

**INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES**
[ISSN 2581-5369]

Volume 9 | Issue 5

2026

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Judicial Perception on Reproductive Rights: Woman Centric or Fetal Protective

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ABSTRACT

A woman's reproductive rights encompass a comprehensive framework of legal and ethical principles that affirm individual autonomy over reproductive decisions. The multifaceted nature of these rights is evident in their inclusion of positive as well as negative entitlements. On one side, reproductive rights secure a woman's right to conceive or not to conceive, including decisions on birth control methods, such as undergoing sterilization procedures, to prevent pregnancy. This right is recognized as absolute within the ambit of individual liberty and bodily integrity, and may be described as the reproductive or decisional autonomy of the woman, recognized by legislation and the judiciary even where societal perception differs. Indian courts have recognized the procreative freedom of women, emphasizing access to safe medical support for terminating unwanted pregnancies beyond the permissible gestation period and bringing it within the 'right to life'. The judiciary's protection of the rights of mothers over the fetus, within the shield of personal liberty, is established through a series of decisions. Changing judicial trends, however, show that the judiciary is now empathetic towards the life inside the mother, especially once it crosses twenty-four weeks of gestation, and recent judicial decisions underscore this changing attitude. The paper examines the judicial approach adopted in India to harmonize the reproductive rights of women without impairing the 'right to life' of the unborn.

Keywords: Reproductive rights, ultimate decision maker, rights of fetus, judicial conscience

I. INTRODUCTION

“Of course, the autonomy of the mother triumphs, but here nobody is appearing for the child. How do we balance the rights of the child?”¹

– Chief Justice D.Y. Chandrachud, Supreme Court of India, hearing in *X v. Union of India* (12 October 2023)

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¹ Ashish Kumar Bhargava, *Unborn Child's Rights vs Mother's Choice: Chief Justice's Key Question*, NDTV (Oct. 12, 2023), <https://www.ndtv.com/india-news/chief-justice-of-india-dy-chandrachud-supreme-court-unborn-childrens-rights-vs-mothers-choice-chief-justices-key-question-4474952> (last visited May 4, 2026) (reporting the oral observations of Chandrachud, C.J., at the hearing of *X v. Union of India*, W.P. (C) No. 1137 of 2023 (India), on Oct. 12, 2023).

The right to health, the foremost among all rights, is enshrined in several international and national legal instruments, including the International Covenant on Economic, Social and Cultural Rights, 1966 (“ICESCR”). Article 12(1) of the ICESCR reads: “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”² The ‘right to health’ embodies both freedoms and entitlements. The freedoms include control over one’s health and body, encompassing sexual and reproductive choice, as well as protection from interference in the form of torture, non-consensual medical treatment and experimentation.³

Reproductive justice is a basic right to which every individual is entitled. The definition of reproductive health agreed upon by the World Health Organization (“WHO”) in its first global strategy on reproductive health, adopted by the Fifty-seventh World Health Assembly in May 2004, also encompassed sexual health.⁴

WHO defines sexual health as “a state of physical, emotional, mental and social well-being in relation to sexuality; it is not merely the absence of disease, dysfunction or infirmity.”⁵ For sexual health to be attained and maintained, the sexual rights of every individual must be respected, protected and fulfilled. WHO has also placed sexual rights within human rights, and these rights are recognized in both national and international human rights documents, as well as in many other related documents. Sexual rights comprise an individual’s right to the highest possible level of health in relation to sexuality, free from bias, discrimination and violence. They encompass sexual independence and reproductive discretion, along with the right to seek, receive and share information related to sexuality and sexual education. These rights recognize respect for bodily integrity, the discretion to choose one’s own partner, and the liberty to decide whether or not to become sexually active. They include the right to engage in sexual activity only with mutual consent, to enter into marriage freely and with consent, and to decide whether to conceive, including the timing and circumstances of parenthood. Fundamentally, sexual rights affirm every individual’s right to a satisfying, safe and fulfilling sexual life.

² International Covenant on Economic, Social and Cultural Rights art. 12(1), Dec. 16, 1966, 993 U.N.T.S. 3, https://treaties.un.org/doc/treaties/1976/01/19760103%2009-57%20pm/ch_iv_03.pdf (last visited Aug. 19, 2026).

³ Jan Cumming, GENEVA FOUND. FOR MED. EDUC. & RSCH., *Sexual and Reproductive Rights* (Training Course in Sexual and Reproductive Health Research, 2016), <https://www.gfmer.ch/SRH-Course-2016/srr/pdf/SRR-Cumming-2016.pdf> (last visited May 20, 2025).

⁴ WORLD HEALTH ORG., *Reproductive Health Strategy to Accelerate Progress Towards the Attainment of International Development Goals and Targets*, WHO/RHR/04.8 (2004) (global strategy adopted by the Fifty-seventh World Health Assembly, May 2004), https://iris.who.int/bitstream/handle/10665/68754/WHO_RHR_04.8.pdf (last visited May 20, 2026).

⁵ WORLD HEALTH ORG., *Sexual Health*, [https://www.who.int/teams/sexual-and-reproductive-health-and-research-\(srh\)/areas-of-work/sexual-health](https://www.who.int/teams/sexual-and-reproductive-health-and-research-(srh)/areas-of-work/sexual-health) (last visited May 22, 2026).

Reproductive rights, encompassed within sexual rights, become particularly complex in relation to women who, despite advances in gender equality, continue to be a vulnerable segment of society. Reproductive rights remain a highly debated domain, as women are biologically tasked with the responsibility of gestation. Their autonomy over reproductive decisions has, however, often been subject to legal constraints and contested through judicial interpretation. This intersection of bodily autonomy, legal regulation and gendered vulnerability underscores the need for a nuanced and rights-based approach to reproductive justice, one which, as recent judicial interpretations make clear, should not conflict with the rights of the unborn.

