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When Voices for the 'Unborn Child' Silence Women

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A set of recent judgements has eroded the pro-choice stance of Indian courts. The shrinking of access to abortion puts into jeopardy women's right to life and dignity.

In October 2023, the Supreme Court of India was faced with a case that would over the weeks lead to a significant upending of the right to an abortion.

A mother of two wished to terminate her pregnancy at 26 weeks, citing extreme socio-economic hardship and distress as well as psychological effects of undergoing another pregnancy. The bench of Justices Hima Kohli and B.V. Nagarathna initially granted "the right of a woman over her body," emphasising decisional and reproductive autonomy.

The following week, this reasoning was overshadowed. The bench delivered a split verdict in the matter of the right of the woman as opposed to the right of the 'child' due to foetal viability upon birth in the process of conducting the abortion.

This split led to a 3-judge bench headed by the Chief Justice D.Y. Chandrachud and comprising Justices J.B. Pardiwala and Manoj Misra, which dealt with the procedure of the abortion itself: stopping the foetal heartbeat, or proceeding with a premature delivery that would most likely leave the child with significant mental and physical difficulties.

> The option of giving the child up for adoption is seen by the court as 'freeing' her from the responsibilities of caring for her child, while protecting the right to life of the child itself. This decision can only be enforced through the surveillance of pregnant women.

The choice was far from easy to make, no doubt, but the question of how the abortion was to be conducted was inexplicably translated into whether the abortion should be conducted at all. The protection of the rights of the unborn child were at the core of these oral deliberations. The Chief Justice is quoted to have remarked,

"We must also think of the right of the unborn child. Woman's autonomy is important of course. She has a right under Article 21 [...] but equally, we must be conscious of the fact that whatever is done will affect the right of the unborn child. *Who is appearing for the unborn child?* [...] How do you balance the rights of the unborn child? It's a living viable foetus. Today its chances of survival are there but very likely that child would be born with deformities." (Emphasis added)

Despite the petitioner refusing a suggestion she carry the foetus for a few more weeks to lessen the risk of deformities, the Supreme Court expressed aversion to still the foetal heartbeat and did not permit the termination. It asked that the All India Institute of Medical Sciences assist with the delivery at the appropriate time, all costs paid, with the option for assistance in case she wished to give the child up for adoption.

The rights of the unborn child

Rulings such as these conflate a woman's unwillingness *to bear a child at a particular moment*, with not wanting a child at all. The former specifically addresses the woman's refusal of pregnancy, consciously opting to stop it once detected, instead. The latter approach assumes that it is child-rearing that is burdensome to women, and unproblematically denies them agency in decisions regarding bodily autonomy. The act of carrying the foetus, and the experience of gestation is unilaterally disregarded by the court resulting in the denial of an abortion.

The primacy of the rights of the unborn child over that of the pregnant woman is also apparent in the expectation to ensure the survival of the viable foetus in the process of detachment.

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Legal abortion procedures are often accepted and defined on the touchstone of safety: the safety of the procedure itself. They also consider the requirement to save the life of the pregnant woman, and the impact on the pregnant woman undergoing the abortion, in protecting her right to health, dignity and life.

It is a fact that the body is used in significant ways in the process of detaching the foetus, like it is in the decision to induce labour or have a C-section, but this is also why the method by which the abortion is conducted is equally important for considerations of reproductive autonomy and mental and physical well-being (Hine 2021). Women seeking abortion do so having weighed the tolls of gestation and childbirth on themselves.

The option of giving the child up for adoption is seen by the court as 'freeing' her from the responsibilities of caring for her child, while protecting the right to life of the child itself. This decision can only be enforced through the surveillance of pregnant women, drawing from an interest in the protection of the rights of the unborn child who suffers the consequence of standing unrepresented before the court.

The viable foetus

Legal scholars in the West have argued that the right to an abortion is essential for equal citizenship, and restrictions on this right inadvertently draw from notions of women as mothers first, instead of their position as individual citizens (Siegel 2005). Forcing a woman to undergo a pregnancy, by this argument, violates principles of equal citizenship. A commitment to reproductive justice, in its most basic iteration, protects decisional autonomy as a commitment to core values which comprise of the decision to have a child, not to have a child, and the right to parent children in safe, healthy and sustainable environments. It thus encompasses not just the decision on whether or not to carry a pregnancy to term, but the circumstances after birth.

While these philosophical commitments inform our own understanding of abortion rights as women, the recent trend in court rulings on abortion rights force us to contend with a subversion of justice with wide-ranging implications, not limited to reproductive justice. Foetal viability and thus 'life' becomes a much debated ethical, legal, and political term, pushing us to examine its premises.

> Making distinctions between the right to life and pro-life are important even in the Indian case, where conflating them allows for a language of divestment of women's rights, in the deliberation on a law which requires judicial and legislative reconsideration.

The ethical issue of foetal viability and how it is determined has been a point of intense political and scientific debate across geographies, because the possibility of viability does not exist in isolation, nor does it provide a determinative cut-off point that ensures survival, an issue most notably dealt with in the United States, but also elsewhere.

Consequently, the need to ensure the 'survival' of the foetus is being re-constituted constantly, precisely because this term itself is not concretely defined, and is dependent upon the availability of resources and equipment.

