Promise of Reproductive Autonomy: Does *Suchita Srivastava* Walk the Talk?

*Ajey Sangai**

Abstract

A woman with mental retardation was raped in a government run welfare institution in Chandigarh. She was found impregnated for nine weeks. A medical board was set-up to give opinion on whether she had requisite capability and comprehension to continue with pregnancy which favoured abortion. When an opinion from the High Court was sought, it appointed an expert body which recommended continuation of pregnancy. The Court exercising its *parens patriae* powers, overruled it and ordered termination. This order was reversed by the Supreme Court. Alluding to *Roe v. Wade*, it held that the reproductive autonomy was an integral part of a woman's right to life under Article 21. It rejected the exercise of *parens patriae* powers to alter appellant's decisions and asked the state to ensure healthy delivery and post-natal care for both the mother and the child. Further, it observed that stereotypes levelled against persons with disabilities are impermissible after India has acceded to the UN Convention on the Rights of Persons with Disabilities. In spite of a fair outcome, the judgment fails to find connections between reproductive autonomy and Article 21 which have been sought to be illuminated in this comment. The Court's uncritical acceptance of legislative distinction between persons with mental retardation and mental illness vis-à-vis exercising legal capacity and over-reliance on medical opinions displays an imperfect understanding of the Convention and the paradigm it seeks to bring. This inhibits its impact and ability to be of much assistance to the disability rights crusaders.

Introduction

Personal autonomy and bodily integrity are integral to the guarantee of right to life. In fact, the co-terminus linkage between these concepts is revelatory to the issue of reproductive choice. After the pronouncement in *Roe v. Wade*[1] and the adoption of United Nations Convention on Elimination of all forms of Discrimination Against Women, reproductive autonomy has been recognised as a right of every woman.[2] The United Nations Convention on Rights of Persons with Disabilities guarantees the same right to a woman with disability.[3] However,

* B.A., LL.B. (Hons.), 2011, NALSAR University of Law, Hyderabad, LL.M. candidate 2012, New York University, U.S.A.

1. Jane Roe v. Henry Wade, 410 US 113 (1973), at 164-5 [hereinafter *Roe*].
2. *See* United Nations Convention on Elimination of all forms of Discrimination Against Women, 1249 U.N.T.S. 13 (entered into force 3 September. 1981), art. 16 [hereinafter CEDAW].
3. United Nations Convention on Rights of Persons with Disabilities, 189 U.N.T.S. 137 (entered into force 3 May 2008), art. 6, art. 23 [hereinafter UNCRPD].

in cases involving termination of pregnancy, there is a significant aspect at loggerheads with reproductive autonomy, namely, the life of an unborn child and its associated claims. An attempt to balance these competing interests has been made in the Medical Termination of Pregnancy Act, 1971 which provides for abortion within twenty weeks of pregnancy upon the approval of medical practitioners.[4] It enlists specific circumstances under which the termination can take place.[5] Midst the prevailing standard, one interesting question which arises is whether the enumerated parameters can be changed by the state in the exercise of its *parens patriae*[6] powers, if the pregnant woman is one with mental retardation who desires to continue her pregnancy.[7] This question recently arose before the Supreme Court of India in *Suchita Srivastava v. Chandigarh Administration*.[8] Although the decision is largely based on the interpretations of the impugned provisions of the Act, I shall restrict this comment to the profound constitutional and jurisprudential significance of this case.

In stretching the contours of Article 21 of the Constitution, the Court situated 'reproductive autonomy' within the corpus of right to life and personal liberty.[9] While this outcome is welcomed, the judgment itself lacks adequate legal reasoning and logical coherency for utilizing the final decision in an emancipatory manner by human rights advocates. This comment seeks to unearth the principal constitutional flaws in the judgment, using a jurisprudential lens. Part I of the comment briefly provides a background of the case. Part II deals with the inter-linkages between the concepts of reproductive autonomy, personal liberty and dignity to provide for a justification for bringing this right in the larger fold of Article 21. Part III critiques the inconsistencies and contradictions surrounding the issue of consent and the ambivalence in the medical opinions with an underlying caution to the courts in their over-reliance on expert opinions in complex personal matters.

