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Reproductive Autonomy as a Fundamental Right: Reassessing Bodily Integrity, Privacy, and Gender Equality under the Indian Constitution

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ABSTRACT

Indian courts now speak of reproductive autonomy in the vocabulary of fundamental rights, yet the statute through which most reproductive decisions are actually made still conditions abortion on medical opinion rather than on the pregnant person's choice. This paper examines that gap. It traces the right's doctrinal construction from Suchita Srivastava *to* X v. Principal Secretary *and* A (Mother of X)*, and asks which of three constitutional foundations (bodily integrity, decisional privacy and sex equality) can best carry it. The argument is that bodily integrity and privacy, though indispensable, are individualist in a way that leaves the State wide latitude once proportionality is applied, and that the courts have been slow to treat the burdens of compelled pregnancy as a question of equal citizenship under Articles 14 and 15. Read through an equality lens, problems as varied as late-term gestational limits, coercive sterilisation, two-child norms, the marital rape exception and eligibility rules in surrogacy law share a common structure. The paper closes with a reconstructed account in which autonomy supplies the content of the right and equality fixes the intensity of review.*

Keywords: *Reproductive Autonomy, Medical Termination of Pregnancy Act, 1971, Proportionality, Indirect Discrimination, Reproductive Justice*

I. A RIGHT DECLARED, A LICENCE RETAINED

In September 2022 the Supreme Court told a twenty-five-year-old unmarried woman, abandoned by her partner and twenty-two weeks pregnant when she went to court, that the line drawn by the Medical Termination of Pregnancy Rules between married and unmarried women could not stand.[1] The judgment was received, at home and abroad, as an Indian reply to *Dobbs v. Jackson Women's Health Organization*, decided three months earlier.[2] Barely a year later, a

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[1] *X v. Principal Sec'y, Health & Fam. Welf. Dep't, Gov't of NCT of Delhi*, Civil Appeal No. 5802 of 2022, ¶¶ 3, 89–94, 118 (India) (Sept. 29, 2022), *reported in* (2023) 9 SCC 433.

[2] *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

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three-judge bench refused to let a married woman end a pregnancy of roughly twenty-six weeks. The statutory conditions for termination beyond twenty-four weeks were not met, the bench reasoned, and it was unwilling to direct doctors to stop a foetal heartbeat.[3] The same judge, D.Y. Chandrachud, wrote both opinions, the first as a puisne judge and the second as Chief Justice. Both invoked reproductive autonomy.

That pairing sets the problem. Within a decade, Indian reproductive law has acquired the language of a fundamental right while keeping the architecture of a medical licence. The Medical Termination of Pregnancy Act, 1971 (MTP Act) never conferred a right to abortion. It carved an exception out of the offence of causing miscarriage, now found in sections 88 to 92 of the Bharatiya Nyaya Sanhita, 2023, and vested the decision in registered medical practitioners who must form a good-faith opinion about risk to the woman's life or health, or about foetal abnormality.[4] The 2021 amendments lengthened the gestational limits and replaced "married woman or her husband" with "any woman or her partner" in the contraceptive-failure explanation. They left the gatekeeping structure untouched.[5]

Much of the scholarly debate has asked whether reproductive autonomy is part of Article 21. The courts have answered yes, and the answer has done surprisingly little work. The more useful question is one of foundation. A right resting on bodily integrity, on decisional privacy or on sex equality will behave differently when it meets a statutory deadline, a medical board, a population target or a criminal-law exception. My claim is that Indian doctrine has leaned on the first two foundations and only gestured at the third, and that this imbalance accounts for much of its inconsistency. Two pending matters, the challenge to the marital rape exception and the challenge to the surrogacy legislation, bear directly on the argument; where their outcome is unknown, I say so.

II. How the right was assembled

Reproduction first reached the Supreme Court as a matter of population policy, not individual entitlement. In *Javed v. State of Haryana* the Court upheld a provision disqualifying persons with more than two living children from panchayat office, treating fertility control as a legitimate national objective and rejecting arguments based on personal liberty and religious

[3] *X v. Union of India*, 2023 INSC 919, ¶¶ 13, 24–25 (India) (decided Oct. 16, 2023), *reported in* 2023 SCC OnLine SC 1338.

[4] The Medical Termination of Pregnancy Act, No. 34 of 1971, §§ 3, 5, India Code (1971); Bharatiya Nyaya Sanhita, No. 45 of 2023, §§ 88–92, India Code (2023) (replacing Indian Penal Code, No. 45 of 1860, §§ 312–316, India Code (1860)).

