UNPACKING CHOICE: WHAT DOES FEMINIST THEORY HAVE TO RETHINK AFTER THE NEMO/NARI NIKETAN CASES?

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This article attempts to raise some critical questions for feminist theory and politics in relation to abortion and a woman's right to choose in cases of mental disability - questions which have come to light in the Nemo / Nari Niketan cases before the Punjab & Haryana High Court, and finally the Supreme Court.

I. INTRODUCTION

Increasingly over the three hundred years of its existence as the cornerstone of liberal philosophy, the 'individuated being' has percolated into our common sense so as to become one of the most dominant forms of modern self-imagination. The critique that most

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[1] The contours and concepts of liberalism as a political philosophy has varied greatly throughout history from the understanding of Thomas Hobbes (1588-1679) - who argued that individual liberties must be curtailed by the establishment of an all powerful (`Leviathan') sovereign in order to secure peace — through the understanding of 'representative government' formulated by John Stuart Mill (1806-1873) — upto the critique of utilitarianism as a part of liberal thought on the basis that all individuals are not merely means to desired ends but ends in themselves by John Rawls (1921-2002). As such, while the earlier understanding of liberalism was based on clearly demarcated public and private spheres, it has now come to be centred on the individual. *See generally* JURGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO THE CATEGORY OF BOURGEOIS SOCIETY (1991). All the values traditionally espoused by contemporary liberal thought — liberty, equality, justice, constitutionalism, democracy, and rights are premised on the idea of the individual. *See generally* DAVID HELD, **PouncAL** THEORY AND THE MODERN STATE: ESSAYS ON STATE, POWER AND DEMOCRACY (1998).

feminists have made of liberal philosophy is centred on the conception of the "individual" as being at the heart of liberal thought. Feminists have argued that this supposedly value-free conception of the individual — which is claimed to be one of the central tenets of liberalism, ordaining every individual with a space which is free from any form of infringement — is not really value-free. Liberalism's celebration of the ethics of reason and rationality, they argued, has essentially been the celebration of male values and ethics. As such, the feminist critique of this figure of the individual at the heart of liberal thought has exposed the unstated assumption that this individual is necessarily male.' Despite this, feminist theory has not been able to question the centrality of the liberal ethos and has not generally concerned itself with effectively displacing liberalism or liberalism's central tenet of the 'individuated being' itself, perhaps because feminist thought was itself based largely on liberal philosophy.

The task of generating a feminist theory has therefore been to create a system of knowledge that starts from the experiences of women but which is moulded within a larger liberal frame of thought. It is in this regard that the pregnant female body raises a fundamental question in relation to how the notion of the 'individual' is theorized in liberal thought as it creates a dichotomy as to whether a pregnant woman should be considered as a single individual or as two separate individuals with different legal rights and obligations. If individuals and their rights are truly the cornerstone of liberal philosophy, then it is not clear what it means for liberal thought when a question is premised both on the rights of a pregnant woman as an individual as well as those of her unborn foetus as a potential individual. This dichotomy is of course at the heart of the pro-choice/pro-life debate

[2] *See generally* SIIVIONE DE BEAUVOIR, THE SECOND SEX (1989); CAROLE PATEMAN, THE SEXUAL CONTRACT (1988). These are foundational works of feminist thought. It should be noted however that focusing on this feminist critique of liberal thought requires us to regretfully ignore the works of socialist feminists whose criticisms of liberal thought came from Marxism. Rosalind Petchesky concedes that socialist feminists have also not been able to come up with an alternative socialist feminist morality of its own. *See* ROSALIND PETCHESKY, ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY AND REPRODUCTIVE FREEDOM (1990).

on abortion — a debate which only begs the question raised here but does not satisfactorily answer it.

This dichotomy is further complicated when we consider that it is premised on the notion of a rights-based discourse where an `individual' has independent legal rights including the right to choose by virtue of being an 'individual'. For the purposes of this article, it is considered that individuals who have independent legal rights are those whose legal rights may be protected by means of their being recognized as having *locus standi* to litigate on their legal rights either by themselves or through their representative, acting on their behalf and in their interests.' This of course leads to the question of how liberal theory would resolve the multi-pronged questions that the right to choose can pose through the pregnant body of a mentally disabled female — this article seeks to explore this dichotomy from a largely Indian perspective in general and in relation to the "Nemo" (Nati Niketan) cases in the Supreme Court of India and in the High Court of Punjab and Haryana in particular. As such, it needs to be clarified at the outset that the Nemo/Nari Niketan cases are intended only as a context or backdrop to discuss the implications of such questions for feminist politics in general and in India in particular. This case brings out the theoretical trouble regarding not only the right of a woman to choose but also about who can be a consenting individual. This being the case, this

[3] There has been much debate as to what kind of entities can be right-holders with one of the most contentious areas being whether young children and the mentally disabled can properly be regarded as being legal right-holders. It has for example been argued that any theory of rights which could not accommodate the rights of children would be deficient to that extent, and that therefore it must be considered that all those whose interests are protected by law — whether these interests are protected by means of them being capable of litigating on their own behalf or through a representative — are to be considered as right-holders. *See* Neil MacCormick, *Children's Rights: A Test-Case for Theories of Rights,* in NEIL MACCORM ECK, LEGAL RIGHT AND SOCIAL DEMOCRACY: ESSAYS IN LEGAL AND POLITICAL PHILOSOPHY 154 (1982). On the other hand, there are those who argue that this distorts the concept of a right since children and the mentally disabled lack the relevant control of the legal machinery, and that therefore the relevant rights should be seen as belonging only to those who can bring legal action on their behalf. *See generally* CARL WELLMAN, REAL RIGHTS (1995).

article would not enter into a detailed legal analysis of the decisions but would attempt only to consider the implications of such questions for feminist politics, namely, what effect such a conundrum may have on the feminist understanding of a woman's right to choose in general and in circumstances of disability in particular.

The cases themselves were centred around the interpretation of Section 3 of the Medical Termination of Pregnancy Act, 1971 *(hereinafter* the "MTP Act") and concerned a young mentally retarded woman (referred to in the cases as "Nemo") who had conceived a child as a result of being raped by the guards of a protection home in Chandigarh and had refused to abort the child against the advice of her doctors. Apart from the violence of rape, the factor that complicated the matter was the question of consent or choice — to what extent can a mentally retarded woman 'consent' in the context of abortion in the understanding of Indian law. Ultimately, the Supreme Court ruled in favour of Nemo allowing her to keep her child, overruling the decision of the Punjab and Haryana High Court to terminate Nemo's pregnancy. Though the Supreme Court's decision settled the questions of law raised in this particular case admirably, it does little to settle the overarching philosophical and theoretical questions that arose as a result.

