



## REPRODUCTIVE RIGHTS OF WOMEN IN FEMINIST JURISPRUDENTIAL PERSPECTIVE – AN ANALYSIS IN INDIAN SCINARIO

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### INTRODUCTION

In India, women form about half of the population of the country, but their conditions in the society have been grim. For centuries, they have been deliberately denied the opportunities for growth in the name of religion and socio-cultural practices. At the social-political plan, women suffered from the denial of freedom even in their homes, repression and unnatural indoctrination, an unequal and inferior status<sup>2</sup>. Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination”<sup>3</sup>.

It has been 77 years since India got independence and there cannot be a righter time to analyse the situation and ‘space’ that women in India enjoy today. As in the words of Swami Vivekananda “It is impossible to think about the welfare of the world unless the condition of women is improved. It is impossible for a bird to fly on only one wing.” In a situation where women have no right to clean drinking water, basic facilities, health care or education, where society decides where women will live, how they will live and often, how they will die, who they will marry, whether they will study, where the State believe they have the right to determine how many children women will bear, when they will get sterilised and what form of contraception women must opt for, it is apparent that the struggle for Indian women’s reproductive rights needs to go further than reproductive freedom, and enter the arena of social, economic and political rights<sup>4</sup>.

Females are faced with daily issues concerning personal well-being and self-awareness that are not always under their control. These issues include sexual health and reproductive rights. Reproductive rights mean an individual’s capability to decide whether to reproduce and make independent and informed choices regarding reproductive health. In other words, they are the legal rights and freedom relating to reproduction. That reproductive health varies from country to country. The right to reproduce encompasses the following: the right to an abortion, fertility treatments, overall wellness, access to information, and the finest medical care.<sup>5</sup>

More precisely reproductive rights include:

- The right to legal and safe abortion
- The right to make the reproductive choice without coercion, violence and discrimination
- The right to control one's reproductive function

<sup>2</sup> Dr. S.R. Myneni, Gender Justice & Feminist Jurisprudence, New Era Law Publication, first edition, 2022, p.77, ISBN: 978-93-92234-71-2

<sup>3</sup> Justice K. Ramaswamy in Madhu Kishwar v. State of Bihar, [(2996) 5 SCC 148]

<sup>4</sup> <https://sites.google.com/site/saheliorgsite/health/reproductive-rights-in-the-indian-context>

<sup>5</sup> <https://www.legalserviceindia.com/legal/article-13683-reproductive-rights-of-women-in-india-a-struggle-for-autonomy->

- The right to know about contraception, sexually transmitted diseases and about sterilization and contraception

The sexual and reproductive health of women is related to multiple human rights, including the right to life, right to be free from torture, right to health, right to privacy, right to education and the prohibition of discrimination. That is, women have the right to attain the highest standard of sexual and reproductive health, right to equality in reproductive decisions, right to sexual and reproductive security and the right to reproductive sexual and health services. The journey of women's emancipation in India has been truly dynamic with women's participation in nationalist movements, to their resurgence as super-women today, as women in our country have seen it all. However, the recognition of sexual and reproductive rights of women in the country still remains negligible.

Reproductive choices can be exercised to procreate as well as to abstain from procreating. The worldwide evolution of jurisprudence on the reproductive rights framework is based on two key principles- first, (a) the right to reproductive healthcare and second, the right to reproductive self-determination<sup>6</sup>. Reproductive healthcare is an essential part of women's health and autonomy and technological advancements have the potential to completely transform the society.

In India, no specific legislation meant for women's reproductive rights. There are a few legislations those contain provisions relating to reproduction. Often, the sexual rights are neglected by government in legislations and the reason behind this negligence is that state and society consider sexual rights as a reproductive right. States' responsibility is to protect women's rights including ensuring access to comprehensive reproductive health services, as well as having positive reproductive health outcomes like lower rates of unsafe abortion and maternal mortality and the ability to make fully informed decisions about their sexuality and reproduction.

## INTERNATIONAL FRAMEWORK

Reproductive rights mean an individual's capability to decide whether to reproduce and make independent and informed choices regarding reproductive health. In other words, they are the legal rights and freedom relating to reproduction and reproductive health. These rights may vary from country to country. At the international platform, many conventions and charter of international organisations contain provisions which recognize the reproductive rights as a basic human right of every individual. It formed a part of: the Universal Declaration of Human Rights 1948.

The International Conference on Population and Development, 1994 states, "Reproductive rights embrace certain human rights"<sup>7</sup>. It is already recognised in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents". Similarly, the Beijing Declaration, states<sup>8</sup>: "The explicit recognition and reaffirmation of the right of all women to control all aspects of their health, particularly their fertility, is basic to their empowerment".