[5] The Medical Termination of Pregnancy (Amendment) Act, No. 8 of 2021, India Code (2021); The Medical Termination of Pregnancy Act, No. 34 of 1971, § 3(2) expl. 1, India Code (1971).

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freedom.[6] The judgment did not ask who, within a household, would bear the cost of complying with the norm. Some years earlier the Andhra Pradesh High Court, considering a similar disqualification in *B.K. Parthasarathi*, had located the decision whether to beget children within the privacy protected by Article 21, while upholding the disqualification on the ground that the right to contest a local election is statutory rather than fundamental.[7] Neither court placed the pregnant woman at the centre of its analysis.

That changed with *Suchita Srivastava v. Chandigarh Administration*. A woman with a mild intellectual disability became pregnant after being raped in a State-run welfare institution. The High Court ordered termination, doubting her capacity to raise a child. The Supreme Court reversed. It held that a woman's right to make reproductive choices is a dimension of personal liberty under Article 21, and that this includes the choice to carry a pregnancy to term, give birth and raise children.[8] Reading section 3(4)(a) of the MTP Act closely, the Court distinguished "mental illness", for which guardian consent sufficed, from mental retardation (the statutory term of the time), for which it did not.[9] The posture deserves attention. India's reproductive autonomy jurisprudence was born as a shield against State-imposed termination. From its first articulation it was a right against official judgments about who is fit to reproduce, and only secondarily a right of access.

Devika Biswas v. Union of India carried the reasoning to the opposite pole of the population apparatus. The petitioners documented sterilisation camps run in unhygienic conditions under target-linked incentives, the deaths in Bilaspur in 2014 being the most widely reported instance.[10] The Court held that reproductive rights include access to quality health care and the freedom to decide on sterilisation without coercion, and it held the Union to its stated undertaking to stop sterilisation camps within three years.[11] The judgment's insistence on informed consent echoes the law of consent set out in *Samira Kohli*, where the removal of a patient's reproductive organs during surgery, without her prior agreement to that procedure, was held to vitiate consent.[12]

K.S. Puttaswamy v. Union of India supplied the scaffolding. The plurality opinion of Chandrachud J. placed procreation among the intimate decisions that privacy protects and relied

[6] *Javed v. State of Haryana*, (2003) 8 SCC 369 (India).
[7] *B.K. Parthasarathi v. Gov't of Andhra Pradesh*, AIR 2000 AP 156, ¶¶ 14–15, 26–27 (India).
[8] *Suchita Srivastava v. Chandigarh Admin.*, (2009) 9 SCC 1, 15, ¶ 22 (India).
[9] *Id.*; The Medical Termination of Pregnancy Act, No. 34 of 1971, § 3(4)(a), INDIA CODE (1971) (prior to 2021 amendment).
[10] *Devika Biswas v. Union of India*, W.P. (C) No. 95 of 2012 (India) (Sept. 14, 2016), *reported in* (2016) 10 SCC 726.
[11] *Id.* ¶¶ 81–88.
[12] *Samira Kohli v. Prabha Manchanda*, (2008) 2 SCC 1 (India).

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on *Suchita* for the point.[13] Kaul J. wrote of an individual's right to exercise control over his or her own life, and counted procreation among the aspects of dignity that privacy protects.[14] No less significant was the method: intrusions on privacy must satisfy legality, a legitimate aim and proportionality, a test later refined in the Aadhaar judgment and anchored in *Modern Dental College*.[15]

X v. Principal Secretary gathered these strands. Construing rule 3B purposively, the Court held that the category of women experiencing a "change of marital status" during pregnancy, who may terminate between twenty and twenty-four weeks, is illustrative of a wider class of women whose material circumstances change, and that this class includes unmarried women whose relationships have ended, because the material change in circumstance, and not the fact of marriage, is what the rule addresses.[16] It went on to hold that "rape" for MTP purposes includes non-consensual intercourse by a husband; that practitioners may not insist on extra-legal conditions such as family consent; and that a practitioner reporting a minor's pregnancy under section 19 of the POCSO Act need not, at the request of the minor and her guardian, disclose the minor's identity.[17] It also stated that it used the term "woman" as including persons other than cisgender women who may require access to abortion care.[18] In *A (Mother of X)* the Court added that a medical board assessing a pregnancy beyond twenty-four weeks cannot confine itself to the criteria in section 3(2B) but must report on the pregnant person's physical and mental health, and that where a minor's wishes diverge from her guardian's, her view is an important factor.[19]

The trajectory is impressive. It is also lopsided. Each advance was secured by reading a statute generously, never by questioning its premise. That preference for purposive construction over constitutional invalidation is itself a choice about the right's foundation, and it is the choice the following parts examine.

