COMMENTARY / GENDER

Birth Right

A landmark judgment finally acknowledges abortion is about women's autonomy

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An operating table at an abortion clinic in Delhi. Medical abortions are out of reach for most women in rural areas, who often only have access to public-health facilities, and even many urban women struggle with high costs and a lack of qualified doctors at private clinics. ROBERT NICKELSBERG/GETTY IMAGES

In June, the Supreme Court of the United States overturned *Roe vs Wade*, a landmark decision that had made abortion a constitutional right in the country. Given this massive setback to reproductive rights in the world's oldest democracy, many in India took the opportunity to congratulate themselves on having more progressive abortion laws. The next month, however, the Delhi high court refused a 25-year-old woman the right to terminate her pregnancy because she was

law—the Medical Termination of Pregnancy Act, 1971—which allowed certain categories of women the right to abortion under very specific conditions. The judges argued that, in her case, aborting the foetus would be equivalent to "killing the child." On 29 September, the Supreme Court of India stepped in to expand the right to cover "unmarried women," whom the MTP Act did not until then explicitly include. "Certain constitutional values, such as the right to reproductive autonomy, the right to live a dignified life, the right to equality, and the right to privacy have animated our interpretation of the MTP Act and the MTP Rule," the judgment states.

While this is a step in the right direction and is remarkable for upholding a comprehensive view of women's rights, it is in stark contrast to how India got its abortion law, which was not exactly created keeping women's reproductive autonomy in mind. Unlike in several other parts of the world, our abortion law did not emerge as a result of feminist interventions that placed women's political, social and sexual autonomy at their centre. Instead, in India, women's reproductive fate has always been tied up with government anxieties about population control. After Independence, family planning became a central plank in India's developmental ambitions and, to that end, the regulation of women's fertility was treated as a national imperative.

But not all women were treated the same. The country's efforts at controlling birth rates, historically, have been influenced by deep structural inequalities. In her recent book *Reproductive Politics and the Making of Modern India*, Mytheli Sreenivas lays this out clearly. She writes that the early years after Independence "were central in bringing middle-class women—as family planners—into the state's development agenda, and in situating poor and working-class women as their targets. This targeting would intensify in the later 1960s, as Western funders and Indian government priorities aligned to make population control a focal point of Indian development, and women's bodies became the ground to enact this developmental agenda." Dalit,

The burden of family planning in India has almost always fallen on women, except during Indira Gandhi's emergency, when it was working-class men who were subject to coercive measures of population control.

Until the early 1970s, abortions—or voluntarily "causing miscarriages," as it was euphemistically called—were illegal and could be criminalised under the Indian penal code. This did not stop large numbers of women from seeking ways to terminate their pregnancies in whichever way they could, prompting the government to set up a committee to look into the merits of liberalising abortion laws. The committee, in its 1967 report, invoked population control as one of the probable outcomes of legalising abortion, among other desirable effects such as a reduction in high maternal mortality. "The decline in birth cannot be considered separately from the number of legal abortions," the report stated. The "crux of the problem," the committee said, was that deaths were resulting from abortions "being performed mostly by unqualified people under unhygienic conditions."

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The government finally passed the MTP Act in 1971, allowing for abortions at the discretion of medical practitioners under some circumstances: risk of life to the pregnant woman, possibilities of abnormalities in the infant or in the case of rape. It was not guided by the idea that a woman should be able to access safe abortion on demand, even for non-sentimental or non-tragic reasons. The decision and liability ultimately lay with doctors. As a result, till date, women have often had to rely on the benevolent paternalism of doctors and judges, very often male, to get an abortion. A 2020 study by the Centre for Reproductive Rights, the National Law University in Delhi, and the National Law School of India in Bengaluru found that doctors'

concerns over the woman's health and well-being, her right to make her own decision in this regard, or even with the legal provisions under the MTP Act; and has much to do with the providers' apprehension about consequences for themselves, their views about the morality of abortion, as well as their beliefs about women's role and place in society." Very often, medical practitioners, fearing prosecution, demand parental consent or some form of judicial permission. The September judgment makes note of this and unequivocally states, "We are of the opinion that significant reliance ought to be placed on each woman's own estimation of whether she is in a position to continue and carry to term her pregnancy."