<sup>6</sup> <https://www.tsld.com/reproductive-rights-under-the-indian-constitution>

<sup>7</sup> Para 7.3

<sup>8</sup> 4th World Conference on Women

For many decades, access to safe and legal abortion and contraception has been a contentious subject, acting as proof of the ongoing fight for women's autonomy over their bodies and responsibility over reproductive decisions. Despite persistent religious and cultural opposition, a series of international conferences and agreements, ranging from ICCPR and the Vienna Declaration and Programme of Action<sup>9</sup> to the International Conference on Population and Development<sup>10</sup>, have established a solid groundwork to recognize and protect these rights.

U.N. human rights experts and bodies have raised concerns to the Indian government about human rights violations arising from a range of reproductive rights issues, including maternal mortality and morbidity, unsafe abortion and poor quality of post-abortion care, lack of access to the full range of contraceptive methods and reliance on coercive and substandard female sterilization, child marriage, and lack of information and education on reproductive and sexual health. These experts and bodies have called for India to address these violations, as well as disparities in access to reproductive health care<sup>11</sup>. India is a signatory of many international documents concerning reproductive rights of women and tries to improve women's condition and can say the situation is changed to some extent.

## CONSTITUTIONAL FRAMEWORK

The framers of the Indian Constitution were well aware of the discrimination and unequal treatment faced by the society to the farer sex, from time immemorial. So, they included certain general as well as specific provisions for upliftment of the status of women. They provided equality of status and of opportunities explicitly at some places and implicitly in all other places on par with men as citizens of India<sup>12</sup>. Right to life is main right of human beings and human rights are those which are accessible to all people without any favouritism. Our Constitution has taken all the protective measures to protect the interest of women. While the Indian Constitution does not explicitly mention the right to abortion, certain fundamental rights have been interpreted by the judiciary in connection with reproductive rights and women's healthcare. That is, the reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children.

According to Article 21 of the Constitution of India, reproductive choices can be exercised to procreate as well as to abstain from procreating. Focussing in the rights to privacy, dignity and bodily integrity, the Constitution recognised a disabled pregnant woman's reproductive right to resist being forced to abort her pregnancy. The Apex Court has recognized reproductive rights as both a component of right to health and a dimension of personal liberty under Article 21 of the Constitution of India<sup>13</sup>. Reproductive and sexual rights are directly linked with freedom of women. The identification of dignity and equal rights to all human beings are the base of liberty.

Several provisions in Part IV of the Constitution of India (Directive Principles of State Policy) are related to issues of health.<sup>14</sup> Besides Part IV, in Part IV A, Article 51(c) of the Indian Constitution have established

<sup>9</sup> <https://humanrightscommitments.ca/wp-content/uploads/2019/03/Vienna-Declaration.pdf>.

<sup>10</sup> <https://www.unfpa.org/events/international-conference-population-and-development-icpd>

<sup>11</sup> Committee on the Rights of the Child, Concluding Observations: India, U.N. Doc. CRC/C/IND/CO/3-4 (2014); CEDAW Committee, Concluding Observations: India, U.N. Doc. CEDAW/C/IND/CO/4-5 (2014);

<sup>12</sup> Women & Criminal Law, Dr. S.R. Myneni, New Era Law Publication, first edition 2021, p.26, ISBN: 978-93-922-34-07-1

<sup>13</sup> Justice K.S. Puttaswamy (Retd.) and Anr v. Union of India And Ors, AIR 2017 SC 4161

<sup>14</sup> Article 39(a) requires the government to promote equal access to justice and free legal aid as a means to ensure that opportunities for justice are not denied to any citizen by reason of economic or other disabilities.

Article 39(e) proclaims that the State should direct its policy towards ensuring that the health and strength of both men and women workers, and of children, are not abused and that citizens are not forced by economic necessity to enter vocations unsuited to their age or strength.

that the government has a constitutional obligation to respect international law and treaty obligations. The government of India also bears a constitutional obligation to ensure legal remedies for violations of fundamental rights and human rights.