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[13] *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1 (India) (Chandrachud, J., plurality opinion).
[14] *Id.* (Kaul, J., concurring).
[15] *K.S. Puttaswamy v. Union of India (Aadhaar)*, (2019) 1 SCC 1 (India); *Modern Dental Coll. & Rsch. Ctr. v. State of Madhya Pradesh*, (2016) 7 SCC 353 (India).
[16] *X v. Principal Sec'y*, *supra* note 1, ¶¶ 89–94, 118–122; The Medical Termination of Pregnancy Rules, 2003, r. 3B(c) (India), amended by The Medical Termination of Pregnancy (Amendment) Rules, 2021 (India).
[17] *X v. Principal Sec'y*, *supra* note 1, ¶¶ 22–23, 74–75, 80–81; The Protection of Children from Sexual Offences Act, No. 32 of 2012, § 19, INDIA CODE (2012); The Medical Termination of Pregnancy Act, No. 34 of 1971, § 5A, INDIA CODE (1971).
[18] *X v. Principal Sec'y*, *supra* note 1, ¶ 11.
[19] *A (Mother of X) v. State of Maharashtra*, (2024) 6 SCC 327, ¶¶ 25–26, 35, 37 (India).

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III. THE BODY AS BOUNDARY

Bodily integrity is the most intuitive foundation. Pregnancy occupies the body, and its compelled continuation is a sustained physical imposition lasting months. Indian law already treats non-consensual medical intervention as a wrong in both tort and constitutional terms: *Samira Kohli* made real consent the condition of lawful treatment, and *Common Cause* extended self-determination over one's body to the refusal of life-prolonging care.[20] If a competent adult may decline a ventilator, the argument runs, she may decline to lend her body to gestation.

The philosophical version of this claim is Judith Jarvis Thomson's. Even if the foetus is granted full moral status, she argued, nobody is obliged to sustain another's life with her own body.[21] For Indian courts the attraction is that the argument sidesteps the question of when life begins, which they have consistently avoided answering. The difficulty is that their practice does not match it. In *X v. Union of India* the bench treated foetal viability as close to decisive: once the pregnancy had crossed twenty-four weeks without a diagnosis of substantial abnormality or a threat to life, the petitioner's interests were taken as already weighed by Parliament.[22] A thoroughgoing bodily-integrity analysis would have required the State to justify, case by case, why her body could be conscripted for another eight to ten weeks.

The late-term cases expose three weaknesses in this foundation. The first is that it is a negative conception. It tells the State to keep its hands off, which works well against coerced sterilisation or forced termination, but says little about access. A right not to be interfered with does not, by itself, require that a provider be within reach, that public facilities stock mifepristone, or that a medical board meet within days rather than weeks.

The second weakness is that bodily integrity cannot explain why reproductive regulation is especially suspect. The State prohibits the sale of organs, mandates helmets and criminalises some drug use. Each limits self-determination over the body, and each routinely survives review. Without a further account of what sets reproductive control apart, the claim collapses into ordinary liberty weighed against ordinary State interests, and the State tends to win such contests.

The third is that the framing translates awkwardly where the constraint is material rather than coercive. *Laxmi Mandal*, where the Delhi High Court held that denying maternal health entitlements to poor women violated Article 21, was a case about the State's failure to provide,

[20] *Samira Kohli*, (2008) 2 SCC 1; *Common Cause v. Union of India*, (2018) 5 SCC 1 (India).
[21] Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFFS. 47 (1971).
[22] *X v. Union of India*, *supra* note 3, ¶¶ 24–25.

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not its decision to intrude.[23] Bodily integrity remains the indispensable floor of any reproductive right. It is not, on its own, an adequate theory of one.

IV. Privacy, proportionality and the medical gatekeeper

Decisional privacy moves the inquiry from the body to the choice. In the American line running from *Griswold* through *Eisenstadt* to *Roe*, privacy came to protect the decision "whether to bear or beget a child", and *Puttaswamy* surveyed that line at length.[24] What India did not import was the trimester framework or the idea of a zone categorically immune from regulation. Every intrusion on privacy is instead tested for proportionality, and the strength of the right depends on how seriously that test is applied.

