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The Masculine Indian State: On Abortion in India

AISHWARYA RAMKUMAR[1]

ABSTRACT

"The state is a male in the feminist sense". Catherine Mackinnon, in this statement, critiques the masculine nature of the state and its ignorance of a woman's agency. Using this statement as a point of departure, this paper is premised on the argument that the state and its organs are blind to the rights and liberties of a women. It seeks to analyse this statement in the Indian context in light of the Indian abortion laws. It primarily argues that the abortion laws in India are rather masculine, and are often used to control the sexuality, agency, and choice of women (the term "women" is used in a non-exclusive manner and the arguments in this paper are inclusive of everyone person who can bear a foetus). The Medical Termination of Pregnancy Act, 1971 and the Medical Termination of Pregnancy (Amendment) Bill, 2020 will also be discussed to ascertain the extent of their masculinity. The paper will also engage with some masculine acts of the legislature and judiciary which have resulted denying women their basic human rights. Finally, it calls for the coming of a feminist or women centric state, that is sensitive towards and conscious of the rights and autonomy of women. This paper, therefore, critiques the socio-legal landscape that shapes this male perspective of the state, and appeals for a more women-centric state where women have the exclusive autonomy and choice with respect to their body.

I. INTRODUCTION

"The state is a male in the feminist sense".[2] To understand this statement and appreciate its implications, one needs to inquire into what a state is, what a male state is, and what a feminist state is. By first understanding what a state is, and why is it masculine, we will delve into the meaning and need of a feminist state. A state, in the modern sense, is a political entity that can legitimately exercise coercive power over its citizens, in exchange for their loyalty and support.[3] The state, therefore, takes the form of a paternalistic figure in relation to its subjects

[1] Author is a student at Jindal Global Law School, India.

[2] Catherine Mackinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence* SIGNS 8(4), 1983 at 644.

[3] DAVID HELD, FORMATIONS OF MODERNITY 88 (Blackwell Publishers Ltd 1995) (1992).

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and becomes responsible for acting in the best interest of its subjects, especially women. In doing so, I argue, in line with Mackinnon, that the state adopts a male standpoint. In light of this, another question that Mackinnon asks – "Are women humans"?[4] becomes pertinent. In adopting a male standpoint, the state often forsakes the fact that its population consists of women who too have rights.

This article primarily argues that the state and its organs are often ignorant of the woman's question all together, making the state a masculine entity with laws that are blind to women. This can be seen in form of rape laws, sexual harassment laws, abortion laws, etc. in India. For instance, marital rape is still not an offence in India,[5] the murky nature of sexual harassment laws,[6] and the extremely restrictive abortion laws. This article seeks to draw our attention specifically to the masculine nature of abortion laws in India. This is because, in light of the recent Bill (2020) that seeks to regulate abortion in India, this discussion on the masculine nature of abortion laws and whether the Bill too subscribes to this becomes relevant.

This article aims to understand the male stance of the state in relation to abortion laws in India from an Indian socio-legal perspective. Section One of the article deals with debates around abortion in the United States and in India to understand how the rights of the foetus bearer foetus are weighed against each other. In Section Two, we will understand the objective behind the Indian law that seemingly governs abortions, i.e., the Medical Termination of Pregnancy Act 1971,[7] (henceforth, MTPA). The term 'seemingly' is used intentionally and consciously, as we will discuss in that section. Section Three of the article delves into how the legislative and judicial bodies of the Indian state reek of masculinity, and the laws and judgements passed by them ignore basic human rights. It is pertinent at this point to draw on the fact that reproductive rights, including choice and access to healthcare are a part of basis human rights, which are guaranteed internationally. Thereby, when the state does not allow access to this, its women residents are denied their human rights. Finally, in section Four, I present an appeal for a women-centric, or a female state; one that adopts a standpoint favourable to women. In this regard the Medical Termination of Pregnancy (Amendment) Bill 2020,[8] (henceforth, the Bill) will be discussed.

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[4] CATHERIN MACKINNON, ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES 41-43 (Harvard University Press) (2006).

[5] *See*, Indian Penal Code, 1860, s 375 (henceforth, IPC). *See also*, M Bhat and S.E. Ullman, *Examining Marital Violence in India: Review and Recommendations for Future Research and Practice*, TRAUMA, VIOLENCE & ABUSE 15(1) 2014.

[6] *See*, Kalpana Kannabiran, *Introduction to Liberty and Non-Discrimination- The Scope of Intersectional Jurisprudence* en TOOLS OF JUSTICE- NON-DISCRIMINATION AND THE INDIAN CONSTITUTION (Routledge 2012).

[7] Medical Termination of Pregnancy Act ,1971 (henceforth, MTPA).

[8] Medical Termination of Pregnancy (Amendment) Bill 2020 (henceforth, MTP Amendment Bill)

I began this article by quoting Mackinnon, a well-known radical feminist who would advocate for structural change, as opposed to a change within existing structures.[9] I agree that this is the goal- existing structures of state formed patriarchy must be overthrown to emancipate women. However, while this happens, the present cannot be left remediless. Therefore, this article attempts to provide a short-term structural solution.

Throughout this article, the term 'foetus' is used consciously instead of the term 'baby', 'child', or 'prospective child', as is used in the MTPA as well as various judgments[2]. This is because, often by interpreting an unborn foetus as a child, the life of the latter is given precedence over the choice of a woman (this will be discussed in detail subsequent sections).

At this point, it would be essential to clarify that while this article advocates for the free choice of women with respect to abortion, in no means does it include within its ambit those abortions that are done with the intention of female foeticide. This category of abortions, the writer's opinion, are illegal and unlawful. This is excluded from the scope of this article. It is also important to note that the term 'abortion' is also used in order to consciously avoid the phrase 'termination of pregnancy', as the latter is a one that does not in any way empower women, and instead focuses on this procedure from the perspective of a medical practitioner. This is discussed in section two of the article.

Before delving into the Indian socio-legal realm, let us briefly discuss the debates on abortion, which are often classified into the positions of pro-life and pro-choice, as we will see in the subsequent section.