4. Medical Termination of Pregnancy Act, Act no. 34 of 1971, § 3(2) [hereinafter the Act].
5. *Id.* The opinion of the medical practitioner must be based on the risk of life or grave physical or mental injury to the pregnant woman or if there is a risk that a child may be born with disabilities or abnormalities.
6. *Parens Patriae* in Latin means 'parent of the nation'. It is the inherent power of the State or Court which is invoked to protect persons who are unable to act on their own behalf whether legally or otherwise.
7. Medical Termination of Pregnancy (Amendment Act), 2002, § 3(4)(a) replaced 'lunatic' with 'mentally ill person' in wherein consent of the guardian is required for the termination of pregnancy. The Court here looking into the existing statutes distinguishes between 'mental illness' and 'mental retardation' and unquestionably accepts the legislative classification which would mean that while pregnancy cannot be terminated for the women with mental retardation without their consent, for the women with mental illness consent of guardian needs to be taken.
8. Suchita Srivastava and Anr. v. Chandigarh Administration, (2009) 9 SCC 1 [hereinafter *Suchita Srivastava*].
9. *Id.* at 15, ¶ 22.

I. *SUCHITA SRIVASTAVA*: THE BUILD UP

The case involved a woman with mental retardation residing at a government run welfare institution in Chandigarh where she was raped and subsequently found impregnated for over nine weeks.[10] The ossification test certified that she was a major at the time of the incident.[11] A medical board was constituted to give its opinion on the continuation of pregnancy, its consequences and capability of the woman to cope with it; the board recommended abortion.[12] When the administration sought judicial opinion of the High Court, the latter constituted an expert body to determine her best interests and the ability to comprehend the situation and make decisions.[13] This expert body suggested continuation of pregnancy, since the woman was willing to give birth.[14] The High Court, sidelining the report of the expert body, adopted *parens patriae* approach and directed abortion even when she had been pregnant for about nineteen weeks by then.[15]

The apex court overruled the High Court's verdict and allowed the woman to continue pregnancy.[16] This comment critiques the two major premises on which the Court's decision was based: *first*, reproductive autonomy of a woman in keeping or terminating her pregnancy and; *secondly*, the scope of *parens patriae* power in altering appellant's decisions. In the Court's unequivocal and unambiguous opinion:

> *[*R*]eproductive choice should be respected in spite of other factors such as the lack of understanding of the sexual act as well as apprehensions about her capacity to carry the pregnancy to its full term and the assumption of maternal responsibilities thereafter.*[17]

II. PERSONAL LIBERTY AND REPRODUCTIVE AUTONOMY

Reaffirming the trend of expanding the horizons of 'personal liberty', the Court held that:

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10. *Id.* at 7, ¶ 2.
11. *Id.* at 9, ¶ 12.
12. *Id.* at 9, ¶¶ 13, 14.
13. *Id.* at 10, ¶ 15.
14. *Id.* at 13, ¶ 18.
15. Chandigarh Administration v. Nemo, In the High Court of Punjab and Haryana, CWP No. 8760 of 2009, order dated 17-7-2009. Section 3(2) of the Act except for the circumstances mentioned in Section 5(1) of the Act prohibits termination of pregnancy after 20 weeks. There are specific considerations put in the Act following which only can the pregnancy be terminated. It is generally believed that abortion after passage of 20 weeks is potentially dangerous for both the mother and the unborn child. The High Court disregarded these caveats and directed abortion merely on the basis of the psychosocial disability of the woman, a condition which is relevant only insofar as consent is concerned which as would be discussed later is not beyond the pale of suspicion.
16. *Id.* at 13, ¶ 18.
17. *Suchita Srivastava*, *supra* note 8, at 13, ¶ 19.

> *…a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21.*[18]

The Court mentioned the principles of right to privacy, bodily integrity and dignity; however, their *inter se* linkages, nexus with reproductive autonomy and situation within the larger picture of right to life was left unexplored in the judgment. I attempt to draw these connections and present a nuanced argument in expanding the fold of Article 21 to include reproductive choice.