As we have clarified previously, however, this article is limited to the questions this case raises for feminist theory and politics in relation to abortion and a woman's right to choose in cases of mental disability. This article commences with a brief introduction to the various concerns that the issue of abortion rights raises for feminist thought in general (see Part II — Abortion and Feminist Thought: Privacy and the Pro-Choice/Pro-Life Debate), before considering how the evolution of abortion rights in India has raised new and different concerns in this regard (see Part III - Abortion Rights in India). With this theoretical background in place, we summarize how the Supreme Court has considered the specific issue of abortion rights in cases of mental disability in the Nemo/ Nari Niketan case (see Part IV — The Nemo/Nari Niketan Cases). Finally, we discuss the issues this raises for feminist thought (see Part V — A Few Conundrums for Feminist Theory).

II. ABORTION AND FEMINIST THOUGHT: PRIVACY AND THE FRO-CHOICE/FRO-LIFE DEBATE

In this part, we will briefly consider some of the critical questions that the issue of abortion rights raises for feminist thought in general. At the outset, we have already noted the dichotomy that the pregnant female body raises in terms of whether it should be considered as a single individual with one set of rights or as two separate individuals with separate and different sets of rights; this dichotomy becomes further complicated in feminist theory when we look at the standard pro-life position on abortion.

The debate on abortion in the West in general, and especially in the United States of America, is generally encapsulated in the pro-choice versus pro-life positions. While the pro-life position - which is usually based on moral or religious grounds and opposes any legal right to abort, on the basis of the argument that the human embryo/foetus is a legal person and enjoys the right to life — is usually regarded as a conservative stand, the pro-choice position — which argues that women should have the right to freely choose whether to abort the foetus — is generally regarded as the standard liberal and feminist position. Since this article attempts to address how the issue of abortion raises critical questions for feminist theory, we will attempt to critically understand the pro-choice position as articulated in several registers.[4]

Kristin Luker used testimonies from American pro-life and pro-choice activists to draw neat divisions between them on the basis of their social class and their understanding of the status of the 'embryo'.[5] Her narrative is so neatly drawn that it seems that there is

[4] It should be noted that our focus on raising critical questions for the pro-choice position alone (and not for both the pro-choice and pro-life positions) should not be considered as our support for the pro-life position but is due merely to the fact that this article concentrates on raising critical questions for feminist thought on abortion.

[5] KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 144 (1983).

virtually no place for any grey zones in the abortion debate. Luker's average pro-choice woman is an educated, middle-class woman, while a pro-life woman is a much less educated, church-going, conservative woman. This attempt to divide the debate into neat and uncomplicated binaries often has the effect of essentialising the rival positions into two often extremist camps thus further complicating the terms on which the issue can be evaluated. For example, Susan Himmelwelt describes how pro-choice activists have ended up describing the foetus as a 'clump of tissues' or a 'bunch of cells' in order to make a claim for abortion rights.' Adopting such a position has often led to completely obscuring a host of sentiments which women undergoing abortions experience. This is evident from Ruth Fletcher's case study of Irish women who chose to undergo abortion. As abortions are banned in Ireland, the contours of the pro-choice versus pro-life dispute created such strict boundaries between the two positions that pro-choice activists could neither sympathize with the choices made by women who underwent abortions nor understand the emotions such as guilt, loss or pain that these women suffered.'

This seems to indicate that the feminist movement as a whole must consider a different set of questions which may not have been resolved by the pro-choice versus pro-life debate but the answers to which may in fact have been hampered thereby. While the pro-choice movement has been associated with a perception of abortion as a straightforward procedure which a woman undertakes in pursuit of control of her reproductive capacity with little or no consideration for the foetus, the understanding of abortion that is connected with the pro-life movement is one of an evil act where the woman is responsible for the killing of an innocent unborn child, resulting in her feeling guilt and remorse. The lived experiences of women who have to choose whether or not to undergo abortion often places them

[6] Susan Himmelwelt, *More Than AWoman's Right to Choose,* 29 FEMINIST REVIEW 49-50 (Summer, 1988).

[7] Ruth Fletcher, *Silences: Irish Women and Abortion,* 50 FEMINIST REVIEW, 44- 66 (Summer, 1995).

in indeterminate grey zones between the two oppositions and do not neatly fit within the terms of either discourse. This often renders women very inadequate in terms of expression of their own sentiments and experiences in a political space. Both the standard pro-choice and pro-life positions therefore fail to look at the multiplicity of women's experiences and responses, and thus attempt to box women's experiences as well as their solutions. The liberal celebration of pro-choice as the sole vehicle of women's free choice, consent and agency may not, therefore, be a testimony of free choice. Thus, the question of free choice or consent raises critical questions for the standard feminist pro-choice position on abortion. This is further complicated, as we shall now see, by the fact that the standard feminist pro-life position on abortion is based on the right to privacy.

In America, the landmark 1973 Supreme Court judgment in the case of *Roe v. Wade,'* which struck down various state-level laws banning abortion, granted women the right to choose to undergo an abortion but also allowed states the right to restrict and thereby control this choice, thus limiting women's procreative choices.' Although the Supreme Court held that the *"light to privacy ... is broad enough to encompass a woman's decision whether or not to terminate her pregnamyr* ° it rejected the claim that women should have *"an unlimited right to do with* [her] *body as* [she] *please[d]"*[il] on the grounds that the *"light of personal privacy ... is not unqualified and must be considered against important state interests in regulation"*.[12] The Supreme Court went on to hold that a *"pregnant woman cannot be isolated in her priva91'*[13] arguing that the state has an *"important and legitimate interest in protecting the potentiality of human life"* .[14] Subsequently, states began to use the latitude afforded by the judgment

[8] Roe v. Wade, 410 US 113 (1973) (hereinafter "Roe v. Wade").

[9] Frances Olsen, *Unraveling Compromise,* 103 HARV. L. REV. 40 (November, 1989).

[10] Wade, supra note 8, at 153.

Wade, supra note 8, at 154.

[12] Wade, supra note 8, at 159.

[13] Wade, supra note 8, at 162.

