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THE RESTRICTIVE-LIBERAL DILEMMA: A Comment on XYZ v. The Dean of B.J. Government Medical College
Parul Bhalla

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THE RESTRICTIVE-LIBERAL DILEMMA: A comment on *X.Y.Z. v. The Dean of B.J. Government Medical College 2024: BHC-AS:22704-DB*

*Parul Bhalla**

[Abstract: The World Health Organisation defines health as being inclusive of not only physical, but also mental well-being of a person.¹ A woman's ability to procreate and nurture a healthy and developed progeny is solely dependent on her own well-being. Logically, then is it not correct to infer that it is completely irrational to force a woman to carry a child specifically when she repeatedly asserts her inability to raise the same? Fundamental questions concerning reproductive choices await answers. The international sphere continues to put up a fight to live up to the image it has created of itself. The extent of the say of the male counterpart holds significance as it leads to the inference of the approach adopted by the judiciary in general. This paper examines the various authorities laid by the Supreme Court with regard to the abortion rights of a pregnant lady, irrespective of her being a married or unmarried woman. There exist wide disparities among the approaches adopted by different countries while drawing parallels between reproductive rights of a woman with the right to life of the unborn. And the results are the opposite of expected. There, however, is a need to fill the gaps which still act as big question marks. One, thus needs to recognise a suitable path which is not only feasible but also ethical and is in conformity with the principles of reproductive justice.]

I

Introduction

*'A changed social context demands a readjustment of our laws. Law must not remain static and its interpretation should keep in mind the changing social context and advance the cause of social justice.'*²

--Dr. D.Y. Chandrachud J.

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¹ WORLD HEALTH ORGANISATION, *Health and Well-Being* available at - <https://www.who.int/data/gho/data/major-themes/health-and-well-being> (last visited Jul. 21, 2025).

² *X v. Principal Secretary Health and Family Welfare Department*, 2022 SCC OnLine SC 1321.

Energy can neither be created nor be destroyed.³ The statement holds true not only for natural sciences but also for social sciences because at the fundamental level, we as human beings are also composed of energy. The society comprises of various classifications which have been long drawn.⁴ This is also true for the Indian knowledge systems wherein, the Buddhist tradition expounds upon the median path of life.⁵ In a similar vein, the presence of two sexes, female and the male, is essential of preserving life as we know it, but this preservation has been subjected to huge risk.⁶ The risks of imbalanced sex ratio have existed for a long time. Liberalism that has protected vulnerable and the marginalized communities. However, there has also been sidelining of certain interests with the spread of liberal juridical thinking.⁷ In this context, one of the most contentious issues has been the reproductive rights of women.

Amidst the host of issues being brought up time and again before the courts, the dust does not seem to be settled around the issue of reproductive autonomy of women. She struggles to achieve bodily autonomy, the discourse around which still lurks around like a ghost.

The present paper, is a case comment, opening further forum for discussing the fundamental question of granting absolute reproductive rights to women. In addition to determining the weight of the mental health of the lady in deciding the fate of the pregnancy, the text also looks into the extent of the say of the spouse. Does he get to put in his word when the lady refuses to carry the baby? Are both the parent equal stakeholders? Such hypotheses force the reader to critically analyze the position of women in the society in the past and present.

³ NASA, *First Law of Thermodynamics*, Glenn Research Centre, available at:

<https://www.grc.nasa.gov/www/k-12/airplane/thermo1.html>.

⁴ Aristotle, *POLITICS: BOOK VII* (1995).

⁵ Minati Panda, *Madhyam Marg: How It Constitutes Indian Mind* 25(1) *PSYCHOLOGY AND DEVELOPING SOCIETIES* 77(2013); See also, *Madhyamak Buddhism* available at:

<https://www.mnzencenter.org/uploads/2/9/5/8/29581455/madhyamaka.pdf>.

⁶ Mari Havistendahl, *UNNATURAL SELECTION: CHOOSING BOYS OVER GIRLS, AND THE CONSEQUENCES OF A WORLD FULL OF MEN* (2011).

⁷ David A.J. Richards, *Liberal Political Culture and the Marginalized Voice: Interpretive Responsibility and the American Law School* 45(6) *STANFORD LAW REVIEW* 1955 (1993); Melissa S. Williams, *VOICE, TRUST, AND MEMORY: MARGINALIZED GROUPS AND THE FAILINGS OF LIBERAL REPRESENTATION* (2021).

II

The Decision of the Bombay High Court: Is Mental Health of a Pregnant Lady a Decisive Factor?

The 2022 Supreme Court case⁸, has set the stage for the 2024 Bombay High Court decision in *X.Y.Z. v. The Dean of B.J. Government Medical College and Sassoon Hospital*.⁹ In the later court ruling, the court went a step ahead to expand the limits of allowing an abortion to not only sexual assault cases, but also to situations where the continuation of the pregnancy might have adverse effects on both, the bearer and the born. Additionally, the court while deciding on such a sensitive issue should take into account the 'grave mental injury' it would cause to the pregnant women.