This results in the (skewed) balancing of the rights of the unborn child, with that of the pregnant woman, the latter always subordinated to the former, especially in cases where making it more optimally viable (and enhancing chance of survival), would benefit from further gestation. This is offered to the pregnant woman as a compromise (adoption upon birth), that simultaneously emphasises on her duty as a mother.

Reversing the precedent

The legal framework for abortion in India was established by family planning and population control measures in the 1960s and 70s. The Medical Termination of Pregnancy (MTP) Act 1971 provided a legal framework of exception to Section 312 of the Indian Penal Code of 1860, which criminalises the act of 'causing miscarriage' except to save the life of the woman. To note is that the act did not decriminalise abortion or stem from a concern for women's rights (Menon 1995). It had state imperatives and the interests of medical practitioners as its focus.

Over the years, the MTP Act was amended in light of advancements in methods of abortion, once in 2002 and then most recently, in 2021. The MTP (Amendment) Act 2021, which came into effect in September 2021, allows for abortions to be conducted up to 24 weeks, an extension of the earlier gestational limit of 20 weeks. While this 'liberalisation' did not permit abortions on demand, it was still a step forward in abortion permissibility.

Judicial pronouncements are shaped by the fact that the legality of abortion in India has little to do with the protection of women's rights and vests the power of final decision making in medical practitioners. Jurisprudential deliberation sit at the centre of this conundrum, pushing the question of citizenship into focus, pitting the rights of the unborn child, against the rights of the woman seeking an abortion. Paradoxically, however, this does not stand in the way of comparisons by Indian courts with crackdowns on these very same rights in the West, in discussions on making 'safe abortion' available and accessible.

> We need to move away from discussing the fact of unwanted pregnancies in the language of morality and instead address limitations, and inequity within a more holistic understanding of the right to live...

The October judgement of the Supreme Court has led to multiple decisions, operating on a similar template to deny abortions to women seeking them by invoking the health and well-being of the unborn child. The textures of the pro-choice stance of the courts in the past have undergone a drastic change in these cases, and in fact morphed into pro-life stances putting the very subject of the right to life and dignity in jeopardy.

In January 2024 a Supreme Court bench headed by Justice Bela Trivedi stated that the foetus "is a full-fledged, normal-bodied child" which could be given up for adoption after delivery if the mother so wished. Quick on the heels of this denial, the Delhi High Court refused to allow an unmarried woman to terminate a 28-week pregnancy, stating that "foeticide" cannot be permitted, consequently according it a specific (political) language.

This consideration of the rights of the unborn child is not entirely new in Indian jurisprudence. Even so, the recent trend in quick denials citing the rights of the unborn child most directly affects a right to privacy and bodily autonomy of pregnant women. Denying the right to a safe abortion, with medical practitioners and judges as ultimate arbiters of reproductive destinies, only further alienates women from their right to equal citizenship and reproductive justice.

Positions on abortions worldwide are informed by the particular history and politics of identity in respective countries. In Poland, Holc (2004: 771) argues that these claims behalf of the unborn child are often made in terms of the character of the foetus as a 'citizen-of-the-future' in emphasising its legal capacity, as one who is unable to 'actualise his or her free capacity as an agent,. In the United States, the contentions around foetal personhood and state abortion bans, have led to further restrictions in accessing reproductive healthcare more recently, where the Alabama Supreme Court held that frozen embryos are children and legal persons.

Is there possibly a normative religious claim underlying such a deliberative exercise in India? While religious claims are not the norm in abortion jurisprudence in India, there are instances where courts have invoked religious moorings in articulating 'life', most notably in *Dr Jacob George vs. State of Kerala* (1994), which emphasised life by and under God, thus making abortion morally impermissible and further stigmatising it. Making distinctions between the right to life and pro-life are important even in the Indian case, where conflating them allows for a language of divestment of women's rights, in the deliberation on a law which requires judicial and legislative reconsideration.

Concluding remarks

Foregrounding the intersection and entrenchment of multiple vulnerabilities and rights denials through an analysis of judicial discourse becomes necessary in thinking about questions of transformative empowerment (Tella 2022). This is especially urgent when assertions for the protection of foetal rights and issues of viability are now regularly discussed in the courtroom, with an increased visibility and frequency.

During the marriage equality hearings, Chief Justice Chandrachud expressed his reservation regarding the mention by a counsel of the US Supreme Court's striking down of abortion rights in that country. In India, he said, "we are far beyond it, and fortunately so."

> Rights frameworks are now in a quick downward spiral of judgements and orders that read down women's rights to bodily integrity and autonomy, subordinating them to the "rights" of the foetus that a woman carries.

Yet, the series of orders on the matter of abortion rights for women in the past few months only cast further doubts on the shifts in the status of women in India, where institutional patriarchal control over reproductive capacity is further entrenched. We need to move away from discussing the fact of unwanted pregnancies in the language of morality and instead address limitations, and inequity within a more holistic understanding of the right to live, as including constitutional protections for reproductive rights and the right to reproductive justice.

The right to a safe abortion is most necessary for marginalised and socio-economically disadvantaged peoples. Judicial callisthenics on the matter of 'rights' of the unborn child and its broader implications, must be critiqued. For what we witness now is a steady unravelling of rights frameworks that had until recently, shown an encouraging trend in the protection of reproductive rights.

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