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REPRODUCTIVE CHOICE OF WOMEN IN INDIA: A FUNDAMENTAL RIGHT

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Abstract

The right to life is every citizen's most precious and inalienable right and is the fundamental right guaranteed under Article 21 of the Indian Constitution. Reproductive right is directly connected with the right to life, health, dignity, privacy and bodily integrity of women and hence is one of women's fundamental rights. Indian women continue to experience significant hindrances in enjoying their reproductive rights due to poor health care services and denial of decision-making authority to women, even though India was among the 1st few countries in the world to develop legal frameworks and policies giving access to abortion and contraception. The reproductive right was not given due importance earlier, but in the recent judgments of the High Courts and Supreme Court of India, it is seen that reproductive rights have been recognized as one of the most important fundamental rights as it directly affects the right to life. It is need of time that the Fundamental right to life and personal liberty guaranteed under Indian Constitution be interpreted to include the Reproductive Rights of women.

Keywords: Reproductive rights, fundamental rights, right to life and personal liberty.

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I. INTRODUCTION

Reproductive right is the women's right to control their childbearing, which includes the freedom to make decisions regarding their pregnancy, the right to choose whether to keep or abort the pregnancy and the freedom to make her own decision regarding other sexual or reproductive choice or health. It is one of the fundamental rights of women which has been ignored for decades. As per the International Conference on Population and Development, Reproductive Rights are the fundamental rights 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 the right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents¹.

CEDAW², one of the most important international conventions that deal with the protection of the reproductive rights of women, obligates the State Parties to ensure that women have easy access to healthcare services, including services related to family planning. Article 12 of the Convention states that the State parties must provide appropriate essential services for pregnancy and the post-natal period, granting free services wherever necessary. The Convention also obligates the State Parties to provide adequate nutrition during pregnancy and lactation. The State parties are obliged to take appropriate measures to eliminate discrimination against women and ensure that women have the right to decide on the number and spacing of children as per Article 16(e) of the Convention. It needs to be mentioned that no single instrument or international Convention specifically deals with women's reproductive rights, but various human rights instruments protect various elements of reproductive rights.

II. REPRODUCTIVE RIGHTS UNDER INDIAN CONSTITUTION

In the past few years, the Indian Courts have delivered numerous landmark judgments recognizing women's reproductive rights as one of life's most essential and inalienable fundamental rights.

In specific landmark cases, courts have recognized that women's right to autonomy and to make decisions concerning pregnancy forms an essential part of the right to life and personal liberty. Hence the protection of reproductive rights is essential for women's equality.

Reproductive rights encompass a bundle of rights which includes the right to health, life, equality and non-discrimination, privacy, bodily integrity, dignity, the right to make an informed choice and to be free from torture or ill-treatment. Violation of the rights, as mentioned earlier, disproportionately harms women; hence legal safeguarding of these rights is of utmost importance to enable gender justice and equality of women.

Article 14 of the Indian Constitution guarantees the right to equality of law and equal protection of the law, and Article 15, which guarantees the right against discrimination based on sex, explicitly protects the above-mentioned reproductive rights of women. Reproductive rights are also protected and recognized under Article 21, i.e. right to life and personal liberty, which includes the right to health, privacy, dignity, and freedom from torture and ill-treatment.

III. LANDMARK CASES

In numerous recent cases, the Supreme Court of India and various High Courts have held that denial of reproductive rights leads to violation of women's fundamental rights to life and personal liberty. Following are some of the landmark cases related to women's reproductive rights.

a) Right of a pregnant woman to have access to and receive a minimum standard of treatment and care in public health facilities:

¹International Conference on Population and Development, Program of Action, Para 7.3

²Convention on Elimination of all Forms of Discrimination against Women 1979

In *Jaitun v. Maternity Home, MCD, Jangpura & Ors [2010]*³, a homeless lady was forced to deliver a baby in an open space in full public view without access to health care facilities and medical assistance. The Maternity Home staff ignored Mother and the newborn. The healthcare facilities not only failed to examine the child when brought to the maternity home five days after the birth for vaccination, but they also ignored the mother by not giving or prescribing medication which led to the deterioration of their health as they did not receive any nutrition or health care under the relevant schemes. The newborn was malnourished and required nutrition and supplements, which were denied till the court's intervention. Even the ICDS benefits were given only after the court's intervention. As the negligence and denial of basic health care assistance would have caused irreparable loss of lives, the High Court directed the Delhi Municipal Corporation and Government of NCT of Delhi to pay fifty thousand rupees. The mother was compensated for violating her fundamental rights for the ordeals she had to go through by being compelled to give birth to her daughter under a tree and denying basic medical assistance.

In *Laxmi Mandal v. Deen Dayal Harinagar Hospital & Ors [2010]*⁴, a poor woman, Shanti Devi, had to carry a dead fetus in her womb for five days due to denial of maternal health care as her husband was not able to show a valid document (Ration Card) for availing free medical services. Thus, she could not avail of the free services even after being eligible due to failure to produce the ration card on time. In her subsequent pregnancy in 2010, she lost her life immediately after giving birth to a premature daughter at home without any medical attention. The court found that the death of Shanti Devi, in this case, was preventable if required medical assistance was given in time, making respondents liable in violation of her right to life and health and thus ordered the State of Haryana to pay monetary compensation of rupees two lakhs to the family of the deceased.