[14] Wade, supra note 8, at 163.

to legislate on abortion to restrict it by regulation; such regulations included the requirement of parental involvement in abortions by minors and restrictions on late-term abortions; most importantly, the 1976 Hyde Amendment barred the use of certain federal funds (in particular, Medicaid) to pay for abortions. Based on the rationale outlined in *Roe v. Wade,* the courts ruled that this did not necessarily constitute governmental interference in the exercise of the constitutionally guaranteed right to abortion since the right to privacy merely guarantees that the state will not interfere with one's right to choose to abort but does not necessarily guarantee state support for such abortions."

The lack of state support for abortions — while justified by the privacy rationale of *Roe v. Wade* — rendered abortion an expensive choice thus placing practical limitations on a woman's right to choose without calling into question the theoretical right to choose granted to women by the judgment. Catherine Mackinnon has therefore argued that the decision in *Roe v. Wade* was disappointing precisely because it made abortion a right within the right to privacy." This clearly meant that this right was premised on individual choice and therefore the individual would be completely responsible for undergoing abortions without any state support. Feminists have in general criticised the privacy doctrine on the grounds that it reinforces the structures that perpetuate the powerlessness of women by relegating women's problems to the realm of the private and therefore outside the purview of public discourse or state action/support.[17]

[15] *See* Beal v. Doe, 432 US 438 (1977); Maher v. Roe, 432 US 464 (1977); Harris v. McRae, 448 US 297 (1980); Rust v. Sullivan, 500 US 173 (1991).

[16] CATHERINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 93 (1987); CATHERIN MACKINNON, TOWARDS A FEMINIST THEORY OF THE STATE 184 (1989).

17 We are referring to the long standing critique that second-wave feminism has made regarding the sharp distinction between the private and the public spheres since it is in the private sphere that inequalities are perpetuated. *See generally* CAROLE PATEMAN, THE SEXUAL CONTRACT (1988). One of the most powerful slogans used by the second-wave feminists of the 1960s was that the "personal is political".

Having seen how the standard feminist position on abortion itself raises critical questions for feminist thought, it is clear that feminist theory must concern itself with the question of whether feminists should continue to argue for abortion rights along the lines of a woman's right to choose as a part of her right to privacy while at the same time recognizing the historicity of the concept of privacy which in practice often acts to the disadvantage of women. More importantly, the question is how feminists are supposed to argue that child-bearing and child-rearing are both individual (inasmuch as it is only the woman concerned who can choose whether or not to undergo abortion as a part of the woman's right over her own body and as such a part of her right to privacy) as well as social (in as much as child-bearing and child-rearing are not simply the responsibility of the woman but also of the state, family and social set-up of which she is a part). This would of course affect how feminists, liberal or radical, think about the questions of procreation, contraception and child-rearing which are so deeply caught between the two terrains.

III. ABORTION RIGHTS IN INDIA

In the Indian context, the issue of abortion gets further convoluted owing to the peculiarities of South-Asian socio-political dynamics where — as Nivedita Menon argues — "pro-choice becomes anti-women".[18] Based on her reading of the parliamentary debates on the Medical Termination of Pregnancy Bill, Menon argues that abortion rights in India followed a very different trajectory than it did in the West since abortion was introduced in India as a policy of population control due to concerns over India's increasing population rather than for the protection of the rights of women over their own bodies.' Since abortion and birth control were introduced more as techniques of population control rather than to protect the rights of women,'

[18] "Abortion: Where Pro-Choice is Anti-Women" is the title of the chapter on Abortion in NIVEDITA MENON, RECOVERING SUBVERSION: FEMINIST POLITICS BEYOND THE LAW 66 (2004).

[19] *Id.* at 71.

[20] *Id.* at 72-81.

they were more or less indiscriminately applied without having anything to do with a woman's right over her own body.' This is in stark contrast to the trajectory of the abortion debate in the West, where (as we have previously seen) the pro-choice position arose in opposition to a conservative discourse whereby abortion was considered immoral as a foetus was considered to be a life in its own right. As such, in India, the pro-choice discourse coincides with the statist agenda of population control which might prove to be dangerous for feminist politics.

This is especially difficult in India where the problem of female foeticide makes it difficult for feminist politics to reconcile with apparently freely made choices to abort female fetuses. Himmelweit argues that the right to choose becomes extremely fallacious when we see cases where women themselves with no external pressure decide to abort female foetuses or foetuses which may be born with certain disabilities.' Himmelweit asks whether we decry these as choices which are not free enough or do we argue for the right to life of the female foetus. Even if we are to agree that the right to choose in the truest sense of the term in any case remains largely unavailable to women in India, treating a woman as someone without agency or with no idea as to what is her 'real will' (as in the case of female foeticide) is a dangerous proposition. For many women therefore, the choice to undergo abortion is clearly because of structural issues. Often it becomes extremely difficult for women, especially poor working-class women, to bring up children as pregnancy might mean loss of livelihood for them. This is evident from S. Anandhi's case

[21] Very evidently there is a class angle to the way these population control policies are implemented. The huge uproar over injectable contraceptives Net-en and Depo Provera during the 1980s is an example of how these contraceptives were being experimented on lower-class women. Nandita Shah and Nandita Gandhi give a detailed explanation of how several employment guarantee programmes and relief work programmes were used, directly or indirectly, to introduce family-planning **programEs** *See* NANDITA SHAH AND NANDITA GANDHI, ISSUES AT STAKE: THEORY AND PRACTICES IN THE CONTEMPORARY WOMEN'S MOVEMENT (1992).

[22] Susan Himmelweit, *More than 'a Woman's Right to Choose'?,* FEMINIST REVIEW 41 (Summer 1988).

study on Tamil Nadu where she demonstrates that abortions are often opted for due to a lack of structural support and in order to negotiate with their societal conditions.'

Thus, whether in India or in the West, whether abortion rights are premised on the right to privacy or are seen as a mechanism of population control, the lived experiences of women demonstrate that the real problem for feminist theory is to generate a coherent and self-consistent argument which may be used both to argue for removing unfair social, economic or legal restrictions on a woman's right to choose as well as to argue that socio-economic mechanisms of state support must be made available in order to ensure that such choices are truly free and not unfairly limited.

With this theoretical background in place, we may now consider how these issues should be appreciated in cases of mental disability. In order to do so, we will commence with a summary of the Nemo/Nari Niketan case.

IV. THE NEMO/NARI NIKETAN CASE

The recent judgment of the Supreme Court ("SC")[24] and the two judgments of the High Court of Punjab and Haryana ("P&H HC")' in what has (in)famously come to be known as the "Nari

[23] S. Anandhi, *Women Work and Abortion: A Case Study of Tamil Nadu,* Eco & PoL. WKLY. 1054-1059 (Mar 24, 2007).