II. THE FOETUS BEARER VERSUS THE FOETUS

The right of the pregnant woman, i.e., the foetus bearer is often weighed against that of the foetus. The school of thought that favours the rights of the bearer argues that the woman's right over her body is of most importance.[10] While this debate has manifested it in various forms over the world, this section of the article focuses on this debate in the context of the United States and India. In both these states the nature of the debate is rights based, i.e., the right of the woman to her bodily autonomy, and the foetus' potential right to life, forming opposing sides of pro-choice, and pro-life, respectively.[11]

In the United States, major pro-life sentiments stemmed from the Roman catholic Church.[12]It

[9] *See,* Mackinnon, *supra* note 2.
[10] Lance Gable, *Reproductive Health as a Human Right* 60 CASE W RES. L REV 95, 2010 at 975.
[11] *Id.*
[12] Judith McCoyd *Women in No Man's Land: The Abortion Debate in the USA and Women Terminating Desired Pregnancies Due to Foetal Anomaly* THE BRITISH JOURNAL OF SOCIAL WORK 40(1), 2010 at 153.

was of the staunch opinion that it is better for a hundred mothers to be killed, than one 'innocent' child. In fact, various opinions of physicians are used to justify this by stating that while the foetus is capable of growing into a productive member of the society, the woman's necessity is limited to serving the interest of their husband and the society, and this ends upon their death.[13] This highlights an overview of this side of the debate, i.e., those who opine that a foetus is a living being, and in aborting it, an act tantamount to taking a life is performed.

Let us now understand the legal position on abortion in the United States. The decision in *Roe v. Wade,*[14] in 1973 was a landmark one and was hailed and celebrated amongst the pro-choice groups. The majority opinion in this case upheld a woman's right to abortion and minimised the state's regulation. This decision decriminalized abortions in the United States. While this was a breakthrough in recognizing the rights of the woman, its scope is limited in the sense that it affords a certain amount of balancing between the rights of the woman and the foetus.

Unlike the United States, the sides of pro-life and pro-choice are not so well defined in India.[15] The is because religion plays an overwhelmingly important part in Indian society, and most religions oppose abortions. [16] As a result, those opting for abortions are faced with grave societal shame.[17] Similar to the United States' Roman Catholic church which propagated extensive anti-abortion sentiments, the Hindu dominant class and castes in India also rebuked this on the basis of their readings of their ancient scriptures- the Vedas, Dharma Sashtras, and the Smritis.[18] This is because these texts advocated that life starts with foetal movement.[19]

In this Indian society, the is a significant amount of stigma associated with abortions.[20]This is especially the case when the pregnancy is caused due to pre-marital sex as society tends to look down upon unmarried women engaging in this.[21] This another way in which the masculine state, through society, tries to regulate the sexuality of women. In various Dalit communities too, the sentiments shifted towards a pro-life one owing to societal norms and stigma associated with the procedure.[22] A study conducted in 2015 revealed that Dalit women not only wanted

[13] *Id.*
[14] Roe v. Wade 410 US 113 (1973) (henceforth, *Wade*).
[15] Srishti Agnihotri, *Abortion Rights in India and the Absence of The Pro-Life/Pro-Choice Debate*, FEMINISM IN INDIA (Apr 11 2016).
[16] Raj Pal Mohan *Abortion in India* 50(3) SOCIAL SCIENCE, 1975 at 141
[17] *Id.*, Melissa Stillman et. al, *Abortion in India: A Literature Review* GUTTMACHER INSTITUTE , 2004 at 32; T.K. Sundari Ravindran, *Medical abortion: Understanding perspectives of rural and marginalized women from rural South India* 118(1) INTERNATIONAL JOURNAL OF GYNECOLOGY AND OBSTETRICS, 2012.
[18] Pal Mohan, *supra* note 16 at 143.
[19] *Id.*
[20] Stillman, *supra* note 17 at 17.
[21] *Id.*
[22] Ravindran, *supra* note 18.

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medial safety with respect to abortions, but also social safety.[23] Some also opined that abortion was looked down upon in the community as it was thought of as a way out of pregnancies that arose out of wedlock.[24]

This stigma, however, is not just limited to pre-marital sexual intercourse. Often women who are in violent and sexually coercive marriages are subject to even more violence after undergoing an abortion.[25] This is because their husbands do not want for others to know of the abortion. This is especially the case in rural areas of the country. [26] As a result, various studies reveal that many women, almost more than fifty-percent in some cases, are likely to conceive a child even though they do not wish to.[27]In light of this textualist and stigmatised view of abortion in different communities, let us now delve into a more legal and constitutional approach to this debate. Article 21 of the Indian Constitution guaranteed the right to life and personal liberty to everyone.[28] The right to personal liberty includes the right of a woman to make her own reproductive choices, inclusive of termination, contraception, as well as giving birth in the interest of her dignity, privacy, and bodily integrity.[29] This article argues that keeping in mind Article 21[30] of the Indian Constitution which guarantees to everyone the right to life and personal liberty, it is essential that the foetus bearer's rights are given precedence over those of a foetus.

Indian courts have interpreted Article 21 to include the right of a woman to make her own reproductive decisions, but this is often balanced with the right of the foetus.[31] For instance, as discussed previously, while the Supreme Court did hold that Article 21 gives a woman the personal liberty to make her own reproductive choices, it also laid down a caveat that limits a woman's personal liberty. It held that there is a 'compelling state interest' in protecting the life of the prospective child, and mentioned the MTPA to this effect.[32] In justifying this reasoning, the court relied on the United States case of *Roe v. Wade*[33], where Justice Blackmun adjudged that the state has a legitimate interest in protecting the rights of the woman, but also that of a

[23] *Id.*
[24] *Id.*
[25] Stillman, *supra* note 17.
[26] Bela Ganatra and Siddi Hirve, *Induced abortions in a rural community in Western Maharashtra: prevalence and patterns* 10 REPRODUCTIVE HEALTH MATTERS, 2002 at 19.
[27] Pallabi Dasgupta et, al. *Pro-life or pro-abortion – Women's attitude toward abortion in Darjeeling, India* 7(1) ARCH MED HEALTH SCI, 2009 at 42-47.
[28] INDIA CONST. art. 21.
[29] Suchita Srivastava and Ors. v. Chandigarh Administration, (2009) 9 SCC 1 (henceforth, *Suchita Srivastava)*
[30] INDIA CONST. art. 21
[31] *Suchita Srivastava* at 22.
[32] *Id.* The court viewed the conditions mentioned in the MTPA such as consent of medical practitioner etc., as 'reasonable restrictions' to exercise of reproductive choices.
[33] *Wade* at 162-163.