This paper examines the concept of women's reproductive rights and its evolution over time. It explores how the judicial systems of the United Kingdom and the United States of America have addressed the reproductive autonomy of women. The paper further analyzes the role played by the Indian judiciary in interpreting reproductive rights as an integral part of the 'right to life' under Article 21 of the Constitution of India, and examines the evolving jurisprudence of the Indian judiciary in recognizing and safeguarding women's decisional autonomy in matters relating to reproduction. Finally, it evaluates the shift in judicial perspective towards acknowledging the rights of the fetus, and concludes with suggestions for achieving a balance between women's reproductive autonomy and the emerging recognition of fetal rights.

II. METHODOLOGY OF STUDY

This study adopts the doctrinal method. Doctrinal research relies on the examination and analysis of primary and secondary sources, including statutory provisions, judicial decisions, legal and medical journals, scholarly articles, books (especially legal and medical texts), newspapers and relevant online materials.

III. REPRODUCTIVE RIGHTS OF WOMAN: THE CONCEPT AND ITS DEVELOPMENT

WHO conceptualizes reproductive rights in the following words:

“Reproductive rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so and the right to attain the highest standard of sexual and reproductive health. It also includes their right to

make decisions concerning reproduction free of discrimination, coercion and violence.”⁶

A woman’s reproductive rights revolve around two aspects: deciding whether to conceive a child, and determining whether to continue or terminate a pregnancy after conception. Along with this freedom of choice, reproductive rights also encompass access to a supportive environment for adapting to the new role of mother, comprehensive pre-natal and post-natal care, medical and health care services, and accurate and accessible information on maternal health. A woman’s decisional autonomy over sexuality and procreation rests on a comprehensive framework of legal and ethical principles that affirm individual autonomy over reproductive decisions. These rights are multifaceted, incorporating both entitlements and immunities. On one side, reproductive rights secure a woman’s freedom to conceive or not to conceive, including the choice of birth control methods to prevent pregnancy. This right is recognized as absolute within the ambit of individual liberty and bodily integrity; it may be described as the reproductive or decisional autonomy of the woman, recognized by legislation and the judiciary even where society holds a different perception. The second aspect comprises the liberty of a woman to continue a pregnancy to full term, to give birth and subsequently to raise children, or to terminate the pregnancy midway. The right to continue a pregnancy falls largely within a woman’s decisional autonomy, subject to very limited restrictions, and is protected by legislation; the right to terminate a pregnancy, by contrast, is not recognized as part of reproductive autonomy, since it is hedged by legal restrictions and judicial supervision.

Sexuality and procreation, while distinct in certain respects, are fundamentally interrelated and recognized as essential components of basic rights. The first effort to formally acknowledge reproductive rights within the broader framework of human rights came in 1968, at the International Conference on Human Rights held in Teheran, which was instrumental in this development. Although the term ‘reproductive rights’ was not explicitly employed, the Conference proclaimed that parents have a basic human right to determine freely and responsibly the number and the spacing of their children, thereby highlighting the significance of family planning and its intrinsic link to population growth for the realization of other human rights.⁷ The concept of ‘sexual and reproductive health and rights’ (“SRHR”) was first declared

⁶ Asfia Khatun, *Reproductive Rights of Women in India: A New Perspective*, 8 INT’L J. NOVEL RSCH. & DEV. d414 (2023), <https://www.ijnrd.org/papers/IJNRD2312347.pdf> (last visited May 22, 2026); see also Report of the International Conference on Population and Development, Cairo, Sept. 5–13, 1994, ¶ 7.3, U.N. Doc. A/CONF.171/13/Rev.1 (1995).

⁷ Final Act of the International Conference on Human Rights, Teheran, Apr. 22–May 13, 1968, Proclamation of Teheran ¶ 16, U.N. Doc. A/CONF.32/41 (1968), https://legal.un.org/avl/pdf/ha/fatchr/final_act_of_tehranconf.pdf (last visited May 23, 2026).

a human right at the International Conference on Population and Development (“ICPD”) held in Cairo, Egypt, in 1994.⁸ The ICPD played a pivotal role in shifting the emphasis from governmental aims to limit population growth to individual decision-making in reproductive health. The narrow definition of reproductive rights, confined to family planning programmes, the use of contraceptives and issues relating to pregnancy, was expanded holistically to include an individual’s comprehensive needs and freedom of choice.⁹

The ICPD of 1994 and its subsequent review in 1999 established women’s sexual and reproductive health as fundamental to their overall well-being, and highlighted a new paradigm addressing human reproduction and health as a human right. The rationale for conferring these rights is already covered by the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) and by the work of the Committee on Economic, Social and Cultural Rights (“CESCR”). CEDAW guarantees women equal rights to decide “freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights”.¹⁰ General Comment No. 14 of the CESCR places the provision of maternal health care among the obligations of comparable priority to the core obligations, which are non-derogable, and explains that States have an immediate obligation to take deliberate, concrete and targeted steps towards fulfilling the right to health, including in the context of pregnancy and childbirth.¹¹

By redefining the concept of human rights at the ICPD, there was a significant shift away from conventional approaches, which often saw women simply as instruments for implementing population schemes. The reproductive health rights framework embraced at the ICPD is rooted in a perspective that recognizes the intrinsic value of women and is genuinely committed to safeguarding their health and well-being. Through the international documents adopted at the ICPD, women’s reproductive capacity was fundamentally redefined: rather than being viewed as a target for population control, it came to be recognized as a key aspect of women’s empowerment, enabling them to make autonomous decisions about their sexual and

⁸ Report of the International Conference on Population and Development, *supra* note 6 (text disseminated by the United Nations Population Information Network (POPIN), 1994).