A. Reproductive Rights: Competing and Compelling Interests

The apex court mounted an exception to *parens patriae* jurisdiction exercised by the High Court, as a power subject to constitutional challenge on the ground of right to privacy.[19] It was held that right to privacy includes within its ambit decisions regarding child birth.[20] The Court relied on American case law, particularly, the celebrated case of *Roe v. Wade*[21] where BLACKMUN J. (speaking for the majority) observed that:

> *[T]he right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.*[22]

Undoubtedly, the State has a compelling interest in protecting life of an unborn child. To this end, the conditions imposed by the statute must be strictly construed.[23] American courts have held that any intervention directed towards regulating a 'fundamental right' ought to be justified by a 'compelling state interest'.[24] With abortion as a 'fundamental right', BLACKMUN J. opined that the state has a legitimate interest in protecting the health of a pregnant woman, similarly it also has an important stake in preserving the potentiality of human life and "*each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes compelling.*"[25] Hence, an algorithm of permissible levels of state intervention

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18. *Id.* at 15, ¶ 22.
19. Anuj Garg v. Hotel Association of India, (2008) 3 SCC 1, at ¶ 30.
20. *Suchita Srivastava*, *supra* note 8, at 15, ¶ 22.
21. *See Roe*, *supra* note 1 (Roe, an unmarried pregnant woman brought a class action challenging the constitutionality of a Texas criminal law, which proscribed procuring or attempting an abortion, at any stage of pregnancy, except on medical advice for the purpose of saving the mother's life. The majority held that the law as unconstitutional).
22. *Id.* at 153, ¶ 10.
23. State of U.P. v. Lalai Singh, (1976) 4 SCC 213, at ¶ 10.
24. Kramer v. Union Free School District, 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Sherbert v. Verner, 374 U.S. 398 (1963).
25. *Roe*, *supra* note 1, at 162-3, ¶ 12.

on the basis of the stage of pregnancy was charted thus providing a neat balancing of the two competing interests.[26]

An important distinction between *Roe* and *Suchita Srivastava* is that in the former appellants had prayed for termination of pregnancy, whilst in the latter, the prayer was for continuation of pregnancy, the commonality in that being the issue of autonomous preference of a pregnant woman.[27]

B. Enriching Life: Privacy, Autonomy, Dignity and Right to 'Life'

Privacy has twin strands[28] of 'self-autonomy'[29] and 'spatial autonomy'.[30] Traditionally, the qualified right to privacy was discussed mostly around issues pertaining to surveillance,[31] search and seizure,[32] and family relations.[33] In this

26. The court observed that till the end of the first trimester the abortion decision and its effectuation must be left to the medical judgment of the woman's attending physician. Subsequent to this till the viability, the State may regulate abortion procedure in ways reasonably related to maternal health, and at the stage after this it may regulate and even proscribe abortion except where necessary in an appropriate medical judgment for preservation of life or health of mother. *See Roe*, *supra* note 1, at 163-5. The US Supreme Court later, in Robert Casey v. Planned Parenthood of South-eastern Pennsylvania, 505 U.S. 833 (1992) held that the undue burden test, rather than the trimester framework, should be used in evaluating abortion restrictions before viability [hereinafter *Casey*].

27. 'Right to abortion', as premised in *Roe* is associated with all the weaknesses of negative notions of freedom i.e., the State cannot justify inflicting harm on a woman in an arena generally reserved to personal rather than governmental control. The question, whether reproductive autonomy or personal decision making in the realm of family life or procreative choices, is integral to a woman's personhood is often neglected. It is proclaimed that the right to abortion as such has no positive content to it and when and when juxtaposed against the harms of enforced childbirth, termination may be 'the only civilized step to take.' Not a moral step, not even necessarily a good step, but a 'civilized' step is the limit of ardour expressed in support of the right to choose. *See* Elizabeth Reilly, *The 'Jurisprudence Of Doubt': How the Premises of the Supreme Court's Abortion Jurisprudence Undermine Procreative Liberty,* 14 JOUR. OF LAW AND POLITICS 757, 764-5 (1998). In continuing pregnancy, the interest in the life of the unborn child competes with that of a woman's privacy, autonomy, dignity and bodily integrity claims. What must also be noticed is the reversal of the role of the State in the two cases. While in *Roe* the state contested termination of pregnancy, in *Suchita Srivastava* it was strangely the state that insisted on abortion.