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potential human life. The reason for this was that before the end of the first trimester, the mortality rate of women who underwent an abortion was lower than those completed the term of their pregnancy.[34] While he acknowledges that potential life cannot be protected, he balances this right with that of a foetus as at the point of what he calls 'viability', the foetus can sustain outside the bearer's body.[35]This reasoning is also based on the inherent and unnecessary need of the state to decide for a woman what is in her best interest, and is erroneously adopted in *Suchita Srivastava* in a manner that tips the scales in the direction of the foetus and denies the woman her right to abort in case the prescribed threshold time has elapsed. The state in both these decisions, presumes the role of deciding what is in the woman's best interest, and in doing so erases the narrative and experience of the woman who wishes otherwise, and is forced to see the pregnancy through.

In the case of Dalit women, the control they exercise over their own bodies is even more constricted. As discussed previously, there is a lot more stigma and control surrounding the body and reproductive choice of a Dalit woman.[36] This is because, they not only lack access to medically safe abortions but also fear for social safety.[37] They not only need to fight the masculine state but also the casteist masculine state.[38] This has manifested itself in various instances of forced abortions for the purpose of preserving honour the woman and her family's honour.[39] In one such instance, a Dalit woman who was pregnant after sexual intercourse with a dominant caste Hindu man was forced to abort her foetus by his parents as well as the police (acting as the masculine state).[40]

This is another instance of how the state adopts a paternalistic approach to the autonomy of a woman. It is as if she forfeits her Article 21 rights as soon as the said time of twelve or twenty weeks has elapsed, and no longer has the right to her bodily autonomy, dignity, and privacy. The state therefore, gives more voice to a literally voiceless foetus than it does to its bearer. This leads to a rather ironic situation, wherein, the state empowers the foetus over the woman who bears it, only to silence the foetus again on the chance that it grows to become a woman.

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[34] *Id.*
[35] *Id.*
[36] Ravindran, *supra* note 17.
[37] *Id.*
[38] This is because of the intersectional discrimination that the Dalit woman faces on account of being a woman as well as a Dalit. To understand intersectionality better, *see* Kimberle Crenshaw, *Demarginalizing The Intersection of Race and Sex* 1(8) University of Chicago Legal Forum, 1989.
[39] R. Sivakumar, *Caste discrimination: Minor Dalit girl forced to abort by in-laws, Ranipet police nab 19-year-old husband, family The Indian Express* Oct 17 2020) <https://www.newindianexpress.com/states/tamil-nadu/2020/oct/17/caste-discrimination-minor-dalit-girl-forced-to-abort-by-in-laws-ranipet-police-nab19-year-old-hu-2211246.html.> *See,* Ravindran, *supra* note 17.
[40] *Id.*

III. INTENTION AND OBJECTIVE OF THE MTPA

The legislative intent behind an act forms an important part of understanding the attitude of the state towards the objective is seeks to achieve through the act. Therefore, looking at the intention of the state in drafting the MTPA will help us understand if this Act, in fact, is an abortion legislation to protect women, or it is actually a legislation meant to protect medical practitioners and control the population.[41] In order to ascertain this, let us discuss the attitude of various groups towards the drafting of this Act, as well as the Preamble of the Act. Before this, let us look at what inspired the coming of the MTPA.

The foundation for the need of an abortion legislature was first brought up in 1957 through the Mudaliyar Committee report on illegal abortions.[42] Following this, in 1964, noting the problem of failed contraception, the Indian Parliamentary and Scientific Committee under the chairmanship of Lai Bahadur Sastri proposed the idea of abortion.[43] In light of this, a committee consisting of various doctors, lawyers, social workers, etc., was set up by the Central Family Planning Board to formulate a report addressing this problem.[44]This report forms the basis of the current MTPA.

At the time of deliberation, various groups such as medical professionals, government officials, and even pressure groups such as the All-India Women's Conference believed that the Bill should be passed as population control measure.[45] Only some political parties such as the Indian National Congress and the Communist Party of India believed that this should be passed for emancipating women.[46] The Preamble of the Act itself states that it is "an Act to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto."[47]

While the proponents of the Bill mostly supported it as a population control legislation and not a woman centric one,[48] (with the exception of the Congress party), the Bill also faced major opposition. The Jan Sangh Party was one of its strongest opposers and opined that the introduction of this Bill would be against Hindu values, and that birth control should be stained through restraint and self-control, and not abortion.[49] The Kerala Congress was also opposed

[41] Amar Jesani and Aditi Iyer, *Women and Abortion* 28(48) EPW, 1993 at 2592.
[42] Savithri Chattopadhyay, *Medical Termination of Pregnancy Act, 1971: A Study of The Legislative Process* 16(4) JOURNAL OF THE INDIAN LAW INSTITUTE, 1974 at 555-558.
[43] *Id.*
[44] *Id.*
[45] Chattopadhyay, *supra* note 42 at 555.
[46] *Id.*
[47] MPTA, preamble.
[48] Jesani, *supra* note 41.
[49]Chattopadhyay, *supra* note 40 at 555.

to the Bill, and considered abortion tantamount to murder.[50] The Communist Party- Marxist opposed the Bill on completely different grounds (similar to the criticism that this article is based on).[51] They believed that this Bill did not really emancipate women as it placed certain limitations and conditions on a woman's right to abort,[52] (as we shall discuss in subsequent sections). Therefore, they called for a Bill that would unconditionally allow a woman to abort, without the consent of her husband or a medical practitioner.[53]Therefore, from the intention of most of the proponents of the Bill [54], as well as the Preamble of the Act, it is evident that this is not a legislation that seeks to protect the interest of women, allow them to exercise their free choice and reproductive freedom, or bodily autonomy. It is, contrarily, a legislation to ensure population control and protect the interest of the medical practitioners who facilitate these abortions, as is explained below.

