



REALISING REPRODUCTIVE RIGHTS AND CHOICE: CONSTITUTIONAL PROTECTION OF ABORTION AND CONTRACEPTION IN INDIA¹

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“There is no freedom, no equality, no full human dignity and personhood possible for women until they assert and demand control over their own bodies and reproductive process”

-Betty Friedan

MEANING

Reproductive rights refer to the basic human rights and freedoms related to individuals ability to make decisions about their reproductive health and to control their own bodies and reproductive lives. These rights also include sexual and reproductive health which encompass a spectrum of civil, political, economic, and social rights, from the rights to health and life, to the rights to equality and non-discrimination, privacy, information, and to be free from torture or ill-treatment. These rights encompass a wide range of issues and choices discussed in the following points, thought the list is not exhaustive. It may include the Access to Contraception i.e., the right to access a variety of safe and effective contraceptive methods to prevent unintended pregnancies. Another option is family planning, or the freedom to schedule pregnancies so that women and couples can decide for themselves how many children they wish to have and when. It also includes the right to obtain safe and legal abortion services, when necessary, free from stigma, prejudice, or harm. In order to promote safe and healthy results for both mother and child, it also involves maternal health, or the right to obtain adequate healthcare services during pregnancy, childbirth, and postpartum. In order to equip people with the knowledge necessary to make wise decisions about their bodies and romantic relationships, they also have the right to thorough and accurate sex education. The right to access a range of

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reproductive health services, including screenings, treatments, and support for various reproductive health issues are too included. It further adds the right to make reproductive decisions free from coercion, discrimination, and violence. In addition, gender equality, individual liberty, and general well-being of people and communities all depend on reproductive rights. They are essential in enabling people to decide how to conduct their reproductive lives in accordance with their own values, beliefs, and circumstances. In order to ensure that everyone can exercise control over their reproductive health and lives without running afoul of discrimination or obstacles erected by others, proponents of reproductive rights frequently seek to safeguard and enhance these rights.

States responsibilities to uphold these rights include ensuring that women and girls have access to comprehensive reproductive health information and services as well as positive reproductive health outcomes, such as lower rates of unsafe abortion and maternal mortality and the freedom to make fully informed decisions about their sexuality and reproduction without fear of violence, discrimination, or coercion. According to the Cairo agenda, a crucial aspect of women's reproductive rights is their control over having children. The fundamental human rights treaties serve as the foundation for international standards on reproductive rights, which are constantly changing. Reproductive rights are based on a number of essential human rights guarantees that are safeguarded by international and regional human rights treaties as well as foundational human rights instruments, ensuring the ongoing development and elaboration of these standards.

At every stage of our lives, sexual and reproductive health is vital to each and every one of us. The right to sexual and reproductive health is nevertheless denied to an excessive number of people. The vast majority are underprivileged young people, men, and women from underdeveloped nations. Poor people, especially women and young people, face huge social and economic barriers to sexual and reproductive health. 120 million couples do not have access to the family planning services and contraception they need. Every year 5,29,000 women die from complications of pregnancy and childbirth and 3 million children die in the first week of life.² Millions of women and men lack access to contraception and to the sexual and reproductive health information and services they need to choose their family size and improve their own and their children's life chances. There are millions more people living with HIV and other STDs that could have been treated or prevented. A woman passes away per minute as a result of a pregnancy or childbirth-related problem. Every year, 80 million women experience undesired or unexpected pregnancies. Too many people have unsafe abortion as their only option. More options and control over their sexual and reproductive lives are needed, especially for women.³

² Hilary Benn, "Sexual and Reproductive Health and Rights" Department for International Development, July 2004.

³ Ibid

Abortion rights refer to a person's moral and legal right to obtain safe and acceptable abortion services. These rights are based on the principle that everyone, and women in particular, have a basic right to make choices about their bodies and reproductive health, including the option to have an abortion if they so choose. Abortion rights cover a number of important tenets. These rights include the freedom to control one's own reproductive process, access to safe and legal abortion services, respect for one's privacy and confidentiality, gender equality, good health, and reproductive justice.