Applied seriously, proportionality has real bite. Take the requirement that a registered practitioner form an opinion about risk to the woman's physical or mental health before terminating a pregnancy of up to twenty weeks. Its aim, the safety of the procedure, is legitimate. The measure, however, is not a safety rule. It substitutes the clinician's judgment about the woman's mental health for her own decision. The Act already lets the practitioner presume grave injury to mental health where the pregnancy follows rape or contraceptive failure, and to consider the woman's actual or reasonably foreseeable environment.[25] In practice the opinion requirement at early gestation does little clinical work; its main effect is to arm the cautious or ideologically resistant practitioner with a veto. A less restrictive alternative, termination on request in the first trimester with safety secured through provider qualification and facility standards, is plainly available. On the necessity limb, the requirement looks vulnerable. The Court in *X v. Principal Secretary* did not go that far. It read the statute expansively and warned practitioners against obstruction, leaving the opinion requirement itself unexamined.[26]

Two objections to the privacy framing deserve weight, and they point in opposite directions. The first comes from feminist legal theory. Catharine MacKinnon argued that privacy doctrine shelters the very sphere in which women's subordination has historically been organised, and that calling abortion a private choice presupposes a freedom in sexual relations that many women lack.[27] Indian law gives the objection force. Exception 2 to section 375 of the Indian

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[23] *Laxmi Mandal v. Deen Dayal Harinagar Hosp.*, (2010) 172 DLT 9 (India).

[24] *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022); *see generally K.S. Puttaswamy*, (2017) 10 SCC 1 (surveying comparative privacy jurisprudence).

[25] The Medical Termination of Pregnancy Act, No. 34 of 1971, § 3(2) expls. 1–2, § 3(3), INDIA CODE (1971).

[26] *X v. Principal Sec'y*, *supra* note 1, ¶¶ 22–23, 122.

[27] Catharine A. MacKinnon, *Privacy v. Equality: Beyond Roe v. Wade*, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 93 (1987); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281

Penal Code, carried into Exception 2 to section 63 of the Bharatiya Nyaya Sanhita, is a legal construction of the marital bedroom as a space beyond the criminal law.[28] *X v. Principal Secretary* recognised marital rape for the limited purpose of the MTP Act and Rules while expressly declining to touch the penal exception.[29] The result is a doctrine that acknowledges harm within marriage for one purpose and preserves immunity for another, which is roughly what MacKinnon predicted privacy reasoning would produce.

The second objection holds that privacy, once filtered through proportionality, is too accommodating of State interests. Legitimate aims are easy to find, and analysis tends to turn on deference at the balancing stage. The gestational-limit cases bear this out. In *X v. Union of India* the State's interest in a viable foetus was not tested for necessity or against alternatives; it was treated as embodied in the statutory scheme and given decisive weight.[30] A privacy right whose content at the margin is fixed by the legislature's chosen thresholds offers little protection at those thresholds, which is where protection is most needed.

Relational theories of autonomy offer a partial reply. Jennifer Nedelsky, and the contributors to the collection edited by Mackenzie and Stoljar, argue that autonomy is developed through relationships and institutions, not exercised in isolation from them.[31] The account fits the Indian setting, where reproductive decisions are routinely negotiated with spouses, in-laws and natal families. Read in that light, the Court's refusal in *X v. Principal Secretary* to allow practitioners to demand family consent protects a person's authority within her relationships rather than abstracting her from them. Relational autonomy explains why the decision should be hers. It does not, however, supply a standard of review, and it is silent on why the State should carry a heavy burden when it intervenes.

V. Equality as the Missing Foundation

The equality argument begins with a fact the other framings treat as background: only persons capable of pregnancy can be made to remain pregnant. Laws restricting termination therefore distribute their burdens along the axis of sex, in a field long governed by assumptions about women's proper roles. Ruth Bader Ginsburg suggested in 1985 that *Roe* would have stood on

(1991).

[28] Indian Penal Code, No. 45 of 1860, § 375 exception 2, INDIA CODE (1860); Bharatiya Nyaya Sanhita, No. 45 of 2023, § 63 exception 2, INDIA CODE (2023).

[29] *X v. Principal Sec'y*, *supra* note 1, ¶¶ 74–75.

[30] *X v. Union of India*, *supra* note 3, ¶¶ 24–26.

[31] Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7 (1989); RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF (Catriona Mackenzie & Natalie Stoljar eds., 2000).

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firmer ground had it rested on equal protection rather than privacy.[32] Reva Siegel turned the suggestion into a theory, showing that abortion restrictions have historically reflected and reinforced judgments about women's social function, and arguing that they should be measured against sex-equality norms.[33]

Indian constitutional law is in several respects better placed than American law to receive the argument. *Anuj Garg* held that laws resting on stereotyped assumptions about women's roles attract heightened scrutiny, and that protective intent does not excuse paternalism.[34] *Navtej Singh Johar* read "sex" in Article 15(1) to reach discrimination grounded in stereotypes about sexual roles.[35] *Joseph Shine* struck down the offence of adultery partly because it treated a wife as her husband's property and denied her sexual agency.[36] *Lt. Col. Nitisha* then recognised indirect discrimination: facially neutral criteria that disproportionately disadvantage women offend Articles 14 and 15(1) unless the State justifies them.[37] The tools are already on the table.