Are these intentions problematic? While population control may seem to be a goal that is desirable, especially for a country as populated as India, when this is the sole basis of drafting a legislation on abortion, and not the interest or choice of the women who wish to avail this, the focus is shifted from those whose interests are intrinsically linked to this in terms of autonomy and choice, to a more macro-level issue of population control. Similarly, by seeking to protect the interest of the medical practitioners who perform abortions, the focus is shifted from the woman's right to her bodily autonomy to a situation where she cannot exercise this without the medical practitioner deeming her fit to avail this. Recall how we referred to the MTPA as a law that 'seemingly' is an abortion framework. It is now evident that the real intention of this law is not to reflect the choices of the foetus bearer, but for reasons of population control, and protecting medical practitioners, etc.

It is also important to note that the MTPA, which is often hailed as a framework guiding the process of abortion, does not mention the term 'abortion' even once. It refers to this process as 'termination of pregnancy'. The choice of this phrase in place of abortion is deliberate and in consonance with the intention behind enacting this. The choice of phrase is so because this law actually sought to protect doctors so that they can abort foetuses without the penalties under Section 312 of the Indian Penal Code 1860,[55] that penalizes on anyone who aids an abortion.[56]

[50] *Id.* at 556.
[51] *Id.* at 557.
[52] *Id.*
[53] *Id.*
[53] *Id.*
[55] IPC, s.312 "Causing Miscarriage".
[56] *See*, Center for Reproductive Rights, Chapter 5 en: *Securing Reproductive Justice in India : A casebook* (2019); K.D. Gaur, *Abortion and the Law in Countries of Indian Subcontinent, AESAN region, United Kingdom, Ireland, and United States of America* 37(3) JOURNAL OF INDIAN LAW INSTITUTE, 1995 at 294-301.

After analysing these subtle and covert instances that reveal the state's masculinity in the MTPA, it is also pertinent to discuss the more overt aspects of this Act that display a lack of consideration for a woman's bodily autonomy.

IV. THE STATE'S MASCULINITY AND THE LACK OF AUTONOMY

It is an indisputable fact that the MTPA does not give a woman the bodily autonomy that she is guaranteed under Article 21 of the Indian Constitution. This is because the Act only gives the woman a partial and contingent right over her body. As per the MTPA, a woman may have an abortion only if one medical practitioner is of the opinion that the continuation of such pregnancy would risk her life, or physical or mental health, or the child born would suffer from physical or mental abnormalities that would handicap it.[57] This is the level of scrutiny that is applicable if the pregnancy has not crossed a twelve-week limit.[58] In case this limit has been crossed but twenty weeks have not been completed, two medical practitioners must be of the above-mentioned opinion.[59]It is pertinent to note that the Bill relaxes some of these requirements, such as the twenty-week period is proposed to be extended to twenty-four weeks in cases of a threat to the physical or mental health of the woman, or the risk of a foetal abnormality.[60] The Bill will be discussed in detail in a subsequent section.

Two inferences may be drawn from this legislative position. Firstly, a woman's opinion of her own mental or physical position to bear a child is not sufficient. A medical practitioner, a third person, who has very little insight into the life and conditions of the pregnant woman, is given the power to ascertain her readiness. Secondly, another reason that the legislation allows for the practitioner to formulate an opinion in favour of the abortion is if there is a risk to the life of the mother or the foetus. This limits the choice of a woman and grants her the right to abort only in two narrow situations, giving her no real or substantial control over her own body. The possibility that she may be undesirous of subjecting her body to birthing a child, or raising a child is given no consideration. This is another way in which the state asserts its masculinity and dominance by being ignorant towards the choice that a woman wants to make with respect to her own body. By allowing the medical practitioner's word more value than hers, her autonomy and voice are diminished by the patriarchal state.

The legislative's attempt to control the sexuality of a woman can also be seen in other provisions of the MTPA 1971. A woman can avail an abortion if the pregnancy is a result of

[57] MTPA, s 3(2).
[58] *Id.*
[59] *Id.*
[60] MPT (Amendment Bill), s.3(2)(b).

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failed contraception due to intercourse between a married couple,[61] (this, of course, is subject to the twelve and twenty-week conditions). The deliberate use of the term 'married couple' is an exclusion of any other category of individuals engaging in consensual, pre-marital sexual intercourse. Through this provision, the state assumes the role of a benevolent patriarch who seeks to reprimand a woman who engages in pre-marital or extra-marital intercourse by excluding her from her ambit of the already exclusionary and narrowly worded abortion provision. It is almost as if the state intends to make the woman face the consequence of engaging in pre-marital intercourse. This leads to a situation wherein the only kind of sex that is sanctioned by the state is acceptable, irrespective of whether it is consensual or not. This is significant especially in the case of marital rape which is still not a crime in India.[62] Further, in a recent shocking instance, the Chief Justice of India Justice Bobde, asked an alleged rapist if he would be willing to marry the survivor.[63] In this instance as well, the state is willing to condone rape if the parties marry each other, signifying that state regulated rape is also acceptable. Mackinnon appropriately sums this up "rape is sex with a woman who is not yours, unless the act is so as to make her yours."[64]

Having discussed the paternalistic and primarily male perspective of the State in case of abortion, it is pertinent to delve into how the Indian judiciary has dealt with this. In this endeavour, the cases of *Z v. State of Bihar*[65], and *State of Rajasthan v. S*[66] will be analysed subsequently.