Thus the Delhi High Court observed that the two inalienable and most integral rights that form part of the right to life or the right to health

includes the right to access and receive a minimum standard of treatment and care in public health facilities. High Court also held that no woman, especially a pregnant woman, should be denied the health facility or treatment at any stage, irrespective of her social and economic background.

b) Right to make an informed choice about sterilization

In the landmark case, the Supreme Court of India recognized the women's right to informed choice as her fundamental right. In *Devika Biswas v. Union of India & Ors*,⁵ an NGO in Bihar conducted an extremely abusive sterilization camp which was brought to the notice of the Supreme Court of India. The procedure was not only unhygienic but also highly cruel as it was carried without sanitary gloves on a school desk. The women undergoing the process suffered immense physical pain after the operation. The women undergoing sterilization were not given counselling or information about the procedure. Thus, the basic protocol was not followed in the camp. The court, in this case, held that any State policies/ programs that lead to sterilization abuse violate women's reproductive rights, including the right to make an informed and free choice from coercion. Hence such abuse would violate the fundamental right to life and health guaranteed under Article 21 of the Indian Constitution.

The court, in this case, observed that the right to health, including reproductive rights, was an integral part of Article 21. Further, the right to choose sterilization free from any coercion was also guaranteed under the Constitution. Relying on *A.S v. Hungary*⁶, the court observed that informed consent is essential to the right to reproductive health in sterilization procedures. Hence, it directed the government to stop target-based sterilization as it leads to non-consensual sterilizations. The government was directed to discontinue sterilization camps.

In its decision, the Supreme Court unequivocally held that Article 21 includes the "reproductive rights of a person, which includes right to have access to a range of good reproductive health facilities, access to a range of reproductive information in order to enable

³ W.P.(C) 10700/2009

⁴ W.P.(C) No. 8853 of 2008

⁵ AIR 2016, S.C

⁶ CEDAW/C/36/D/4/2004

individuals to make free, informed and responsible decisions about their reproductive behaviour, right to choose sterilization based on informed consent and free from any form of coercion." Supreme Court, in its decision, also criticized the Government policies explicitly focusing on female sterilization as violations of women's right to equality and emphasized that States should ensure the reproductive freedoms of socially and economically marginalized groups and also expressed concerns about the fact that informal targets and incentives have deprived the socially & economically marginalized women of any meaningful choice. Supreme Court's decision, in this case, is of utmost importance as it marks a progressive step forward from the past cases where, due to concerns related to population growth, S.C. justified violations of reproductive autonomy.

c) Women's right to reproductive autonomy/ to make reproductive choice

We have moved towards the more excellent constitutional protection of reproductive rights through subsequent landmark decisions. In *Suchita Srivastava & Another v. Chandigarh Administration*,⁷ the Supreme Court recognized women's reproductive autonomy as a fundamental right. It held that the right to make a reproductive choice is women's right to personal liberty covered under Article 21 of the Constitution. It also stated that it is essential to recognize that reproductive rights or choice can be exercised to procreate and abstain from procreating. Thus a woman's right to dignity, privacy and bodily integrity should be respected, which includes her right to refuse to participate in sexual activity, her insistence on the use of contraceptives, her right to choose birth control measures, and her right to undergo sterilization.

In *Anil Kumar Malhotra v. Ajay Pasricha*,⁸ the Supreme Court of India dismissed the appeal filed by the husband against the decision of the Punjab & Haryana High Court. In 2011, a suit filed by the husband against a doctor who performed his wife's abortion without his consent was dismissed by the Punjab and Haryana High Court. It was done to reiterate the

decision recognizing women's rights to reproductive autonomy and held that the decision or choice to keep or abort the child is that of the woman, and no one can interfere in her personal decision as an unwanted pregnancy would naturally affect the mental health of the pregnant woman. The court, in this case, noted that as per Sec 3(4) (b) of the MTP Act, only the consent of a pregnant woman is required to terminate the pregnancy. The High Court also remarked, 'A woman is not a machine in which raw material is put, and a finished product comes out. She should be mentally prepared to conceive, continue the same and give birth to a child. Thus it was held that a husband has no right to compel his wife not to terminate the pregnancy.'⁹

d) Reproductive rights of the rape victim

Recognizing the rights of the rape victim, in 2013, the Madhya Pradesh High Court in *Hallo Bi v. State of Madhya Pradesh and Others*¹⁰ held that the victims of rape should have access to abortion without requiring judicial authorization to give birth to a child of a rapist will undoubtedly cause a grave injury to the mental health of the victim.

e) Women's right to abort in case of Fetal impairment at 24 weeks of pregnancy

Another essential question that affected women's reproductive rights relates to section 5 of the Medical Termination of Pregnancy Act 1971 which criminalized abortion after 20 weeks of pregnancy. Various cases have been filed nationwide to permit abortion after 20 weeks to save a pregnant woman's life in cases of rape or fetal impairment since 2008. Supreme Court of India, in various cases, has given decisions in favour of abortion after 20 weeks in cases where continuance of pregnancy is a risk to the woman's physical and mental health.