⁹ Carmel Shalev, *Rights to Sexual and Reproductive Health: The ICPD and the Convention on the Elimination of All Forms of Discrimination Against Women* (paper presented at the International Conference on Reproductive Health, Mumbai, India, Mar. 15–19, 1998, jointly organised by the Indian Society for the Study of Reproduction and Fertility and the UNDP/UNFPA/WHO/World Bank Special Programme of Research, Development and Research Training in Human Reproduction), <https://www.un.org/womenwatch/daw/csw/shalev.htm> (last visited May 23, 2026).

¹⁰ Convention on the Elimination of All Forms of Discrimination Against Women art. 16(1)(e), Dec. 18, 1979, 1249 U.N.T.S. 13.

¹¹ Comm. on Econ., Soc. & Cultural Rts., *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, ¶¶ 30, 44(a), 47, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

reproductive health. This transformation underscored the significance of respecting women's rights and choices, and thus led the way towards more equitable and rights-based approaches to health and development.¹²

The inclusion of these rights as basic rights at the ICPD was thus a turning point: women were no longer to be treated merely as instruments of population control. In Carmel Shalev's words, "[t]he reproductive health and rights approach adopted at ICPD is premised on a view that values women intrinsically and is genuinely concerned about their health and well-being", and women's reproductive capacity "was transformed from an object of population control to a matter of women's empowerment to exercise personal autonomy in relation to their sexual and reproductive health within their social, economic and political contexts".¹³

IV. WOMAN AUTONOMY AND FETAL PROTECTION: JUDICIAL RESPONSE IN THE UK AND THE USA

Even if one accepts that life begins before birth, that does not automatically and unconditionally confer on this form of human life a right to life equivalent to the corresponding right of a child after its birth. This does not mean that the unborn child does not enjoy any protection by human society, since – as the relevant legislation of European States, and European agreements and relevant documents show – the unborn life is already considered to be worthy of protection.¹⁴

– Judge Rozakis, separate opinion, *Vo v. France* (2004)

A. United Kingdom

Article 2(1) of the European Convention on Human Rights ("ECHR") affirms:

"Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."¹⁵

In *Paton v. United Kingdom*,¹⁶ the European Commission of Human Rights was called upon to consider a woman's reproductive freedom in the context of Article 2 of the ECHR. The

¹² OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS., *Sexual and Reproductive Health and Rights*, <https://www.ohchr.org/en/women/sexual-and-reproductive-health-and-rights> (last visited May 23, 2026); *see also* Shalev, *supra* note 9.

¹³ Shalev, *supra* note 9.

¹⁴ *Vo v. France*, App. No. 53924/00 (Eur. Ct. H.R. July 8, 2004) (Grand Chamber) (Rozakis, J., separate opinion, joined by Caflisch, Fischbach, Lorenzen & Thomassen, JJ.), <https://hudoc.echr.coe.int/fre?i=001-61887>.

¹⁵ Convention for the Protection of Human Rights and Fundamental Freedoms art. 2(1), Nov. 4, 1950, 213 U.N.T.S. 221; *see* Rosamund Scott, *The English Fetus and the Right to Life*, 11 EUR. J. HEALTH L. 347 (2004), <https://doi.org/10.1163/1571809043418324>, *also available at* <https://www.jstor.org/stable/45442687> (last visited May 19, 2026).

Commission declared inadmissible the application of a husband who had sought to stop his wife from terminating her pregnancy. The Commission accepted that, under English law and by extension under the ECHR, the husband as a father had no lawful authority over his wife's decision to terminate her pregnancy, since the law does not confer legal rights on the fetus until it is born and has an existence independent of its mother. The decision upholds the mother's right to privacy and autonomy over her reproductive choices, which outweighs the father's interest in protecting the life of the fetus. The Commission emphasized that the pregnant woman is the person most directly affected by the pregnancy and its potential termination, and that her safety must be given the utmost importance. The decision established that Article 2 does not confer an absolute 'right to life' on the fetus, since the life of the fetus is intimately connected with that of the pregnant woman and cannot be regarded in isolation from it.

In that case, the Commission reasoned that if Article 2 were interpreted as extending the right to life to the fetus, with absolute protection in the absence of any express limitation, abortion would inevitably be prohibited even where the continuance of the pregnancy would seriously endanger the life of the mother. This approach would effectively place the life of the fetus above that of the mother. In *Paton*, the Commission thus firmly underscored the principle that neither the father nor the fetus has a right to restrain a woman from having an abortion, and favoured liberal abortion laws by affirming the rights of the pregnant woman over those of the fetus.

In *Vo v. France*,¹⁷ the question of conferring a legal entitlement on the fetus through Article 2 of the ECHR arose again, this time before the Grand Chamber of the European Court of Human Rights ("ECtHR") within the Council of Europe. The case arose from a medical error that led to the termination of the pregnancy of the applicant, Thi-Nho Vo. The French courts dismissed the homicide charge on the ground that the fetus lacked legal personhood under the criminal law. Before the ECtHR, Vo argued that France's failure to criminalize such acts violated the fetus's right to life under Article 2. The Court expressly declined to determine whether the unborn child is a 'person' for the purposes of Article 2 and held that, even assuming Article 2 applied, there had been no violation; it observed that the life of the fetus was intimately connected with that of the mother and could be protected through her. Thus, in *Vo*, the Court did not prioritize the life of the fetus over that of the mother, but it did recognize the need to protect unborn life.¹⁸

¹⁶ *Paton v. United Kingdom*, App. No. 8416/79, 19 Eur. Comm'n H.R. Dec. & Rep. 244 (1980) (published as *X v. United Kingdom*); (1981) 3 EHRR 408.