Z v. State of Bihar (2018)

In this case, the appellant was found living on the pavement by a shelter home in the August of 2017, which took her in. On medical examination, it was found that the woman was pregnant as a result of rape. On her desire to abort her foetus, she was taken to the government hospital in Patna. It was also discovered that she was HIV positive. When she approached the hospital for the abortion, she was already thirteen weeks pregnant. However, the hospital did not proceed with the abortion. By the time she would approach the court by means of a writ petition, she was twenty weeks pregnant. By the time the Supreme Court could decide this matter, her pregnancy had crossed twenty-four weeks. The time within which an abortion could take place as per the MTPA which is twenty weeks had elapsed as her pregnancy had reach

[61] MTPA, s 3(2).
[62] IPC, s 375. *See*, Santhya, K. G., et al. *Consent and Coercion: Examining Unwanted Sex among Married Young Women in India*, 33(3) INTERNATIONAL FAMILY PLANNING PERSPECTIVES, 2007 at 124.
[63] *Shocker as SC asks alleged rapist if he'll marry victim*, THE INDIAN EXPRESS (New Delhi, 2 March 2021).
[64] Mackinnon, *supra* note 2.
[65] *Z v. State of Bihar* (2018) 11 SCC 572 (henceforth, Z's case).
[66] *State of Rajasthan v. S* (2020) MANU/RH/0333 (henceforth, S' case).

twenty-four weeks now. A report by the medical board was relied on as per which abortion after twenty-four weeks would endanger the appellant's life. Therefore, she was not permitted to abort her foetus, and was instead given a compensation of ten lakh rupees for the state's negligence.

In light of this decision, certain aspects need to be considered. Firstly, how can any monetary benefit possibly compensate a woman against her being stripped of her bodily autonomy? It is true that in terms of remedies that could be provided once she has given birth, monetary compensation seems to be the one of the few possible remedies. However, other options such as funds for the child's education etc. must be provided if she wishes to raise the child. In case she does not, arrangement must be made for them in a child care centre, children's hostel, etc. A mere amount of ten lakhs does not undo the consequences suffered.

Unfortunately, Z's case is not a one-off instance of such of such administrative and judicial delay.[67] Z, like many others had to bear the brunt of administrative and judicial delays, yielding a result completely antithetic to the right of a woman over her body. Taking multiple permissions and opinions leads to such delay, the consequence of which affects the woman who never wanted to bear her foetus. Secondly, the MTPA states that mental factors can contribute to a medical practitioner opining that a woman may proceed with abortion.[68] By making her consult medical practitioners who must then opine that a woman who wants to abort her foetus is doing so due to the physical or mental trauma that she may face if it is born, or that contraception failed in the course of sexual intercourse with her husband is redundant.

***State of Rajasthan and Ors. v. S* (2020)**

Keeping in mind this judicial, legislative and administrative state masculinity, a recent Rajasthan High Court decision with respect to abortion, has been hailed as a breath of fresh air. While this might be a betterment from the previous position, it nowhere near a desirable outcome. This case dealt with a minor who had been raped and impregnated. She approached a hospital for an abortion, which was denied as her pregnancy had crossed the twenty-week threshold. She then approached the High Court with this grievance. The single-judge bench, even after taking into account the opinion of the medical board which said that abortion will not cause a risk to the woman's life, rejected her petition stating the need to protect the foetus'

[67] *See*, *supra* note 56. Similar cases of *R v. State of Haryana* (2016) W.P.(C), 6733 /2016 H.C. P.& H and *Mr.* X and Mrs. *X v. Union of India* (2008), W.P.(L) 1816 /2008, H.C. Bom are also relevant. *See also,* Akshi Chawla *Why 243 Indian women had to ask a court for permission to abort*, BUSINESS STANDARD (sept. 5, 2020) https://www.business-standard.com/article/health/why-243-women-had-to-ask-a-court-for-permission-to-abort-says-report-120090500257_1.html

[68] MTPA, s 3(2).

right to life. This again, incorrectly attempts to balance the right of the unborn foetus, against that of its bearer. This decision was appealed and referred to a division bench at the high court. The division bench judgement deviated from the patronising and paternalistic approach to a woman's sexuality, and reproductive decisions and upheld the right of a rape victim 'to avoid'[69]under Article 21. "The infringement of the fundamental right to life of the victim heavily outweighs the right to life of the child in womb.*"*[70] The court relied on the decision in *Suchita Srivastava* (discussed previously) to hold that a woman has the right to make her own reproductive choices. The bench opined that forcing a woman to bear a foetus that is a result of rape would violate two of her rights, firstly, her right to make her own reproductive decisions, and secondly, it would affect her mental health causing her grave mental trauma.[71] This right, in this case however, is restricted to a woman who is impregnated because of rape.

However, by the time this pronouncement was made, the woman approached her due date and delivered her child. The Court through this decision paved way to what is a hopefully more liberal abortion jurisprudence, as it urged the state government to frame guidelines so that victims of rape are provided necessary medical services so that they can exercise their reproductive choices. It also directed the police to inform the District Legal Service Authority, so they can inform the victim of her rights and remedies under the MTPA.[72] It also laid down that application to terminate pregnancy shall be taken up within three days of submission.[73]

While the judgment does lay a precedent that the interest of a foetus bearer outweighs that of the foetus, it delivers this ruling in a manner specific to cases of rape. While it follows logically, morally, and emotionally that no woman must be compelled to bear a foetus that is the result of a rape is it correct to simply limit this to the case of women, who have unfortunately been through this? It is argued that while the experience and trauma of a woman who has endured the violation of rape and been consequently impregnated, cannot, by any means, be compared to that of one who engaged in consensual sexual-intercourse but is not desirous of bearing a child, they must be allowed the same choice. Admittedly, in the former there is a bodily violation and, in the latter, there is an absence of one. However, in forcing either of them to bear the foetus there will necessarily be a bodily violation, which should, by all means be avoided.