28. The classification is suggested by Marybeth Herald, *A Room of One's Own: Morality and Sexual Privacy after Lawrence v. Texas*, 16 YJLF 1, 34 (2003)

29. This includes matters relating to preferences and innate in one's self and identity (e.g. sexual orientation, state of one's mind and body (potency, disability and illness, etc.). Forced medical examination, or elicitation of personal details normally attack this strand.

30. The psychological aspect of selfhood, in some instances is supplemented by the physical aspect of spatial prerogative. There are private places that are off limits to the government where an individual should be free to do as s/he chooses i.e. matters relating to consensual transactions like sexual relationships, family, intimate conversations with associated persons, etc.

31. Development of the concept of right to privacy in Indian Constitutional law discourse owes its origin from Kharak Singh v. State of Uttar Pradesh, AIR 1963 SC 1295 (particularly the dissenting opinion of SUBBA RAO J.); Gobind v. State of Madhya Pradesh, (1975) 2 SCC 148, at 157-8 ¶ 31 ("Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of *compelling public interest*." (emphasis supplied)) [hereinafter *Gobind*].

32. M.P. Sharma v. Statish Chandra, AIR 1954 SC 300; V.S. Kuttan Pillai v. Ramakrishnan, AIR 1980 SC 185.

33. Saroj Rani v. Sudharshan Kumar, AIR 1984 SC 1562 (relating to restitution of conjugal rights); Mr. X v. Hospital Z, AIR 1999 SC 495 (a doctor's duty of keeping confidentiality about a patient's ailments (e.g.

backdrop, it is difficult to comprehend the issues of privacy involved in medical termination of pregnancy which is why there was a dissenting opinion in *Roe*.[34] But when 'privacy' is understood as an interest subsisting in 'individual autonomy', which then is inextricably related to making informed/free preferences that defines one's present and future course of life without interference from any outside agency, the nexus between reproductive choice and 'dignity' becomes apparent.[35] This, in my opinion, is the rationale of expanding the contours of 'personal liberty' enshrined in Article 21 to include 'reproductive choice'. The court rightly held that forcible sterilization based on eugenics theory violates Article 14.[36] But as the above discussion shows such measures also infringe upon Article 21. The Court, though held in favour of a woman's right to make reproductive choices, yet failed to underscore the relationship between privacy rights and 'personal liberty'[37] and allowed its observation to remain a brushstroke. In fact earlier cases had observed that:

> *Privacy primarily concerns the individual. It therefore relates to and overlaps with the concept of liberty… right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing.*[38]

The US Supreme Court in *Casey* observed that these matters:

> *involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.*[39]

Pregnancy is an expression of motherhood which clearly is an intimate personal choice a woman makes. Depriving her of independent decision-making involving a right to choice and control over her body strikes at her bodily integrity, self-determination and dignified life which must inform the understanding of 'life' in Article 21.[40] The Court in *Suchita Srivastava* goes only as far as providing instances

AIDS in this case)); Sharda v. Dharmpal, AIR 2003 SC 3450 (court ordered medical examination of a spouse for mental illness for deciding on divorce petition.).

34. *Roe*, *supra* note 1, at 172-3 (per REHNQUIST J.).

35. Jeffery Shaman, *The Right of Privacy in State Constitutional Law*, 37 RUTGERS L.J. 971, 972-4 (2006).

36. *Suchita Srivastava*, *supra* note 8, at 23.

37. For a profound understanding of the nexus between privacy, autonomy and dignity, *see* Naz Foundation v. Government of NCT of Delhi, 160 (2009) DLT 277 (per SHAH J.). Though this case relates to the constitutional validity of Section 377 of the Indian Penal Code that criminalizes homosexual association of persons, the reasoning is applicable in the instant case too. Another exposition on privacy rights that may be considered a benchmark is the opinion of MATHEW J. in *Gobind*, *supra* note 31, at ¶¶ 19-26.

