling limit of 20 weeks. However, that is really not the issue with which we are concerned in these batch of Petitions. In fact, in these batch of Petitions, we are not concerned with the rights, if any of pregnant mothers to seek medical termination of their pregnancies solely on the ground of right to make reproductive choices or personal liberty or on any grounds de-hors the contingencies referred to in clauses (i) and (ii) of section 3(2)(b) of the MTP Act. In these Petitions, we are

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really concerned with pregnancies which have exceeded 20 weeks and circumstances as set out in clauses (i) and (ii) of section 3(2)(b) of the MTP Act exist. At least in these circumstances, we do not think that the consideration based upon compelling State interest must be permitted to prevail. The most relevant consideration in these circumstances will be whether undertaking procedures for termination of pregnancy at such an advanced stage would endanger the life of the mother. If the medical opinion reports danger, then surely this consideration will prevail and permission for medical termination of pregnancy will have to be declined.

92] In ***Independent Thought vs. Union of India – (2017) 10 SCC 800,*** the Supreme Court was considering the challenge to Exception - 2 to section 375 of IPC (rape) since, the exception had decriminalized sexual intercourse between a man and his minor wife (a girl between 15 and 18 years of age). One of the defences raised by the Union of India was "*Compelling State interest*". This was elaborated by urging that otherwise, the very '*institution of marriage*' might perish. The Supreme Court, emphatically rejected such defence by holding that early marriage takes away the self esteem and confidence of a girl child and subjects her, in a sense, to sexual abuse. Such marriage severely curtails the reproductive choices of such married girl child, even though, documentary material suggests that there are greater chances of girl child dying during childbirth and there are greater chances of neonatal deaths. The Supreme Court also noted that the legislation which may be quite rea-

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sonable and rational at the time of its enactment may with the lapse of time and/or due to change of circumstances become arbitrary, unreasonable and violative of the doctrine of equality and even if the validity of such legislation may have been upheld at a given point of time, the Court may, in subsequent litigation, strike down the same if it is found that the rationale of classification has become non-existent. There is therefore no doubt that the impact and effect of Exception 2 to Section 375 of IPC has to be considered not with the blinkered vision of the days gone by but with the social realities of today. Traditions that might have been acceptable at some historical point of time are not cast in stone. If times and situations change, so must views, traditions and conventions.

93] In ***Anuj Garg vs. Hotel Assn. of India – (2008) 3 SCC 1,*** the Supreme Court, when dealing with the defence of "*compelling State purpose*" observed that "*heightened level of scrutiny*"is the normative threshold for judicial review in such cases. The Supreme Court observed that it is to be borne in mind that legislations with pronounced "*protective discrimination*" aims, such as this one, potentially serve as double-edged swords. Strict scrutiny test should be employed while assessing the implications of this variety of legislations. Legislation should not be only assessed on its proposed aims but rather on the implications and the effects. The impugned legislation suffers from incurable fixations of stereotype morality and conception of sexual role. The perspective thus arrived at is outmoded in content and stifling in means. No law in its ultimate effect should end up perpetuating the oppression of

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women. Personal freedom is a fundamental tenet which cannot be compromised in the name of expediency until and unless there is a compelling State purpose. Heightened level of scrutiny is the normative threshold for judicial review in such cases.

94] As noted earlier, in *Z vs. State of Bihar (supra)*, the Supreme Court was concerned with the pregnancy of a mentally retarded (but not mentally ill) rape victim, who was also found to be HIV positive. The High Court, relying upon the doctrines of "*parens patriae*" and "*compelling State interest*" declined permission for medical termination of pregnancy which had by then advanced into 23rd or 24th week.

95] The Supreme Court upon detailed evaluation of the facts and analysis of the law on the subject, emphatically reversed the High Court. The observations in paragraphs 23 and 48 are relevant and the same read thus:

> ***"23. We have already analysed in detail the factual score and the approach of the High Court. We do not have the slightest hesitation in saying that the approach of the High Court is completely erroneous.*** *The report submitted by IGIMS stated that termination of pregnancy may need major surgical procedure along with subsequent consequences such as bleeding, sepsis and anaesthesia hazards,* ***but there was no opinion that the termination could not be carried out and it was risky to the life of the appellant. There should have been a query in this regard by the High Court which it did not do.*** *That apart, the report shows that the appellant, who was a writ petitioner before the High Court, was suffering from mild mental retardation and she was on medications and her condition was stable and she would require long-term psychiatry treatment. The Medical Board*

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has not stated that she was suffering from any kind of mental illness. The appellant was thirty-five years old at that time. She was a major. She was able to allege that she had been raped and that she wanted to terminate her pregnancy. PMCH, as we find, is definitely a place where pregnancy can be terminated".