## LEGAL FRAMEWORK

The main legislations cover the reproductive rights of women in India are: The Prevention of Child Marriage Act, 2006, enacted to prohibit solemnisation of child marriages in India and any matter connected therewith, The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 to prevent sex-selective abortions and prenatal sex determination, The Protection of Children from Sexual Offences Act, 2012 which authorizes a minor's right to terminate a pregnancy resulting from sexual assault, ensuring access to safe abortions notwithstanding the sensitivity of the circumstances. Finally, the Indian Penal Code defines the penalties for illegal abortions conducted outside the context of the Medical Termination of Pregnancy Act, 1971 which contains provisions with respect to abortion. It contains certain grounds, under which, abortion is legal in India. This emphasizes the importance of adhering to legislative regulations that protect both women and healthcare providers.

## MTP ACT – AN OVERVIEW

Acknowledging the significant influence that reproductive rights have on women's health, empowerment, and general well-being, India has created a legal landscape, including both constitutional provisions and specific legislations such as the Medical Termination of Pregnancy Act, 1971 while also taking public health considerations into account. The problem of unwanted pregnancy and its termination is a perennial problem which defies clear-cut answers.<sup>15</sup> If the case doesn't come under the ambit of the legislation, then either a person has to go for illegal abortion or forcefully bear the child. The act proves beneficial, and society thinks it to be progressive. However, the thing is that even in the 21st century, a woman still has no absolute say about her body and whether she wants to continue carrying the child<sup>16</sup>.

The Medical Termination of Pregnancy Act, 1971 has liberalized the position of women in India to a great extent. Women's health, undesired pregnancy due to the failure of contraceptive, the pregnancy being the result of rape or some other unlawful intercourses are some of the permissible grounds under the Act. The Act prima facie allowed abortion up to 20 weeks of pregnancy and granted immunity to doctors who performing abortions, if they feel that the pregnancy detrimentally affects the health of women and foetus.

The Act allowed the termination of pregnancy in two stages:

- For termination of pregnancy up to 12 weeks from conception, the opinion of one doctor was required,
- For pregnancies between 12 and 20 weeks old, the opinion of two doctors was required.

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Article 39(f) provides that States must take steps to ensure that children are given opportunities and facilities to develop in a healthy manner.

Article 42 provides that the State shall make provisions for securing just and humane conditions for work and for maternity relief. Article 47: it is among the primary duties of the State to raise the level of nutrition and the standard of living of its people and to improve public health.

<sup>15</sup> Ahmad Siddique, Criminology, Penology and Victimology, Eastern Book Company, seventh edition, 2016, p.142.

<sup>16</sup> <https://primelegal.in/2023/01/28/medical-termination-of-pregnancy-mtp-changes-in-law-and-impact-on-women-indian->



## Amendment Act, 2021:

The MTP Act was amended in 2021, extending the abortion limit from 20 to 24 weeks. The amended MTP Act allowed the termination of pregnancy under the opinion of one doctor up to 20 weeks. If it advances beyond 20 weeks, but below 24 weeks, the amended law requires the opinion of two doctors.

The MTP Act (amendment) specified seven categories of women eligible for termination between 20 and 24 weeks of pregnancy:

- Survivors of sexual assault or rape or incest
- Minors
- Change of marital status during the ongoing pregnancy (widowhood and divorce)
- Women with physical disabilities
- Mentally ill women including mental retardation
- The foetal malformation
- Women with pregnancy in humanitarian settings or disaster or emergency situations

The amendment Act, 2021 allows unmarried women also to terminate a pregnancy on the very same reason of failure of contraceptive method or device as married women. The Act also allows abortion even after 24 weeks only in cases where a medical board diagnoses substantial foetal abnormalities. These provisions of sexual and reproductive health services are essential to protect the human rights of women, particularly those belonging to marginalised groups like sex workers, LGBTIQ (lesbian, gay, bisexual, transgender, intersex, and queer) groups, women with disabilities, and ageing women. The Act also prohibits the disclosure of the identity and details of a woman whose pregnancy has been terminated, unless authorized by existing laws.

## Arguments in favour of abortion:

Previously, abortion was considered as a crime, for which the women as well as the abortionist could be punished except where it had to be induced to save the life of the mother. In spite of this, abortions were continued in India for various social and medical reasons<sup>17</sup>. So, the Government proposed to liberalise the existing provisions relating to termination of pregnancy to avoid loss of the mother's health, strength and sometimes life for various reasons like:

- **Bodily Autonomy:** Abortion upholds a woman's right to bodily autonomy, enabling her to make decisions about her own body and reproductive choices.
- **Choice and Life Course Impact:** Allowing abortion provides individuals the freedom to choose their life course, preventing unwanted pregnancies from adversely affecting education, career, and mental well-being.
- **Avoiding Unsafe Abortions:** Legalizing abortion helps to prevent unsafe abortions, which can pose serious risks to women's health and may lead to fatalities.
- **Changing Social Norms:** Laws should adapt to changing social norms, acknowledging the prevalence of premarital sex, live-in relationships, and diverse family structures.
- **Foetal Abnormalities:** The abnormalities are not always found upto 20 weeks, not allowing women a safe access to abortion puts her life in danger.