Applied to reproduction, they yield results the other foundations do not. A gestational limit is neutral in the thin sense that it applies to every pregnancy. Its effects, however, fall only on pregnant persons and, within that group, most heavily on those who learn of a pregnancy late: minors, survivors of sexual violence, women with irregular cycles or post-partum amenorrhoea, and women far from diagnostic services. The petitioner in *X v. Union of India* said she had not known she was pregnant because of lactational amenorrhoea.[38] An equality analysis asks whether the chosen threshold, together with the absence of any mental-health ground beyond it, imposes a disproportionate burden on an identifiable subgroup of women, and whether the State can justify that burden. Indirect-discrimination doctrine places the onus of justification on the State once disparate impact is shown. That is a sharper inquiry than the deferential balancing the courts have conducted under Article 21.

Equality also explains a pattern that autonomy alone leaves unexplained, namely the direction in which reproductive coercion has historically flowed. Mohan Rao's study of Indian population policy shows how targets and incentives bore down on poor and rural communities, and how, after the backlash against the Emergency-era vasectomy drives, the burden shifted decisively

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[32] Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985).
[33] Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992).
[34] *Anuj Garg v. Hotel Ass'n of India*, (2008) 3 SCC 1 (India).
[35] *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (India).
[36] *Joseph Shine v. Union of India*, (2019) 3 SCC 39 (India).
[37] *Lt. Col. Nitisha v. Union of India*, W.P. (C) No. 1109 of 2020, ¶¶ 48, 66–70 (India) (Mar. 25, 2021), *reported in* (2021) 15 SCC 125.
[38] *X v. Union of India*, *supra* note 3, ¶ 2.

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onto women as the more administrable subjects of family planning.[39] *Devika Biswas* recorded the same pattern four decades on.[40] The reproductive justice framework developed by Loretta Ross and Rickie Solinger insists that the right not to have children, the right to have them and the right to raise them in safe conditions be analysed together, precisely because coercion has run in both directions depending on a woman's class and race.[41] Indian law, with *Suchita* protecting the decision to continue a pregnancy and *Devika Biswas* protecting against sterilisation, already contains the elements of that framework. It has not yet described them as a single equality claim.

Three objections need answering. The first is that equality reasoning requires a comparator, and pregnancy has no male analogue. After *Nitisha* and the anti-stereotyping cases, the better question is not whether men and women are treated identically but whether the law entrenches a disadvantage connected to sex. Pregnancy-based burdens are the paradigm of such a disadvantage.

The second objection is sharper. Sex-selective abortion, regulated by the PCPNDT Act, seems to show that a choice-based right can itself serve gender inequality.[42] Nivedita Menon has written about how Indian feminism struggled to defend access to abortion while campaigning against sex selection.[43] The tension is genuine, but it tells in favour of an equality foundation. A right resting only on autonomy has no internal resources for distinguishing sex selection from any other reason for termination. A right resting on equality can explain why the State may police the determination and disclosure of foetal sex, the instrument of selection, without making access to abortion depend on scrutiny of women's reasons.

The third objection is practical. Indian equality review still often defaults to the reasonable-classification test, which is poorly suited to effects-based claims. That concern has weakened since *Shayara Bano* revived manifest arbitrariness and *Nitisha* turned attention to effects, but no court has yet applied Article 15 scrutiny directly to the MTP Act.[44] To that extent the argument here is prescriptive, and I present it as such.

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[39] MOHAN RAO, FROM POPULATION CONTROL TO REPRODUCTIVE HEALTH: MALTHUSIAN ARITHMETIC (2004).
[40] *Devika Biswas*, (2016) 10 SCC 726.
[41] LORETTA J. ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE: AN INTRODUCTION (2017).
[42] The Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, No. 57 of 1994, INDIA CODE (1994).
[43] NIVEDITA MENON, RECOVERING SUBVERSION: FEMINIST POLITICS BEYOND THE LAW (2004).
[44] *Shayara Bano v. Union of India*, (2017) 9 SCC 1 (India); *Lt. Col. Nitisha*, (2021) 15 SCC 125.