[69] In the context of this case, the court emphasized on the right of a woman who has been raped to avoid the consequent pregnancy by including this within the ambit of Article 21 of the Constitution that guarantees the right to life and personal liberty.
[70] *S' case* at 13.
[71] *S' case* at 9.
[72] *S' case* at 16.
[73] *Id.*

Therefore, while the Article 21 right to avoid of a woman is recognized, this is specific to the case of a woman who is pregnant as a result of rape. A solution, that could affect to the choice of a woman is needed, and could be implemented by allowing a woman to exercise her Article 21 right to abort her foetus at any time she wishes, even until the ninth month, except when there is medical evidence to show that such abortion will gravely endanger her life. In this case, she must be informed of the associated risks and be given the choice of whether or not she would like to proceed with it, knowing the risks. The foetus' father, will not have a say in making this decision. This is because it is the bearer whose body carries the foetus, making it a question of her bodily autonomy and, therefore, her decision. This model will be discussed in detail in the next section.

V. AN APPEAL FOR A MORE WOMAN-CENTRIC STATE

The current position of the law is that a woman can opt for an abortion after twenty weeks, only when there is a grave threat to her life.[74] This article argues for a reversal in the position, wherein the only time a woman wanting an abortion is not immediately attended to, is when her doctor believes in good faith that undergoing such a procedure will endanger her life. In this situation, the doctor must present and meticulously explain this concern to her, following which the pregnant woman must be the one who still has the choice of whether or not she wants to proceed with the abortion, being fully aware and cognisant of its risks. Men often opt to undergo vasectomies, a procedure that affects their ability to reproduce. In this case, doctors inform the patient who wants to undergo this procedure of the associated risks and perform the surgery if the patient consents. It is true that abortions and vasectomies are not directly comparable owing to the time sensitive nature of an abortion. However, this comparison has been made for a different purpose, i.e., to compare state control on male sexuality as opposed to female sexuality. Vasectomies affect the male's ability to reproduce completely, while abortions have no such impact on a woman's body, and yet the latter suffers more regulation at the hand of the masculine state.

An abortion is (in most cases) a voluntary procedure. When a man chooses to do a vasectomy, there is no stigma attached to this process in terms of how he can no longer procreate. When a man's position in society is not regulated by the state or the law, then why must a woman have to suffer various legal and procedural barriers when she chooses to abort? The state feels the need to regulate the body of a woman and act in her best interest, but allows the man the autonomy over his body, displaying heightened levels of double standards. This is owing to the

[74] MTPA, s 3(2).

inherently patriarchal nature of the state wherein the male point of view frames state policy or the law.[75] As a result, the free choice that is offered to men regarding what they wish to do with their body is unfairly not afforded to women. Mackinnon believe that the state views women the way men do,[76]and given the social inequality between the two genders,[77] laws often favour men over women.

Secondly, even if an abortion is to be compared to a hysterectomy (assuming it is voluntary), while both of these are looked down upon by society, abortion receives more disapproval. One of the many reasons for this is that in the first instance, the uterus without a child is removed, while in the latter the foetus is removed, leaving the uterus empty. While it is true that the differences between the two are more nuanced than just the idea of child-bearing, this is address specifically to highlight the emphasis that society places on motherhood. The value of a woman to notions of motherhood and the conception of who 'deserves' to be a mother.[78] Societal values attached to motherhood have been a point of contention is most feminist discourses.[79] Simone de Beauvoir believed that it is motherhood that others women from men,[80] and that the destiny or purpose of a woman's life is to give into motherhood.[81] The masculine state also discreetly furthers this agenda by giving women an illusion of control over their reproductive choices, but doing it so narrowly and in a manner that hails motherhood and caregiving.

The woman's choice in both these instances is weighed down, by a man's as well a potential child's, thereby, denying her, her Article 21 rights.

VI. TOWARDS A SOLUTION

At this point it is imperative to allude to the "Reproductive Rights Model".[82] This model is based on women's rights and human rights movements, as well as various international human rights treaties.[83] This model emphasizes on the right of the woman to make a decision for her own body, using her own autonomy and choice, and exercising her right to self-determination. This model, therefore, places primacy on the bodily autonomy of a woman, which can be read

[75] Mackinnon, *supra* note 2 at 644.
[76] *Id.*
[77] *Id*.
[78] Dorothy Roberts, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 159 (Penguin 1997).
[79] Gerda Neyer and Laura Bernardi, *Feminist Perspectives on Motherhood and Reproduction* 36(2):136 HISTORICAL SOCIAL RESEARCH, 2011 at 162.
[80] *Id* at 165. *see,* Simone de Beauvoir, THE SECOND SEX. (New York: Alfred A. Knop, 1953)
[81] *Id.*
[82] Gable, *supra* note 10 at 975.
[83] This is guaranteed under the UHDR (1948), Articles 2, 5, 12, 15 and 25, Articles 6 to 27 of the ICCPR (1976), ICESCR (1976), Article 12(a), and CEDAW (1981), Article 12(2). See also, Gable, *supra* note 10.

under the right to dignity as guaranteed by Article 21 of the Indian Constitution. The "Right to Health Model"[84] on the other hand, too finds its basis in human rights treaties, but approaches reproductive rights in a different manner. This model, as its name suggests, is based on the health aspect of reproductive rights more than their decisional aspect. The focus in this model is, therefore, on efforts to provide for the conditions and determinants necessary for the flourishment of good reproductive health.[85] The difference between the two lies in the fact that while the former is based in an individual's civil and political rights, the latter is based on their social and economic rights. In the former, the bearer's decision is given primacy, while in the latter is based on the provision of a conducive environment so as to allow good reproductive health. A cohesive understanding of both the models and applying them together would allow for an ideal situation. In this combination, the 'decisional and foundational'[86]. This means that adequate and simultaneous consideration will be given to. the woman's right to decide on whether or not to reproduce, combined with access to necessary reproductive care including the availability of contraceptives, sex education, gender sensitization, etc. so that she can give effect to her decision in a manner that supports good reproductive health.[87] This will also help reduce stigma around sexual intercourse, pregnancies outside marriages and abortions.[88]

