India’s Push-and-Pull on Reproductive Rights

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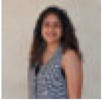

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This article belongs to the debate » Indian Constitutionalism in the Last Decade

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For a piece mapping India’s push-and-pull on reproductive rights – the expanse of its protection and the edges it comes up against – history is a good place to start. Rights in the reproductive sphere are relatively new to India. While India enacted a seemingly liberal abortion legislation as early as 1971, concerns about women’s rights were hardly the drivers behind it. Rather, the Medical Termination of Pregnancy Act, 1971 (MTPA) was motivated by fears about population growth in India and part of a host of measures (including forcible sterilisation) targeted at reducing the population growth rate. Women’s bodies were thus, at least partially, a means to achieve the State’s end of population control. To the extent that women’s own concerns were part of the assessment, the State was alarmed at the number of women who died trying to access abortion from backstreet providers. Legalisation of abortion in India was, thus, also motivated by concerns about preserving the lives of women. Yet, here too, rights were not the frame used. Rather than centering women as competent decision-makers whose reproductive decisions ought to be respected and enabled, including by providing access to safe abortions, the State benevolently stepped in to protect women from unscrupulous medical providers. Underlying this measure was, thus, a discernable protectionist intent, difficult to justify if women were truly seen as rights-holders.

The early 90s saw a shift in the international imagination of reproductive rights. For the first time, at the International Conference of Population Development (ICPD) in 1994, the global community vowed to move away from prioritising State interests to guaranteeing women’s rights in the reproductive sphere. Post the ICPD, rights language on reproduction rippled through domestic contexts. Its arrival in India took 15 years. It was only in 2009 that the Indian Supreme Court, in *Suchitra Srivastava*, issued a landmark declaration: “a woman’s right to make reproductive choices is a dimension of personal liberty…under Article 21 of the Constitution of India…reproductive choices can be exercised to procreate as well as to abstain from procreating”. Drawing on the rights to “privacy, dignity and bodily integrity”, the Court recognised a disabled pregnant woman’s reproductive right to resist being forced to abort her pregnancy. Parallelly, the Delhi High Court decided *Laxmi Mandal*, the first case in the world to hold that maternal mortality is a violation of human rights. Assuming landmark status in the years to come, the High Court affirmed that the “inalienable survival rights” under Article 21 include the “reproductive rights of the mother”.

The Law's Expanse

Suchitra Srivastava and *Laxmi Mandal* formed the bedrock of India's reproductive rights jurisprudence. From the nascent, bare-bones recognition in these cases, the state of the law has now flourished. The last decade has seen advancements in the constitutional underpinning of reproductive rights, their scope, the duties they impose on States and their role in shaping statutory interpretation.

The privacy right at the heart of reproductive rights has evolved. From facial references to privacy in *Suchitra Srivastava*, the Supreme Court in *Puttaswamy* developed privacy as decisional autonomy, protecting for the individual a "zone of choice and self-determination" and recognising the ability of each individual to "make choices…governing matters intimate and personal" including "whether to bear a child or abort her pregnancy", a "crucial aspect of personhood". This is a significant advancement. Privacy has been critiqued by feminist scholars for shielding coercive and exploitative private spaces (like the home, family and marriage) from State intervention. The right to privacy, for MacKinnon, is thus simply an "injury got up as a gift" for women. In rejecting privacy as a "spatial" construct because it serves as a "veneer for patriarchal domination and abuse of women", the Indian Supreme Court instead embraced privacy as the right "to exercise intimate personal choices and control over the vital aspects of their body and life". Endorsing this foundational shift, other cases have affirmed women's "exclusive and inalienable" choice about "whether or not to get pregnant, and if pregnant whether to retain the pregnancy and to deliver the child", a choice that "she, and she alone, can make".

In a second major development, the body has found its place within constitutional accounts of reproductive rights in India. The recognition exists not only at the level of protecting the right to "bodily autonomy": A "Woman owns her body and has [a] right over it…and [the] woman alone should be the choice maker". It is also driven by a keen appreciation of the bodily burdens of an unwanted pregnancy, a facet that is typically ignored and treated as routine, something all pregnant persons go through:

> **The consequences of an unwanted pregnancy on a woman's body…cannot be understated**. The foetus relies on the pregnant woman's body for sustenance and nourishment until it is born. The biological process of pregnancy transforms the woman's body to permit this. The woman may experience swelling, body ache, contractions, morning sickness, and restricted mobility, to name a few of a host of side effects. Further, complications may arise which pose a risk to the life of the woman.

Third, the right to equality and non-discrimination has gradually become part of the constitutional framing of reproductive rights in India. Privacy and equality play two distinct roles in underpinning reproductive rights. While privacy recognises that reproductive decision-making is intimate, a reflection of *individual* identity, equality foregrounds that members of certain disadvantaged groups have been (and are being) denied reproductive

rights because of their *group* identity. For a long time, "[Indian] courts primarily addressed [reproductive] rights as a matter of life and personal liberty", failing to "robustly address [it] as an issue of equality and non-discrimination". A shift, however small, is visible in *Devika Biswas*, where the Supreme Court condemned State policies compelling women from marginalised groups to undergo sterilisation as mirroring prevalent "systemic discrimination" and impacting the "reproductive freedoms of the most vulnerable groups of society". Going further, the Supreme Court in *X v NCT* affirmed that reproduction is not just "biological" – as "physical bodies reproduce" – but also "political", with the decision to reproduce being bound to broader social structures: "[a] woman's role and status in family, and society generally, is often tied to childbearing and ensuring the continuation of successive generations". Here, the Court showed a keener appreciation of the role of group membership in mediating access to, and denial of, reproductive rights, characteristic of an equality-framing. While there is a long way to go to fully develop this framing, the beginnings are evident and deserve appreciation.