Historically, reproductive health-related laws and policies in India have failed to take a women's rights-based approach, instead focusing on demographic targets, such as population control, while also implicitly or explicitly undermining women's reproductive autonomy through discriminatory provisions such as spousal consent requirements for access to reproductive health services. Despite a national law penalizing marriages of girls below 18 years of age and policies and schemes guaranteeing women maternal healthcare, in practice India continues to account for the highest number of child marriages and 20% of all maternal deaths globally.⁴

Human rights include the right to an abortion. No matter a person's race, sex, nationality, ethnicity, or any other trait, they all have fundamental human rights. The concepts of physical autonomy, dignity, and freedom of choice are at the foundation of the concept of reproductive rights. International human rights frameworks, such as the Universal Declaration of Human Rights (UDHR)⁵, International Covenant on Civil and Political Rights (ICCPR)⁶ and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), recognize and protect reproductive rights as fundamental rights. Article 16 of the UDHR explicitly states that "Men and women of full age, without any limitation due to race, nationality, or religion, have the right to marry and to found a family." Moreover, the Program of Action of the International Conference on Population and Development (ICPD) held in 1994 reaffirms the importance of reproductive rights. The ICPD recognizes that individuals have the right to make decisions concerning their reproductive lives, free from coercion or discrimination. It emphasizes the importance of access to reproductive health services, including family planning and maternal healthcare. The right to reproductive health and family planning is also reinforced by the "Convention on the Elimination of All Forms of Discrimination Against Women" (CEDAW). This convention calls for the elimination of discrimination against women in all matters related to marriage and family life and ensures their equal rights in decision-making regarding reproductive matters. Overall, reproductive rights are firmly grounded in international human rights principles and are considered an integral part of the broader spectrum of human rights that promote dignity, equality, and freedom for all individuals. Another interpretation can be drawn from article-12 of the CEDAW Convention that provides

⁴ World Health Organisation, "Child marriages-39000 every day: More than 140 million girls will marry between 2011 and 2020" 7 March 2013.

⁵ The preamble states that "the peoples of the United Nations have . . . reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights of men and women".

⁶ It echoes and enforces the right to life of the declaration. The Covenant proclaims, "Every human being has the inherent right to life. Law shall protect this right. No one shall be arbitrarily deprived of his life."

that, “States parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.”

Reproductive rights and freedom in India must be viewed in the light of a number of variables. The implementation of official policies on family planning and abortion, the trend towards smaller families and declining fertility rates, which have an impact on the demand for contraception and abortion, as well as social and gender-related pressures and options that affect women’s reproductive choices, are a few of these factors. In spite of the fact that India was one of the first nations in the world to create legal and policy frameworks ensuring access to abortion and contraception, women and girls still face significant obstacles to fully exercising their reproductive rights, such as subpar health services and lack of power over their own reproductive decisions. In India, the Medical Termination of Pregnancy (MTP) Act made abortion legal in 1972, and the legality of abortion has not been in contention. Paradoxically, however, the vast majority of Indian women get abortions outside this legal framework. In part, this is due to the inherent restrictions regarding registered facilities and doctor consent built into the MTP Act, but it is also due to lack of services, poor implementation of the Act by providers, and an even poorer understanding among women regarding their legal rights. Although India’s National Population Policy guarantees women voluntary access to the full range of contraceptive methods, in practice state governments continue to introduce schemes promoting female sterilization, including through targets, leading to coercion, risky substandard sterilization procedures, and denial of access to non-permanent methods.

In order to address difficulties with population growth and reproductive health, India has made strides in expanding access to various contraceptive techniques. The Indian government has developed a number of family planning efforts and programmes to raise knowledge of and enhance access to contraceptives, particularly for women. Contraceptive methods available in India include condoms, oral contraceptive pills, intrauterine devices (IUDs), injectables, implants, and permanent methods like tubal ligation and vasectomy. Public health facilities often provide contraceptive services for free or at subsidized rates to improve accessibility, especially for marginalized populations. However, despite these efforts, there are still challenges in reaching certain underserved areas and communities.