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VI. Viability, Medical Boards and the Late-Term Cases

Pregnancies beyond twenty-four weeks are where any theory of the right is tested. The 2021 amendments created two routes past that point. Section 3(2B) lifts the gestational limit where a State medical board diagnoses substantial foetal abnormalities, and section 5 permits termination at any stage where it is immediately necessary to save the woman's life.[45] Nothing in the scheme allows a late termination on the ground of grave risk to mental health alone, unless that risk can be described as a threat to life.

The Supreme Court has filled this gap through its constitutional and Article 142 jurisdiction, and has done so unevenly. In *A (Mother of X)* a fourteen-year-old survivor of sexual assault, nearly thirty weeks pregnant, was first permitted to terminate after a fresh medical board reported that continuing the pregnancy against her will may harm her physical and mental well-being; the Court later faulted the earlier board, on whose report the High Court had refused relief, for ignoring her physical and mental health.[46] Days later the order was recalled when her parents, with her agreement, decided to continue the pregnancy, the Court observing that her view and theirs were in tandem and that a minor's view must weigh as an important factor.[47] In *X v. Union of India*, an adult married woman at about twenty-six weeks was refused relief after a two-judge bench had split on the Union's application to recall an earlier permission.[48]

These outcomes admit more than one reading. A generous one sees individualised constitutional adjudication: relief where the statute produces disproportionate hardship, as with a child survivor, and no relief where the bench judges the hardship insufficient. A more sceptical reading observes that the decisive variable often appears to be the medical board's description of viability, coupled with the bench's evident reluctance, voiced in the hearings and repeated in the judgment, to direct doctors to stop a foetal heartbeat.[49] On that reading, the clinical framing returns the decision to the very gatekeeper the autonomy jurisprudence had set out to displace.

Comparative law shows how wide the range of defensible positions is. The Supreme Court of Canada in *Morgentaler* struck down a therapeutic-committee system chiefly because the delays it generated violated security of the person.[50] The German Federal Constitutional Court went

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[45] The Medical Termination of Pregnancy Act, No. 34 of 1971, §§ 3(2B)–(2D), 5, India Code (1971).
[46] *A (Mother of X)*, (2024) 6 SCC 327, ¶¶ 6–8, 24–26 (recounting operative order of Apr. 22, 2024).
[47] *Id.* ¶¶ 17–19, 35 (recalling the earlier order).
[48] *X v. Union of India*, *supra* note 3, ¶¶ 4–9. A division bench (Kohli & Nagarathna, JJ.) had permitted termination by order of Oct. 9, 2023, and divided on the Union's recall application on Oct. 11, 2023, before the matter went to a three-judge bench.
[49] *X v. Union of India*, *supra* note 3, ¶ 25; *see also Termination of 26-Week Pregnancy: We Can't Kill a Child, Says SC*, Deccan Herald (Oct. 12, 2023), https://deccanherald.com/amp/story/india%2Ftermination-of-26-week-pregnancy-we-cant-kill-a-child-says-sc-2723578 (reporting remarks made at the hearing).
[50] *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (Can.).

the other way, finding a State duty to protect unborn life from an early stage and permitting early abortion to go unpunished only within a counselling model.[51] The UN Human Rights Committee, in *K.L. v. Peru* and *Mellet v. Ireland*, held that compelling a woman to carry a pregnancy with a fatal foetal impairment could amount to cruel, inhuman or degrading treatment.[52] Its General Comment No. 36 allows States to regulate termination but not in ways that force women into unsafe abortion, and calls for access where carrying to term would cause substantial pain or suffering.[53] India's board model resembles, in its procedural effects, the committee structure that *Morgentaler* condemned. Its substantive limits past twenty-four weeks approach the German position, but without the German doctrine that supports them.

That absence matters more than is usually acknowledged. Indian courts have never held the foetus to be a bearer of Article 21 rights. *Suchita* spoke of a "compelling state interest" in protecting the life of the prospective child, but located its expression in the conditions laid down by the statute.[54] If the State's interest is defined by the statute, the constitutional question becomes whether the statute's line is a proportionate restriction of a fundamental right. On that question, the absence of a mental-health ground beyond twenty-four weeks is hard to defend. A person facing grave psychological harm must either fit the abnormality or life-threat categories or petition a constitutional court, and the second route is open in practice only to those with counsel and time. The analysis returns, by another road, to equality.

Some uncertainty should be admitted. Clinical evidence on viability, neonatal outcomes and the comparative risks of late termination and induced preterm delivery is contested, and courts are poorly placed to settle it. A defensible reform might keep an upper limit while adding a mental-health ground assessed by the treating practitioner, reserving boards for genuinely complex cases. Whether the Constitution requires such a reform, as distinct from making it advisable, is a question I answer in the affirmative only tentatively.