The question that arises now is, how can this be incorporated in the Indian context? This can be ensured in a manner that allows for self-determination in consonance with the right to life and dignity under Article 21, along with unhindered access to health care based on the decision of the foetus bearer. Further, it is also important for the state to encourage and allow access to gender sensitization, sex education, including information about intercourse, contraception, abortions, etc., so that an informed choice may be made. This is useful, as studies have shown that there is a positive change in women's behaviour towards abortion by aiding their access to information on safe abortions.[89] Many organizations such as the All-India Women's Conference (AIWC), since the coming of the MTPA have designed programs to educate Indian women on abortions, and encourage them to accept it.[90]

The mechanism must, hence, be such that, if she chooses to bear the foetus, she must be given adequate health care to ensure her medical safety and well-being under the right to health (read

[84] Gable, *supra* note 10 at 982.
[85] *Id.*
[86] *Id.*
[87] Sushanta K. Banerjee et. al, *Effectiveness of a Behavior Change Communication Intervention to Improve Knowledge and Perceptions About Abortion in Bihar and Jharkhand, India* 3 INTERNATIONAL PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH, 2013 at 142.
[88] *Id.*
[89] *Id.*
[90] Chattopadhyay, supra note 42 at 557.

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under the right to life under Article 21). Similarly, if she chooses to abort the foetus, she should be provided with necessary facilities and medication for this. As mentioned earlier, this choice must be offered to her at any point of the pregnancy, even during the last trimester. There is evidence to show that abortion at any stage of the pregnancy is medically safe, and non-invasive.[91] There have also been instances where abortions have been performed in the third trimester, when foetal abnormalities were left undetected at an earlier stage.[92] Therefore, when late-stage abortions can take place in case of foetal abnormalities in a safe manner, there is no reason why this cannot be extended on a choice basis to all women seeking an abortion.

An abortion, therefore, must be treated as any surgical procedure where the doctor explains to the patient the risks and procedure of a surgery, and give their own opinion to the patient, after which the patient exercises their bodily autonomy to decide (in case the patient is incompetent to determine this, a person so identified on their behalf) to decide whether or not they want the surgery. So why then is abortion any different from, say, a vasectomy. One might argue for the need to protect the foetus' life, however, the foetus is not born yet, it does not have a decision-making agency. The foetus bearer, however, does, and therefore must be free to exercise the same. Therefore, if so desired by a woman, abortion must be the norm and otherwise must be an exception, that too on the basis of the woman's choice after knowing its risks. This way, the woman is treated as a thinking individual who knows what is in her best interest, and the paternalistic and masculine state need not step in and intervene, trying to dictate how she may or may not use her Article 21 right.

VII. A LESS MASCULINE LEGISLATURE- THE MPT (AMENDMENT) BILL, 2020

The MPT (Amendment) Bill, 2020 (the Bill) seeks to give some relief against the excessively masculine Act. This Bill seeks to change the upper limit to get an abortion from 20 weeks to 24 weeks.[93] However, the Bill allows this in a similar framework where the opinion of a medical practitioner based on the same factors, i.e., physical or mental health, failed contraception, etc. must be taken in order to avail this extended period.[94] This provision also mentions that the twenty-four-week period would be applicable only to certain cases where there may be a threat to the physical or mental health of a woman, of the foetus has a substantial

[91] Alka Barua et. al, *The MTP 2020 Amendment Bill: anti-rights subjectivity* 28(1) SEXUAL AND REPRODUCTIVE HEALTH MATTERS 2020 at 2.
[92] M Dommergues et. al, *The reasons for termination of pregnancy in the third trimester* 106(4) AN INTERNATIONAL JOURNAL OF OBSTETRICS AND GYNAECOLOGY, 1999. *See*, F A Chervenak et, al. , *Third trimester abortion: is compassion enough?* 106(4) AN INTERNATIONAL JOURNAL OF OBSTETRICS AND GYNAECOLOGY, 1999.
[93] MPT (Amendment Bill), s.3(2)(b).
[94] *Id.*

risk of suffering from an abnormality.[95]

This article advocates for a woman to be able to avail an abortion at any time during her pregnancy, fully aware of all the associated risks in case there are any. However, since the Bill seeks to extend the prescribed period by four weeks for some women, arguments in the section will be addressing this specific time extension. While I will argue subsequently that the four-week additional period must be extended to all categories of women, this is purely for the purpose of understanding and critiquing the rationale of the Bill, the larger argument of this article still remains that there should be no prescribed time limit for abortion. (Recall our discussion on how there is evidence to show that last trimmest abortions are medically safe and prevalent.[96])

A press release in this regard threw light on the legislative intent behind increasing this period by an additional four weeks. It stated that this provision was to be applied only to those special categories of women who are survivors of rape, incest, and other vulnerable women, such as differently-abled women and minors.[97] However, with this classification and an additional four-week time to just this group, the question that arises is what separated the members of this group from the others, and whether this criterion of separation is such others cannot be granted the same time extension. While there is no doubt that women in this category are more vulnerable than women who do not belong to this, the right to bodily autonomy and free choice must be given uniformly to all women who do not wish to complete the term of their pregnancy. Therefore, while the classification is based on a well-defined criterion, i.e., women who have been subject to rape, etc., I argued that while this category is based on a difference in terms of experience and narrative, the legal perspective in both these cases must pertain to the simple question of choice and bodily autonomy. So, in both cases, if the woman is undesirous of bearing her foetus, this right must be extended universally and uniformly across all categories of women.

It true that this paper emphasizes on the choice of the woman to a great extent. This might fall on the side of a more liberal feminist approach.[98] It can be argued from a more radical vantage point that a woman's choice is not always her own, and that her consent is often manufactured by various institutions that she is subject to (such as patriarchy, family, etc.).[99] This is a

[95] *Id.*
[96] See, Barua et. al, *supra* note 91; *Dommergues* et. al, *supra* note 92; Chervenak et, al. *supra* note 92.
[97] Press Release, Press Information Bureau, Cabinet approves Medical Termination of Pregnancy (Amendment) Bill, 2020 (Jan. 29, 2020).
[98] McCoubrey and White, TEXTBOOK ON JURISPRUDENCE. 288 5th edn. (Oxford: Oxford University Press, 2002).
[99] *ibid. See,* works of Mackinnon such as 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence' (1983), Pornography and Civil Rights: A New Day for Women's Equality (1988), Feminism

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compelling point. However, while acknowledging that this is true, denying her a choice in this hardly solves the problem. Instead, measures can be taken to elevate her ability to choose, through sex education, awareness on contraception and abortions etc.[100]This awareness and education will ensure a positive change,[101] where she can make these decisions based on her own volition.