ABORTION RIGHTS AND THE CONSTITUTION OF INDIA

The right to abortion has been a highly contested and emotive issue worldwide. It involves a woman’s fundamental right to make decisions about her reproductive health and body. The right to privacy is protected under Article 21 of the Indian Constitution, which also guarantees the right to life. The most sacred, priceless, unassailable, and fundamental of all citizens’ fundamental rights is the right to life and personal liberty. Every woman has an inherent right to life, liberty, and the pursuit of happiness in this situation, which supports her right to an abortion. Women have reproductive characteristics and the right to control their sexual health and

reproductive decisions. The international community recognised a woman's right to abortion in order to protect women's human rights and advance development. Governments from all over the world have elevated the recognition and accreditation of women's reproductive rights to new levels in order to comply with the worldwide mandate. To fulfill its commitment government enacted formal laws and policies that are prime indicators in promoting reproductive rights. Thus, it can be reiterated that all over the World each and every woman has an unconditional right to have control over her own body.

In several countries, including the United States, this right is constitutionally protected. The United States Supreme Court in the landmark case of *Roe v. Wade*⁷ issued a groundbreaking decision which fundamentally changed the landscape of abortion rights in the country. The Supreme Court acknowledged that the right to privacy provides constitutional protection for a woman's choice to decide whether to have an abortion. It is drawn from the Fourteenth Amendment's Due Process Clause. The Due Process Clause guarantees that no state may take away someone's life, liberty, or property without providing them with a fair trial. Because of this constitutional guarantee, the state is prohibited from unreasonably interfering with a woman's decision to end her pregnancy in the first two trimesters. In *Roe v. Wade*, the Supreme Court also established a trimester structure. The choice to undergo an abortion during the first trimester of pregnancy is made completely by the woman and her healthcare provider. This right cannot be subjected to any unreasonable burdens or limitations by the state. The state may impose restrictions on abortion practices during the second trimester in order to safeguard a woman's health, but not to the point where it makes it impossible for her to get abortion services. In the third trimester, the state's interest in protecting potential life becomes compelling, and it may restrict or prohibit abortion, except when necessary to protect the life or health of the woman. The case of *Roe* has been subsequently modified and narrowed by the US Supreme Court in *Planned Parenthood v. Casey*⁸ where the legality of the abortion law is now linked to the viability of the foetus rather than the rigid third trimester test laid down in *Roe* case. *Casey* case recognizes a woman's fundamental right to make decisions about her reproductive health and body. This right is grounded in the principle of privacy and reflects the belief that individual autonomy and bodily integrity should be protected.

In India, the Central Family Planning Board on August 25, 1964 recommended the Ministry of Health to constitute a committee to study the need of legislation on abortion. The committee called Shantilal Shah Committee issued a report on December 30, 1966.⁹ The Medical Termination of Pregnancy Act, 1971 (MTP Act of 1971), which liberalised India's abortion restrictions, was enacted by the government in response to this research. It is noteworthy that the MTP Act was enacted in April of 1972 and again changed in 1975 in order to remove cumbersome processes for the approval of the location and to increase the accessibility of services. In 2002 and again in 2005, this Act was revised. The Act, which only has 8 parts, covers a variety of

⁷ 410 U.S. 113 (1973).

⁸ 505 U.S. 833 (1992)

⁹ Government of India, Report of the Committee to Study the Question of Legalisation of Abortion 36 (Ministry of Health and Family, 1966).

topics, including the time, location, and conditions under which a certified medical professional may end a pregnancy. According to the act, abortion is legal up to 12 weeks into a pregnancy with the consent of one licenced medical professional (a doctor), but between 12 and 20 weeks, two licenced medical professionals are required. An abortion may be permitted up to 24 weeks of pregnancy with the advice of two medical professionals in rare circumstances when the mother's life is at risk or if carrying the pregnancy further could result in the foetus having physical or mental defects. The Act is unable to strike a balance between the right of the unborn to life and the right of the woman who carries, gives birth, and raises the child to choose whether or not she wants the baby.