... .

... .

"***48. In Mehmood Nayyar Azam v. State of Chhattisgarh (2012) 8 SCC 1, the Court has observed that the word "torture" in its denotative concept includes mental and psychological harassment. It has the potentiality to cause distress and affects the dignity of a citizen. Under the present Act, the appellant is covered by the definition. In such a situation, there was no justification to push back her rights and throw her into darkness to corrode her self-respect and individual concern.*** *She had decided to exercise her statutory right, being a victim of rape, not to bear the child and more so, when there is possibility of the child likely to suffer from HIV+ve, the authorities of the State should have been more equipped to assist the appellant instead of delaying the process.* ***That apart, as is seen, the State in a way contested the matter before the High Court on the foundation of State interest. The principle of State interest is not at all applicable to the present case. Therefore, the concept of grant of compensation under public law remedy emerges."***

(emphasis supplied)

96] The issue with which we are presently concerned, came up for consideration before Division Bench of this Court (R.M. Borde and R.G. Ketkar, JJ.) in ***Shaikh Ayesha Khatoon vs. Union of India (Writ Petition (St.) No. 36727 of 2017)*** which was disposed of on 9th January 2018. The Division Bench was concerned with a case where pregnancy had exceeded twenty weeks and the termination of such pregnancy was not

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immediately necessary to save the life of pregnant woman. However, the reports of Medical Board specially constituted for the purpose has indicated that there were foetal anomalies and the chances of survival of the fetus appear less and there was substantial risk of severe physical handicap to the child, if born alive.

97] In the aforesaid circumstances, the Division Bench permitted the MTP by adopting a purposive construction and observing thus:

> "*13. It is further observed that ordinarily a pregnancy can be terminated only when a medical practitioner is satisfied that a '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' [as per Section 3(2)(b)(i) of the Act of 1971] or when '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' [as per Section 3(2)(b)(ii) of the Act of 1971]. It is true that Clauses (i) & (ii) of sub- section 2(b) of Section 3 are attracted in the case where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks. However, as has been recorded above Section 5 permits termination of pregnancy by a registered medical practitioner in 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. It shall also have to be construed that Section 5 brings within its ambit the provisions of Section 4 and so much of the provisions of sub- section (2) of Section 3 of the Act of 1971 except the limitation in respect of length of the pregnancy of 20 weeks as provided in sub-section (2)(b) of Section 3 of the Act of 1971.* ***It would thus be logical to conclude that the contingencies referred in Clauses (i) & (ii) of sub-section (2)(b) of Section 3 will have to be read in Section 5 of the Act of 1971 and it would be relevant to consider the threat perception and***

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substantial risk involved if the child were to born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. The contingencies laid down in Clauses (i) & (ii) of sub-section (2)(b) of Section 3 shall therefore equally apply to the request of a pregnant woman seeking permission to terminate the pregnancy beyond 20 weeks and accordingly Section 5(1) will have to be construed, to meet the object and purpose of enactment and to promote cause of justice.

14. As has been recorded above, the freedom of a pregnant woman of making choice of reproduction which is integral part of "personal liberty", whether to continue with the pregnancy or otherwise cannot be taken away. It shall also be taken into consideration that besides physical injury, the legislature has widened the scope of the termination of pregnancy by including "a injury" to mental health of the pregnant woman. Thus, if continuance of pregnancy is harmful to the mental health of a pregnant woman, then that is a good and legal ground to allow termination of pregnancy if all the conditions incorporated in legal provision are met. ***In the instant matter the petitioner claims that it would be injurious to her mental health to continue with the pregnancy since there are severe foetal abnormalities noticed and it would also be violative of her "personal liberty" to deny her the choice to terminate the pregnancy. The provisions of Section 5 of the Act of 1971 shall have to be interpreted in the manner for advancing the cause of justice."***

(Emphasis supplied)

98] Another Division Bench of this Court (Mrs.Tahilramani, J. as Her Ladyship then was and Mrs.Mrudula Bhatkar, J.) in ***High Court on its own motion vs. The State of Maharashtra – 2017 Cri.L.J. 218*** has held that a woman's

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decision to terminate a pregnancy is not a frivolous one. Abortion is often the only way out of a very difficult situation for a woman. An abortion is a carefully considered decision taken by a woman who fears that the welfare of the child she already has, and of other members of the household that she is obliged to care for with limited financial and other resources, may be compromised by the birth of another child. These are decisions taken by responsible women who have few other options. They are women who would ideally have preferred to prevent an unwanted pregnancy, but were unable to do so. If a woman does not want to continue with the pregnancy, then forcing her to do so represents a violation of the woman's bodily integrity and aggravates her mental trauma which would be deleterious to her mental health.