VII. Beyond abortion

A coherent reproductive right has to account for more than abortion. Four areas put that coherence under strain.

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[51] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 25, 1975, 39 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (Ger.); BVerfG May 28, 1993, 88 BVerfGE 203 (Ger.).

[52] *K.L. v. Peru*, Hum. Rts. Comm., Commc'n No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2005); *Mellet v. Ireland*, Hum. Rts. Comm., Commc'n No. 2324/2013, U.N. Doc. CCPR/C/116/D/2324/2013 (2016).

[53] Hum. Rts. Comm., *General Comment No. 36: Article 6: Right to Life*, ¶ 8, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019).

[54] *Suchita Srivastava*, (2009) 9 SCC 1, 15, ¶ 22.

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Population policy. *Javed* has not been overruled, and two-child conditions survive in local-body election laws in several States and in eligibility criteria for some State schemes.[55] The draft Uttar Pradesh Population (Control, Stabilization and Welfare) Bill, 2021, released for public comment by the State Law Commission in July 2021, proposed incentives and disincentives keyed to family size. It has not been enacted: it had been neither passed nor implemented by June 2024, and no later legislative action on it has been reported.[56] After *Puttaswamy*, norms of this kind must pass the proportionality test that *Javed* never applied, and the earlier decision now rests on weakened foundations. An equality analysis sharpens the critique. The disqualifications are addressed to families, but compliance is extracted through women's bodies, as pressure for sterilisation and, in some settings, for sex-selective termination. The National Population Policy, 2000 itself committed the Union to voluntary and informed choice and a target-free approach, which makes coercive measures difficult to defend as necessary.[57]

Surrogacy and assisted reproduction. The Surrogacy (Regulation) Act, 2021 permits only altruistic surrogacy. It confines eligibility to married heterosexual couples within prescribed age bands and to widowed or divorced women between thirty-five and forty-five, excluding other single women, single men and same-sex couples.[58] The constitutional challenges, led by *Arun Muthuvel v. Union of India*, are pending. In October 2025 the Court held that the upper age limits do not apply to couples who had frozen embryos before the Act came into force, while stating that it was not ruling on the validity of those limits; the challenges to the Act's other eligibility conditions had not been decided as of October 2026.[59] The ban on commercial surrogacy rests on an anti-exploitation rationale that may well survive scrutiny. The eligibility exclusions are another matter. If *Suchita* protects the decision to have a child, it is hard to see why that protection should turn on marital status, particularly after *X v. Principal Secretary*

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[55] *Javed*, (2003) 8 SCC 369.

[56] UTTAR PRADESH STATE L. COMM'N, *Draft Uttar Pradesh Population (Control, Stabilization and Welfare) Bill, 2021* (2021) (released for public comment); Aishwarya Varma, *Fact-Check: No, Uttar Pradesh Has Not Implemented Its 'Two-Child Policy' Yet!*, THE QUINT (June 10, 2024), https://www.thequint.com/amp/story/news/webqoof/uttar-pradesh-has-not-implement-two-child-policy-fact-check (reporting that the Bill had been neither passed nor implemented).

[57] MINISTRY OF HEALTH & FAM. WELF., GOV'T OF INDIA, *National Population Policy 2000* (2000).

[58] The Surrogacy (Regulation) Act, No. 47 of 2021, §§ 2(1), 4, INDIA CODE (2021).

[59] *Vijaya Kumari S. v. Union of India*, 2025 SCC OnLine SC 2195 (India) (Oct. 9, 2025) (deciding W.P. (C) No. 331 of 2024 with I.A. No. 181569 of 2022 in *Arun Muthuvel v. Union of India*, W.P. (C) No. 756 of 2022) (holding that § 4(iii)(c)(I) of the Surrogacy (Regulation) Act, 2021 does not operate retrospectively); *see Arun Muthuvel v. Union of India*, W.P. (C) No. 756 of 2022 (India) (record of proceedings, July 29, 2025) (reserving orders on the age-limit question and listing the connected challenges separately). The remaining challenges to the Surrogacy (Regulation) Act, 2021 and the Assisted Reproductive Technology (Regulation) Act, 2021 had not been decided as of October 2026.

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rejected marital status as a basis for unequal access to abortion. The two lines of doctrine pull against each other, and the Court will have to choose between them.