¹⁷ *Vo v. France*, App. No. 53924/00, (2005) 40 EHRR 12; 17 BHRC 1.

¹⁸ *Vo*, *supra* note 17, ¶¶ 85–86, 95, <https://hudoc.echr.coe.int/fre?i=001-61887> (last visited May 22, 2026).

By thus prioritizing the rights of the mother, the European Commission and the European Court establish that whatever protection the fetus enjoys under the ‘right to life’ is dependent on the pregnant woman, rather than on its potential to become a child.

In England and Wales, abortion remains a crime under the Offences Against the Person Act 1861 and the Infant Life (Preservation) Act 1929, the latter of which criminalizes later-stage abortions. Under these statutes, providing an abortion can be punishable by life imprisonment unless it is done in line with the exceptions provided by the governing legislation, although since the Crime and Policing Act 2026 these offences no longer apply to a woman acting in relation to her own pregnancy.¹⁹ The primary law governing the legality of abortion in England is the Abortion Act 1967. Rather than decriminalizing abortion outright, it specifies the situations in which an abortion may lawfully be carried out without attracting criminal liability. The grounds and procedures under which termination of pregnancy is permitted are set out in Section 1 of the Abortion Act 1967.²⁰ In England, Scotland and Wales, abortion is generally allowed up to 23 weeks and 6 days of gestation. However, the permission is conditional on two registered medical practitioners forming the opinion in good faith that the continuance of the pregnancy would involve a greater risk to the physical or mental health of the woman than its termination. Where termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman, where continuing the pregnancy would involve a risk to her life, or where there is a substantial risk that the child, if born, would suffer from such physical or mental abnormalities as to be seriously handicapped, there is no statutory time limit. In such cases, the law permits abortion beyond 24 weeks, up until birth, provided the medical practitioners certify that the conditions are met.²¹

B. United States of America

From the founding era until 1821, when Connecticut, a state in the north-eastern United States, criminalized abortion, the procedure was permitted across the United States before the stage of quickening. In the latter part of the nineteenth century, almost all states banned abortion unless the procedure was necessary to save the life of the pregnant woman, owing to a campaign led by doctors under the American Medical Association (“AMA”). The middle of the twentieth

¹⁹ Offences Against the Person Act 1861, 24 & 25 Vict. c. 100, §§ 58–59 (UK); Infant Life (Preservation) Act 1929, 19 & 20 Geo. 5 c. 34, § 1 (UK); Crime and Policing Act 2026, c. 20, pt. 16 (UK).

²⁰ Abortion Act 1967, c. 87, § 1 (UK); *see* THE ABORTION ACT 1967 (Michael D. Kandiah & Gillian Staerck eds., Inst. of Contemporary Brit. Hist. 2002) (ISBN 1 871348 75 7), <https://www.kcl.ac.uk/sspp/assets/icbh-witness/abortionact1967.pdf> (last visited Sept. 18, 2026).

²¹ Abortion Act 1967, c. 87, § 1(1)(a)–(d) (UK); Esme Cairns, *Termination of Pregnancy and Wishes and Feelings in the Court of Protection*, UK HUM. RTS. BLOG (Apr. 25, 2024), <https://ukhumanrightsblog.com/2024/04/25/termination-of-pregnancy-and-wishes-and-feelings-in-the-court-of-protection> (last visited May 19, 2026).

century witnessed a transition, as medical and legal professionals began to ask “whether abortion ought to be prohibited in all cases”.²²

The ruling of the U.S. Supreme Court in *Roe v. Wade*,²³ considered the paramount decision upholding the reproductive rights of women, recognized that the right to seek an abortion during the initial stages of pregnancy came within the constitutionally protected “right to privacy”. The case also discussed the risks of late-term abortions, and the Court recognized a compelling state interest in protecting the potential life of the prospective child, along with the well-being of the pregnant woman, after a certain point in the gestation period. In 2022, this celebrated decision was overruled by the U.S. Supreme Court in *Dobbs v. Jackson Women’s Health Organization*,²⁴ which held that the Constitution confers no right to abortion, removing the right to seek an abortion from the purview of constitutional rights and abandoning almost 50 years of precedent. Justice Samuel Alito, writing for the majority, stated that the only legitimate unenumerated rights, that is, rights not explicitly stated in the Constitution, are those deeply rooted in the Nation’s history and tradition and implicit in the concept of ordered liberty, and that abortion is not such a right. The decision restricting the reproductive rights of women was taken by the apex court of a country renowned for its protection of individual rights and personal liberty. It clearly conveys the message that termination of pregnancy cannot be accepted as a fundamental right and is always subject to statutory limitations.

V. REPRODUCTIVE CHOICE: EMBEDDED UNDER “RIGHT TO LIFE”

...A woman’s right to make reproductive choices is also a dimension of personal liberty as understood under Article 21 of the Constitution...²⁵

As Shalev puts it, “[r]ights to reproductive and sexual health include the right to life, liberty and the security of the person; the right to health care and information; and the right to non-discrimination in the allocation of resources to health services and in their availability and accessibility. Of central importance are the rights to autonomy and privacy in making sexual and reproductive decisions, as well as the rights to informed consent and confidentiality in relation to health services.”²⁶

²² Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028 (2011), https://law.yale.edu/sites/default/files/documents/pdf/Faculty/Siegel_BeforeAndAfterRoeVWadeNewQuestionsAboutBacklash.pdf (last visited May 19, 2026).

²³ *Roe v. Wade*, 410 U.S. 113 (1973).

²⁴ *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

²⁵ *Suchita Srivastava v. Chandigarh Admin.*, (2009) 9 SCC 1; AIR 2010 SC 235 (India).

²⁶ Shalev, *supra* note 9.