The judgement addresses the right to bodily autonomy of a female who still face societal pressures to continue with the pregnancy despite repeatedly asserting her unreadiness for the same. A female, often loaded with innumerable constraints and pressures already, fails to think of her own self and succumbs to the uninvited opinions of her surroundings. In simpler terms, once a woman conceives a baby, she is forced to keep the baby and ultimately is pressurised to go through the laborious process of childbirth. Nobody cares to give regard to the psychological and physical repercussions that the pregnancy would have on the psyche of the female. Conversely, there also arises a situation where the family pressurises the woman to abort the foetus when it is conceived without a lawful wedlock, just to preserve the honour of the family. No consideration is given to *her desire* of wanting to keep the baby.

In the former kind of circumstances, the individuality of a woman is seen subordinate to the interests of the family and her status is reduced to that of being a child bearing machine. She is left to navigate her pregnancy on her own with no or little help. This further aggravates the feelings of isolation and helplessness within her, which she has to deal along with the physical burden of pregnancy. The events that follow are traumatic, complicated, and harsh. Nevertheless, the woman is forced to stay silent to continue the family lineage and protect its honour in the society. Such acts strip her of the fundamental right of a dignified life. Society's failure to recognize her autonomy reduces her to little more than a passive participant in her own life with respect to taking decisions central to her existence.

The factual matrix of the case revolved around a twenty-five weeks pregnant 19-year-old girl. Supposedly, she became pregnant out of a consensual relationship but did not want to keep the child due to; *one*, the social stigma attached to the caste she belonged to and *two*, the psychological effects of the pregnancy. The female thus pleaded for an

⁸ *Supra* note 2.

⁹ *X.Y.Z. v. The Dean of B.J. Government Medical College and Sassoon Hospital, Pune and Ors.*, Writ Petition No. 7745 of 2024. (2024: BHC-AS: 22704-DB).

abortion. Simply put, 'abortion' is the medical procedure performed to terminate or abruptly end a pregnancy.

Alternatively, the aggrieved suggested giving up the newborn for adoption, if at all, she was forced to keep the foetus.

As a part of the process, the court required a detailed medical report. The medical reports annexed to the petition for abortion simply affirmed that the foetus was free from any sort of (congenital) abnormality. However, it failed to ponder upon and take into account the other aspect concerning the health of the bearer, i.e., the grave physical and emotional consequences of forcefully commanding the female to continue with the pregnancy.

Generally, the parties contesting such cases present their admissions in terms of – right to life of the female in contradistinction to the right to life of the foetus.

In accordance with the Medical Termination of Pregnancy Act, 1971¹⁰ (hereinafter the 'MTP Act'), the medical board report submitted a report to the Sassoon Hospital. It examined all the factors necessary to determine if the abortion would be safe and appropriate in the instant case. The report also outlined the facts of the pregnancy and clearly revealed that the girl was carrying a twenty-five weeks and six days old '*single live intrauterine foetus*'. Upon thorough counselling of the petitioner, the report concluded that, '*considering the woman's current psychological status, sociocultural and economic conditions, continuation of pregnancy can lead to grave psychological injury*'. It therefore, suggested that the petitioner was fit for an abortion and recommended the court to allow it. The report further remarked that the psychological condition of the woman lied at the heart of the issue and if the pregnancy is nevertheless continued, the newborn would suffer a high risk of an immediate and long term physical and mental instability, thereby impacting the overall quality of life of the child.

Before reaching any conclusions, as part of the protocol, the court asked the petitioner whether she was run through the abortion procedure and its possible consequences. It was only after it received an answer in the affirmative that it continued with anything else. Additionally, in order to rule out the chances of any infirmity, the court also explained the procedure to her. '*Upon a careful consideration of the record and our interaction with the Petitioner*', said the court, '*we are of the opinion that the Petitioner is indeed fully aware of the foetus having a heartbeat, and is also firmly desirous of terminating the pregnancy, after being made well aware of the procedure to be adopted.*'

While upholding the principles of reproductive justice and keeping in mind the psychological and physical consequences attached to the continuation of the pregnancy, the court allowed the petition. It added that the girl had the liberty and right to make a decision about her own body. It was correct in analysing the fact that poor mental health

¹⁰ Medical Termination of Pregnancy Act, 1971.

of the lady can adversely affect her physical health and ultimately the foetus. It has the necessary weight of being the decisive factor in determining the fate of the pregnancy.

Does the spouse have any say in the entire process?

But the story did not end here. Another minor yet significant question which troubled the court was whether the partner of the petitioner had a stake in deciding the fate of the pregnancy and if his say could influence the latter's desire to continue with the pregnancy or not; particularly in this case because the instant pregnancy was the result of a consensual relationship as opposed to being consequent of a sexual crime. The question was answered in the negative.

Given the patriarchal mindset of the society, the fact that the court answered this question in the negative was surprisingly unexpected.