Marital rape. Exception 2 to section 63 of the Bharatiya Nyaya Sanhita excludes non-consensual intercourse by a husband with his adult wife from the offence of rape.[60] *Independent Thought* read the exception down for wives under eighteen.[61] The Delhi High Court divided in *RIT Foundation* in 2022. The challenges remain pending before the Supreme Court: on 9 September 2026 a three-judge bench posted them for final hearing, to consider both whether the exception is valid and whether a prosecution can proceed while it stands, and no judgment had been delivered as of October 2026.[62] The reproductive dimension of this question is underrated. *Suchita* expressly included within reproductive choice the right to refuse participation in sexual activity.[63] A legal order that exempts marriage, the institution within which the overwhelming majority of Indian pregnancies occur, from the law of rape cannot claim fidelity to that idea. The MTP-specific recognition of marital rape in *X v. Principal Secretary* acknowledged the point while illustrating why statutory construction cannot do the work of constitutional review.

Gender identity. *NALSA* recognised the right to self-identify one's gender, and the Transgender Persons (Protection of Rights) Act, 2019 prohibits discrimination, including in health care.[64] The Court in *X v. Principal Secretary* and *A (Mother of X)* expressly extended its reasoning to pregnant persons who are not cisgender women.[65] The text of the Act still speaks of "woman", surrogacy law is built around the married heterosexual couple, and clinical protocols are rarely designed with trans and non-binary patients in mind. A reproductive right that in practice reaches only cisgender women is narrower than the justifications offered for it.

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[60] Bharatiya Nyaya Sanhita, No. 45 of 2023, § 63 exception 2, INDIA CODE (2023).
[61] *Indep. Thought v. Union of India*, (2017) 10 SCC 800 (India).
[62] *RIT Found. v. Union of India*, 2022 SCC OnLine Del 1404 (India) (split decision); *Hrishikesh Sahoo v. State of Karnataka*, SLP (Crl.) Nos. 4063–4064 of 2022 (India) (pending); Aishwarya Iyer, *"What Is Union's Stand?" Supreme Court Asks as Marital Rape Petitions to Be Heard on Sept 9*, LAWBEAT (Sept. 7, 2026), https://lawbeat.in/top-stories/what-is-unions-stand-supreme-court-asks-as-marital-rape-petitions-to-be-heard-on-sept-9-1629164; Debby Jain, *How Can Husband Be Prosecuted for Rape of Wife When Marital Rape Exception Exists in Law? Supreme Court Asks*, LIVELAW (Sept. 9, 2026), https://www.livelaw.in/top-stories/supreme-court-marital-rape-exception-matter-posted-for-final-hearing-can-husband-be-prosecuted-before-verdict-on-constitutional-validity-issue-549401.
[63] *Suchita Srivastava*, (2009) 9 SCC 1, 15, ¶ 22.
[64] *Nat'l Legal Servs. Auth. v. Union of India*, (2014) 5 SCC 438 (India); The Transgender Persons (Protection of Rights) Act, No. 40 of 2019, §§ 3, 15, INDIA CODE (2019).
[65] *X v. Principal Sec'y*, *supra* note 1, ¶ 11; *A (Mother of X)*, (2024) 6 SCC 327, ¶ 21.

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VIII. Toward an equality-centred account

The Supreme Court has built reproductive autonomy into Article 21 with real skill, often under acute time pressure, in cases where a week's delay decides the outcome. Its achievement has been to strip away obstacles the statute never authorised, such as the marital-status distinction and demands for family consent, and to hold the State to its own legal framework. It has been far less willing to test that framework.

The account proposed here assigns different work to each foundation. Autonomy, grounded in bodily integrity and decisional privacy, defines the content of the right: the pregnant person's authority to decide whether to continue a pregnancy, whether to use contraception or undergo sterilisation, and whether and how to become a parent. Equality under Articles 14 and 15 sets the standard of review. Because restrictions on reproduction burden people by reason of sex, and frequently rest on assumptions about women's roles, the State should carry the burden of showing that a measure is necessary and the least restrictive means available, with close attention to its effects on minors, survivors of sexual violence, persons with disabilities, poor and rural women, and gender-diverse persons. Measured this way, the PCPNDT regime and the ban on commercial surrogacy may well survive. The opinion requirement at early gestation, the absence of a mental-health ground beyond twenty-four weeks, the marital-status conditions in surrogacy law and the marital rape exception are, on this analysis, exposed.

Two cautions follow. Courts cannot substitute for legislative reform of the MTP Act; adjudication through individual petitions produces uneven results and rewards those with access to counsel. And an equality foundation carries its own risk, that of treating reproductive regulation as a matter of group disadvantage at the expense of the individual decision. The answer is to keep both foundations in view. Autonomy without equality leaves the State free to draw the boundaries of choice. Equality without autonomy risks replacing one paternalism with another. The Constitution supplies both, and the marital rape and surrogacy cases now before the Court will show whether they are to be read together.

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