<sup>17</sup> Dr. S.R. Myneni, Women & Criminal Law, New Era Law Publication, First Edi. (2021), p.403

- Addressing Marital Rape Victims: Abortion should be accessible for women who may have conceived due to sexual assault or marital rape, respecting their mental and physical well-being and preventing further harm.<sup>18</sup>

## Impact of MTP Act on women's reproductive health:

The Government enacted the Medical Termination of Pregnancy Act, 1971 to provide for the termination of pregnancy by registered medical practitioners where its continuity would involve a risk to life or grave injury to her physical or mental health. The Act has not only affected the health of the mother and the child. Instead, it has a significant impact on the status of women socially, politically, legally as well as economically.

**Rape victim**– According to National Crime Records Bureau, rape is the 4th most common crime against women in India. According to the statistics of NCRB<sup>19</sup>, the number of rape cases recorded was over thirty-one thousand. There have been many instances where a woman gets pregnant due to rape. In such cases, the woman prefers to abort the baby rather than live with its stigma. The MTP Act of 2021 has given women a sufficient period of 24 weeks of gestation to abort the pregnancy. It also leaves a scope of termination even after 24 weeks by filing a writ petition. This will decrease the cases of illegal abortion and will ensure the safety of both the women and the foetus.

**Ensure privacy**– The Act has aimed to ensure the right to privacy for the woman who wants to go through an abortion. The Act clearly states that the woman's identity is not to be revealed to anyone other than the ones authorised by the law.

**Progressive**– The Act is progressive in nature. The failure of contraceptives was a valid reason for any married woman for an abortion. The previous Act's regressive provision kept unmarried women from citing this reason for a medical termination. The MTP Act 2021 has overcome this by -allowing unmarried women also to medically terminate pregnancies while also protecting their reproductive rights of the woman.

**Foetal anomalies**– If a foetal anomaly which is discovered through scanning procedure, it may change the wanted pregnancy into the unwanted one. So, the provision of the Act accepts that if abnormalities are found, the pregnancy can be terminated even after 20 weeks of gestation. State medical board also works in this regard and help pregnant women to get abortions.<sup>20</sup>

## JUDICIAL PRONOUNCEMENTS

Over the last decade, Indian courts have issued several notable decisions recognizing women's reproductive rights as part of the inalienable survival rights, which is implicitly protected under the fundamental right to life. In certain ground-breaking judgments, the courts have even for the first time recognized reproductive rights as essential for women's equality and have called for respect for women's rights to autonomy and decision-making concerning pregnancy<sup>21</sup>. The courts in India play a crucial role in elaborating, protecting, ensuring and promoting reproductive rights as guaranteed by the Constitution of India and human rights documents.

Major judicial decisions have had a significant impact on India's evolving legal landscape in terms of reproductive rights. In the case of *Sandesh Bansal v. Union of India*<sup>22</sup>, the Madhya Pradesh High Court

<sup>18</sup> <https://pwonlyias.com/current-affairs/mtp-act/>

<sup>19</sup> 2021 annual report

<sup>20</sup> Prime Legal > Blog > Articles > Medical Termination of Pregnancy (MTP) Changes in Law and Impact on Women: Indian Perspective, Kriti Gupta

<sup>21</sup> <https://mail.google.com/mail/u/0/#search/RR/KtbxLwgxBjfrwRVvphWxSVzrXLjqgOXIBV?projector=1&messagePartId=0.1>

<sup>22</sup> W.P. (C) 9061/2008

established the government's responsibility to protect the lives of all pregnant women and rejected the use of financial limitations as a justification for violating reproductive rights. In another case, *Devika Biswas v. Union of India*<sup>23</sup>, the Supreme Court supported gender equality and women's autonomy in relation to constitutionally protected reproductive rights. It also condemned government practices that aided in the misuse of sterilization.

In recent times, Indian courts have given a few striking judgements perceiving women's reproductive rights as a component of the inalienable survival rights implicitly protected under the fundamental right to life. Through case laws, the Supreme Court specifically recognised the Constitutional right of women to make reproductive choices, as a part of personal liberty under Article 21 of the Indian Constitution<sup>24</sup>. The Supreme Court also reiterated this stand in the case of *Suchita Srivastava v Chandigarh Administration*,<sup>25</sup> that reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth, and to subsequently raise children; and that these rights form part of a woman's right to privacy, dignity, and bodily integrity.