Article 21, the core of the Indian Constitution, which provides that “No person shall be deprived of his life or personal liberty except according to procedure established by law”,²⁷ has been described by the Supreme Court of India in *I.R. Coelho v. State of Tamil Nadu*²⁸ as the heart of the Constitution; it has also been described as the most organic and progressive provision in our living Constitution and the foundation of our laws. The right to life does not merely mean the continuance of a person’s animal existence, but a quality of life.²⁹ In 2010, the High Court of Delhi, in its landmark decision in *Laxmi Mandal v. Deen Dayal Harinagar Hospital*³⁰ and *Jaitun v. Maternity Home, MCD, Jangpura*,³¹ reaffirmed the approach established by the Supreme Court, the guardian of the Indian Constitution, in *People’s Union for Civil Liberties v. Union of India*.³² The Court unequivocally declared that the constitutional entitlement of the “right to life” encompasses two inalienable survival rights: first, the ‘right to health’, which includes the right to access and receive a minimum standard of treatment and care in public health facilities, with particular emphasis on the reproductive rights of the mother; and second, the ‘right to food’, as essential to ensuring a life of dignity for all, especially the most marginalized.

The right to privacy has evolved as an intrinsic component of life and liberty through a plethora of decisions of the Supreme Court and various High Courts.³³ The judgment in *Justice K.S. Puttaswamy (Retd.) v. Union of India*³⁴ significantly extended the right to privacy in India, with implications for reproductive rights under Article 21. The Supreme Court affirmed that the right to privacy is fundamental and integral to the right to life and personal liberty guaranteed by the Constitution of India. This recognition has significant ramifications for reproductive choices, which are now understood as an essential facet of bodily autonomy and privacy. Through this decision, the right to privacy was elevated to a fundamental right, and restrictions on reproductive rights, as one of the dimensions of this broader right, must be subjected to strict constitutional scrutiny.

A three-judge bench had earlier, in *Suchita Srivastava v. Chandigarh Administration*,³⁵ confirmed a woman’s reproductive rights as fundamental. The Court clarified that the State may

²⁷ INDIA CONST. art. 21.

²⁸ *I.R. Coelho v. State of Tamil Nadu*, (2007) 2 SCC 1; AIR 2007 SC 861 (India).

²⁹ NARENDER KUMAR, CONSTITUTIONAL LAW OF INDIA 307 (Allahabad L. Agency, 8th ed. 2014).

³⁰ *Laxmi Mandal v. Deen Dayal Harinagar Hosp.*, W.P. (C) No. 8853 of 2008, 2010 SCC OnLine Del 2234 (Delhi HC June 4, 2010) (India).

³¹ *Jaitun v. Maternity Home, MCD, Jangpura*, W.P. (C) No. 10700 of 2009 (Delhi HC June 4, 2010) (India) (decided together with *Laxmi Mandal*, *supra* note 30).

³² *People’s Union for Civil Liberties v. Union of India*, W.P. (C) No. 196 of 2001 (India) (the right to food proceedings; see, e.g., order of Nov. 28, 2001), as relied on in *Laxmi Mandal*, *supra* note 30.

³³ *Gobind v. State of Madhya Pradesh*, AIR 1975 SC 1378 (India); *Malak Singh v. State of Punjab & Haryana*, AIR 1981 SC 760 (India); *R. Rajagopal v. State of Tamil Nadu*, AIR 1995 SC 264 (India).

³⁴ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1; AIR 2017 SC 4161 (India).

³⁵ *Suchita Srivastava*, *supra* note 25.

place limitations on these rights, subject to compliance with the principles and guidelines enshrined in constitutional jurisprudence and declared through judicial pronouncements. Indian jurisprudence has thus developed a robust body of case law treating reproductive rights as a branch of fundamental rights, grounded in the principles of liberty, autonomy and dignity, which can be restricted only by legislation that satisfies the test of being just, fair and reasonable laid down in *Maneka Gandhi v. Union of India*.³⁶

Termination of pregnancy was initially governed in India by the Indian Penal Code, 1860 (“IPC”), which criminalized abortion save where it was required to save the life of the mother.³⁷ This restrictive approach led to unsafe practices and significant risk to women’s health. In response, the Medical Termination of Pregnancy Act, 1971 (“MTP Act”) was enacted, according legal sanction to abortion in specific circumstances, at approved places and by qualified and approved persons. The significant provisions of the Act are Sections 3 and 5, which set out the circumstances in which abortion is lawful and the procedures for complying with them. The constitutional validity of the MTP Act, particularly Section 3(2)(a) and (b) and Explanations I and II to Section 3, was challenged in *Nand Kishore Sharma v. Union of India*³⁸ before the Rajasthan High Court as being unethical and violative of Article 21 of the Constitution. The High Court, however, dismissed the writ petition and upheld the Act as constitutionally valid.

The judicial interpretation of Sections 3 and 5 of the Act is crucial in determining the scope of women’s reproductive rights. While the Act recognizes and protects the right to safe and legal abortion, it also subjects that right to certain restrictions aimed at balancing the interests of the woman with the potential rights of the unborn. The judiciary plays a pivotal role in ensuring that these restraining provisions are just, fair and reasonable and do not arbitrarily infringe the fundamental rights to life and liberty guaranteed under the Constitution of India.

The MTP Act represents a progressive shift in India’s legal landscape, balancing women’s reproductive autonomy with necessary safeguards. Section 3(2), which confers legal permission for the termination of pregnancy, has withstood constitutional challenge, and the Supreme Court

³⁶ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248; AIR 1978 SC 597 (India).

³⁷ The Indian Penal Code, No. 45 of 1860, INDIA CODE (1860), § 312, which provides: “Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.” The Explanation to the section provides that “[a] woman who causes herself to miscarry, is within the meaning of this section.” The offence is now dealt with under The Bharatiya Nyaya Sanhita, No. 45 of 2023, INDIA CODE (2023), § 88.