38. *Gobind*, *supra* note 31, at ¶¶ 23-4 followed in Rajagopal v. State of Tamil Nadu, AIR 1995 SC 264, at ¶ 9.

39. *Casey*, *supra* note 26, at 851.

40. Francis Coraile v. Union Territory of Delhi, AIR 1981 SC 746; Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 802; Sunil Batra v. Delhi Administration, AIR 1978 SC1675.

of 'reproductive autonomy' without much theoretical base.[41] This discussion is significant in as much as it provides a foundational understanding of privacy rights in the backdrop of reproductive autonomy. Privacy, like any other right, is not absolute. However, it is imperative that in plotting restriction in the exercise of right, the latter must be given the widest amplitude. 'Compelling state interest' is one such restriction recognised in *Roe*. The Court in *Suchita Srivastava* held that the Act provides for such reasonable restrictions. It needs to be examined whether they have a 'direct or inevitable effect' of abridging the rights of a pregnant woman.[42]

C. 'Choice' and its Implications

This cavalier assertion of a right has a disadvantage in decontextualization of the circumstances of choice. The fleshing out of right with inadequate reasoning may also render the co-relative duties unclear. A 'choice' is worth little if the circumstances are such that it cannot be exercised with adequate information or cannot be implemented because of lack of access to medical or financial resources.[43] In this regard, the state indeed has a cardinal role to play by creating a rights-enabling environment for effectively realising the opportunity to make a choice.[44] This has two implications in the present case: (i) free/informed consent of the pregnant woman; and (ii) provisions for exercise of right i.e., successful delivery. The Supreme Court only took care of the second when it directed that "*the best medical facilities* [are] *made available so as to ensure proper care and supervision during the period of pregnancy as well as for post-natal care.*"[45]

III. Contradictions Around Consent

The Act makes consent of a guardian, in case the woman is a minor or a patient of mental illness, or in all other cases the consent of the pregnant woman mandatory for the termination of pregnancy.[46] Obviating the provision mandating guardian's consent, the Court distinguished the situation in the present case by holding that mental illness is different from mental retardation.[47] To arrive at this

41. See *Suchita Srivastava*, *supra* note 8, at 15, ¶ 22 (e.g. right to refuse participation in sexual activity; insistence on the use of contraceptive methods; choosing birth-control methods (like sterilisation) and a woman's entitlement to carry a pregnancy to its full term, give birth and raise children.).
42. See Bennett Coleman & Co. v. Union of India, AIR 1973 SC 106, at ¶ 39.
43. Nicola Lacey, *Feminist Legal Theory and the Rights of Women*, *in* Gender and Human Rights 13, 40-41 (Karen Knop ed. 2004).
44. *See* Rangarajan v. P. Jagjivan Ram, (1989) 2 SCC 574 ("what good is the protection of freedom of expression if the state does not take care to protect it?"). *See also* Express Newspapers Pvt. Ltd. v. Union of India, AIR 1986 SC 872 (the court quashed the notice issued by the Central Government regarding cancellation of lease and demolition of building on the grounds of *mala fide* and held that it intended to silence the voice of Indian Express).
45. *Suchita Srivastava*, *supra* note 8, at 23, ¶ 60.
46. § 3(2) read with ¶¶ 3(4)(a) and 3(4)(b) of the Act.
47. *Suchita Srivastava*, *supra* note 8, at 16.

conclusion, definitions that exclude 'mental retardation' from the purview of mental illness[48] or treat it as a distinct category altogether[49], were brought to reason. Therefore, the Court held that an explicit consent of the woman with 'mental retardation' needs to be obtained before sanctioning abortion.[50] The Court held that it:

> *...cannot permit a dilution of this requirement of consent since the same would amount to an arbitrary and unreasonable restriction on the reproductive rights of the victim.*[51]

It is argued that this generalisation is incorrect. In fact, the Act itself provides that in certain cases a doctor can terminate the pregnancy without obtaining consent of the woman.[52] The reason is that arbitrarily diluting consent requirement meets out unequal treatment, stifles free expression and annihilates dignity, autonomy and bodily integrity, thereby violating Articles 14, 19(1)(a) and 21.