Besides merely adjudicating upon the right of abortion, the court also went on to cite *A (Mother of X) v. State of Maharashtra*.¹¹ and said that the report presented by the Medical Boards should reflect upon the 'effect of the pregnancy on the pregnant person's physical and mental health'. Additionally, the petitioner's consent should be of utmost importance. The court further added,

'The right to abortion is a concomitant right of dignity, autonomy and reproductive choice. This right is guaranteed under Article 21 of the Constitution. The decision to terminate pregnancy is deeply personal for any person. The choice exercised by a pregnant person is not merely about their reproductive freedom but also about their agency as recognised by this court in X v. State (NCT of Delhi). It is therefore imperative that the fundamental right of a pregnant person is not compromised for reasons other than to protect the physical and mental health of the pregnant person.'

The above ratio cited a precedent in favour of denying an abortion because the foetus was not found to have any sort of abnormality. The test of substantial foetal abnormalities, as was seen to be applied, made the length of the pregnancy irrelevant for abortion. However, the court said that this test should not be applied blindly and mechanically to every and any case in isolation, but in the light of the facts and circumstances of each of them. Accordingly, any pregnancy which extended beyond 24 weeks should not base 'congenital abnormalities' as a determinative factor for denying abortion to a female.

'... Firstly, the health of the woman is paramount. This includes the risk avoided from the woman not availing unsafe and illegal methods or abortion. Secondly, disallowing terminations does not stop abortions, it only stops safe and accessible abortions...'

Further, the case also deliberated on the question of whether the partners have a stake in having a final say in the question of termination of pregnancy. Backing its decision on the MTP Act, the bench said that the *litera legis* denied any interference in the question of termination. The lady had the sole right of deciding upon her bodily autonomy. The

¹¹ *A (Mother of X) v. State of Maharashtra and Anr.*, 2024 SCC OnLine SC 835.

reproductive choice of a woman is hers alone and cannot be touched upon by her family or partner in any way. However, an exception was created in the case of minors.

III

The Provisions of Law

The Medical Termination of Pregnancy Act¹² governs abortion rights of women in India. Under the Act, the governments of the states and Union Territories are empowered to constitute Medical Boards to determine issues, essential to the deal with the issues before the courts. Additionally, the act permits medical termination of pregnancy (or 'abortion') up to 20 weeks in general and up to 24 weeks if a special opinion of not less than two medical practitioners is procured in situations where the life of either the mother or the foetus is at risk.

As far as the consent of the pregnant female is considered, the act lays down that:

- a) The written consent of the guardians is necessary if she is a minor (i.e., under eighteen years) or mentally-ill.¹³
- b) In cases where she is a major, the termination procedures necessarily require her consent, unless there is a case of emergency and not less than two medical practitioners, in a bona fide faith believe that the termination is necessary to save the life of the female.¹⁴

The act also lays down what shall be the place of such termination. Additionally, the identity of the woman has to be kept confidential.

The act empowers the state and central governments to make rules and regulations on the same subject.

The need to strike a balance between ethics and necessity

Two facets covered within the ambit of the ratio are to be put through a lens of deliberation:

1. What is the value of the mental health of a pregnant lady, and should it be one of the main determining factors while deciding the fate of her pregnancy?

¹² The Medical Termination of Pregnancy Act, 1971.

¹³ The Medical Termination of Pregnancy Act, 1971, S.3.

¹⁴ The Medical Termination of Pregnancy Act, 1971, S.5.

2. Does the spouse (in cases of pregnancies arising out of a lawful wedlock) or the partner of the lady (when the baby is conceived without a wedlock) have a significant say in not allowing a termination of the pregnancy?

As far as the first question is concerned, it has been well settled that the courts have come to recognise the mental well-being of a human to be of paramount importance. There is nothing superior to the happiness of one. But the simple truth is that one cannot pour from an empty cup. If a woman is not mentally stable, she cannot be expected to raise another human being. This very rationale is alone sufficient for a prudent man to infer that the psychological sanity of a woman outweighs every other factor put before the deciding parties. Even if a lady is physically capable, but her mental state does not allow her to embrace motherhood, no force of law or external pressure can prepare her to become a mother.

The second question, however, evokes a much more meticulous debate and attracts two very strong divergent opinions. Pregnancy, by its very nature, is not just the responsibility of one but two people. Even though it is the female who goes through the laborious physical pain of pregnancy, her male counterpart has equally emotional and moral responsibilities. Undoubtedly, even the father is an essential stakeholder of the pregnancy. One opinion advocating in favour of the father of the foetus suggests that the father, being the co-creator of the foetus, is equally involved in pregnancy. His opinion, though not decisive, becomes crucial for deciding the fate of the foetus. Any framework, rule, or regulation depriving the father of such an expression is a clear infringement of his rights.

However, a contrasting opinion put forth by another group maintains that since it is the mother who goes through the physical pain, social consequences, and emotional changes of childbirth, the decision-making power of opting for an adoption should solely rest with her.

Perhaps, amidst such diametrically opposite opinions, a middle path is therefore, necessary and desirable.

It is now well established that a male partner is an equal stakeholder of a pregnancy. His opinion, thus, cannot be completely discarded. His opinion must be considered *inter alia* the relative circumstances and the well-being of the prospective mother. This approach is not only ethical but also in line with the principles of equality enshrined in the Indian Constitution.