[24] Suchita Srivastava and Another vs. Chandigarh Administration, MR 2010 SC 235: 2009 (11) SCALE 813: (2009) 9 SCC 1 (decided in the Supreme Court, by a Bench comprising Chief Justice K.G. Balakrishnan and Justices P. Sathasivam and B.S. Chauhan, on the 28th of August, 2009) (hereinafter referred to as "Nemo", for the sake of convenience).

[25] Chandigarh Administration vs. Nemo, (2009) 156 PLR 489 (decided in the High Court of Punjab and Haryana, by a Division Bench comprising Justices Surya Kant and Augustine George Masih, on the 9th of June, 2009) (hereinafter referred to as "Nemo-I", for the sake of convenience); Chandigarh Administration vs. Nemo, MANU/PH/0397/2009 (decided in the High Court of Punjab and Haryana, by a Division Bench comprising Justices Surya Kant and Augustine George Masih, on the 17th of July, 2009) (hereinafter referred to as "Nemo-II", for the sake of convenience).

Niketan case" provide interesting insights, especially regarding the premises upon which the judgments are based. This series of cases concerned a 'mentally retarded' woman who had conceived as a result of being raped by the security guard of the shelter home she used to stay in. The extraordinariness of the case lies in the fact that it overturns any assumption that a conception that has occurred due to a rape will be terminated willingly by the pregnant woman. This woman, contrary to all expectations, did want to keep the foetus. The Chandigarh Administration therefore filed a writ petition before the P&H HC, "purportedly", as the High Court would term it, "in [the] public interest",[26] seeking permission for the medical termination of the pregnancy of the "mentally retarded girl",[27] described as suffering from "mild mental retardation",[28] who was previously an inmate of Nari Niketan, Chandigarh, a home for the mentally challenged, where she conceived as a result of having been raped by a security guard!' The principal disputes concerned whether her pregnancy should be terminated, and who was competent to consent to such termination — whether her own consent was necessary for such termination or whether the court could assign the power to consent in exercise of its *parens patriae* jurisdiction.'

[26] Nemo-I, *Id.* atilt

[27] Whose name, the P&H HC would tell us, had been withheld — presumably for the purposes of protecting her right to privacy. Ibid. The extensive media coverage the case would receive ensured that little except her name would be kept from the knowledge of the general public (indeed, even the name of her child later became public knowledge). This girl, who would be referred to in the judgment of the P&H HC, only as "the victim", was referred to, for the purposes of being named in the case, as "Nemo" (hence the name of the case). The question of course arises — how far did the courts and the media consult "Nemo" in this regard?

[28] Nemo-I, *supra* note 25, at ¶2(e), citing the opinion of the three-member Medical Board of the Chandigarh Government Medical College and Hospital, as delivered on the 25th of May, 2009).

[29] Nemo-I, *supra* note 25, at ¶1-2.

[30] Nemo-I, *supra* note 25, at 111 1 . The legal principle of *"parens patriae"* has been recognized by the Supreme Court as the "the inherent power and authority of a Legislature to provide protection to the person and property of persons *non sui juris,* such as minor, insane, and incompetent persons"; however, the Supreme Court also recognized that this principle — which denotes the sovereign as "the

Based on its reading of Section 3(4) of the MTP Act — which mandates that pregnancies shall not be terminated without the consent of the pregnant woman or her guardian in case she is a minor or "mentally ill" (defined in Section 2(b) of the Act as "a person who is in need of treatment by reason of any mental disorder other than mental retardation") — the P&H HC held that if a pregnant woman is above 18 years of age and is merely "mental retarded" and not "mentally ill", she would be competent to accord consent for termination of her pregnancy.' Further, the expression "mentally ill person" would not include within its ambit persons suffering from mental retardation as "purposive construction"' would seem to imply that "a mentally retarded pregnant woman who is more than 18 years of age has a right of self determination regarding continuation or otherwise of her pregnancy", regardless of the "consequences" of such a position.' In the very next breath, however, the P&H HC goes on to consider these consequences, holding that such a "literal interpretation"' would hamper the legislative intent of the Persons

father of the country"— also encompassed the right as well as the duty of the State to protect its citizens especially those persons under disability who have no rightful protector. *See* Charan Lal Sahu v. Union of India, A.I.R. 1990 S.C. 1480, at ¶35. While we believe it is possible to essay a feminist critique of this legal principle, this is currently beyond the scope of this article.

[31] Nemo-I, *supra* note 25, at ¶11

[32] In *National Insurance Co. Ltd v. Laxmi Narain Dhut,* A.I.R. 2007 S.C. 1414, the Supreme Court referred to various other Supreme Court decisions and Francis Bennion on "Statutory Interpretation" to hold that the "Golden Rule" of "literal interpretation" which often led to "unjust results" had given way to the principle of "purposive construction" or the "rule of legislative intent" (see paragraphs 14-15) which "combines both literal and purposive approaches" in order to arrive at the "true or legal meaning of an enactment" by "considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed" (see paragraph 19). *See also* Lalit Mohan Pandey v. Pooran Singh, A.I.R. 2004 S.C. 2303: 2004 (5) SCALE 267:, at 754-57; Ameer Trading Corporation Ltd. v. Shapoorji Data Processing Ltd., A.I.R. 2004 S.C. 355. Thus, it would seem that "purposive construction" and "literal interpretation" are not mutually exclusive.

[33] Nemo-I, *supra* note 25, at ¶27.

[34] The literal rule of interpretation of statutes applies where the words of a statute

with Mental Retardation and Multiple Disabilities Act." Therefore, the P&H HC held that the exclusion of mentally retarded persons from the category of mentally ill persons under the MTP Act was not absolute; the foreseeable environment in which such mentally retarded persons live and the degree and condition of such mental retardation must be considered in deciding this question.' In a country inflicted with several social evils born of patriarchy, Courts must consider the "freedom of consent" especially that of a "mentally retarded major pregnant woman" to be "susceptible" to "undue influence, fraud, misrepresentation" and the like." Therefore, the P&H HC held that, depending upon the individual facts and circumstances of each case, while exercising its *parens patriae* jurisdiction, the court is competent to act or appoint a guardian *ad litem* of a mentally retarded major pregnant woman for the purpose of deciding on the question of termination of her pregnancy in her best interests.' Her "social environ" as well as the "attending circumstances", opined the court, must guide the extent to which the State or the Court would be required to assume and exercise its *parens patriae* jurisdiction in the matter." In such a case, her guardian *ad litem* would have to ascertain that her "consent" is free from any type of "undue influence", and is "realistic in the sense that the mental capacity of the person giving consent is beyond doubt".' Therefore, the P&H HC went on to consider the factors which, it considered, "are undeniably of paramount consideration" in determining "the childbearing capacity of any major

are clear and unambiguous and giving effect to the natural or ordinary meaning of such words would not render the statute unintelligible nor nullify the object and purpose of the statute. *See* B. Premanand v. Mohan Koikal, A.I.R. 2011 S.C. 1925.