It is equally important to remember that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on the use of contraceptive methods. Furthermore, women are also free to choose birth-control methods such as undergoing sterilisation procedures.

The recent Supreme Court judgments highlight the ongoing debate over the Medical Termination of Pregnancy Act, underscoring the challenge of balancing women's rights to abortion within the legal framework. The Supreme Court through Navtej Johar judgment<sup>26</sup> held that the right to life and personal liberty under article 21 also includes the women's right to sexual autonomy. In the context of reproductive rights of girls, the Supreme Court in the case of *Independent Thought v. Union of India*<sup>27</sup> held that "the human rights of a girl child are very much alive and kicking whether she is married or not and deserve recognition and acceptance".

In the case of *Meera Santosh Pal v. Union of India*<sup>28</sup>, the Supreme Court legalised abortions of 24 weeks gestation in cases of anencephaly was established, giving precedence to a woman's reproductive autonomy and bodily integrity. In another case, *Ms. Z v. State of Bihar*<sup>29</sup>, a rape survivor petitioned before the Patna High Court to grant her permission to terminate her pregnancy beyond 20-week gestational limit owing to bureaucratic delays. Because of the Patna High Court's negligence, the Supreme Court ordered that the State of Bihar pay the petitioner Rs. 10 lakhs in compensation, provide financial support for her irreversible condition, and assume responsibility for the child's welfare. This is a very progressive step from the part of judiciary in the arena of autonomy of women.

In the case of *Mahima Yadav Vs Government of NCT of Delhi and Ors*<sup>30</sup>, the petitioner has filed the petition to get permission to terminate her pregnancy medically. The provisions of the MTP Act of 1971 were invoked. Although the petitioner's foetus was more than 24 weeks old, the counsel contends that she should be

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<sup>23</sup> (2016) 10 SCC 726

<sup>24</sup> Supra n.13

<sup>25</sup> (2009) 14 SCR 989

<sup>26</sup> *Navtej Singh Johar v. Union of India*, 2018 INSC 790

<sup>27</sup> AIR 2017 SC 4904

<sup>28</sup> (2017) AIR SC 787.

<sup>29</sup> (2018) 11 SCC 572.

<sup>30</sup> 2021 Lawsuit (Del) 607

permitted to carry out the termination because of anomalies of the foetus and risk to the petitioner's life, who is already suffering from severe hearing issues. The Court gave the judgement in her favour in accordance with section 3 of the amended MTP Act, by which pregnancies can be terminated even after 24 weeks in case of substantial abnormalities.

Further, in *Laxmi Mandal v. Deen Dayal Harinagar Hospital & Ors.*<sup>31</sup>, the Delhi High Court recognized maternal health as a fundamental right, emphasizing the importance of ensuring pregnant women's access to treatment and care that meets the minimum standard. Together, these cases reflect a jurisprudential evolution, safeguarding reproductive rights and maternal health in India. These judgments reiterate the sexual and reproductive rights of women.

## CONCLUSION

The right to safe abortion is an essential component of women's right to bodily integrity, life and self-determination and it must be guarded. The fight for reproductive rights and women's control over their own bodies is far from over. All young people, regardless of their religion or belief, receive full, impartial, and comprehensive relationships and sex education that contains accurate information about contraception and abortion, and have access to free contraception. This would allow them to make informed reproductive choices.

Reproductive rights remain contested even in developed countries. But India has made significant progress in the realm of reproductive rights and legal abortion, which is indicated by the backing of constitutional provisions, legislative frameworks, and judicial activism. The current emphasis on reproductive autonomy and the elimination of discrimination in the availability of legal abortion are notable accomplishments. Long-term efforts to ensure universal access to reproductive healthcare, avoiding societal stigmas, and advocate for comprehensive sex education will be crucial in the future for the progress of reproductive rights of women in India and women's autonomy.

In India, economic and societal status, gender, are all closely interrelated when influencing the use of and access to maternal and reproductive health care. Appropriate attention should be given to how these social determinants interplay in attaining the objectives when designing policies and programs towards improved maternal and reproductive health<sup>32</sup>. To ensure the fulfilment of these objectives, a nation country needs to have in place a well-developed public health system that is capable of providing health care services that are comprehensive, of good quality, accessible to all, free at the point of access, and, above all, accountable to all people.

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<sup>31</sup> W.P. (C) No. 8853/2008.

<sup>32</sup> <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3617912>