Had the Indian Judiciary maintained an orthodox viewpoint and denied the permission to a medical termination overriding the mother's lived reality, it would have done more injustice to the unborn foetus rather than upholding its right to life. This could be the only logical inference. If the mother is unready to nurture, she would certainly not be able to give the child a suitable upbringing which would leave the child to himself. As the proverb says, *'Train up a child in the way he should go, and when he is old, he will not*

*depart from it.*¹⁵ The child will grow up as a reflection of what he was taught in the childhood. The clay dried in the heat of the life's furnace would have imprints of his hard work and struggle. The fact that children are the supreme asset of the nation cannot be overemphasised. The onus then, lands on the state to ensure that he is not placed in an unwelcoming home, unwilling to give him the desirable care and nutrition.

Currently, the right to abortion in India is governed by the MTP Act alone. Its roots can be traced back to the Shantilal Shah Committee¹⁶ set up by the government in 1966. Back in the day, it was not less than a victory for a country like India to work on something as progressive as a law on abortion. The committee proposed the Act to reduce the number of unsafe abortions in the country, and thus targeted to reduce morbidity of women occurring as a consequence to unregulated procedures. The Act, as discussed above, does successfully cover multiple important reproductive rights of women but still fails to recognise other ancillary questions, leaving behind loopholes and lacunae in the trail.

IV

Does the Theory Meet Practice at All?

Talks around mental health have been long held as a taboo. It was only in the late 20th century¹⁷ that mental health came to be recognised as an actual issue. Given this scenario, it is impossible to expect that the judicial set-up would consider the mental condition of a man, let alone a woman. However, multiple campaigns and initiatives later, the court has now come to recognise what mental health is and why it is important. However, what we still lack is an explicit legal provision for the same. Even though the court, has time and again actively given judgements¹⁸ on the MTP Act, it cannot take place of the legislature to remedy the deficiencies of the document. There still exists the need of the lawmakers to officially recognise the fact that a woman cannot be denied an abortion if she is mentally unready for a pregnancy. Not only would such a denial lead

¹⁵ Old Testament, Proverbs XXII.

¹⁶ Ministry of Health and Family Welfare, *Advances in Methods of Emergency Contraception: Experience With Liberalised Abortion Services 1969* available at: https://aiims.edu/aiims/events/Gynaewebsite/ma_finalsite/report/1_1_4.htm#:~:text=Governments%20of%20India%20set%20up,related%20to%20abortion%20in%201966 (last visited at Jan. 23, 2025).

¹⁷ Berolete Jose, *The Roots of the Concept of Mental Health* 7 WPA 113 (2008).

¹⁸ *Supra* notes 2 and 9.

to a higher risk of still birth or adverse physical effects on the lady, but also post-partum depression¹⁹ and severe stress²⁰.

Regardless of all the legal provisions in place, it is for a rationale man to understand the simple fact – that a woman is an independent individual with her own mind and mental faculties to decide what is wrong or right for her. If she is explicitly asserting her under-preparedness for a huge responsibility like pregnancy, shouldn't that be cogent enough for the experts to allow for an abortion? Today, progressive stances taken by the courts act as the only ray of hope in the dull and dark justice delivery mechanism. Judges now expressly recognise a female's right to body under her right to life and personal liberty²¹, while making statements like '*Every man is the master of his own body and has the right to deal with it as he pleases*'.²² The apex court, in another case²³, talked of granting decisional autonomy to women and explicitly laid –

A mere description of the side effects of a pregnancy cannot possibly do justice to the visceral image of forcing a woman to continue with an unwarranted pregnancy. Therefore, the decision to carry the pregnancy to its full term or terminate it is firmly rooted in the right to bodily autonomy and decisional autonomy of the pregnant woman.

The court in the case of *Independent Thought*²⁴ discussed the grave consequences and repercussions which might follow if a female is forced to carry a child and why she has a right to bodily integrity and reproductive autonomy. Such a right was previously recognised under the ambit of the right to privacy. In the case of *State of Maharashtra v. Madhukar*²⁵, the hon'ble apex court held that nobody has the right to '*violate the person*' of anybody else. The *Suchita Srivastava* case²⁶, also discussed in the present judgement, is considered a landmark authority on reproductive rights. The court here held reproductive rights to be inclusive of the right of abstaining from procreating. Additionally, it explored various dimensions of reproductive justice including the accessibility to contraception and other birth control methods. Therefore, the MTP Act should also be considered as a reasonable restriction on the fundamental right of reproductive choice.²⁷

¹⁹ Frank C Worrell, *Denying Abortions Endangers Women's Mental and Physical Health* 113(4) AM J PUBLIC HEALTH 382 (2023).

²⁰ Reshma Saujani, *The Opposite of Abortion Isn't Motherhood. It's Injustice.*, (May 12, 2022) ELLE available at: <https://www.elle.com/culture/career-politics/a39954738/abortion-rights-motherhood-essay/> (last visited Jan. 23, 2025).