³⁸ *Nand Kishore Sharma v. Union of India*, AIR 2006 Raj 166 (India) (decided Oct. 22, 2005).

has treated the provisions of the Act as reasonable restrictions on the exercise of reproductive choice.³⁹

VI. DECISIONAL AUTONOMY OF WOMAN: INDIAN JUDICIAL PERSPECTIVE

A woman's right to take decisions on reproductive matters includes her right to refuse participation in sexual activity or, alternatively, to insist on the use of contraceptive methods; her right to choose birth control methods such as undergoing sterilization procedures; and her entitlement to carry a pregnancy to its full term, to give birth and subsequently to raise children.⁴⁰

The judicial landscape regarding procreative independence and access to abortion in India has evolved significantly. Indian courts have supported the reproductive autonomy of women, emphasizing the need for access to safe medical support for terminating unwanted pregnancies beyond the permissible gestation period, and these judicial concerns played a major role in the 2021 amendment of the MTP Act, which extended the gestational limit for abortion from twenty weeks to twenty-four weeks for specified categories of women. The judiciary's response in affirming bodily autonomy, safeguarding personal liberty and protecting the rights of the mother over the fetus is established through a series of landmark judgments, the most significant of which is *Suchita Srivastava v. Chandigarh Administration*.⁴¹ In that case, the Supreme Court declined to permit the termination of the pregnancy of a woman with a cognitive disability who had become pregnant as a result of rape, as she had expressed her desire to continue the pregnancy. The judgment asserted that a woman's freedom to decide on reproductive matters is an inherent feature of "personal liberty" under the Indian Constitution. The Court emphasized that 'reproductive autonomy' encompasses both the right to procreate and the right to abstain from procreating, thereby respecting a woman's freedom to make decisions concerning her reproductive life. In 2011, the High Court of Punjab and Haryana, deciding *Dr. Mangla Dogra v. Anil Kumar Malhotra*,⁴² reiterated women's "right to reproductive autonomy" as follows:

...it is a personal right of a woman to give birth to a child.... No body can interfere in the personal decision of the wife to carry on or abort her pregnancy.....unwanted pregnancy would naturally affect the mental health of the pregnant woman...⁴³

³⁹ *Nand Kishore Sharma, supra note 38; Suchita Srivastava, supra note 25.*

⁴⁰ KUMAR, *supra* note 29, at 333.

⁴¹ *Suchita Srivastava, supra note 25.*

⁴² *Dr. Mangla Dogra v. Anil Kumar Malhotra*, 2012 (1) Law Herald (P&H) 800 (Punjab & Haryana HC Nov. 29, 2011) (India).

In 2013, deciding *Hallo Bi v. State of Madhya Pradesh*,⁴⁴ the High Court of Madhya Pradesh acknowledged the importance of giving victims of rape the choice to terminate a pregnancy without requiring judicial authorization. The Court observed that compelling a victim of violent rape or forced sex to continue a pregnancy would inflict profound anguish and daily humiliation, causing significant harm to her psychological and emotional well-being. It affirmed that compelling a woman to bear the child of a rapist is a profound injustice that disregards her bodily autonomy, dignity and well-being, thereby recognizing that her consent and well-being must be paramount in decisions regarding termination.

In 2016, in *High Court on Its Own Motion v. State of Maharashtra*,⁴⁵ a suo motu public interest litigation, the High Court of Bombay held that forcing a woman to continue a pregnancy she does not want violates her bodily integrity and aggravates her mental trauma, which would be deleterious to her mental health. The Court declared that “[t]he right to control their own body and fertility and motherhood choices should be left to the women alone”, thereby affirming and safeguarding the bodily autonomy of women. The judgment highlighted that the social, financial and psychological burdens of an unwanted pregnancy fall disproportionately on women, and that their informed choices regarding pregnancy must be respected as fundamental rights protected under the Constitution.

In *Devika Biswas v. Union of India*,⁴⁶ the Supreme Court of India reaffirmed its earlier decision in *Suchita Srivastava*, recognizing reproductive rights as an aspect of ‘personal liberty’ guaranteed by the Indian Constitution. The Court held that the freedom to exercise reproductive rights necessarily encompasses the liberty of choice regarding sterilization, based on informed consent and free from any form of coercion. The judgment emphasized that reproductive autonomy extends beyond health or family planning. Both decisions established that a woman’s right to take decisions on reproductive matters is of constitutional significance, laying a strong foundation for subsequent jurisprudence on bodily integrity and the right to informed consent. The decision underscored the importance of strict adherence to guidelines securing a woman’s right to informed consent and prohibiting coercive practices in sterilization procedures, thereby safeguarding the dignity and autonomy of women.

⁴³ CTR. FOR REPROD. RTS., *Reproductive Rights in Indian Courts*, <https://reproductiverights.org/sites/default/files/documents/Reproductive-Rights-In-Indian-Courts.pdf> (last visited May 21, 2026) (quoting *Mangla Dogra*, *supra* note 42).

⁴⁴ *Hallo Bi v. State of Madhya Pradesh*, 2013 (1) MPHT 451 (India) (W.P. No. 408 of 2013).

⁴⁵ *High Court on Its Own Motion v. State of Maharashtra*, 2016 SCC OnLine Bom 8426 (India) (Suo Motu PIL No. 1 of 2016, decided Sept. 19, 2016).

⁴⁶ *Devika Biswas v. Union of India*, (2016) 10 SCC 726; AIR 2016 SC 4405 (India).

