

Reproductive Choice of a Woman: A Fundamental Right

Vishnu C H¹, Megha S²

¹Research Scholar, Government Law College, Thiruvananthapuram

²LLM Student, Government Law College, Thiruvananthapuram

Corresponding Author- Vishnu C H

Email: vishnuharimon@gmail.com

Abstract

Human rights law stipulates that women must be free to decide when to be pregnant, how many children to have, and how to space pregnancies. Laws and policies that deny women and girls their sexual and reproductive health rights are inherently discriminatory. States should respect the capacity of women and girls for autonomous decision-making and not limit the access to contraceptives to the obtention of the authorisation of husbands, partners or parents of girls. The right of women to exercise their reproductive choice is implicitly protected as the fundamental right under the Indian Constitution. Indian courts play a crucial role in preventing and addressing the ongoing violation of these women rights. Women always possess particular rights which shouldn't be denied at any cause. One such right is her right to exercise her reproductive choice. All of us have a right to body autonomy, which means we should be able to make decisions about our bodies on our own. In our society, women and girls are often denied reproductive choices. It is not only immoral and discriminatory, but it also infringes on their basic human rights, including the right to life and dignity. It adds to disparity and violence. The right of reproductive choices is a basic fundamental right that should be granted to all without question and with dignity. With the passage of time, tremendous progress in implementing reproductive health has been made. There is still a long way to go in fully acknowledging reproductive rights. The ultimate purpose of the right to reproduction is the individual's well-being and thus everyone should be able to freely exercise their reproductive choice. Not only will better approach to reproductive health assist women, but it will also benefit society as a whole. Men, particularly spouses, must come out in support, accept their wives consent, and participate equally in the decision-making process. The government must ensure proper reproductive health as well as reproductive information and education to safeguard the individual's rights and promote wellbeing and a healthy lifestyle. This will, in turn, benefit the country's growth and development.

Keywords : reproductive choice, discriminatory, human rights, fundamental rights

Introduction

India is basically a patriarchal society where woman has been abused and were given a lower position from ages. India's culture preferred introduction of men over women. The most offensive wrongdoing in India is female foeticide which is largely observed in Northern States. Actually regenerative decision is a private choice that we make in our life but in reality it is affected by different concerns such as political, philosophical and financial wellbeing and medical care. In earlier times, ie; during Vedic period woman had a high position in the society but later due to social, political and monetary changes, woman lost their status. International laws recognize certain rights that all human beings are entitled to. One of such right is reproductive right of woman. Constitution of India has also recognised sexual and reproductive right which includes right to life, liberty and security of the person, the right to health, care and information, and right to non-discrimination in the allocation of resources to health services. The right to reproductive choice means the right of a woman to choose whether to reproduce or not which includes the right to decide whether to carry or terminate unwanted pregnancy and the right to choose contraception. The key of reproductive

choice is the right to family planning education, information and services. Right to reproductive choice of woman is connected to numerous human rights such as the right to life and right to be free from torture.

State's obligation to ensure regenerative rights necessitate that ladies and young ladies are not only given complete regenerative wellbeing data but also that they experience positive conceptive wellbeing results. Violation of regenerative rights hurt ladies because of their ability to become pregnant and lawful insurance of these rights as basic freedom is necessary to empower sex equity and the uniformity of ladies. The Constitution of India perceives a significant number of these equivalent rights as the essential rights which includes the right to fairness and non-segregation (Article 14 and 15) and right to life (Article 21) which is perceived through law that incorporates the rights to wellbeing, pride, independence from torment and abuse, and privacy. India is a signatory to various worldwide shows which perceive regenerative rights such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights

(ICESCR), and Convention on the Rights of the Child (CRC)¹. Article 51(c) of the Constitution of India states that the State shall endeavour to foster respect for International law and treaty obligations. The public authority of India has a commitment to guarantee lawful solutions for infringement of principal rights and basic freedoms. Article 39(a) in The Constitution Of India says that the citizens, men and women equally, have the right to an adequate means to livelihood. The Supreme Court of India and few State High Courts have taken significant steps in perceiving the regenerative rights. Article 21 incorporates the "conceptive privileges of an individual." This paper tends to throw the spotlight on women's reproductive choice with respect to right to life and personal liberty under Article 21.