²¹ *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1.

²² *Maruti Dalal v. State of Maharashtra*, 1986.

²³ *X2 v. State (NCT of Delhi)*, 2023 9 SCC 433.

²⁴ *Independent Thought v. Union of India*, AIR 2017 SC 4904.

²⁵ *State of Maharashtra v. Madhukar Narayan Mardikar*, 1991 (1) SCC 57.

²⁶ *Supra* note 20.

²⁷ Y.P. Minocha, *et. al.* DIGEST ON MATRIMONIAL LAWS 606 (2022).

At this stage, it is important to understand that the debate we are focusing on is not about abortion rights in general, but rather specifically on awarding such rights to a woman wanting to exercise her personal right. A right, which can only be secured after contravening the law of the land which fails to secure to her the right to govern her own body. Similar but worse situations can be observed in other nations too. There still are countries where abortion is illegal.²⁸ Nations like Iraq, Egypt and Philippines, among several others have put an absolute ban on the medical termination of pregnancy. According to data, around forty percent of women worldwide live in areas where such services are either limited or not legal.²⁹ The 2014 WHO Report³⁰ titled '*Ensuring human rights in the provision of contraceptive information and services: Guidance and Recommendations*' described how 225 million women in the world are deprived of access to safe abortion procedures and modern contraceptive measures.³¹

When compared on the basis of the instant judgement, India can be comparatively put at a way higher rank. Not only has it been successful in legalising abortion, but has also taken steps forward to allow women to have an abortion whatever might be the cause of pregnancy. It is the health of the mother which has to be seen and not how she got pregnant. A discussion on the same is futile. The whole thing boils down to the argument that it does not matter if she got pregnant without a lawful wedlock³², or had been a victim of a sexual crime³³, or desires abortion due to her mental health.

²⁸ Eloise Barry, *The State of Abortion Rights Around the World*, TIME (May 3, 2022) available at: <https://time.com/6173229/countries-abortion-illegal-restrictions/> (last visited Jan. 23, 2025).

²⁹ *A look at some of the world's toughest abortion laws*, ALJAZEERA (May 3, 2022) available at: <https://www.aljazeera.com/news/2022/5/3/a-global-look-at-abortion-and-some-of-the-worlds-toughest-laws#:~:text=There%20are%2016%20countries%20where,to%20three%20years%20in%20ja> (last visited Jan. 23, 2025).

³⁰ World Health Organisation, *ENSURING HUMAN RIGHTS IN THE PROVISION OF CONTRACEPTIVE INFORMATION AND SERVICES: GUIDANCE AND RECOMMENDATIONS* (2014).

³¹ *Supra* note 26.

³² *Supra* note 2.

³³ *Supra* note 9; See also *Murugan Nayakkar v. Union of India*, SC 2017; *Sarmishtha Chakraborty v. Union of India*, (2018) 13; *Supreme Court permits abortion for 14-year-old rape survivor to protect her mental, physical well-being*, THE HINDU (Apr. 22, 2024) available at: <https://www.thehindu.com/news/national/supreme-court-orders-medical-termination-of-pregnancy-of-minor-rape-survivor-from-maharashtra/article68093268.ece> (last visited Jan. 27, 2025).

V

The Fight that Continues

Multiple judgements and quotations, time and again, have reaffirmed the prerogative supporting gender equality in different situations and contexts. But what remains constant is the gap between theory and practice. The Indian Constitution grants to each person, irrespective of their sex, a set of inviolable fundamental rights.³⁴ However, the ground reality is diametrically opposite to this premise. It continues to act not as the conclusion but a hypothesis awaiting verification. Age old patriarchal principles have undermined the value of women in the society. Deep-rooted age-old principles have devalued the position of a woman. Paradoxically, where she is despised as a daughter, she is happily welcomed as a daughter-in-law because she has the ability to carry forward the family lineage by begetting a son. In other words, her status is reduced to that of a child-bearing machine and nothing more. While the statement might seem to be brutal and rough, it has long been the situation. The woman seldom has been given the right to equality in her own household. Her right to life, then, lurks as a big question mark over her entire existence. Her body is not just hers alone, but seen as a 'property' of her husband and her family.

Feminist movements emerging after centuries of systemic silencing, have directly challenged these very foundations.³⁵ Voices which have been silenced through time, have now come to realise of their value. They have mustered the courage to put up a fight against precisely these regressive ideas. Women's rights movements have come a long way. They are no longer restricted to suffrage but also to rights over their own life.³⁶

Article 21 of the Indian Constitution guarantees to all the Right to life,³⁷ which is one of the most expansive, liberal, and widely interpreted provision of this grundnorm. Innumerable rights, central to one's existence enumerate from this very article. Ancillary rights such as – Right to health³⁸, Human Dignity³⁹, Privacy⁴⁰, Reproductive Health⁴¹, and the Right to Body⁴² have been identified and explicitly admitted under the wider

³⁴ The Constitution of India, 1950, Part III.