In 2010, the Delhi High Court issued a landmark joint decision in the cases of *Laxmi Mandal v. Deen Dayal Harinagar Hospital & Ors.*¹⁰ and *Jaitun v. Maternity Home, MCD, Jangpura & Ors.*¹¹ concerning denials of maternal health care to two women living below the poverty line. The Court stated that “these petitions focus on two inalienable survival rights that form part of the right to life: the right to health (which would include the right to access and receive a minimum standard of treatment and care in public health facilities) and in particular the reproductive rights of the mother”. Citing CEDAW and ICESCR, the decision held that “no woman, more so a pregnant woman should be denied the facility of treatment at any stage irrespective of her social and economic background. This is where the inalienable right to health which is so inherent in the right to life gets enforced.”

In 2012, the High Court of Madhya Pradesh echoed the Delhi High Court's judgment in *Sandesh Bansal v. Union of India*, a public interest litigation seeking accountability for maternal deaths, recognizing that “the inability of women to survive pregnancy and child birth violates her fundamental right to live as guaranteed under Article 21 of the Constitution of India” and “it is the primary duty of the government to ensure that every woman survives pregnancy and child birth”. The Bansal decision was significant in that it explicitly rejected financial concerns as an excuse for violations of reproductive rights and established that government obligations under Article-21 call for the immediate implementation of maternal health guarantees in the National Rural Health Mission, including basic infrastructure, such as access to blood, water, and electricity other health facilities, like timely maternal health services, skilled personnel, and efficient referral. In 2016, the Supreme Court issued a judgment in the case of *Devika Biswas v. Union of India & Ors.*¹² that moved beyond the reproductive health framework to also recognize women's autonomy and gender equality as core elements of women's constitutionally-protected reproductive rights. In this case, the Supreme Court established that state policies and programs leading to sterilization abuse violate women's fundamental and human rights. The Supreme Court recognized reproductive rights as both part of the right to health as well as an aspect of personal liberty under Article-21, and defined such rights to include the right to “access a range

¹⁰ 2010 SCC OnLine Del 2234

¹¹ W.P.(C) 10700/2009

¹² (2016) 10 SCC 726

of reproductive health information, goods, facilities and services to enable individuals to make informed, free, and responsible decisions about their reproductive behavior.” The Supreme Court found that “the freedom to exercise these reproductive rights would include the right to make a choice regarding sterilization on the basis of informed consent and free from any form of coercion.

Although a 2004 Supreme Court ruling undermined women’s reproductive autonomy by holding that a woman’s decision to undergo abortion or sterilization without her husband’s consent could constitute mental cruelty.¹³ . In 2009, the Supreme Court recognized women’s reproductive autonomy as a fundamental right, stating that “There is no doubt that a woman’s right to make reproductive choices is also a dimension of ‘personal liberty’ as understood under Article 21.”¹⁴

In 2011, the High Court of Punjab and Haryana reiterated women’s rights to reproductive autonomy by dismissing a suit filed by a husband against a doctor who had performed an abortion without the husband’s consent saying that “It is a personal right of a woman to give birth to a child. No body can interfere in the personal decision of the wife to carry on or abort her pregnancy unwanted pregnancy would naturally affect the mental health of the pregnant women.”¹⁵

In the 2013 case of *Hallo Bi v. State of Madhya Pradesh and Others*, the High Court of Madhya Pradesh affirmed the importance of providing victims of rape access to abortion without requiring judicial authorization, stating “we cannot force a victim of violent rape/forced sex to give birth to a child of a rapist. The anguish and the humiliation which the petitioner is suffering daily, will certainly cause a grave injury to her mental health.”

Since 2008, cases have been filed nationwide seeking interpretation of Section 5 of the MTP Act, which explicitly allows abortion to save the life of a pregnant woman, to also permit abortion past 20 weeks on health grounds in cases of rape or fetal impairment. While the Supreme Court still has two cases pending seeking recognition that the Constitution requires access to abortion past 20 weeks on broader grounds, since 2015 the Supreme Court has ruled three times to permit abortion in individual cases past 20 weeks where medical panels found that forcing the women to continue the pregnancy would pose risks to their mental and physical health.¹⁶ In *Nikhil D. Dattar V. Union of India*,¹⁷ Section 3 and 5 of MTP Act was challenged. In this case the foetus was diagnosed for complete heart block thus the Petitioner, in her twenty sixth week of pregnancy, had sought termination of pregnancy. In order to let the petitioner to stop the pregnancy, the petitioner argued that section 5(1) of the MTP Act should be read down to cover the scenarios in section 3. As a result, the petitioner argued that the respondents should be given a directive to do so. The court dismissed