[35] Nemo-I, *supra* note 25, at ¶¶28, 30.

[36] Nemo-I, *supra* note 25, at ¶30.

[37] Nemo-I, *supra* note 25, at ¶31.

[38] Nemo-I, *supra* note 25, at ¶34. The P&H HC noted that the guardian may consult or even seek the consent of the pregnant woman concerned for the purpose of formation of his final decision as to whether or not the pregnancy may be medically terminated.

[39] Nemo-II, *supra* note 25, at1114.

[40] Nemo-II, *supra* note 25, at ¶14.

woman" 4[1] Considering the first such factor, the physical condition of the mother, the P&H HC noted that notwithstanding her own physical "abnormalities", she did not suffer from any "serious physical disability" so as to "prevent her from carrying on with the pregnancy or delivering the child".' On the question of mental capacity, the P&H HC noted that although she had been variously described as suffering from "mild" and "mild to moderate" mental retardation, she was unaware of how conception and pregnancy occur or what they entail.' Nor did she have any idea as to the "sexual act and its attendant emotions", or the "concept of marriage"." Specifically, the P&H HC noted, she was ignorant as regards "child-rearing", especially "how to provide succour and sustenance to the child".[45] The P&H HC noted, according to the expert testimony, she regarded her child as a "toy", which is why she wished to bear the child.[46] As regards her

[41] Nemo-II, *supra* note 25, at 111116-22. This last statement of the court is more problematic than most. Even assuming that the courts and/or the state machinery *have parens paniae* jurisdiction to assume guardianship of mentally retarded pregnant women for the purposes of determining whether her pregnancy should be terminated, how does this give the court the power to determine the "paramount" factors for consideration for determining "the child bearing capacity of *any major woman"?* [Emphasis supplied]. The factors considered were: (i) physical condition of the mother; (ii) mental capacity of the mother; (iii) social conditions and surrounding environment; and (iv) financial condition. Ibid.

[42] Nemo-II, *supra* note 25, at ¶1 7.

[43] Nemo-II, *supra* note 25, at 8.

[44] Nemo-II, *supra* note 25, at ¶18. It is not clear why the court considered it necessary to consider whether a woman is capable of understanding the "sexual act and its attendant emotions", or the "concept of marriage" in order to determine whether a woman is capable of consenting to termination of her own pregnancy. Does this imply that the court equates "consent" for the purposes of termination of pregnancy as capable of being equated with "consent" for the purposes of sexual intercourse and marriage? This remains unclear.

[45] Nemo-II, *supra* note 25, at ¶18. The P&H HC also noted that although she "displays adequate skills for basic self-care", her "practical and domestic skills are rudimentary". Moreover, she has "impaired social... judgment" and displays "significant emotional immaturity". Specially, the P&H HC noted, she displays a "poor understanding" of "expectations" in the areas of "social reactions" and "social roles", especially as regards "marriage and child bearing".

[46] Nemo-II, *supra* note 25, at ¶19.

social conditions and environs, which, the P&H HC considered, "have a direct bearing on the mother and the child", the P&H HC noted that she was "an orphan" who had been abandoned by her parents, and brought up in state-run/state-aided institutions for mentally ill and mentally retarded persons.' Noting that financial conditions have an impact on the capacity to bear and raise a child, the P&H HC opined that despite the "loud claims of various welfare schemes made by the States", the basic needs of a vast majority of children belonging to the poorer sections of society are seldom fulfilled." Since she was an "illiterate mentally retarded young girl" who did not possess any "occupational skills", the P&H HC expressed doubts regarding her ability to work for a living.' Turning to the question of social or family support, the P&H HC noted that there could be no doubt that "an intellectually impaired pregnant woman" in her position could "legitimately discharge parenting responsibilities" if she were given the necessary "social or family support".' "Family", the P&H HC noted, somewhat fatuously, is "the most vibrant tool of emotional ties" and "social security" inasmuch as it can "protect a pregnant woman from hundreds of discomforts".[51] The absence or lack of such support, it was noted, may be adequately met "by responsible, caring and vigilant social institutions".' However, the P&H HC noted that their "desperate search" for such an institution where she and her future child could be "emotionally compensated" and "socially protected" and "groomed" to survive on a self-sufficient basis, proved "futile" as it would be "too farfetched" to "equate" a state-run/state-aided institution with "an ideal model" 53

[47] Nemo-II, *supra* note 25, at ¶20.

[48] Nemo-II, *supra* note 25, at 121.

[49] Nemo-II, *supra* note 25, at ¶21

[50] Nemo-II, *supra* note 25, at ¶22.

[51] Nemo-II, *supra* note 25, at ¶22. Again, while it is not clear how such remarks are apposite to the court's determination of a woman's capability to consent to termination of pregnancy, it seems revealing in terms of the court's attitude towards pregnancy in general.

[52] Nemo-II, *supra* note 25, at ¶22.

[53] Nemo-II, *supra* note 25, at ¶22.

Concluding its consideration of these factors, the P&H HC found that she was neither "intellectually" nor on the "social, personal, financial or family fronts", able to bear and raise a child;" allowing her to continue with her pregnancy would be a "travesty of justice" and a "permanent addition to her miseries"." The P&H HC also found that, keeping in view the child's "future prospects", allowing continuation of her pregnancy may prove "highly disappointing", as there would be no alternative but to house the child with his mother in the mental institution, thus isolating the child from society and impeding the child's learning process;" the child would be deprived not just of the "care and protection" of a father, but also, on account of her "mental handicap", a mother.' Noting that there was no consensus on the parenting abilities of mentally retarded persons, the P&H HC noted that mentally retarded parents may encounter "difficulty in providing an ideal environment for the maximized intellectual growth of their child", especially due to the "lack of adequate programmes and properly trained teachers" which could teach them to perform the responsibilities of parenting." Therefore, the P&H HC held that, given the "mental condition of the victim", the continuation of her pregnancy would constitute a "grave injury" and may lead to further deterioration in her mental health.' Further, the P&H HC found that the ingredients of Explanation 1 to Section 3(2) of the Act had been satisfied, inasmuch as expert testimony revealed that she "did not like the sexual act" and "expressed her anguish" against her "unwilling and fully resisted sexual encounter".' Since she was unable to "co-relate" her anguish with the

[54] Nemo-II, *supra* note 25, at ¶23.