International Perspective of Reproductive Choice

The Slogan of the ladies' prerogative movement at the 1993 World Conference on Human Rights in Vienna was Women' right are human rights. The Charter of UN in 1945 and the Universal Declaration of Human Rights (UDHR) drawn up that all individuals have essential freedoms for the direct clarification of being human. The Charter disallows segregation based on race, sex, language, or religion. The Bill of rights - The Universal Declaration of Human Rights and its two covenants: International Convention on Civil and Political Rights and International Covenant on Human Rights (ICCPR) and Economic, Social and Cultural Rights (ICESCR) explicitly gives women important opportunities for the same reasons as men. The UN basic freedom framework incorporates an instrument that deals exclusively with liberties by ladies; the —Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Convention). The Convention revolves around the wide range of exploitation against women. The CEDAW Convention in its significant articles, settle various issues that are related to women. s. Article 12(2) of the Convention, for example, sets out that: 'States Parties will guarantee to ladies proper administrations regarding pregnancy, containment and the post-natal time frame, allowing free administrations where important, just as satisfactory nourishment during pregnancy and lactation.' The Economic and Social Council (ECOSOC) of the UN in 1946 set up a particular body to manage ladies' privileges: The Commission on the Status of Ladies (CSW).

"In 1946, the Economic and Social Council" of the UN (ECOSOC) set up a particular body to manage 'ladies' privileges': the Commission on the Status of Ladies (CSW). —1994 International Conference on Population and Development (ICPD) deals with government's obligation to maintain

regenerative rights. As expressed in Paragraph 7.3 of the ICPD Program of Action: "Regenerative rights embrace certain common freedoms that are now perceived in public laws, worldwide basic liberties records and other agreement archives. These rights lay on the acknowledgment of the essential right, everything being equal, and people to choose openly and dependably the number, dispersing and timing of their youngsters and to have the data and intends to do as such, and the option to accomplish the best quality of sexual and conceptive wellbeing. It additionally incorporates their entitlement to settle on choices concerning propagation liberated from separation, compulsion and brutality, as communicated in common freedoms records". The Convention on the Rights of Persons with Disabilities (Disability Rights Convention) is the key instrument to expressly perceive the right to conceptive and sexual prosperity as a fundamental freedom². Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Protocol on the Rights of Women in Africa) explicitly explains ladies' conceptive rights as basic freedoms, and certifies ladies' all in all correct to regenerative decision and self-governance, and explains African states' obligations corresponding to ladies' sexual and conceptive wellbeing. With the appropriation of the UN Millennium Development Goals (MDGs) in 2000, governments were of the opinion to address ladies' conceptive wellbeing is critical. The report delivered at the 2005 World Summit made an express obligation to accomplish conceptive wellbeing by 2015.

Regulating Reproductive Rights in India

Reproductive rights are an individual's overall right to plan a family, end a pregnancy, use contraceptives, get some answers concerning sex guidance in state supported schools ,and access regenerative prosperity organizations. With regards to the judgment in *Justice K S Puttaswamy v Union of India*³, we look at two conceptive rights ie; foetus removal and surrogacy. On 24 August, 2017, a nine judge seat of the Supreme Court of India perceived that security as an unavoidable right and held that security to cover individual self-rule identifying with the body and mind. In the mid 1980s the ladies wellbeing development started in India with little gatherings of ladies from different parts talking about being female. Efforts made to regulate reproductive rights in India are:

1. A long fight against unsafe contraceptives

During 1980's, women's get-togethers discovered that hormonal contraceptives were damaging women's prosperity. Hormonal

³ AIR 2017 SC 4161

contraceptives like injectables can be dangerous, making irreversible and real damage to women's bodies. Hormonal contraceptives require incredibly close checking at each stage through pre-arranged workforce using complex equipment. Other than the pill, all hormonal contraceptives are long-representing model injectables. Thus, whether or not a woman wishes to stop using the precaution, the effect of the synthetic continues holding up in and impact her body for a huge proportion of formerly. The key benefits of long-acting hormonal contraceptives shown to be key risks for women. The woman may not understand the imbue ment she is getting is a precaution due to the lack of proper instructed consent. It is a huge issue which is often rejected in clinical fundamentals of contraceptives and the woman are not taught sufficiently about the possible outcomes of subsequent use of this contraceptives. Women campaigned towards male obligation with respect to contraception. The condom is an unobtrusive, strong and easy to use procedure. It has no outcomes. Vasectomy is with less trouble than female sterilization but men are reluctant to undergo vasectomy.

2. Abortion and Reproductive Autonomy

The Puttaswamy judgment expressly perceived that it is the right of ladies to have regenerative decisions as it is an individual freedom under Article 21 of the Indian Constitution. *Suchita Srivastava V. Chandigarh Administration*⁴, held that conceptive rights incorporate a lady's right to convey a pregnancy to its full term. Infringement of conceptive rights excessively hurt ladies because of their ability to become pregnant. Conceptive rights as common freedoms is basic to empower sex equity and the equity of ladies. The Constitution of India perceives a large number of these equivalent rights including the right to equity and non-segregation (Article 14 and 15) and the right to life (Article 21) which is perceived through law to incorporate the rights to wellbeing, respect, independence from torture and abuse, and security.