Incidentally, the court made an observation that since the woman was an orphan placed in a government run institution, the State could claim guardianship but this cannot be extended mechanically to make her decisions about abortion.[53] This observation, it is submitted, was completely unnecessary because the issue of guardianship is irrelevant whence it was established that the appellant was a patient of 'mental retardation' and not 'mental illness'.

A. Problematizing 'Mental Illness' and 'Mental Retardation' Divide in the Light of UNCRPD

Despite the language of the Act, the High Court had in fact relied on medical opinions and provisions of certain enactments to observe that the distinction between the two mental disorders had collapsed. Replying to this, the apex court, however, ruled that:

> *[T]he distinction between statutory categories can be collapsed for the purpose of empowering the respective classes of persons.*[54]

In this respect, it is submitted that the approaches of both courts left much to be desired. The High Court in dissolving the distinction and extending *parens patriae*

48. § 2(b) of the Act.
49. Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, treats 'mental illness' and 'mental retardation' as distinct forms of 'disability' (§ 2(i)).
50. *Suchita Srivastava*, *supra* note 8, at 17, ¶ 29.
51. *Suchita Srivastava, supra* note 8, at 17, ¶ 31.
52. § 5(1) of the Act.
53. *Suchita Srivastava*, *supra* note 8, at 16, ¶ 27.
54. *Id.* at 17, ¶ 33.

power to a territory cordoned off by the Act, disempowered persons of both the classes. The Supreme Court's unproblematic acceptance of difference legitimises the discrimination against persons with mental illness. Perhaps, the constraints of adversarial system helped the court in ignoring the disempowering provision that makes consent of a guardian mandatory in termination of pregnancy of the woman with mental illness.

This argument is significant as India has ratified the UNCRPD[55] which replaces the paradigm of incapacity, charity and welfare with one grounded in capacity, rights and empowerment. It recognizes universal legal capacity for all persons with disability in all aspects of life on an equal basis with others[56] and mandates the norm of supported decision making.[57]

No cogent reasons have been supplied by the legislature for differential treatment accorded to persons with mental illness and mental retardation and the same has not been questioned by the Supreme Court. Without this, the distinction is without difference and arbitrary. In making such classification, the Court violated its own accepted jurisprudence on equality.[58] Persons with mental illness do posses necessary capacity to reason and are entitled to the same degree of protection against interference as others.[59] Overturning their autonomous decisions on societal notions of welfare is not justifiable. Romanticising mental disorder ignores the trauma caused by deprivation of autonomy and identity.[60]

Whilst judicial decisions may well provide impetus to social and legislative breakthrough, it may be argued that this criticism is more applicable to the legislature. There is no disagreement here, yet the courts on several occasions have been prompters of legislative change.[61] to that extent, it is disappointing to observe that the Supreme Court frittered away one such opportunity. The fact that *Suchita Srivastava* was one of the first judicial opinions post India's ratification to the UNCRPD, only makes the loss costlier.

55. India ratified the UNCRPD on October 1, 2007.

56. UNCRPD, art. 12(2) read with art. 23(1)(b) (this was despite the acknowledgement of the court in *Suchita Srivastava*: "we must also bear in mind that India has ratified the Convention on the Rights of Persons with Disabilities (CRPD) on October 1, 2007 and the contents of the same are binding on our legal system."). *Suchita Srivastava*, *supra* note 8, at ¶ 22.

57. UNCRPD, art. 12(3).

58. *Suchita Srivastava*, *supra* note 8, at 17, ¶ 33.

59. John Stuart Mill, On Liberty and Other Essays 10 (2010) ("over himself, over his own body and mind, the individual is sovereign.").

60. Amita Dhanda, Legal Order and Mental Disorder 29 (2000).

61. For example, the Supreme Court issued guidelines for the arresting a person accused of crime in D.K. Basu v. State of West Bengal, 1997 (1) SCC 416. The substance of these guidelines was incorporated in the Code for Criminal Procedure, 1973 through addition of Section 50-A by the Code of Criminal Procedure (Amendment) Act, 2005.