99] The Division Bench has referred to certain provisions in international treaties concerning human rights. In that context, the Division Bench has observed that a person is vested with human rights only at birth, an unborn fetus is not an entity with human rights. The pregnancy takes place within the body of a woman and has profound effects on her health, mental well being and life. Thus, how she wants to deal with this pregnancy must be a decision she and she alone can make. The right to control her own body and fertility and motherhood choices should be left to the women alone. The basic right of a woman is the right to autonomy, which includes the right to decide whether or not to get pregnant and stay pregnant.

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100] The Division Bench then noted that the right of woman to say no to motherhood, emerges from her human right to live with dignity as a human being and is protected as a fundamental right under Article 21 of the Constitution, no doubt, subject to the reasonable restrictions as contemplated under MTP. The Division Bench has observed that human rights are natural right and thus a woman has a natural right in relation to her body which includes her willingness to be a mother or her unwillingness to be a mother. The Division Bench has observed that section 3 (2) of the MTP Act is an extension of the human right of a woman and this needs to be protected. Woman owns her body and has right over it. Abortion is always a difficult and careful decision and woman alone should be the choice maker. A child when born and takes first breath, is a human entity and thus, unborn fetus cannot be put on a higher pedestal than the right of living woman. Thus, the right of reproductive choice though restricted by MTP Act, recognises and protects her right to say no to the pregnancy if her mental or physical health is at stake.

101] The MTP Act lays great emphasis on grave injury to not just the physical but also the mental health of the pregnant woman. Section 3 (2)(b) of the MTP Act provides that if the continuance of pregnancy would involve grave injury to the mental health of the pregnant woman, then, she can legitimately seek to terminate the same. In fact, the expression '*grave injury to her mental health*' has been liberally construed by the legislature itself. Section 3(3) of the MTP Act provides that in determining is whether the continuance of pregnancy

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would involve such risk of injury to the health as is mentioned in section 3(2) of the MTP Act, '*account may be taken of the pregnant woman's actual or reasonable and foreseeable enviornment*'. This has greater nexus to the aspect of injury to mental health than injury to physical health.

102] The first explanation to section 3 (2) of the MTP Act expands the concept of '*grave injury to mental health*' by raising a presumption that anguish caused by any pregnancy as a result of rape shall be presumed to constitute a grave injury to the mental health of pregnant woman. In fact, the explanation states that where pregnancy is alleged by a pregnant woman to have been caused by rape, anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of a pregnant woman.

103] The second explanation to section 3 (2) of the MTP Act goes even further and provides, that where 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. Thus, even a pregnancy arising out of failure of any contraceptive device and the anguish caused thereby, is presumed to constitute a grave injury to the mental health of the pregnant woman.

104] Therefore, for purposes of section 3 (2) of the MTP Act, the expression '*grave injury to mental health*', is used in a liberal

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sense by the legislature itself. Further, section 3 (3) of the MTP Act, in terms provides that in determining whether continuance of pregnancy would involve such risk of injury to the health as is mentioned in section 3 (2), account may be taken of the *pregnant woman's actual or reasonable foreseeable environment*. Section 3 (3) of the MTP Act, makes reference not merely to physical injury but also to mental injury. In fact, the aspect of a pregnant woman's actual or reasonable foreseeable environment has greater nexus to aspect of mental health as compared to physical health, particularly in the present context.

105] This legislative liberality when it comes to expanding the concept of the grave injury to mental health cannot evaporate no sooner the ceiling of 20 weeks prescribed in section 3 (2)(b) of the MTP Act is crossed. If the expression "*life*" in section 5(1) of the MTP Act is not to be confined to mere physical existence or survival, then, permission will have to be granted under section 5 (1) of the MTP Act for medical termination of pregnancy which may have exceeded 20 weeks, if the continuance of such pregnancy would involve grave injury to the mental health of the pregnant woman.

106] 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 with her gynecologist, double marker test is undertaken between 10th and 13th week; triple marker test between 18th and 20th week and the crucial Anamoly scan, in or around the 20th week. Many serious fetal

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anamolies may not even be diagnosable until twenty weeks as many pregnant mothers may not even have access to suitable diagnostic tools, particularly in rural parts. In many cases, complications can develop as the pregnancy advances. In many cases, complications may be detected at some advanced stage. In such cases, as long as the medical opinion does not suggest that medical termination of pregnancy at the advance stage is itself a serious risk to the physical life of the pregnant mother, the law cannot plead helplessness particularly where circumstances set in clauses (i) and (ii) of section 3 (2)(b) of the MTP Act manifestly exist.