Predominant beliefs about women's role and place in society remain bleak in India, with most families seeing female children as an eventual social and economic burden. That families—across class, caste and region—have an abiding preference for sons is no secret. Female infanticide has a long history in the country. So, when technological advances in the early 1970s allowed the detection of foetuses, including identifying its sex, they gave birth to a confounding new reality. Sex-selective abortions became rampant by the 1990s. For this reason, there has been a complex relationship in India between the women's movement and abortion, with very few voices advocating for an absolute right to abortion.

Many feminists had to campaign against sex determination in the hope of curbing the termination of female foetuses, while also preserving women's right to abortion. In 1994, the Pre-Conception and Prenatal Diagnostic Techniques Act came into force, prohibiting doctors from disclosing the sex of the foetus. But this appears to have had little effect. The sex ratio in India remains terribly skewed—since sex testing got off the ground, an estimated sixty-three million women are said to have gone "missing" from the population. A 2020 study projected that because of the persistence of sex-selective abortions, there would be nearly seven million fewer female births by 2030 than would otherwise have been the case.

Reliable data on the number of abortions that take place every year is hard to come by. According to a study in *The Lancet*, over fifteen million abortions took place in India in 2015. Of these, 73 percent were done outside health facilities. The study looked at data recorded by the ministry of health and family welfare until then and argued that these data "greatly underestimate the incidence of abortion because they exclude abortions by private-sector doctors who are trained in abortion provision but do not work in registered facilities and abortions provided by other formally trained health professionals who do not have specific training in abortion but nonetheless provide the services."

Access to safe abortion for the majority of women in India continues to be very difficult for various reasons, including high costs at private clinics or lack of qualified doctors. The Act mandates that only obstetricians and gynaecologists can perform abortions. According to rural-health statistics released by the health ministry in May 2021, there is a shortfall of almost seventy percent of doctors with these specialisations in government hospitals. This automatically puts medical abortions out of reach for most poor women living in rural areas, who often only have access to public-health facilities.

The MTP law was amended in 2021 to include seven categories of women who could terminate pregnancies of up to 24 weeks, including minors, "mentally ill women," women with physical disabilities and women who had a change in marital status during their pregnancy. It said nothing overtly about single or unmarried women, which the Supreme Court has now corrected, stating that these distinctions are "not constitutionally sustainable."

"The law must remain cognizant of the fact that changes in society have ushered in significant changes in family structure," the judgment states. "In the evolution of law towards a gender equal society, the interpretation of the MTP Act and MTP rules must consider the social reality of today and not be restricted by societal norms of an age which

demonstrate "risk of injury to the mental health," even as the interpretive lens on what constitutes mental health and the "material circumstances" that might warrant the termination of a pregnancy has been widened.

In a recent piece in the *Yale Review*, the author Maggie Doherty writes about the proliferation of certain types of tragic narratives among pro-choice advocates that confer legitimacy on types of women who choose to get an abortion: "good mothers, suffering victims, poor and frightened girls." She writes that "unlike their predecessors," many feminists today "present abortion as a welcome privilege, rather than an incontrovertible moral right. When abortion stories are crafted for maximum appeal, we can only assume that the right to an abortion depends on popular approval."

In the United States, during the second-wave feminist movement, women's collectives organised "speakouts" in which they talked about their abortions and demanded the repeal rather than just reform of the abortion laws of the time. A radical feminist group called the Redstockings famously barged into the New York State Assembly in 1969 while a group of men and a nun were discussing the state's abortion law. After *Roe vs Wade* came into effect in 1973—two years after India got its MTP abortion law—there began a massive polarisation between the Christian right, which called itself "pro-life" in the belief that foetuses have personhood, and feminists, who were "pro-choice."

Most Indian liberals would count themselves in the latter category today, although these categories do not easily map onto the Indian context. It is not difficult to argue that decisions about your own health and body should be your choice. But there is always a larger context that shapes choices. And the context in India is grim, whether one looks at the excessive control families wield over young women's reproductive lives, their obsession with caste and marriage, their unabashed son-preference, or the widespread assumption that all women are waiting to be mothers.

