

“Realizing Women’s Right To Reproductive Autonomy And Barriers To Safe Abortions”

Ms. Gurnoor Kaur, LL.M,
Maharaja Agrasen University, Baddi, Himachal Pradesh, India

“No woman can call herself free who does not own and control her body. No woman can call herself free until she can choose consciously whether she will or will not be a mother.”

— Margaret Sanger

ABSTRACT

The core of a woman’s fundamental right to equality, as protected by the Indian Constitution, is the freedom to make autonomous sexual and reproductive decisions. This right encompasses the autonomy of a woman to make decisions about her body, including whether to carry a pregnancy to term or end it, as well as other reproductive-related choices that affect her personal and familial life. Hence it becomes a crucial decision for a woman which she should be able to make without any discrimination and without impacting her other human rights. Despite the orthodox thought process of the society, the laws around the world gradually became liberal to include reproductive autonomy as a fundamental right of women. But there are still issues surrounding access to these rights. The Indian government took a bold move in 1971 when it passed The Medical Termination of Pregnancy Act, 1971, with the goal of lowering the rate of death among women who are pregnant, giving birth, or having an abortion. The judicial system in India has also evolved over time and through various landmark judgements, recognized the significance of decisional independent decision making with regard to reproductive choices among women, including access to safe abortions. In spite of the presence of such liberal laws, women in India still face several barriers in the name of religion, morals and ethics, societal paradigm and legal constraints, causing hindrance to women’s rights of freely accessing abortion services and realizing their absolute reproductive autonomy. Due to these barriers, it becomes difficult to assert that women are the true masters of their bodies.

KEYWORDS: Reproductive rights, reproductive autonomy, sexual choices, rights of women, Right to Life, legal abortions, The Medical Termination of Pregnancy Act, 1971

INTRODUCTION

Women have always been considered as an important pillar of society. In this progressive world, women are competing and achieving alongside men and have emerged as an equal partner in successes and victories. In today’s world, the society has become aware and vocal about equality and protection of basic human rights. But women, despite their remarkable contributions to society, are still grappling to achieve equality and are not able to realize their rights without any discrimination, especially when the decisions are related to their own body. According to the mandate “Working Group On Discrimination Against Women And Girls” adopted by the United Nations in 2010, right to sexual and reproductive freedom of women, lie at the centre of her fundamental right to equal opportunity. This includes a women’s capability to make independent decisions with regard to her own body and reproductive choices. In this scenario, equality

meanshaving unrestrained access to economically priced, superior quality contraception, and even abortion services when required. The choice of whether to continue a pregnancy or abort it is crucial to a women’s family and personal life and has a huge effect on her future. Hence, it becomes a crucial decision for a woman which she should be able to make without any discrimination and without impacting her other personal rights.

According to World Health Organisation data collected each year, about 45%, or 25 million, of all abortions are done in risky conditions around the world, resulting in roughly fifty thousand casualties and permanent or temporary disability. The WHO has also stated that in nations where pregnancy termination is strictly regulated by law, such abortions are a privilege reserved for the wealthy and elite, while the disadvantaged are at the mercy of inexperienced doctors. According to WHO, unsafe abortions are the major cause of maternal death and morbidity. This is largely owing to the stigma surrounding this subject and the legitimacy of abortion regulations, as anti-abortionists regard this technique as tantamount to "killing".

EVOLUTION OF REPRODUCTIVE AUTONOMY

Reproductive autonomy emerged as an important topic in the early nineteenth century. Early texts focused on the importance of empowering women to be able to decide in terms of sexual freedom, pregnancy, motherhood if they want to continue with the term of pregnancy or not. Since women had no control over their bodies in these aspects, the need for achieving reproductive autonomy became robust. The absence of medical contraceptives to avoid unwanted pregnancies left women with no other option than resorting to any means that would help them avoid pregnancy. Such as inserting various things into vagina to avoid the entry of sperms, drinking a mixture of lead and mercury, using partly squeezed lemon halves as cervical caps during intercourse. This was until condoms were invented in 1844, emerging as a safe and effective way to avoid pregnancy, amidst severe disapproval from orthodox societies, such as the Catholic Church and the passing of the Comstock Laws, which prohibited use and distribution of contraceptives and equated the use of contraception to a sin.