³⁵ Amanda Gouws and Azille Coe, *Women's Movements and Feminist Activism*, 33 EWGE 1 (2019).

³⁶ COUNCIL OF EUROPE, *Feminism and Women's Rights Movements*, available at - <https://www.coe.int/en/web/gender-matters/feminism-and-women-s-rights-movements> (last visited Jul. 21, 2025).

³⁷ The Constitution of India, Article 21.

³⁸ *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802.

³⁹ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

⁴⁰ *Justice K. S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors.*, (2017) 10 SCC 1.

⁴¹ *XYZ and Anr. v UOI through its Minister of Health and Family Welfare and Ors.*, Bom HC.

⁴² *Supra* note 38.

right to life. These rights, coupled with the proposition of the availability of equal rights to women, lead us to the fact that women are an equal asset of the society and are very much entitled to these privileges conferred upon her by the law. She is in no way inferior to her male counterparts.

VI

Reproductive Rights and Reproductive Justice

The hon'ble supreme court of the United States recognised the right to abortion in the landmark judgement of *Roe v. Wade*.⁴³ From such a recognition, emanated ancillary concepts such as – Reproductive Justice, Decisional Autonomy, and Right to Choice. Coined during the Black Women's movement in 1994, 'Reproductive Justice' is the aggregation of independent rights which govern women in controlling their sexuality, work, and reproduction⁴⁴. 'Decisional Autonomy' in the simplest of terms is the liberty of a person in regulating her choices. The right to choice, in the context of this paper deals with the liberty granted to a woman to decide whether she wants to continue with her pregnancy or not.

Pregnancy, if desired, is a beautiful process. Nothing compares to the joy of bringing new life into the world. However, conceiving unexpectedly can be very traumatic and harsh, especially for the lady bearing the foetus. The prenatal stage of pregnancy is one of physical and emotional turmoil. No one but only the woman going through the pain can understand what she goes through. Perhaps, the least one can do for her at this time is to give her complete freedom to have unquestioned autonomy over her body including the right to decide if she wants to terminate the pregnancy or not.

The common masses, in times of distress, see the judicial chair as the last ray of hope. There stems faith in the seat from the legitimate expectation of being delivered justice. The Indian judiciary, has also tried its best in fulfilling their role as the beacon of hope and the flag bearer of change. Justice Chandrachud's statement set out in the very beginning is an excerpt from a 2022 Supreme Court case⁴⁵ and is reflective of the progressive attitude of the judiciary. Marking a significant milestone in the Indian judicial history, the ratio decidendi of the case was appreciated by feminists across the globe. Not only did it settle the unanswered question of abortion rights of unmarried women, but also was it prompt in adopting a forward approach in recognising the right

⁴³ *Roe v. Wade*, 410 U.S. 113 (1973).

⁴⁴ IN OUR OWN VOICE: NATIONAL BLACK WOMEN'S REPRODUCTIVE JUSTICE AGENDA, *Reproductive Justice*, available at [s://blackrj.org/our-causes/reproductive-justice/](https://blackrj.org/our-causes/reproductive-justice/) (last visited Jan. 25, 2025).

⁴⁵ *Supra* note 2.

to decisional autonomy of a woman. It was the same case where the court infamously quoted that –

*'The decision to give birth to and raise a child is formed by one's material circumstances, which includes the situational, social and financial circumstances of a woman and her family and each of these is relevant to her decision to carry the pregnancy to term.'*⁴⁶

Neither is *Shiva* complete without *Shakti*, nor is the latter complete without the former.⁴⁷ The world runs with the correct balance of a masculine and feminine energy. An imbalance between the forces would disturb the entire society. Suppression of either group out of the two is undesirable. Each human being, whether a male, female, or a member belonging to the LGBTQ community, is entitled to equal rights.⁴⁸ Depriving someone of the basic necessities of life only because of the fact that they belong to a particular sex is outrightly unjust and unfair.⁴⁹

The Feminist discourse is not new to the society.⁵⁰ The world has been a witness to a continuous fight for rights.⁵¹ Time goes by but the fight stands. Feminists have had to put up a fight for even 'achieving' basic necessities. The protests have ranged from being a fight for suffrage to a fight to have equal pay.⁵² However, there is no sound reason that could justify this male-female divide.⁵³ Philosophers like Mill have argued a lack of empirical basis to the hypothesis of women's inferior positioning in society.⁵⁴ Though there is no denial of the biological differences between the sexes, it is not correct to deduce that the social ranks should be decided on the basis of muscularity or the ability of performing strenuous exercises by one of the sexes.

⁴⁶ *Supra* note 2.

⁴⁷ Shivashtakam.

⁴⁸ *National Legal Services Authority v. Union of India* (2014) 5 SCC 438.

⁴⁹ Charlo Bunch, *Women's Rights as Human Rights: Toward a Re-Vision of Human* 12 HUM. RTS. Q. 486.

⁵⁰ Sushila Ramaswamy, *Feminist Discourse*, THE STATESMAN (Jan. 18, 2022) available at: <https://www.thestatesman.com/opinion/feminist-discourse-1503039263.html> (last visited Jul. 19, 2025).