107] The aforesaid myriad factors and circumstances assume importance and in fact, are required to be taken into account by the MTP Act legislature. This is evident from the provision in section 3(3) of the MTP Act which requires account to be taken of the pregnant woman's actual or reasonable foreseeable environment in determining whether continuance of a pregnancy would involve such risk of injury to health as is mentioned in section 3(2) of the MTP Act. The expression "*pregnant woman's actual or reasonable foreseeable environment*" is also particularly relevant when it comes to dealing with cases of women from rural areas or rural backgrounds. The provisions of MTP Act have to be so construed so as to not impose any unreasonable or disproportionate burden on pregnant women, who on account of circumstances set out in clauses (i) and (ii) of section 3(2)(b) of the MTP Act seek medical termination of pregnancy, even

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though, the ceiling prescribed in the said provisions may have crossed.

108] Incidentally, reference may be made to the MTP (Amendment) Bill 2014 which also takes conscious cognizance of this aspect – in that the ceiling prescribed in section 3(2) of the MTP Act is proposed to be raised to 24 weeks. This amendment had even proposed to do away entirely with the ceiling of 20 weeks, where termination of pregnancy was necessitated by the diagnosis of any substantial foetal abnormalities as may be prescribed. Similarly, reference may also be made to the Medical Termination of Pregnancy (Amendment) Bill, 2017, the Statement of Objects and Reasons of which reads thus:

> *"This sub-section (2) of section 3 of the Medical Termination of Pregnancy Act, 1971, allows the abortion of terminally ill fetuses upto twenty weeks pregnancy.* ***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 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."*
>
> *(Emphasis supplied)*

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109] For all the aforesaid reasons, we hold that this Court can, in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India, permit the Petitioners to undergo medical termination of their pregnancies in contingencies set out in clauses (i) and (ii) of section 3(2)(b) of the MTP Act, even though, the length of such pregnancies may have exceeded 20 weeks in certain circumstances.

110] In cases where a registered medical practitioner is of the opinion, formed in good faith that termination of pregnancy which may or may not have exceeded 20 weeks is immediately necessary to save the physical life of the pregnant woman, there is no necessity for even seeking any permission. Thus, if a registered medical practitioner is of the opinion that if the pregnancy is not medically terminated immediately, the pregnant woman might die, then, it is the duty of such registered medical practitioner to undertake the termination and the provisions of MTP Act will afford such registered medical practitioner immunity.

111] However, permission from this Court or the Supreme Court will be necessary where the pregnant mother seeks to medically terminate her pregnancy, not on the ground that such termination is immediately necessary to save her life, but on grounds like the continuance of pregnancy would involve a grave injury to her physical or mental health and/or that there is substantial risk that if the child were born, it would suffer from physical or mental abnormalities as to be seriously handicapped.

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112] The reason for treating the two sets of cases differently, is quite obvious. In the former, there is threat to the physical existence of the pregnant mother, if termination of pregnancy is not undertaken by the registered medical practitioner, immediately. The inevitable delay involved in the legal process might even lead to the demise of the pregnant mother. In the later cases however, there may not be any immediate threat to the physical existence of the pregnant mother, but, nevertheless the continuance of pregnancy, particularly under circumstances set out in clauses (i) and (ii) of section 3(2)(b) of the MTP Act, may deprive the Petitioner of her right to life, which as noted earlier, includes not merely the right to physically exist or to survive, but also, the right to live with human dignity, the right to comprehend one's being in its fullest sense.

113] Besides, in the later cases, permission from the Courts is necessary in order to prevent abuse and exploitation, which might result, taking into account the inevitable subjectivity involved in such matters. This Court cannot be oblivious to the observations made by the Supreme Court in ***Voluntary Health Association of Punjab vs. Union of India – 2016(10) SCC 265*** on the aspect of abuse of the MTP Act to eliminate female fetuses as well as the reasons for enacting the PCPNDT Act. Further, if a case is indeed made out for grant of permission, appropriate orders can be made on several aspects, including, *inter alia* on the aspect of immunity to registered medical practitioner, maintenance of proper documentation etc. No

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doubt, the requirement of obtaining such permissions from the Court, will, increase the burden on the pregnant mother. However, in situations where the pregnancy has exceeded twenty weeks and where the pregnant mother seeks termination under circumstances set out in clauses (i) and (ii) of section 3 (2)(b) of the MTP Act even though, there may be no necessity of immediate termination in order to save the mother's life, the requirement of permission from the Court is considered necessary safeguard in such matters.