¹³ Ghosh V. Ghosh (2007) 2004 SC 151

¹⁴ Suchita Srivastava & Anr V. Chandigarh Administration (2009) 11 S.C.C. 409

¹⁵ Dr. Mangla Dogra & Others v. Anil Kumar Malhotra & Others,

¹⁶ Ms. X v. Union of India, (2016) C.W.P 593 (IND)

¹⁷ Available at: <http://www.hrln.org/hrln/images/stories/pdf/xandy-petition-8-3-14.pdf> (last visited on 26.7.2023).

the petition, ruling that since the twenty-six-week gestational limit had already expired, the court was unable to issue any instructions about the exercise of the privilege under Section 3. This case emphasised the ethical dilemma encountered by doctors in similar scenarios as well as the physical and psychological suffering endured by women in such situations.

In 2017, the Supreme Court clarified that abortion at 24 weeks is legal in the case of anencephaly, which is a fatal fetal impairment that also endangers the pregnant woman's life, stating that her rights to bodily integrity and reproductive autonomy permit her to "preserve her own life against the avoidable danger to it."¹⁸ Although state high courts have had mixed rulings, two recent cases in Gujarat and Chhattisgarh have also progressively interpreted the MTP Act to allow abortions past 20 weeks in cases of sexual violence. Importantly, these decisions recognize the significance of access to second trimester abortions for women's mental and physical well-being.¹⁹

In the 2016 case of *High Court on its Own Motion v. State of Maharashtra*, the Bombay High Court issued a decision to increase the availability of abortion services for women in prison and reaffirmed the essential nature of women's access to abortion as guaranteed by Article 21. The ruling notes that women are disproportionately burdened by unintended pregnancies, and it declares that forcing a woman to carry a baby to term is unethical. "represents a violation of the woman's bodily integrity and aggravates her mental trauma which would be deleterious to her mental health." The decision boldly recognizes that an unborn foetus is not an entity with human rights. The pregnancy takes place within the body of a woman and has profound effects on her health, mental well-being and life. Thus, the right to control their own body and fertility and motherhood choices should be left to the women alone. Let us not lose sight of the basic right of women: the right to autonomy and to decide what to do with their own bodies, including whether or not to get pregnant and stay pregnant.²⁰

CONCLUSION

We can state that there are still ongoing legal and political discussions about the right to abortion. It highlights the fine line that must be drawn between a woman's ability to make her own decisions and the state's desire to save future life. This line of reasoning necessitates thorough deliberation and deliberate discussion in order to secure the protection of individual liberties and constitutional ideals. Additionally, the judiciary has a substantial and developing role in addressing the theoretical and actual obstacles that prevent women and girls from having access to reproductive health care. The government has been mandated to move away from population control strategies, confront discriminatory stereotypes that restrict women's authority, and instead place women's rights to dignity, autonomy, and bodily integrity at the centre of reproductive

¹⁸ Meera Santosh Pal & Ors. v. UOI (2017)

¹⁹ Madhuben Arvindbhai Nimavat v. State of Gujarat High Court, (2016) 1 S.C.R. 662;

²⁰ Court on its own Motion v. The State of Maharashtra, W.P. (CRL) No. 1/2016, Maharashtra H.C.

health-related law. Litigation has its challenges, however, including lengthy time frames and difficulty implementing decisions. We must incorporate “liberal” abortion policies. Under Article-21, of the Indian constitution the right to liberty women’s reproductive Choice falls under the right to personal liberty. According to this article, it is solely the women’s rights to get herself protected and also, she possesses the sacrosanct right to have her bodily integrity protected. It also includes access to safe abortion, and entitlement of the right of women to access technology for the safest abortion care. Every woman must have access to abortion services because making abortion illegal may have consequences for the right to life. This can be supported by the cases of suicides that young women commit as a result of not having an abortion because the state has made it illegal, which is a clear violation of their right to life. Anti-abortion laws could result in needless deaths, which would raise questions about the responsibility to guarantee that everyone has the right to life.