[55] Nemo-II, *supra* note 25, at ¶23.

[56] Nemo-II, *supra* note 25, at ¶24.

[57] Nemo-II, *supra* note 25, at ¶24.

[58] Nemo-II, *supra* note 25, at ¶25. Even the National Policy for Persons with Disabilities, 2005, the P&H HC noted, acknowledges that "women with disabilities have serious difficulties in looking after their children".

[59] Nemo-II, *supra* note 25, at1133.

[60] Nemo-II, *supra* note 25, at ¶31-32. Explanation 1 to Section 3(2) of the Act provides that the requirement of "grave injury" to the mental health of the pregnant woman may be presumed to have been fulfilled by the "anguish" caused due to the pregnancy having been "caused by rape".

act of rape, the P&H HC held that her "so-called consent" for the retention of her pregnancy must be "evaluated" in that context.' The P&H HC held that she could not be said to have "consented" for the retention of her pregnancy, when she had "absolutely no knowledge of" what she was consenting to G[2] Therefore, the P&H HC directed the Chandigarh administration to "promptly and forthwith medically terminate the pregnancy of the victim"."

On appeal, however, the SC disagreed with the conclusion of the P&H HC, on the grounds that she had "clearly expressed" her "willingness" to bear her child, and that her "reproductive choice should be respected" in spite of the various factors noted by the P&H HC, since the Act "clearly contemplates" that the consent of mentally retarded women is necessary for the termination of her pregnancy.' A "plain reading" of Section 3, held the SC, "makes it clear" that abortion is permitted only "if the specified conditions are met"." Since a woman's right to make reproductive choices is a dimension of her "personal liberty" under Article 21 of the Constitution, the SC held that it is "important to recognize" that "reproductive choices can be exercised to procreate as well as to abstain from procreating".[66] The "crucial consideration" being that a woman's right to privacy, dignity and bodily integrity should be respected, there can be "no restriction whatsoever" on the exercise of reproductive choices, such as a woman's right to refuse participation in sexual activity, insist on the use of contraceptive methods, or to carry a pregnancy to its full term, to give birth and to subsequently raise children.'

However, the SC noted, there is also a "compelling state interest"' in protecting the life of the prospective child.' Therefore,

[61] Nemo-II, *supra* note 25, at ¶32.

[62] Nemo-II, *supra* note 25, at ¶32.

[63] Nemo-II, *supra* note 25, at 135.

[64] Nemo, *supra* note 24, at ¶10.

[65] Nemo, *supra* note 24, at ¶11.

[66] Nemo, *supra* note 24, at ¶11.

[67] Nemo, *supra* note 24, at ¶11.

the SC concluded that termination of a pregnancy is only permissible when the conditions specified in the Act have been fulfilled.' Noting that none of the other exceptions were applicable," the SC found that the requirement of mental illness in Section 3(4)(a) of the Act is "clearly different" from the condition of "mild mental retardation",[72] and the Legislature, when making such a distinction, must be presumed to have intended for such to be the case.' Therefore, the SC held, the Legislature seems to have intended that persons who suffer from "mental retardation" should be treated differently from those who are "mentally ill".[74] Therefore, while a guardian had to consent to termination of pregnancy on behalf of a "mentally ill

[68] Nemo, *supra* note 24, at1111. It is not clear whether this is meant as a reference to the doctrine of "compelling state interest" in American constitutional law It should be noted that Indian constitutional law may be said to incorporate the view that fundamental rights such as Article 21 are subject to reasonable restrictions in case there is a "compelling state interest" to do so. Certainly, the Indian Supreme Court seems to have hinted at this possibility on occasion. *See* Gobind vs. State of Madhya Pradesh and Another, A I R. 1975 S.C. 1378, at ¶22; District Registrar and Collector, Hyderabad and Another vs. Canara Bank, A.I.R. 2005 S.C. 186, at 737-38; Union of India vs. Rakesh Kumar and Others, (2010) 4 S.C.C. 50, at ¶40. In this case, however, the Supreme Court seems to be recognizing a "compelling state interest" in protecting (as opposed to restricting) the right to life — in this case, that of the unborn foetus. It is not clear what complications this remark may have for abortion rights in general.

[69] Nemo, *supra* note 24, at ¶11.

[70] Nemo, *supra* note 24, at ¶11.

[71] Nemo, *supra* note 24, at ¶12.

[72] Nemo, *supra* note 24, at ¶13.

[73] Nemo, *supra* note 24, at ¶14. Indeed, the SC held, the Legislature has made a distinction between "mental illness" and "mental retardation", as two different forms of "disability", in the similar distinction can also be found in the Persons with Disabilities Act.

[74] Nemo, *supra* note 24, at ¶15. A developmental delay in mental intelligence, held the SC, should not be equated with mental incapacity; and as far as possible, the law should respect decisions made by persons who are found to be in a state of "mild to moderate mental retardation". Id, at paragraph 21. Further, the SC held that its conclusions were buttressed by the United Nations General Assembly Declaration on the Rights of Mentally Retarded Persons, 1971.

person" according to Section 3(4)(a) of the Act, only the consent of the pregnant woman would be sufficient for termination of pregnancy of a woman who suffered from "mental retardation".' A dilution of this requirement of consent could not be permitted, held the SC, since it would amount to an "arbitrary and unreasonable restriction" on "reproductive rights", and would be liable to misuse in a society where sex-selective abortion is a pervasive social evil.'

The SC could not agree with the decision of the P&H HC that ordered termination of her pregnancy in her "best interests" in exercise of its *parens patriae* jurisdiction.' To correctly apply the "best interests" test, the SC held that, the court must undertake a careful inquiry of the medical opinion on the "feasibility of the pregnancy" as well as the "social circumstances" faced by the pregnant woman, and must be guided by the best interests of the pregnant woman alone (and not those of other stakeholders such as her guardians or society in general).[78] While it is evident, held the SC, that the woman in question will need care and assistance, which will in turn entail some costs, this could not be a ground for denying her the exercise of her reproductive rights.' In the present case, the SC found that she had expressed her eagerness to carry the pregnancy till its full term and bear a child, even though experts have opined that she may not be fully prepared for assuming the responsibilities of a mother nor fully understand the idea of pregnancy.[8] Further, she is physically capable of continuing with the pregnancy and the possible risks to her physical health are similar to those of any other expecting mother." There was also no indication that the prospective child may be born with any congenital defects." Furthermore, there is a clear medical consensus,

[75] Nemo, *supra* note 24, at 115

[76] Nemo, *supra* note 24, at ¶15.