114] The aforesaid distinction between the two sets of cases is necessary lest we be misunderstood of holding that *registered medical practitioner* is at liberty, in every case, to medically terminate pregnancy which exceeds 20 weeks on the basis of liberal interpretation of the provisions in section 5 of the MTP Act, by reference to the contingencies in clauses (i) and (ii) of section 3(2)(b) of the MTP Act. We therefore make it clear that a *registered medical practitioner,* in a case where he is of opinion, formed in good faith, that termination of such pregnancy is immediately necessary to save the life of the pregnant woman, can medically terminate such pregnancy which may have exceeded 20 weeks, even without the permission from the Court. This is in a situation where the pregnant woman might actually die if the pregnancy is not immediately terminated. However, we also make it extremely clear that in cases where pregnancy had exceeded 20 weeks and where the pregnant woman will not die if the pregnancy is not immediately terminated, but the pregnant woman seeks to terminate pregnancy on the ground that its continuance would involve

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grave risk to her physical or mental health or where there is substantial risk that if the child were born, it would suffer from physical or mental abnormalities as to be seriously handicapped, then, there will be no liberty to the *registered medical practitioner,* on his own, to terminate such pregnancy. In the later situation, permission will necessarily have to be obtained from the High Court, before *a registered medical practitioner* undertakes such medical termination of pregnancy. The grant or refusal of such permission will then be governed by varied factors, including but not restricted to the opinion of the medical board and the binding precedents of the Supreme Court.

115] The next question which arises in these Petitions relates to the procedure to be followed and the safeguards that will have to be adopted in such matters, particularly with regard to the constitution of medical boards to examine the pregnant mothers and the hospitals and clinics at which such termination of pregnancy may be permitted to be safely undertaken.

116] As noticed earlier, the Supreme Court, in ***Sonali Gaikwad*** (supra) has already clarified that such cases can be filed in the respective High Courts having territorial jurisdiction. This means that Writ Petition under Article 226 of the Constitution of India will have to be instituted in this Court if the Petitioner resides within the territorial jurisdiction of this Court or if the cause of action arises within the territorial

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jurisdiction of this Court to seek permission for termination of her pregnancy, were such termination is not immediately necessary to save her life, but where she alleges that the circumstances set out in clauses (i) and (ii) of section 3(2)(b) of MTP Act exist. Further, as was held in ***X and Others vs. Union of India, 2017 (3) SCC 458,*** a relator action may not be permitted in such cases and therefore, such Petition will have to be instituted by the pregnant mother and such Petition will have to be supported by affidavits of the pregnant mother. This is the general rule which will obviously not apply to exceptional situations, which will have to be dealt with on a case to case basis.

117] The Writ Petition, in such cases, must disclose the details of the Petitioner, along with identity proof. The Petition must state the reasons for seeking medical termination of pregnancy, express consent and request for termination of pregnancy, the hospital/clinic at which the termination is proposed to be undertaken and such other details as may be necessary in such matters. If the pregnant mother is a minor or mentally ill person, then, the Petition can always be filed through her guardian. The requirements in section 3(4) of the MTP Act, will then have to be complied with by such guardian.

118] The pregnant mother, will then be referred for examination by a medical board, which must include, but is not limited to, Doctors from the following departments, in addition to the registered medical practitioner/s:

a. Obstetrics and gynaecology

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b. Paediatrics
c. Psychiatry/ Psychology
d. Radiology / Radiodiagnosis/Sonography
e. The field of medicine pertaining to the ailment that the foetus may be diagnosed with.

119] Mr. Vagyani and Ms. Kantharia, the learned Government Pleaders, on the basis of instructions, have assured this Court that medical boards shall be established on permanent basis in hospitals established or maintained by the Government, to the extent possible. Having regard to the rise in such cases and the fact that the resolution of such cases brooks no delay, we direct the State to set up medical boards on permanent basis, at least in one of the major cities, in each of the Districts of State of Maharashtra. Such medical boards to be established as expeditiously as possible, if not already established, but in any case, within a period of two three months from today. Pending establishment of such medical boards on permanent basis, the State, will have to constitute medical boards on ad-hoc basis to examine pregnant mothers, on case to case basis. Affidavit of compliance to be filed by the Secretary (Health), Government of Maharashtra on the aspect of establishment of permanent medical boards in each of the Districts, State of Maharashtra.