In the early 1900s, Margaret Sanger, an American feminist, created and led the birth control movement, advocating for women to have reproductive independence. Abortion has long been considered a question of reproductive rights. By the late nineteenth century, numerous countries had liberalised their abortion legislation. This was the consequence of broad political campaigns for women's equal rights, as well as initiatives by many international organisations.

The UN Committee on the Elimination of Discrimination Against Women (CEDAW) formulated the abortion rights as a component of freedom and independence of a woman, emphasizing that the failure of the state or its unwillingness to offer reproductive and maternity health care is included in gender inequality. The International Covenant on Economic, Social and Cultural Rights (ICESCR), under Article 12, identified that the right to reproductive health lies within the ambit of human rights and advised states to remove procedural barriers that causes obstruction in accessing the healthcare facilities to its full extent, especially for women and girls. The International Covenant on Civil and Political Rights (ICCPR), in 2018 reinstated the right to life to include the right to abortions in healthy conditions according to the law. Steps should be taken for avoiding stigmatization of women and girls who wish to seek abortions. In June 2022, this right to be considered as a constitutional right, became a burning topic once again. In *Dobbs v. Jackson Women’s Health Organization*, the US Supreme Court reversed its 50-year-old landmark judgement of *Roe V. Wade*, which had nullified all bans on abortions and established certain criteria for accessing abortions. This decision has led to a full ban in 14 states of America and partial restriction in the remaining states.

In India, abortion laws had been restrictive. The first ever law criminalizing abortion was The Indian Penal Code, 1860 which was enacted under British Rule (Section 312). The Central Family Planning Board, in the year 1964, suggested the constitution of a committee under the authority of Ministry of Health with the objective to study the increased number of unauthorized abortions and their effect on the women’s physical and psychological health. The recommendations of the Committee helped frame the groundwork for “The Medical Termination of Pregnancy (MTP) Act”, 1971, which legalized abortions and carving an exception to the stringent penal laws. This Act was amended in 2021, which provides a 20-week window within which pregnancy may be ended which may be extended up to 24 weeks, but only with the compulsory consent of at least two medical practitioners. In case of carrying out an abortion beyond the 24-week mark, one must file writ petition and gain consent of the medical board constituted under Section 3 of the Act.

REPRODUCTIVE AUTONOMY: FUNDAMENTAL RIGHT

Right to life under Article 21 and right to equality under Article 14 and 15 of the Indian Constitution, has been recognized by the Indian judiciary as implicitly protecting the woman’s right to make independent decisions about her own body. The attitude of judicial system towards the right to abortion has greatly evolved since the 1990s.

This can be seen through the series of judgements delivered by various courts when in *Jacob George v. State of Kerala*, the Supreme Court did not divulge on woman’s right and freedom with regard to abortion specially in cases of unwanted and unplanned pregnancies. It did not recognize abortions as a part of reproductive right of a woman. But in *Paschim Banga Khet Majdoor Samiti v. State of West Bengal* an attempt was made to broaden the purview of basic human rights which shall also cover the reproductive rights.

Initially, while deciding the cases of abortions, the MTP Act and the Hindu Marriage Act, 1955, had always been at a conflict. Such conflict always raised the question whether women are actually in control of their bodies. Under MTP Act, a woman does not require the consent of partner, family or others to abort the pregnancy. However in several instances the courts had granted divorce where pregnancy was terminated without the consent of the spouse, on the ground of cruelty. In the light of such decisions, it became hard to assert that an Indian woman is the master of her own body.

Role Of Indian Judiciary in Recognizing Reproductive Rights as Fundamental Rights

Women's decision-making power over their own bodies can be reflected from the abortion laws in a country. The Indian judiciary through various Supreme Court and High Court rulings has made massive strides in identifying these rights as fundamental.

The Supreme Court, in the year 2009, took a reformist initiative by including women’s reproductive autonomy under Article 21 of the Constitution, which promises the basic right to life, which is a dimension of personal liberty. In 2011, the Delhi High Court, while deciding two separate cases, i.e., *Laxmi Mandal v. Deen Dayal Harinagar Hospital & Others* and *Jaitun v. Maternity Home, MCD, Jangpura & Others*, upheld that the right of reproductive autonomy to be an ‘inalienable survival right’ and included it under the scope of right to health, under Article 21.