[77] Nemo, *supra* note 24, at ¶17.

[78] Nemo, *supra* note 24, at ¶19.

[79] Nemo, *supra* note 24, at ¶19.

[80] Nemo, *supra* note 24, at ¶22.

[81] Nemo, *supra* note 24, at ¶22.

[82] Nemo, *supra* note 24, at ¶22.

held the SC, that an abortion performed during the later stages of a pregnancy (as this one would have been) is very likely to cause harm to the mental and physical health of the woman who undergoes it.'

Concluding, the SC held that, for the reasons recorded, the pregnancy could not be terminated without her consent and that proceeding with the same would not have served her "best interests".' Disposing of the case, the SC directed that the "best medical facilities" should be made available during the period of pregnancy, as well as for post-natal care.' Finally, the SC noted that the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities (in consultation with the Chandigarh administration and the Post Graduate Institute of Medical Education and Research, Chandigarh) voluntarily assumed the responsibility for assisting her to "cope with [her] maternal responsibilities"."

V. A FEW CONUNDRUMS FOR FEMINIST THEORY

This case is particularly interesting because of the contradictions within the judgements themselves, as there were no straightforward answers available to what could be just in this situation — either in terms of the right to abortion in general or the right to abortion in the particular case of a woman identified as having mild to moderate mental retardation. The P&H HC revised the blanket term 'lunatic' used by the MTP Act by bringing in a nuanced understanding of the two specific terms using the description given in The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act - mental illness and mental retardation. However, apart from showing sensitivity through a certain deployment of terminologies, the court was largely clueless as to how to deal with this situation. The central focus of this article, however, is not to point to flaws in the judgment of the courts but to point out

[83] Nemo, *supra* note 24, at 11122-24.

[84] Nemo, *supra* note 24, at ¶30.

[85] Nemo, *supra* note 24, at ¶31.

[86] Nemo, *supra* note 24, at ¶31.

that for feminists too, this question was just as difficult. The Nemo / Nan Niketan cases bring in another level of complexity to this peculiar nature of South-Asian reality. the question of clisablility. Can a mentally challenged person be understood to have a will that is inviolable? If not, then to what extent may the doctrine of *parens patriae* be used to protect the subjecthood of a mentally challenged person? The P&H HC judgment seems riddled with these moral questions central to the idea of justice. While recognizing the importance of the questions as to whether the consent of the mentally retarded rape victim should be considered mandatory to terminate her pregnancy, the P&H HC seems to have held that Nemo — who had been variously described as suffering from "mild" and "mild to moderate" mental retardation - was not capable of such consent since she was unaware of how conception and pregnancy occur,' had no idea as to the "sexual act and its attendant emotions" or the "concept of marriage[88] was ignorant as regards "child-rearing' especially "how to provide succour and sustenance to the child",[89] and seemed to regard her child as a "toy" with whom she wished "to play".[90] Further, the P&H HC, disapproved of her social conditions and environs — namely, state-run/aided institutions for mentally ill and mentally retarded persons,' lack of any "occupational skills",[92] lack of the necessary "social or family support",' concluding that she was neither "intellectually" nor on the "social, personal, financial or family fronts", able to bear and raise a child;" allowing her to continue with her pregnancy would be a "travesty of justice" and a "permanent addition to her miseries".'

[87] Nemo-II, *supra* note 25, at 118.

[88] Nemo-II, *supra* note 25, at 118.

[89] Nemo-II, *supra* note 25, at 118.

[90] Nemo-II, *supra* note 25, at 119.

[91] Nemo-II, *supra* note 25, at ¶20.

[92] Nemo-II, *supra* note 25, at 131.

[93] Nemo-II, *supra* note 25, at ¶22.

[94] Nemo-II, *supra* note 25, at ¶23.

[95] Nemo-II, *supra* note 25, at ¶23.

Having thus negated her ability to consent for the purposes of termination of pregnancy *inter alia* on the grounds that she had no knowledge of the "sexual act and its attendant emotions",[96] the P&H HC held that the ingredients of Explanation 1 to Section 3(2) of the Act had been satisfied inasmuch as expert testimony revealed that she "did not like the sexual act" and "expressed her anguish" against her "unwilling and fully resisted sexual encounter".[97] It is not clear to the authors how the P&H HC can — in the same breath — cite Nemo's lack of understanding of the sexual act as well as her dislike and resistance to the forced sexual act — as evidence of her inability to consent.

It was only in the Supreme Court that Nemo's ability to consent would be recognized; on the question of her agency and capacity to consent, the Supreme Court held: *"Her reproductive 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. We have adopted this position since the applicable statute clearly contemplates that even a woman who is found to be 'mentally retarded' should give her consent for the termination of a pregnancy?'* The Supreme Court goes beyond the High Court judgment in many ways. The Supreme Court holds that concerns of social prejudices should not matter and the decision should be solely be dependent on whether this woman can fulfill parental responsibilities or not." The Supreme Court also noted that reproductive rights of a woman are not just regarding the choice to giving birth but also to abstain. A woman's right to privacy, dignity and bodily integrity demands that there should be no restriction on the exercise of reproductive choices such as, a woman's right to refuse participation in a sexual act or insist on the use of contraceptives.

[96] Nemo-II, *supra* note 25, at ¶23.

[97] Nemo-II, *supra* note 25, at 111131-32 (Explanation 1 to Section 3(2) of the Act provides that the requirement of "grave injury" to the mental health of the pregnant woman may be presumed to have been fulfilled by the "anguish" caused due to the pregnancy having been "caused by rape").

[98] Nemo, *supra* note 24, at ¶10.

[99] Nemo, *supra* note 24, at ¶30.

It is therefore with respect to a woman's right to choose that it becomes important to analyse what it actually means by exercising right over one's own body. While a woman may have a theoretical right to freely choose whether to carry a pregnancy to its full term or not, the question remains as to whether socio-economic and regulatory realities allow such a freedom to be truly accessible to women. As we have seen, this is a common theme both in India and the West even though the practical context of the limitations on women's right to choose in India and the West may be different. It is therefore important for us to understand that there is no one woman and no universal set of rights that apply to all women. For example, the issue of female foeticide has definitely complicated the issue of abortion rights in India. Female foeticide led Indian feminists to revise their position on the question of abortion. Technological development which made determination of sex prior to birth possible led to and still leads to numerous instances of female foeticide by way of a so-called free choice to abort. Indian feminists therefore had to take account of the right of these fetuses to be born and start a campaign against sex determination of fetuses which led to the passing of Pre-Conception and Pre-Natal Diagonostic Techniques Act in 1994.