120] The medical boards, upon reference from this Court, must examine the pregnant mother as expeditiously as possible and in any case within a period of 72 hours from the date of referral. Thereafter, within a period of 48 hours, the medical board must submit a report to this Court in sealed cover, indicating *inter alia* the status of the pregnant mother and the

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foetus within, in the context of the request of the pregnant mother for medical termination of her pregnancy.

121] The medical board, in such matters, is expected to address all medical issues which normally arise in such matters, including, but not restricted to the following :

(i) Whether the continuance of the pregnancy would involve risk to the life of the pregnant woman or of grave injury to her physical or mental health; or

(ii) Whether 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.

(iii) Whether, having regard to the advanced stage of pregnancy, there is any danger (other than the usual danger which arises even in spontaneous delivery at the end of full term), if the pregnant mother is permitted to terminate her pregnancy ?

(iv) If the pregnant mother is a minor or mentally ill person, then, the medical board to ascertain, to the extent possible, the wishes of the pregnant mother on the continuance of pregnancy or otherwise.

(v) The medical process best suited to terminate the pregnancy and the possibility of child being born alive, in the process.

(vi) Any other issues, which the medical board regards as relevant, in such matters.

122] Based upon the report of the medical board as also other considerations involved in such matters, if this Court, decides

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to grant permission to medically terminate the pregnancy, then, the procedures for such termination will have to be necessarily undertaken at the places indicated in section 4 of the MTP Act. This means that the termination will have to be undertaken at the hospitals established or maintained by the Government or at places for the time being approved for the purpose of the MTP Act by the Government or a District level Committee constituted by the Government with the Chief Medical Officer or the District Health Officer as the Chairperson of the said Committee. In terms of proviso to section 4 of the MTP Act, the District level Committee shall consist of not less than 3 and not more than 5 members including the Chairperson, as the Government may specify from time to time.

123] Mr.Vagyani and Ms.Kantharia, the learned Government Pleaders, on the basis of instructions, have assured this Court that sufficient number of places have already been approved for the purposes of section 4(b) of the MTP Act. In any case, we direct the State to ensure that sufficient number of places are approved for the purpose of the MTP Act. In approving such places, needless to add that the Government will have to comply with the requirements set out in Rule 5 of the MTP Rules, 2003. Besides, as prescribed in Rule 6 of the MTP Rules, 2003 the Chief Medical Officer of each of the Districts will have to undertake periodic inspections of such approved places with a view to verify whether termination of pregnancies is being done therein under safe and hygienic conditions.

124] In all such cases, where permission is granted to

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medically terminate pregnancies the provisions in the MTP Rules, 2003 and the MTP Regulations, 2003, will have to be complied with by the registered medical practitioners, hospitals/clinics and the approved places in terms of section 4(b) of the MTP Act. Therefore, the directions which we have issued, are in addition to and certainly not in derogation of any of the requirements prescribed under the MTP Act, the rules and regulations made there under.

125] In some cases, including, in one of the cases in this batch of Petitions, the medical board suggested that the pregnant mother and/or her family members give an undertaking that if, despite attempts at medical termination of pregnancy, the child is born alive, then the pregnant mother and/or her family members take full responsibility for such child.

126] At the outset, we make it extremely clear that if despite attempts at medical termination of pregnancy, the child is born alive, then, first and foremost the registered medical practitioner and the hospital/ clinic concerned will have to assume the full responsibility to ensure that such child is offered the best medical treatment available in the circumstances, in order that it develops into a healthy child. Though there is debate as to whether the fetus (child in the womb) is a person, entitled to rights, there is no debate on the issue that a child, born alive, is a person, in whom, the right to life and personal liberty inheres. Therefore, taking into consideration the provisions of Part III and Part IV of the Constitution, we make it clear, that under no circumstances,

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such a child must be neglected or left to perish, particularly where the pregnant or her family members may not be in a position to or may not be willing to assume responsibility in such matters.

127] In the aforesaid regard, we refer to the decision of the Supreme Court in ***Parmanand Katara vs. Union of India (1989) 4 SCC 286*** where it was held that there can be no second opinion that preservation of human life is of paramount importance. That is so on account of the fact that once life is lost, the *status quo ante* cannot be restored as resurrection is beyond the capacity of man. Article 21 of the Constitution casts the obligation on the State to preserve life. The provision as explained by this Court in scores of decisions has emphasised and reiterated with gradually increasing emphasis, that position.