A bureaucratic desire for controlling birth rates eased the pathway to legalising abortion, and now the recent judgment has expanded the scope of women's rights and reproductive choices. But it may be too soon for any triumphalism. India has not had a robust public conversation on abortion, unlike many other countries. If an abortion or miscarriage does feature in popular culture, it is usually to imply a form of tragedy that befalls hapless women. What data we have so far on access and safety is sobering. According to a United Nations Population Fund report released this year, approximately eight women die because of unsafe abortions every day. In a recent piece in *The Guardian*, Shreeja Rao, a law student and Dalit woman, draws attention to how women of her community are persistently overlooked when it comes to access to contraception and safe abortion. "Can they afford safe abortion?" she asks. "Are they able to choose birth control measures? Do they have access to reproductive healthcare at all?" These are extremely important questions. There has been no consistent large-scale study on how women from different communities access abortion, and, therefore, there is no clarity on what public-health measures should be taken going ahead. "While the strength of the women in my community makes me hopeful for an undivided future for reproductive rights, casteism in public life leaves me uncertain of a structural change—which must come from within the women's movement," Rao writes.

Women's freedom is intimately tied up with what control they have over their own reproductive lives. It has a bearing on all things, from our physical and mental health to the choices we can make about motherhood, work, life and love. To that end, the recent judgment on abortion and its emphasis on reproductive justice is a watershed moment. But how this translates on the ground remains to be seen.

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KEYWORDS: abortion(/tag/abortion) feminism(/tag/feminism)

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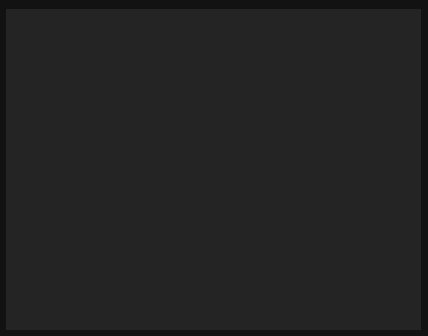

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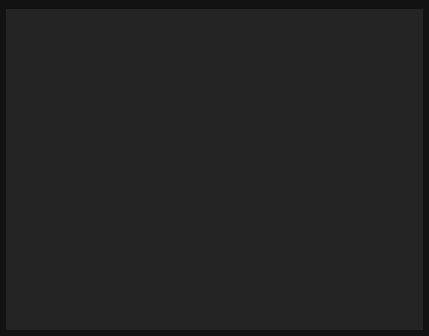

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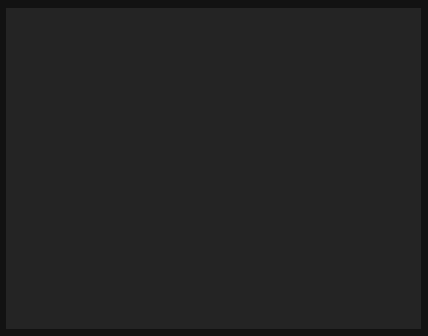

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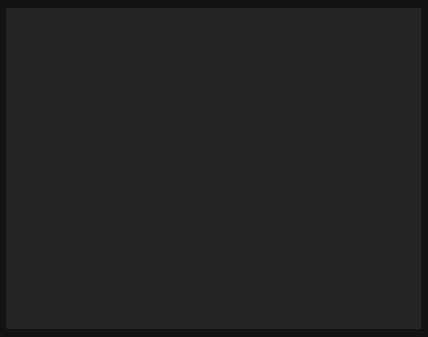

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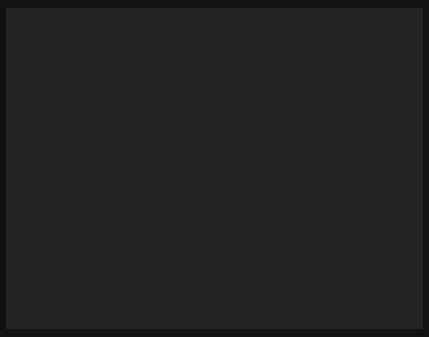

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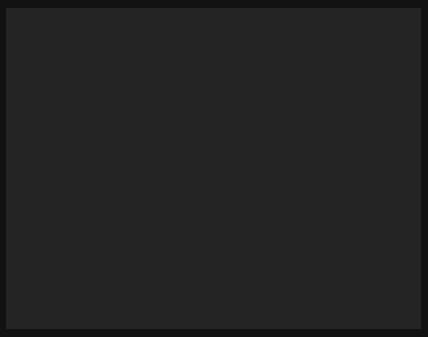

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