⁵¹ Human Rights Watch, *WORLD REPORT* (2023) available at: <https://www.hrw.org/world-report/2023> (last visited Jul. 19, 2025).

⁵² UNITED NATIONS WOMEN, *Never Backing Down: Women March Forward for Equal Rights* (Feb. 25, 2025) available at: <https://www.unwomen.org/en/articles/timeline/never-backing-down-women-march-forward-for-equal-rights#:~:text=For%20centuries%2C%20women%20have%20fought,fulfil%20the%20pledge%20for%20equality> (last visited Jul. 19, 2025).

⁵³ HAMILTON, *Gender Equality in the Classroom*, available at: <https://academic.oup.com/book/12441/chapter/162071459> (Jul. 21, 2025).

⁵⁴ THE GREAT THINKERS, *John Stuart Mill*, available at: <https://thegreatthinkers.org/mill/introduction/> (last visited Jun. 4, 2025).

Vandana Shiva⁵⁵, a prominent eco-feminist has drawn parallels between females and nature while referring to the harsh patriarchal systems of the society. Her environmentalist movements, like the *Chipko Andolan*⁵⁶ highlight how a woman can not only stand up for her own cause but also for the society.

Today, we have come a long way from the society which restricted even education to women. The society, which believed that literacy was not needed for women when all she had to do was to be in the kitchen. But in a time where philosophy was considered to be solely a subject of men, Gabrielle Suchon, a female philosopher, wrote texts for the audience of her own sex.⁵⁷

However, the point here is not a discussion of different ideologies, ideas, female figures, or the fact that women were denied even basic amenities in the past. Rather, it is to develop a thought process where we trace the growth of feminine perspectives. It hasn't been a smooth ride. However, we have sort of got the knack. Females have been somewhat successful in winning legal equality (on paper at least), even though the ground reality tells a different tale.⁵⁸

The 20th and 21st centuries saw the dawn of a new era. Women were better off than their past selves. They could vote, they could act as bread winners, they could do anything a man could do. But the morning sunshine lost shimmer when personal reproductive autonomy was denied to the woman who is the nurturer of the human body. Even though the developed society was prompt to recognise the need to treat women at par with her male counterparts in the professional sphere, the social sphere lacked speed. Women today are still asking for rights which recognise her bodily autonomy and dignity. The very fact that we still are in the middle of a discourse on women rights is indicative of how far do we lag behind.

Reproductive rights in general and abortion rights in particular are still not available in liberal democratic countries, let alone the developing and underdeveloped ones.

⁵⁵ Hannah Elis-Petersen, *Fighting giants: eco-activist Vandana Shiva on her battles against GM multinationals*, THE GUARDIAN (Apr. 28, 2023) available at:

<https://www.theguardian.com/global-development/2023/apr/28/fighting-giants-eco-activist-vandana-shiva-on-her-battle-against-gm-multinationals> (last visited Jun. 05, 2025).

⁵⁶ INDIA TODAY, *Environmentalist Vandana Shiva on Chipko movement* (Dec. 26, 2011) available at: <https://www.indiatoday.in/magazine/cover-story/story/20111226-india-today-35-anniversary-big-ideas-environmental-awareness-vandana-shiva-750046-2011-12-16> (last visited Jun. 05, 2025).

⁵⁷ HISTORY OF WOMEN PHILOSOPHERS AND SCIENTISTS, *Gabrielle Suchon*, available at: <https://historyofwomenphilosophers.org/project/directory-of-women-philosophers/suchon-gabrielle-1632-1703/> (last visited Jun. 06, 2025).

⁵⁸ NATIONAL WOMENS HISTORY ALLIANCE, *Living the Legacy: The Women's Rights Movement (1848-1998)*, available at: <https://nationalwomenshistoryalliance.org/history-of-the-womens-rights-movement/> (last visited Jul. 19, 2025).

Andorra and Malta (Europe), and El Salvador, Honduras (Central America) still adopt very narrow approaches while adjudicating upon this important issue⁵⁹; and sadly, they are not the only ones in the list. This comes as a shocker to the world when these countries are taken to be at the forefront in terms of development and liberty. The established position of these countries as being very open-minded countries has suffered a major setback in the recent times.

The phrase 'man is sovereign' has taken a literal meaning. It seems that 'man' here is only used for the male populace of the world and not its other counterpart. A woman's sovereignty reduces to a big question mark, while the man enjoys the full advantage of the exclamation marks and full stops.

A liberal approach in India, in this context, comes as a surprise. Still considered as a developing country with huge gender disparity, it was expected of India to be backward in terms of granting women autonomy. However, it has proved to be the opposite. Even though females lack certain other rights in the country, they are completely free to decide upon what suits their body the best. If she feels that her body is not ready to carry a baby, she can legally go for an abortion. Progressive decisions by High Courts and Supreme Court act as a ray of hope to the world where there exists a belief that such decisions might influence the international community and governments to legally recognise a woman's right to bodily autonomy.