128] The Supreme Court has further observed that a Doctor at the government hospital positioned to meet this State obligation is, therefore, duty bound to extend medical assistance for preserving life. Every doctor whether at a government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life. No law or State action can intervene to avoid/delay the discharge of the paramount obligation cast upon members of the medical profession. The obligation being total, absolute and paramount, laws of procedure whether in statutes or otherwise which would interfere with the discharge of this obligation cannot be sustained and must, therefore, give way. So far as this duty of

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medical profession is concerned, it is a duty coupled with human instinct and therefore, it needs neither any decision nor any code for compliance. In any case, Code of Medical Ethics framed by the Medical Council of India Item 13 specifically provides for it.

129] In *M. Nagraj* **(***supra*), the Constitution Bench in the context of certain fundamental rights, including the right to life and human dignity, has held that the values impose a positive duty on the State to ensure their attainment as far as practicable. The rights, liberties and freedoms of the individual are not only to be protected against the State, they should be facilitated by it. It is the duty of the State to not only to protect the human dignity but to facilitate it by taking positive steps in that direction.

130] Therefore, if the child, despite attempts at medical termination of pregnancy, is born alive, then the parents as well as the Doctors owe a duty of care to such child. The best interest of the child must be the central consideration in determining how to treat the child. The extreme vulnerability of such child is itself reason enough to ensure that everything which is reasonably possible and feasible, in the circumstances, will have to be offered to such child, so that it develops into a healthy child.

131] In such matters, the instinct of the parents, will no doubt take over when it comes to the love and care to be offered to such child. However, in the unfortunate situation, where for

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several myriad factors, the parents of such child are unwilling to or genuinely not in a position to care for such child, then, the "*parens patriae*" doctrine, will oblige the State to assume parental responsibility in relation to such child.

132] Even apart from the "*parens patriae*" doctrine, the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015, will apply to such an unfortunate situation. There are detailed provisions under the Juvenile Justice Act to deal with cases of "*abandoned child*" as defined under section 2(1) or "*child in need of care and protection*" as defined in section 2(14) of the Juvenile Justice Act. The hospital/clinic authorities, must take necessary measures as prescribed under the Juvenile Justice Act to deal with such unfortunate situations. The best interest of the child, must be the primary consideration in all such matters.

133] According to us, both the *parens patriae doctrine* as well as provisions of Juvenile Justice Act obliged the State to assume parental responsibility in relation to such children. Therefore, the State, consistent with the provisions of the Juvenile Justice Act will have to protect and take care of such children, should, such need arise. Mr. Vagyani and Ms.Kantharia, the learned Government Pleaders, on the basis of instructions, have assured this Court, that consistent with the provisions of section 27 of the Juvenile Justice Act, the State Government, where it has not already done so, will by notification in the Government Gazette constitute for every District, one or more Child Welfare Committees (CWC) for

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exercising the powers and discharging the duties conferred upon such Committees in relation to children in need of care and protection under the Juvenile Justice Act.

134] The learned Government Pleaders, on the basis of instructions, have assured this Court that the State and its agencies like CWC etc. will, after compliance prescribed procedures, declare such children legally "*free for adoption*", in case the enquiries establish that such children have no one to care for or are abandoned or surrendered. In any case, we direct the State and its agencies to take all steps in this regard, keeping in mind the principle of the best interests of such children.

135] The learned Government Pleaders pointed out that at least, at major Government Hospitals in Metros as well as at District places, there are specialized adoption agencies, which facilitate adoption of such children. In any case, the learned Government Pleaders, again on basis of instructions, assured this Court that the State and its agencies will take care of such children, as obligated under the Juvenile Justice Act, till suitable means of rehabilitation are found or till such children attain the age of 18 years.

136] We make absolute, the interim orders made in these petitions, on the basis of which, the petitioners, were permitted to medically terminate their pregnancies in circumstances made clear by us, in the said interim orders.

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137] We are conscious that when it comes to laying down procedures or prescribing safeguards in such matters, the State and its agencies are much better poised to undertake such an exercise. We are therefore, of the opinion that the State, in consultation with various stakeholders, must consider formulating suitable policies to deal with such cases, more particularly, when it comes to constitution of Medical Boards to expeditiously examine pregnant mothers and submit reports to this Court and the hospitals/clinics where terminations, if permitted, can take place in safe and hygienic conditions. Similarly, the State and its agencies, in consultation with various stakeholder, like the Juvenile Justice Boards and the CWCs, must also consider formulating suitable policies to deal with cases of children born alive, despite attempts at medical pregnancies, including but not restricted to issues of medical care, adoptions etc. However, since such matters are on the rise and further since the resolution of such issues brooks no delay, we have, relying mainly upon the decisions of the Supreme Court attempted to suggest procedures and safeguards, which, we propose to follow until the State formulates policies in such matters. Taking into consideration the nature of such matters and the necessity of expeditious resolution of such issues, it is obviously not possible for pregnant mothers to wait until the formulation of such policies.