3. Current situation in respect to MTP Act

Section 3 of the MTP Act places a 20-week gestational limit on abortions. Post this time frame, there is no provision for abortion, except when it is "immediately necessary to save the life of the pregnant woman"⁵. Section 5 of the MTP Act says that this limit in Section 3 will not apply in case a RMP opines that such termination is necessary to save the life of the pregnant woman.

The Supreme Court has given abroad interpretation to the expression life under Section 5 which includes the physical and mental health of a

pregnant person, beyond immediate survival⁶. In the case of rape, court has permitted post-20 weeks terminations of pregnancies. Under Section 5, Court has also recognized substantial foetal impairment as a ground for termination of pregnancies post-20 weeks⁷.

Bombay High Court in *High Court on its own motion V. State of Maharashtra*⁸, held that all pregnant women have the same rights in the case of termination of pregnancy, and forcing any woman to continue with any unwanted pregnancy would result in violation of her bodily integrity and would be injurious to her mental health. Reproductive autonomy, or the right to make one's own reproductive choices has been recognised as part of the right to personal liberty under Article 21 of the Constitution of India⁹.

The Medical Termination of Pregnancy Act, 1971 was instituted to end specific pregnancies by enlisted clinical professionals. The said Act is to protect ladies who need to end pregnancy under certain predefined conditions. The MTP Act designates service providers to control exercise of this right by women. Many service providers are of the view that post-20 weeks termination of pregnancy is legally impermissible for them to provide abortion services. So, women are denied abortions or asked to get permission of the court for post-20 weeks termination which leads to delays and sometimes denials. In 2017, the Supreme Court explained foetus removal at 24 weeks is lawful and it is to safeguard her own life against the avoidable risk to it.

An MTP Amendment Bill was passed by Parliament in March 2020. It is an enhanced and liberal version of previous act. It increased the time limit for abortion from 20 to 24 weeks for pregnant woman. This Act also allowed unmarried woman to terminate unwanted pregnancy based on failure of contraceptives. The right to privacy of woman was ensured by this Act. The medical institute conducting abortion can reveal the details regarding

⁶ Aparna Chandra et al, Securing Reproductive Justice in India (n 18) 112-113

⁷ Tapasya Umesh Pisal v Union of India (2018) 12 SCC 57, Sonali Kiran Gaikwad v Union of India WP(C) 928/2017 (Order dated 9 October 2017) (Supreme Court), Sarmishtha Chakraborty v Union of India (2018) 13 SCC 339; Shaikh Ayesha Khatoon v Union of India 2018 SCC OnLine Bom 11 (Bom HC), XYZ v Union of India WP 10835 of 2018 (Order dated 3 April 2019) (Bom HC). See generally, Aparna Chandra et al, Securing Reproductive Justice in India (n 18) 113

⁸ 2017 Cri LJ 218 (Bom HC)

⁹ See *Suchita Srivastava v Chandigarh Administration* (2009) 9 SCC 1; *Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors* (2017) 10 SCC 1.

⁴ (2009) 14 SCR 989, (2009)9 SCC 1

⁵ MTP Act, s 5

abortion to the authorised person only. It is more inclusive of victims of rape, incest, differently abled, minors etc. Earlier, for abortion of more than 12 weeks and under 20 weeks requires the opinion of two medical practitioners. Now it has been change to one doctor for abortion within 20 weeks and two doctors for abortion between 20 to 24 weeks. For abortion beyond 24 weeks, a medical board has to decide it.

A Comparative Study in India and USA

The debate on abortion in the USA is primarily between communities religious belief and the interest of State in protection of a potential life on one side and on other side the mother's right to reproductive autonomy¹⁰. Involuntary sterilization is another instance where an individual's right to procreative choice is considered secondary when compared to population control. The right to procreative choices has not yet gained an explicit recognition from US Constitution as well as from Indian Constitution. The right to procreative choices has been protected from unreasonable and unnecessary State interference by the wide view of right to privacy. This was subsequent to the Supreme Court's case in the *Griswold V. Connecticut*¹¹.

State Policy in the U.S.A

The right to abort with the consent of the pregnant woman was granted only at stages prior to quickening by United States. The State was of the view that unrestricted abortion could pose significant threats to the life of mother or child. Later, the legalisation of abortion was a result of intense campaigning between vocal feminist organisations. Therefore, the right to abortion is considered as a female's right to liberty and received legal recognition in the year 1973. It was legalised after the abolition Anti-Abortion Laws as it violated woman's right to reproductive choice which is ultimately violation of one's right to personal liberty. So, Supreme Court rulings in *Roe V. Wade*¹², created protection for a pregnant woman's right to get an abortion. However, this case was overturned in 2022 by *Dobbs V. Jackson Women's Health Organisation*¹³, and states now impose regulation on abortion.