In *Meera Santosh Pal & Others V. Union of India & Others*,¹¹ the petitioner sought directions under Art 32 of the Constitution to allow termination of her 24 weeks of pregnancy as she was carrying a pregnancy with anencephaly. In this condition, the fetal head,

⁷ (2009) 14 SCR 989

⁸ Civil Revision Nos. 6337 of 2011

⁹ <https://ohrh.law.ox.ac.uk/is-consent-of-the-husband-needed-for-an-abortion-in-india/>

Referred on: 14/03/2023

¹⁰ WP(C) 7032/2012

¹¹(2017) W.P. (C) No. 17

brain and skull are underdeveloped. The Supreme Court of India allowed an abortion at 24 weeks of pregnancy. It clarified that in case of fatal fetal impairment, the abortion is legal even at 24 weeks as it endangers the pregnant woman's life and also stated that her right to bodily integrity and reproductive autonomy permits her to "preserve her own life against the avoidable danger to it."

IV. MEDICAL TERMINATION OF PREGNANCY (AMENDMENT) ACT 2021

In order to correct the loopholes and shortcomings in the Medical Termination of Pregnancy Act of 1977, amendments were made in the Act in 2021 to protect women's reproductive rights in different scenarios not covered earlier. The newly amended Act has extended access to abortion by increasing the gestational limits. Thus as per the newly amended Act:

- 12 to 20 weeks of pregnancy can be aborted on the advice of 1 doctor.
- 20 to 24 weeks pregnancy can be aborted on the advice of 2 doctors only if the pregnant woman falls under the following category, i.e., a survivor of rape, sexual assault, or incest; the woman who experiences a change in marital status during pregnancy including women who are divorced or widowed; women living with mental illness; women with a significant physical disability as per Rights of Persons with Disabilities Act 2016; pregnancy with fetal impairments where a child may suffer from severe mental or physical abnormalities; pregnant women in humanitarian settings, disaster or emergency situation as declared by the government.¹²
- Pregnancy above 24 weeks can be aborted on the advice of the Medical board in case of substantial fetal abnormalities and to save the pregnant woman's life.¹³

The newly amended Act explicitly protects women's right to privacy as it restricts the registered medical practitioner from revealing the name and other particulars of the woman

whose pregnancy is terminated (except to the person authorized by law).¹⁴

V. CONCLUSION

In recent years, the Supreme Court has shown a progressive approach towards Women's Reproductive rights. It has included various other rights like the right to autonomy, freedom of informed choice, bodily integrity, dignity, right to health, privacy, and right to access and receive medical health care facilities. Courts in India have gone a step ahead and have even interpreted the MTP Act to allow abortions past 20 weeks in cases of sexual violence, severe fetal impairment, and in cases of risk to women's physical and mental health, which has also led to an amendment in the MTP Act by an amendment act of 2021.

Though the new Act is a progressive step towards recognizing and protecting women's reproductive rights, there are certain grey areas that need to be addressed. As the newly amended law permits abortion after 24 weeks in case a significant fetal abnormality is identified by the Medical Board. However, the rape victim must first file a writ petition for the abortion. Authorizing a third party like the medical board causes a significant barrier to accessing safe abortion as the requirement may cause delays in receiving urgent abortion care. It would not be wrong to say that such requirement of authorization from a third party like courts, Medical Boards, doctors, and spouses infringes on women's right to equality and constitutes discrimination.

The newly amended laws, though, protect the reproductive rights of women and the right to have access to abortion. However, the law does not recognize the rights of non-binary people and transgender persons, thus ignoring the Transgender Persons Protections and Rights Act 2019 which recognizes their rights to medical facilities and care without discrimination. It has to be noted that the World Health Organization, in its recent guidelines, recommends the removal of ground-based

¹² Sec 3(2)(b), The Medical Termination of Pregnancy (Amendment) Act, 2021 <https://egazette.nic.in/WriteReadData/2021/226130.pdf> Referred on 15/03/2023

¹³ Sec 3(2B), The Medical Termination of Pregnancy (Amendment) Act, 2021

¹⁴ Section 5A, The Medical Termination of Pregnancy (Amendment) Act 2021, <https://egazette.nic.in/WriteReadData/2021/226130.pdf> 15/03/2023

abortion access, complete decriminalization of abortion, removal of gestational limits to ensure abortion without delay, access to abortion on demand (for girls, women or any pregnant person), removal of a mandatory waiting period to access abortion.

In order to ensure the protection of reproductive rights for women, specific legislative measures must be taken. These measures should include protections for individuals who identify as transgender or non-binary. Additionally, it is crucial to sensitize medical practitioners and staff on the importance of reproductive rights. Sterilization camps and policies that target women must be banned, and rape victims should be allowed to terminate pregnancies resulting from rape without judicial intervention. The criminalization of forced pregnancy is also necessary to protect women's reproductive rights fully. By taking these steps, society can ensure that women can make informed decisions about their reproductive health and autonomy. Only then the reproductive rights can be protected in a true sense.