Equality's introduction ushered in a fourth concrete dimension within constitutional reproductive rights in India: the emerging focus on marginalised groups. *Snehalatha Singh* is an excellent example. Shocked by "poor, shabby and inadequate" public healthcare institutions in Uttar Pradesh, the Allahabad High Court remarked: this "negligence and apathy" simply proves that at the highest level of State "nobody is sensitive enough to look into the plight of poor, needy, infirm and sick people for whose benefit State medical services are run". The Court, in turn, held the State to account to fill vacancies, supply medicines, guarantee infrastructure, and prepare an Action Plan so that "quality medical treatment is available to poor people in the same manner as it is available to resourceful high officials and rich people, and people may not suffer in the matter of medical care merely on account of their poverty". Similarly, in *X v NCT,* recognising the heightened vulnerability of pregnancy outside marriage, especially in a context where pre-marital sex is a social taboo, the Supreme Court extended the reach of India's abortion legislation to unmarried pregnant women.

As a fifth facet, constitutional reproductive rights in India require positive duties of the State to "remove obstacles for an autonomous shaping of individual identities", with the Supreme Court acknowledging that it is "meaningless to speak of" negative duties "in the absence of" positive duties, thus mandating that the State "undertake active steps to help increase access to healthcare (including reproductive healthcare such as abortion)". Once again, this interpretation responds well to feminist concerns about common pitfalls of the privacy right, which typically requires State non-intervention alone, of limited use to members of marginalised groups who often require State action to meaningfully access rights.

Finally, expanding conceptions of reproductive rights have, in turn, enabled expansive readings of the MTPA, with rights serving as tools to push interpretations of the MTPA beyond the literal. Take the example of Section 5 of the MTPA, which allows abortions outside of gestational limits if termination of pregnancy is "immediately necessary" to save the "life" of the pregnant woman. Initially, "life" was interpreted literally, to mean avoiding

death, with abortions being granted when women would die without them. However, with expanding reproductive rights, “life” took a wider meaning, bringing within its ambit cases of harm to physical and mental health. This interpretative shift was driven by reasoning that “life” under the Constitution is not restricted to “animal existence or mere survival”: “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 fulfilment of life [is] as much within the protection of the guarantee of life”. The increasing instances of judicial expansion of the MTPA, in turn, motivated its legislative amendment in 2021, widening the grounds on which abortion can be accessed and extending relevant timelines. Of course, the statutory framework still has significant limitations, especially in its prominent focus on medical professionals as primary decision-makers. Yet, the role of constitutional reproductive rights in prompting the law’s evolution so far is noteworthy.

The Law’s Edges

In spite of these gains, all is not well (as it never is). Of late, a distinct judicial trend of preserving the State’s interest in potential foetal life is emerging. In the landmark *Suchitra Srivastava*, citing the US Supreme Court in *Roe v Wade*, the Indian Supreme Court held that the State has a “compelling interest” in protecting the “prospective child”, placing “reasonable restrictions” on the reproductive rights of the woman. However, unlike the US, where the foetus has always occupied a prominent position in the abortion debate, the foetus has largely been absent from legal and public discourse on abortion in India. In the 1971 legislative assembly debates on the MTPA, only two members of the Parliament objected to liberalising abortion on the grounds of threats to foetal life. Yet, the Act was passed, and the objections were set aside, affirming that “there is no violation of [the right to life] in ***any*** manner”.

Despite this history, the foetal figure is growing in importance within constitutional accounts of reproductive rights in India. While some High Courts have held that the foetus does not possess a constitutional right to life, others have simply deflected this question by focusing on the woman’s right to life. Yet others have held that post-viability, the “potential child” becomes a part of the determination, with the “right to life of the foetus” outweighing the “mental trauma” of the mother, and one court has rejected a termination request at 20 weeks on hearing “the voice of the unheard foetus…a human being which too is alive, though yet to be born” (this decision was later set aside). In 2022, a petition was filed before the Supreme Court claiming that India’s abortion law authorises “foeticide”. In 2023, the Supreme Court disallowed an abortion at 26 weeks, refusing to exercise its power to do “complete justice” because it could not “stop the [foetal] heartbeat”. In 2024, despite the Delhi High Court allowing abortion, the doctors refused, claiming that it was “foeticide”.

At this stage, it is hard to deny the foetus' presence as a prominent edge reproductive rights in India routinely come up against. While it may have been marginal previously, with this development possibly reflecting tensions within abortion law globally, the foetal figure in India is no longer a shadow, lurking in the background. It is, rather, an entity with a rapidly evolving form, and if global trends are even minimally indicative, a force that can drastically alter the constitutional guarantee of reproductive rights.

In this context, protecting reproductive rights requires careful legal and constitutional engagement with foetal interests, starting with whether they are, at all, a legitimate aim for the State to pursue. Even if they are, taking foetal interests into account need not mean the annihilation of women's reproductive rights. As recent South Korean and Colombian examples remind us, even if the State were to persevere in protecting the foetus, restricting abortion is both ineffective and unnecessary to achieve the aim. Foetal interests are better preserved through State policies which support women in their pregnancies, including ensuring comprehensive sex education, access to temporary contraception, clamping down on violence against women, and providing forms of childcare support, reducing the overall rate of abortions.

Reproductive rights in India are, then, at a moment of serious reckoning, set against a global climate of fraught contestation around laws regulating reproduction. The path India takes will determine if, as the Supreme Court promised in 2022, women actually have access to the full "constellation of freedoms and entitlements" enabling them to "decide freely on all matters relating to [their] sexual and reproductive health".

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