State policy in India

In India, abortion is considered as a criminal offence under Section 312 of Indian Penal Code, 1860¹⁴. Apart from this, Parliament passed

M.T.P. Act, 1971¹⁵. This Act is an exception to Section 312 of IPC and permits to undergo abortion with restriction. Abortion is allowed for cases where the continuance of pregnancy will cause grave injury to mental and physical and health.

Reproductive Autonomy: A Comparison of Judicial Attitudes in the U.S.A and India U.S.A

Abortion was illegal in US before the landmark judgment of *Roe V. Wade*¹⁶, were a woman named Jane Roe moved to the court in demand of abortion for her third pregnancy when the Texas Constitution revoked her choice. Roe appealed to Supreme Court. SC with a dominant majority of 7-2 amended the Constitution and thus abortion was legalized following the due process of law under the right to privacy. But it is not an absolute right. Woman were permitted to abort till foetal viability, that is until the third trimester. But in 2022, *Dobbs V. Jackson Women's Health Organisation*¹⁷ overturned the earlier decision and states now impose regulation on abortion.

India

Before 1971, abortion was criminalized under Section 312 of IPC. But in 1971, M.T.P Act came into force and Indian Constitution grant abortion rights to women. In 1964, socio-cultural, medical and legal study was conducted by Shah Committee appointed by government of India. Committee recommended legalisation of abortion. Thus, Medical Termination of Pregnancy Act, 1971 was included in the Constitution. It inferred the right To abortion of women up to 20 weeks of pregnancy in the following conditions:

1. If the pregnancy causes threat to a women's life and can cause physical and mental damage.
2. If the expected child threat to life or physical or mental injury
3. If pregnancy is due to rape
4. If pregnancy is the result of failed contraceptive

Permission was given by Supreme Court in few cases for abortion after 20 weeks of pregnancy in accordance with Article 142 to confer justice¹⁸. An MTP Amendment Bill was passed by Parliament in

of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

¹⁵ Medical Termination of Pregnancy Act, 1970

¹⁶ Supra note 10

¹⁷ No.19-1392,597 U.S-2022

¹⁸ Article 142 (order passed by the apex court to do complete justice) confers this power to the highest court.

¹⁰ Roe v. Wade 410 U.S. 113, 148-1950 (1973)

¹¹ In this case, the Court invalidated 1879 Connecticut Law that made the sale and possession of birth control devices a misdemeanour.

¹² 410 U.S. 113, 148-1950 (1973)

¹³ No.19-1392,597 U.S-2022

¹⁴ S.312-Causing miscarriage.—Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose

March 2020. It is an enhanced and liberal version of previous act. It increased the time limit for abortion from 20 to 24 weeks for pregnant woman. This Act also allowed unmarried woman to terminate unwanted pregnancy based on failure of contraceptives. The right to privacy of woman was ensured by this Act. The medical institute conducting abortion can reveal the details regarding abortion to the authorised person only. It is more inclusive of victims of rape, incest, differently abled, minors etc. Earlier, for abortion of more than 12 weeks and under 20 weeks requires the opinion of two medical practitioners. Now it has been change to one doctor for abortion within 20 weeks and two doctors for abortion between 20 to 24 weeks. For abortion beyond 24 weeks, a medical board has to decide it.

Conclusion and Suggestion

My personal view is that every woman should be able to freely exercise their reproductive choice. The ultimate aim of right to reproductive choice is the individual's well being. Men, particularly spouses should support, accept the wife's consent and participate equally in decision making process. The main issue arising here is the conflict between the right of reproductive choice of woman and right of unborn child. Woman should have reproductive choice to abort an unwanted pregnancy even though it seems to be a violation of the right of unborn child because otherwise the parenting and guardianship of that child will be badly affected. A woman should not be forced to behave against her own free will. Reproductive choice of a woman is a fundamental right as well as human right. It should be protected. Some are of the view that since abortion does not require the consent of the father, it is a violation of paternal right of the father. Actually a proper family planning should be present between the spouses. The primary cause of abortion is unplanned pregnancy. Family planning programs that emphasize counselling can help couples determine whether, when, and how often they will have children. Expanding women's access to safe and voluntary family planning, counselling and services and to a range of modern, safe, and effective contraceptives allows them to control their reproductive lives. Government should take the initiative to bring family planning program thereby reducing abortion, controlling population growth and protecting physical and mental health of the woman which leads to the protection of reproductive right of the woman.

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