While the international arena is still full of news explaining the sorry state of affairs of women in terms of autonomy, the Indian newspapers abound with hopeful slogans. The Supreme Court of India, in 2022 brought at par married and unmarried females while deciding on safe abortions.⁶⁰ It was quick to bring within the ambit of personal rights, the reproductive autonomy of a woman. This is in a strong contrast to a US Case where the already established constitutional right to abortion was taken away.⁶¹

⁵⁹ LIVEMINT, *Abortion laws around the world* (Jun. 24, 2022) available at: <https://www.livemint.com/news/world/abortion-laws-around-the-world-11656088710521.html> (last visited Jun. 06, 2025).

⁶⁰ Sudipta Das, *Explained\ How has the Supreme Court expanded abortion rights?*, THE HINDU, (Oct. 05, 2022) available at <https://www.thehindu.com/sci-tech/health/explained-how-has-the-supreme-court-expanded-abortion-rights/article65960016.ece> (last visited Jun. 06, 2025).

⁶¹ *Dobbs v. Jackson Women's Health Organization*, U. S. 1 (2022).

VII

Conclusion

A practical approach forces us to think about the ground realities. Even if the court has adopted a progressive approach, are the people at the receiving end really ready? Can the regressive patriarchal principles digest a subservient value in stakeholder-ship? Are the so-called independent women really free from all the pressures that come from social stigma? Not one of these hypotheses can be answered in an absolute positive. Such a sorry state of affairs requires affirmative action and a sound legal backing. Awareness campaigns follow. Females still lack knowledge on basic subjects like sex education and their fundamental rights. How does one expect them to step over the boundary of restrictions if they do not know that they can. Stories paint rosy pictures but groundwork poke the harsh thorns that come along those flowers. The medical personnel need to be trained to make sure that they have ample reach among the masses who still 'expect' women to procreate⁶².

The intersection of two disadvantageous positions for a woman becomes all the more difficult. A financially weak woman belonging to a socially lower caste would find it impossible to approach a doctor for such a process. Abortion for unaware women would not be a distant dream but a sin. This is not because such facilities are not affordable, but because they have been socially conditioned to be nurtures. They were always prepared to be good mothers. Realistically speaking, such mindset is very difficult to change. Because not only are these ladies raised like this, but because, their world is now limited to their families.

Potential solutions at this point can be well drafted policies or legislations which comprehensively deal with the women's rights and address the loopholes left behind in present legislations. An active collaboration of medical and legal professionals would create a desirable environment where facilities are accessible and affordable. An ideal situation will be where abortion rights protect a woman's bodily autonomy, while maintaining a balance with the opinion of her significant half.

Concluding whatever has been put down in the text and analysing the past and present of the feminist landscape, we can picture a hopeful scenario. While the Indian judicial and executive branches have recognised the reproductive rights of a woman, countries still struggle with anti-social elements who have an orthodox and rigid outlook towards the ancient patriarchal struggles. Feminist history has faced multiple challenges. With the evolving social landscape, there arises a need to bring about contemporary change in the existing legal framework too. The judiciary cannot be solely responsible to act as the flag bearer of change. The parliament should also step in to draft potential policies

⁶² Stancy Mariya Mark, *Commercial Surrogacy with Special Reference to Capabilities Approach* 3 GJS 71 (2021).

and statutes which aid the pace of change. Concrete steps in terms of precisely worded legislations and well-drafted policies would help in avoiding ambiguities which trail behind every issue. A clear-cut division of rules would act as a benchmark to determine the extent of stakeholder-ship of each of the spouses. Not only would it remove any potentialities for conflict but also define the possibility of inherent biases of the court in corrupting the judgment.

Right to life and personal liberty enshrined in Article 21 of the Indian Constitution covers a woman's right to make informed reproductive choices. In no way can we undermine her fundamental right on the pretext of prevailing patriarchal principles.

According to multiple reports and surveys, India lacks any solid legislation to back the sole consent of a woman who does not want to continue with the pregnancy owing to her mental health.⁶³ Even though the MTP Act talks of the final consent of the mother, it is not always the case practically. Social factors have a heavy influence on her say. The Indian jurists have now come to recognise such opinion.⁶⁴

There is nothing completely black or grey, we still hang somewhere in the grey where one stance is not reached at. The courts have tried to adopt a forward approach, but the patriarchal society is on a regressive stand. What needs to be achieved is a balance between these two strong forces so that the main stakeholders, i.e. the women, are at peace.

⁶³ Harish Kalra *et. al.*, *National policies and programs for perinatal mental health in India: A systematic review*, 91 AJP.

⁶⁴ *Pregnant person's consent, physical and mental health in decisions of reproductive autonomy and termination of pregnancy is paramount: Supreme Court*, SCC ONLINE (May 8, 2024) available at: <https://www.sconline.com/blog/post/2024/05/08/pregnant-person-consent-physical-mental-health-decisions-reproductive-autonomy-termination-pregnancy-paramount-supreme-court/> (last visited Dec. 30, 2024); See also *X v. State (NCT of Delhi)*, 2023 9 SCC 433.