The Supreme Court's judgment in *X v. Principal Secretary, Health and Family Welfare Department, Government of NCT of Delhi*⁴⁷ has been celebrated by reproductive rights advocates as a landmark precedent, as it recognized the reproductive autonomy of every pregnant woman. Through this verdict, the Court unequivocally confirmed that the decision to continue or to terminate a pregnancy is firmly rooted in a woman's right to bodily autonomy and her ability to choose her path in life. The Court also recognized that an unwanted pregnancy could have a serious negative effect on a woman's life, disrupting her education, career and mental well-being.

Unlike the judicial trend in the United States, where the fetus has consistently occupied a prominent position in abortion jurisprudence, Indian judicial discourse on reproductive rights has largely sidelined or omitted the fetus as a central subject of interpretation, and has made significant strides in recognizing and protecting women's reproductive rights.

VII. ACCEPTING RIGHT OF UNBORN: REDEFINING "JUDICIAL CONSCIENCE"

The positive approach of upholding the mother's rights over those of the unborn, through the legislative enactment of 1971, the legislative amendment of 2021 and a series of judicial interpretations as recent as 2022, was overshadowed by a decision of the Supreme Court in 2023. The judiciary's concern to protect the life of a viable fetus was discussed in *XYZ v. State of Gujarat*.⁴⁸ Deciding that case, which came before it by way of a special leave petition, the Supreme Court had the opportunity to answer a crucial question: whether a woman can be compelled to give birth to an unwanted child. The Court allowed the appeal and permitted the termination of a pregnancy of over twenty-seven weeks' gestation, on the reasoning that forced continuation of pregnancy violates a woman's dignity, infringes her bodily integrity and can harm her mental health. While pronouncing the decision, the Court also gave the following directions:

"...in the event, the foetus is found to be alive, the hospital shall give all necessary medical assistance including incubation either in that hospital or any other hospital where incubation facility is available in order to ensure that the foetus survives. Further, in case the foetus survives, then State shall take steps for ensuring that the child could be adopted in accordance with law."

⁴⁷ *X v. Principal Sec'y, Health & Family Welfare Dep't, Gov't of NCT of Delhi*, (2023) 9 SCC 433; AIR 2022 SC 4917; 2022 SCC OnLine SC 1321 (India).

⁴⁸ *XYZ v. State of Gujarat*, 2023 LiveLaw (SC) 680 (India) (criminal appeal arising out of SLP (Crl.) Diary No. 33790 of 2023, decided Aug. 21, 2023).

In its decision, the Court granted permission to terminate the pregnancy in order to uphold the rights and autonomy of the mother. Simultaneously, it directed that every necessary measure be taken to protect the life of a fetus born alive during the procedure, thereby acknowledging the potential rights of the unborn. This dual approach, however, highlights a fundamental tension, since it is hard to reconcile permitting the termination of a pregnancy with mandating protection for a fetus that may survive the procedure. In effect, the Court directed both that the pregnancy be ended and that the life of a potentially viable fetus be safeguarded, a position that seems inherently contradictory. This evolving judicial stance may reflect a shift away from the earlier principle that women are the ultimate decision-makers in matters of reproductive rights, towards a greater emphasis on protecting the interests of a fetus that could survive outside the womb, and this shift was confirmed in *X v. Union of India*.⁴⁹

The case concerned permission to terminate a pregnancy that had crossed 24 weeks of gestation. The woman, a mother of two children, sought termination relying on her mental health condition. The issue was initially decided in her favour by a two-judge bench, relying on the approval of termination given by the Medical Board constituted at the All India Institute of Medical Sciences (“AIIMS”). The Additional Solicitor General of India, representing the Government of India, then applied for recall of the order on the basis of a communication from one of the doctors on the Medical Board seeking clarification of the Court’s order. The communication stated that the report submitted by the Medical Board contained a medical finding that the fetus had a strong chance of survival, and sought the Court’s direction as to whether cessation of the fetal heartbeat was required before the procedure. The Chief Justice constituted the same two-judge bench, of Kohli and Nagarathna, JJ., to hear the recall application; its members took divergent views, and the matter was therefore placed before a three-judge bench headed by the then Chief Justice, D.Y. Chandrachud. In this confrontation between the reproductive autonomy of the mother and fetal viability, as the fetus showed signs of life and had a strong possibility of survival, the judiciary stood in favour of the life that could not present itself before the Court, and gave it predominance over the reproductive autonomy of the mother. The Court declined to direct the doctors to stop the heartbeat of a viable fetus, thereby confining the woman’s reproductive rights within the statutory limits, since there was no immediate threat to the life of the mother and no substantial fetal abnormality.

⁴⁹ *X v. Union of India*, 2023 INSC 919 (India) (W.P. (C) No. 1137 of 2023, decided Oct. 16, 2023), <https://indiankanoon.org/doc/125724114/> (last visited May 21, 2026).

In *Indulekha Sreejith v. Union of India*,⁵⁰ the High Court of Kerala affirmed the ‘right to life’ of the unborn under Article 21 of the Indian Constitution. Considering a plea to terminate a pregnancy that had crossed 30 weeks of gestation, the Court was sympathetic towards the potential life and protected it, although the Medical Board’s report had revealed non-lethal fetal abnormalities. The case marks a significant moment in Indian jurisprudence, in which the rights of the unborn were judicially recognized and balanced against the mother’s right to reproductive autonomy. The Court reasoned as follows:

“An unborn child has a life of its own and rights of its own and the rights of unborn are recognised by law. No doubt, only if the unborn can be treated as a person, the right to life of the unborn can be equated with the fundamental right of the mother guaranteed under article 21 of the Constitution. True, an unborn is not a natural person, but it is well known that after six weeks, life is infused into the embryo, thus converting embryo into foetus and once an embryo evolves into a foetus, the heartbeat starts. In other words, the unborn has life from the stage it transforms into foetus. If the unborn has life, though it is not a natural person, it can certainly be considered as a person within the meaning of article 21 of the Constitution, for there is absolutely no reason to treat an unborn child differently from a born child. In other words, the right to life of an unborn shall also be considered as one falling within the scope of Article 21 of the Constitution.”⁵¹

The case suggests that once a fetus has reached an advanced stage of gestation, in that case over 30 weeks, it attains a status worthy of protection as potential life under Article 21.