Secondly, while the Bill does give the woman a choice to decide whether or not she wants to foetus that could be a child with abnormalities, the same courtesy should be extended to her irrespective of foetal abnormalities. While it is acknowledged that the conditions and situation of a pregnant woman whose foetus suffers abnormalities is different from that of the bearer of a healthy foetus, the classification of the former in a manner in which only they can avail the extended four weeks is arbitrary as both these categories of women are equally entitles to exercise their right to bodily autonomy.

Moreover, while the four-week additional time does give women an additional time period to contemplate their reproductive decisions also means that the earlier twenty-week period was not an absolute medical necessity and was unnecessarily arbitrary. This would mean that all those women who could just not abort their foetus after the twenty-week threshold were unfairly denied an opportunity to exercise their right just because this arbitrary time period, and a lack of threat to their life if they continued with the pregnancy. Further, while the time period is expanded, it still does lay a time restriction and does not really give effect to the bearer's choice. For instance, what if a woman who is pregnant with consensual sexual intercourse wants to abort her foetus after twenty-four weeks and there is no threat to her life if she proceeds with the abortion? The fact that she will be denied this is still problematic as it goes on to make it seem like she forfeited her right when she crossed the threshold. How can she forfeit a right so inanely linked to her exercising her bodily autonomy and free choice? Therefore, the solution, as discussed above should be for women to exercise their right to abortion at any point in the course of their pregnancy, and if there is a risk to their life in proceeding with the abortion, they must be informed of this, and be given the choice of whether or not they want to proceed with it.

The Bill however, does bring out two compellingly progressive changes in terms of the woman's privacy and the exercise of her sexuality. The Bill, through the insertion of Section 5A seeks to protect the identity of the woman who chooses to have an abortion, and no medical

Unmodified (1987) among many of her other acclaimed works.

[100] Banerjee, *supra* note 83.

[101] *Id.*

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practitioner is permitted to reveal the same. This provision also places a penalty in the form of a fine and/or imprisonment of up to a year if a practitioner contravenes this. This is beneficial for women who seek to abort a foetus without having to bear the brunt of societal judgment. A lack of privacy and confidentiality often discourage women from seeking safe abortion services and puts them at risk of unsafe abortion and related complications. [102]While in an ideal situation no woman should be judged for her reproductive decisions, many married women undergo abortions without the knowledge of their family members and even husbands.[103]Similarly single women who wish to abort their foetus are also subject to societal control and shaming.[104]In light of this protection of the identity of the woman seeking an abortion is essential to allow her to adequately and comfortably exercise her right.

Further, with respect to the sexuality of the woman, this Bill calls for the State to take a step back from its masculine nature that penalises a woman who engages in consensual sexual intercourse resulting in a pregnancy with someone who is not her husband. The Bill, through Section seeks to amend the provision that allowed for failed contraception to be a reason for abortion only if the intercourse was between a married couple and replaces 'married woman or her husband' to 'woman or her partner'.[105] While there is no doubt that this position is an improvement as it no longer indirectly penalizes pre-marital sex, this is still not enough. This is because, the provision still lays emphasis on the 'partner' of the woman.[106]This means that the woman will still need to have a partner, and cite relational grounds for seeking an abortion.[107] This will make it extremely difficult for single women, sex workers, etc.[108] We can therefore, see a reluctance in the state trying to ease its control over the sexuality of women, yet again representing its maleness.

Therefore, for reasons discussed above while this Bill cannot be considered a complete change in the state's masculine stand point it certainly is a small deviation from its maleness.

VIII. CONCLUSION

At the outset, this article started with a radical feminist critique of the state, relying on Mackinnon). However, the reader must have noticed that the solution suggested is a liberal feminist one, emphasising majorly on the free choice of a woman.[109] This is a problem various

[102] Stillman, *supra* note 17 at 39.
[103] Geetanjali Gangoli, *Reproduction, Abortion, and Women's Health* 26(11) SOCIAL SCIENTIST, 1998 at 87.
[104] *Id.*
[105] MPT Amendment Bill, 2020, s. 3(2)(b)
[106] Barua et. al, *supra* note 91 at 2.
[107] *Id.*
[108] *Id.*
[109] McCoubrey and White, *supra* note 98 at 288.

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feminist deal with, as when reform is demanded, these demands are still made to the state within the same structural framework. The real solution would be in terms of a structural coup finished off with structural reclamation. A liberal feminist solution is needed until this structural change and reclamation takes place. This article, does not in any way seek to take away from the cause of structural change. It merely suggests an interim solution, that gives effect to the autonomy of a woman. As Mackinnon argues, the situation can only be remedied permanently with the coming of a more feminist jurisprudence,[110] that averts the masculine perspective of the state in favour of more inclusive and compassionate one. In the meantime, to respect the bodily autonomy and dignity of a woman as guaranteed by Article 21, it is imperative that be allowed to exercise her right to abortion, without incessant state interference. Regulation, as mentioned above, must merely be facilitative, so to say that it should be mandatory that she be informed by her doctor of any risks to her life if she opts for an abortion. After this, her choice is supreme, and not the state's paternalistic need to act in her alleged favour. Further, it is necessary that the jurisprudence around this issue develops in a more feminist manner. While judgments like the one delivered by the Rajasthan HC[111] are a step forward, this must not create a sense of false security or hope. The goal is to achieve free choice abortions, and this must be extended to all categories of women.

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[110] Mackinnon *supra* note 2.
[111] *S' case.*

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