The expert body of the High Court had found that: (i) the woman was aware of her pregnancy and was keen to have her child; and (ii) possessed highly suggestible mental state, imperfect understanding of her and the prospective child's future and role of a mother.[62] Could it be said that she had made an informed choice of continuation of pregnancy? The Supreme Court held that *parens patriae* jurisdiction could be exercised only in the 'best interest' of the patient. It considered the first finding sufficient for adopting this approach. On second, it did not deliberate and merely held that since the twenty weeks time for permissible termination was fast approaching continuation of pregnancy will be in her 'best interest'.[63] It is pertinent to observe that the second question could have been answered taking recourse to the principles of legal capacity and supported decision-making enshrined in the UNCRPD.[64]

B. Questioning the Decisive Importance of Medical Opinions

Incidentally, the expert body report on which the Court primarily relied gave exactly the opposite answers to the questions posed before the earlier medical board constituted by the Chandigarh Administration. Perhaps when the previous board gave its opinion, pregnancy could be terminated without much risk to the woman and by the time second opinion was submitted, due to the passage of time the risks had also grown. *Suchita Srivastava* exposes the ambivalence in medical opinions and the risk in allowing determination of the issues of rights of an expectant woman to be dictated by such opinions. The Court failed to appreciate this and provided another instance of privileging the medical opinion despite the shift in the understanding of disability brought by UNCRPD wherein disability is viewed is not reduced to its medical formulation but is recognised as a 'social construct'.[65]

Conclusion

With every decision it renders, a court redefines its role in democracy. In the instant case, it was a guardian of rights. When it took the opportunity to confront

62. The report of the expert body has been reproduced in the order of the Supreme Court in *Suchita Srivastava*, *supra* note 8, at 10-12.

63. *Id.* at 20-1, ¶ 48.

64. *See infra* notes 56-7. Despite the absence of a legislation in respect of the domestic implementation of the ratified by India) and framed certain guidelines to guarantee the right against sexual harassment at the workplace.

65. UNCRPD, art. I ("persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which *in interaction with various barriers may hinder their full and effective participation in society* on an equal basis with others." (emphasis supplied))). *See also* UNCRPD, pmbl. ¶ (e) ("recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.").

the social stereotypes operating against mentally retarded persons, it assumed the role of a social reformer. This order is indeed another feather in the cap of rights jurisprudence of the Indian courts. Yet it lacks the logical consistency and nuanced connections necessary for sustaining the pragmatic inclusion of 'reproductive choices' within the fold of 'personal liberty' in Article 21.

The Supreme Court's reconstructionist[66] approach has ensured that rights are not merely an area of non-interference but as claims inherent to the existence of human beings they must also be actively provided for and promoted by the State. The judgment in the instant case would have fostered more integrity had it been informed by some of these epochal decisions.[67]

Similarly, the Court did recognise the binding nature of international law but fell short of actually applying it inasmuch as it spared the impugned legislation from scrutiny on the basis of India's commitments to the United Nations, obligations under the UNCRPD and also the Constitutional principles.

The case did present a promise to deliberate and pronounce on some broader (yet significant) issues concerning persons with disabilities as regards equal recognition before law and enjoyment of fundamental rights on equal basis with others. In fact, the court did make an effort to question and reject the stereotypes of incapacity levelled against them.[68]

While critiquing the judgment it must be considered that the court was pressed for time as when it took cognizance of the appeal, the woman had already been pregnant for 19 weeks. Yet, even as the final order in *Suchita Srivastava* is fair and just, it is clear that the judgment as a whole falls short of being progressive and emancipatory for the persons with disabilities.

66. See Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 Harv. L. Rev. 593, 618 (1994-95).

67. For example, Francis Coraile v. Union Territory of Delhi, AIR 1981 SC 746 (meaning and extent of term 'life' in Article 21 to include life with dignity); *Gobind*, *supra* note 31 (right to privacy and its linkages with right to life); Rajagopal v. State of Tamil Nadu, AIR 1995 SC 264 (elements of right to privacy); Bennett Coleman & Co. v. Union of India, AIR 1973 SC 106 (direct and inevitable effect test to check the validity of the impugned state action for violation of fundamental rights).

68. *Suchita Srivastava*, *supra* note 8, at 22, ¶ 53.