In conferring protection on the unborn, the judiciary does not seek outright to deny a woman’s right; rather, it places a judicial check on later-term abortions, emphasizing that termination beyond a certain threshold requires compelling justification, primarily where the fetus is not viable or the mother’s life is endangered.

VIII. CONCLUSION AND SUGGESTIONS

“Killing a Kshatriya [knight] or a Vaishya [Merchant] engaged in sacrifice, a menstruating woman, a pregnant woman... [and]... the embryo (even) of a stranger is tantamount to killing a Brahmin [Priest].”

– *Visnudharmasutra*

⁵⁰ *Indulekha Sreejith v. Union of India*, AIROnline 2021 Ker 1285 (India) (W.P. (C) No. 17036 of 2021, decided Aug. 27, 2021).

⁵¹ *Indulekha Sreejith*, *supra* note 50.

The Medical Termination of Pregnancy Act, 1971 legalized abortion by registered medical practitioners in specified situations,⁵² which would otherwise constitute an offence under the IPC and now under the Bharatiya Nyaya Sanhita, 2023 (“BNS”).⁵³ The primary object of the MTP Act is to safeguard the life and health, both physical and mental, of the pregnant woman. While the MTP Act allows termination of pregnancy up to a particular gestational limit, its intent is not to prioritize the protection of the fetus over the well-being of the woman. The Act originally established 20 weeks as the ceiling for induced abortion, having regard to the health of the mother and the fetus. Under the 2021 Amendment Act, a pregnancy of up to 20 weeks may be terminated on the opinion of one registered medical practitioner, and the limit was extended to 24 weeks, on the opinion of two registered medical practitioners, only for the categories of women prescribed in Rule 3B of the Medical Termination of Pregnancy Rules, 2003. Beyond 24 weeks, termination is permitted only where it is necessitated by substantial fetal abnormalities diagnosed by a duly constituted Medical Board, or where, under Section 5, it is immediately necessary to save the life of the pregnant woman. In its earlier approach, the judiciary adopted a liberal stance, recognizing the woman as the “ultimate decision maker” regarding her reproductive choices. In several instances, courts even allowed termination in circumstances not explicitly covered by the MTP Act. However, a noticeable shift in judicial perspective can be observed, and recent rulings reflect a growing recognition of the life and rights embedded in the fetus, particularly after the 24-week threshold. This evolving approach is evident in the words of the former Chief Justice of India, D.Y. Chandrachud, who acknowledged the need to consider the rights of the fetus alongside those of the pregnant woman:

“...the fact of the matter remains, it is not just a foetus, it is a living, viable foetus.

If given birth to, it can survive outside.”⁵⁴

Parliament has fixed twenty-four weeks as the upper gestational limit, having regard to the viability of the fetus. Beyond this period, the fetus is likely to exhibit signs of life and possesses significant potential for survival outside the mother’s womb. Although all induced abortions after twenty weeks are classified as later-term abortions, those beyond twenty-four weeks fall within a legally sanctioned form of feticide. This procedure typically requires the cessation of

⁵² The Medical Termination of Pregnancy Act, No. 34 of 1971, INDIA CODE (1971), § 3, as amended by The Medical Termination of Pregnancy (Amendment) Act, No. 8 of 2021, INDIA CODE (2021); *see also* The Medical Termination of Pregnancy Act, No. 34 of 1971, §§ 3(2B), 5; The Medical Termination of Pregnancy Rules, 2003, r. 3B (inserted by the Medical Termination of Pregnancy (Amendment) Rules, 2021).

⁵³ The Indian Penal Code, No. 45 of 1860, INDIA CODE (1860), § 312; The Bharatiya Nyaya Sanhita, No. 45 of 2023, INDIA CODE (2023), § 88.

⁵⁴ Bhargava, *supra* note 1.

the fetal heartbeat before it is begun. If the heartbeat is not stopped, the procedure does not constitute a termination but rather a preterm delivery, carried out first by induction of labour and, if indicated, by hysterotomy, after obtaining the woman's consent and explaining the risks to maternal health and the likely fetal outcome. In such cases, there is every possibility that the fetus may be born alive, often with a significant danger of immediate and long-term physical and psychological abnormalities. This, in turn, can severely compromise the child's quality of life. Moreover, preterm induction of labour carries a significant risk of failure, resulting in caesarean delivery, which also affects future pregnancies.

While the legislature, through the MTP Act, has already adopted a balanced approach to protecting the rights of the mother and the fetus, the burden has shifted to the judiciary to interpret the legal provisions in a manner that upholds a woman's reproductive rights while giving due consideration to potential life once it crosses a certain threshold. The recent decisions reflect a judicial conscience that fosters fetal life while giving due respect to maternal rights, without ignoring reproductive rights.

Legal scholars and other experts who advocate the primacy of a mother's rights over those of the unborn often emphasize that, even where legislation or judicial interpretation confers certain rights upon a fetus, those rights are not vested but contingent upon the fetus being born alive. Such contingent rights depend on a future event and are therefore considered subordinate to the mother's already vested rights. It is nonetheless imperative to interpret these contingent rights in a manner that ensures they become fully vested upon the live birth of the fetus and, conversely, lapse if the fetus is not born alive. This approach of the legislature and the judiciary maintains a balance between protecting the potential 'rights of the unborn' and upholding the established 'rights of the mother'.