138] Accordingly, we dispose of these petitions, with the following orders:

(a) We hold that *a registered medical practitioner* may medically terminate pregnancy which has exceeded 20

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

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

(c) We hold that where a pregnant woman, the length of whose pregnancy has exceeded 20 weeks seeks to terminate such pregnancy on the ground that its continuance would involve grave injury to her physical or mental health or where there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped, such pregnant woman will have to seek permission from the High Court and unless such permission is granted, no registered medical practitioner can terminate such pregnancy, *inter alia* on the basis of the interpretation of the provisions in section 5 of the MTP Act;

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(d) We hold that this Court can, in exercise of its extra ordinary jurisdiction under Article 226 of the Constitution of India, permit medical termination of pregnancies, the length of which exceeds twenty weeks, in contingencies set out in clauses (i) and (ii) of section 3(2)(b) of the MTP Act, subject no doubt by adherence to the procedures and the safeguards indicated in this judgment and order;

(e) We direct the State to constitute and establish, as expeditiously as possible, and in any case within a period of three months from today, Medical Boards as indicated in this judgment and order, in each of the districts, to examine pregnant women and to furnish reports in cases where permission to medically terminate pregnancy whose length exceeds twenty weeks, is sought for by institution of writ petitions in this Court. The Secretary (Health), Government of Maharashtra, to file affidavit of compliance on 1st July 2019, in this Court;

(f) We direct the State and /or the District Level Committees to ensure that there are sufficient approved places in terms of section 4 (b) of the MTP Act in each of the districts of State of Maharashtra, where, pregnancies may be terminated consistent with the provisions of the MTP Act. We also direct the Chief Medical Officers of each of districts to undertake periodic inspection of such approved places as contemplated by Rule 6 of the MTP Rules, 2003 with a view to verify whether termination of

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pregnancies is being done therein under safe and hygienic condition and to document and maintain such inspection reports. The Secretary (Health), Government of Maharashtra, to file a status report in this regard on 1st July 2019 in this Court;

(g) We direct the State to consider formulating a suitable policy to deal with cases of medical termination of pregnancies, with special emphasis upon rural areas, so that, pregnant women have access to safe and hygienic facilities and there is avoidable wastage of mother's health, strength and sometimes, life. The Secretary (Health), Government of Maharashtra, to file a status report in this regard on 1st July 2019 in this Court;

(h) We hold that where, this Court, in exercise of of its powers under Article 226 of the Constitution of India has permitted medical termination of pregnancy and the child is born alive, then, the *registered medical practitioner* and the hospital/clinic concerned will have to assume full responsibility to ensure that such child is offered best medical treatment available in the circumstances, in order that it develops into a healthy child;

(i) We further hold that where, this Court, in exercise of its powers under Article 226 of the Constitution of India has permitted medical termination of pregnancy and the child is born alive, if the parents of such child are not

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willing to or are not in a position to assume the responsibility for such child, then, the State and its agencies will have to assume full responsibility for such child and offer such child medical support and facilities, as may be reasonably feasible, adhering always to the principle of best interests of such child as well as the Statutory provisions in the Juvenile Justice Act;

(j) We direct the State to consider formulating a suitable policy to deal with the cases where despite attempts at medical termination of pregnancy, children are born alive, so that, such children are offered medical support and facilities, as may be reasonably feasible, adhering always, to the principle of best interests of such child as well as the Statutory provisions of the Juvenile Justice Act. The policy could also address the issue of adoption of such children. The Secretary (Health) or the Secretary of the concerned Department, Government of Maharashtra, to file a status report in this regard on 1st July 2019 in this Court;

(k) We make absolute all the interim orders made by us in these petitions, on the basis of which, the petitioners were permitted to medically terminate their respective pregnancies and we reiterate our reasons set out therein;

(l) We express our gratitude to Mr. D.J. Khambatta, *Amicus Curaie* , who was ably assisted by Ms Naira

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Jejeebhoy and Mr. Pheroze F. Mehta in these matters. We also express our gratitude to all the learned counsel and the learned Government Pleaders who assisted us in these matters;

(m) Though, these matters are disposed of, the same may be placed before the appropriate Bench on 8th July 2019 to consider the affidavits of compliances.

(M. S. SONAK, J.) **(A. S. OKA, J.)**

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