This case probably helps us to ask certain uncomfortable questions as to whether feminist thought can go beyond the liberal imagination of the individual and the inviolable will of the individual. As we have seen, the question of choice or personal freedom becomes fraught with innumerable problems — whether in a country like India or in the West — if the state does not provide mechanisms of socio-economic support for both abortion and for bringing up children to economically and socially disadvantaged women.

However, our intervention here is merely theoretical. The older set of questions — which asked how to distinguish questions of free will — has remained unanswered. The new set of questions has added the issues of disability and eugenics to it. In a country where women are primary caregivers, the political question it poses is fraught with innumerable problems for feminist politics. The Nemo/Nari Niketan case was probably easier for the Supreme Court to decide as Nemo was already staying in a protection home so the Court could direct the same

protection home to take care of the child. It is not clear however what the Court would have done if this was not the case.

Clearly, however, whether a mentally disabled pregnant woman can freely choose to become a mother or to undergo abortion is still in doubt under law. As we have seen, feminist thought — to the extent that it is premised on liberal thought — is largely unable to respond to such questions which problematise the nature of 'will' and 'choice'. It is therefore of crucial importance for feminist politics to come up with philosophically grounded responses which not just put the category of 'will' and 'choice' under the scanner but also go beyond them and look for new theoretical alternatives which allow feminists to argue both for removing unfair social, economic or legal restrictions on a woman's right to choose as well as to argue that socio-economic mechanisms of state support must be made available in order to ensure that such choices are truly free and not unfairly limited.

Though the courts in India have on occasion recognized that reproductive choices can be exercised to procreate as well as to abstain from procreating,' the scope for the right to give birth has been extremely limited by the fact that the Indian state does not provide any support to the economically disadvantaged or the physically and mentally retarded to have their children brought up. In a country like India, where the primary and in practice the only caregiver of a child is the mother, these socio-economic factors impinge on the free choice of a pregnant woman.

Another representative case was that of *Nikhil D Dattar v Union ofIndia,*[100] wherein a woman wanted to undergo an abortion because she was carrying a foetus which could have been born with congenital heart disease. The Bombay High Court disallowed her from doing so on the grounds *inter alia* that the requirement of the MTP Act was not met inasmuch as there was no categorical opinion from the medical experts that if the child were born, it would suffer from physical or mental abnormalities as to be seriously handicapped. The judgment in this case

Imo Janak Ramsang Kanzariya through Manjuben Ramsang Kanzar vs. State of Gujarat and Ant, 2011 Cri. L.J. 1306, at1122.

[101] Nikhil D. Dattar vs. Union of India, 2008 110 BOM. L.R. 3293.

was therefore based on the "degree" of handicap of the foetus as opposed to the Nemo cases which are based on the degree of handicap of the woman. The decision of the Bombay High Court in this case brought to the fore the fact that it is fairly uncomplicated in the eyes of law to abort a physically or mentally challenged foetus. It is important to note however that all of these judgments are to some extent also based on the grounds of right over one's own body. Right over one's own body therefore seems almost collapsible with the eugenical approach of a modern nation state whereby only an "efficient working body" can find a place. The question of will or personal freedom becomes almost nullified in the face of no state support for giving birth and bringing up such children. The idea that free choice is not something that exists in the absolute is one that feminists have been dealing with for decades now The question of disability only adds another knot that needs to be untied for feminist theory and politics.

According to Keith Sharp and Sarah Earle, choice is what matters for feminism.' Which choice is more ethical is not the point. Whether it is the rape victim wanting an abortion or a career-oriented woman should never be a concern. Therefore, the issue of abortion is one which should never enter the ethical-moral domain. The issue of choice also does not remain completely uncomplicated. One simple way out of this is to argue for expansion of women's choices, as the Supreme Court effectively argued for in the Nemo judgment. However, the difficulty in accepting this is the fact that choice as a category remains extremely amorphous, elusive and beyond a point idealistic. 'Choice' as an entitlement is not freely accessible but only realizable with a host of other conditions. At this point of course, this debate does not stay limited to South Asia but extends to conundrums that feminists have to deal with worldwide. Though Sharp and Earle seem to be of the opinion that feminism and disability issues are inherently incompatible, the authors would refer to the work of scholars like Menon and Himmelweit to argue that the problem lies in the way feminism has become completely embroiled in the language of liberalism. In the Nemo cases, with the available framework, feminist

[102] Keith Sharp and Sarah Earle, *Feminism, Abortion and Disability: Irreconciliable Differences?,* 17(2) DISABILITY AND SOCIETY 137,140(2002).

politics would at best have come to the same solution that the Supreme Court did. The essential tension between liberal philosophy and feminism however, remains unsolved.

Another important intervention from the perspective of disability studies comes from Anita Ghai and Rachana Johri, who have argued that the medical profession itself can often act in ways which preclude the level of choice exercised.' Using interviews, they argue that medical professionals often do not provide adequate information about the particularities of the nature and severity of disability of the foetus or the possibility of raising children with such disabilities. Thus, they argue, a wide range of large and minor differences are grouped under the umbrella term of "disability or "abnormality'[103] Many mothers of disabled children, they point out, feel that bringing their children up has been a fruitful exercise. In conclusion, they argue that for women to provide informed consent as to whether they wish to keep or abort the foetus, they would need detailed and unbiased information from their doctors and counsellors.

How the Nemo cases further the traditional scholarship is that they consider the question of what it means for mentally retarded women to provide consent as to whether they wish to keep or abort the foetus. The issue becomes all the more complicated since here it is the Law and the State interpreting a woman's sense of bodily integrity on her behalf. To what extent the answers to such questions depend on the ability of Law and the State to provide for such women and their offspring remains unclear and needs to be further debated. Even if we do not jettison the rights discourse completely, then the real challenge lies in thinking through how we think of rights in these cases. The important question here would be to develop an understanding of how feminists see the issue of disability in general and as it relates to abortion and a woman's right to choose in particular.

[103] Anita Ghai and Rachana Johri, *Prenatal Diagonosis: Where Do We Draw the Line?,* 15 INDIAN JOURNAL OF GENDER Srunws 291,316 (2008).

[104] *Id.* at 298-299