In another landmark decision by the High Court of Madhya Pradesh, *Sandesh Bansal v Union of India*, the court highlighted that rise in maternal mortality rate is a cause of concern, and is violative of woman’s basic right to life under the Indian Constitution (Article 21). This was also a part of an attempt to connect the reproductive rights with Article 21.

In *Devika Biswas v. Union of India*, the Apex Court recognized the right of women to make independent decisions about her reproductive choices and body to be part of procreative rights and the sterilization procedures that were taking place in unhygienic and unsanitary camps

without consent of the patients, especially women, were immoral and violated the rights granted under Indian constitution.

Justice Chandrachud, along with eight other judges, while pronouncing the revolutionary judgement of *K.S. Puttaswamy v. Union of India* observed that the exercise of reproductive choices is unequivocally founded in constitutional right to life and personal liberty (Article 21). He cited in the ruling that a woman's fundamental right to make reproductive decisions is connected to her statutory right to an abortion as stipulated under the MTP Act.

The petitioners have been granted permission by the courts in a number of cases to undergo abortions beyond the 24-week legal limit, but only after the medical board approved the procedure and found that the mother's mental or physical health would be gravely jeopardised if the pregnancy was continued, or if there were significant foetal abnormalities that would prevent the child from surviving outside of the womb. The court may deny such a privilege if it is convinced that there is a possibility that a healthy child may be born with the necessary and sufficient care, based on the report provided by the medical board.

The court also broadened the ambit of the Act to include unmarried women, women in live-in relationships and to women, who have undergone circumstantial change in their marital status post pregnancy.

Access to Rape Victims

In the cases of pregnancy in rape victims, it becomes a compelling ground to terminate it. Such child born shall be a constant reminder of that crime which is unfair to both mother and child. Such pregnancies often go unnoticed due to social stigma and fear, especially where the victims are minors. Delays in discovering the pregnancies coupled with the failure of state officials to take appropriate steps can cause miscarriage of justice and feeling of anguish and suffering, including suicidal ideation, as a result of being forced to continue their pregnancy. The Madhya Pradesh High Court underlined the need for legalising abortions without a judge's consent in *Hallo Bi v. State of Madhya Pradesh and Others*, ruling that victims of forced sex or brutal rape cannot be forced to bear a child by their abuser.

In a 2023 ruling, the Kerala High Court allowed an abortion in the case of a 15-year-old who became pregnant after being raped by her own brother, citing social ramifications from having a kid of that age even though the pregnancy was past 32 weeks.

BARRIERS TO SAFE ABORTIONS

Safe abortions refer to the termination of pregnancy conducted by qualified individuals in environments that strictly adhere to medical standards as prescribed. Heavy restrictions on abortions force women to resort to unsafe methods in hazardous environments. Indian women still do not have guaranteed access to safe abortion services, despite its legality. Women are nonetheless hindered by cultural pressure and the shame associated with the phrase abortion, even in cases where such facilities are readily available.

Religious Issues

In India, law and religion are closely related. In a country where religious beliefs have such an unfathomable impact on the social behaviour and values, the reproductive conduct gets influenced by religion that one follows. The underlying belief of every religion is in favour of procreative rights and women are the ones who bear this burden of procreation. Fertility is deemed as a prized possession bestowed on humans. Termination of pregnancy would be considered equivalent to murder since it is presumed that the foetus becomes a living entity since conception and is a blessing of God. Choosing to abort would mean going against the course of nature and the will of the God. Many communities have perceived pro-abortion laws as an assault on religious sentiments and beliefs.

Social Issues

Although it is legal for women to make "choices," most of them do not feel empowered to do so or are not given the chance to think about it. This is because of stigmatisation by the society. Safe abortion methods are out of reach for women in a society that prioritises maintaining women's dignity over their lives. In order to protect their reputation and avoid being judged, they prefer keeping such issues hidden instead of reaching the authorities. The societal stigma steers women towards unsafe abortion methods. Although, consent of spouse is not mandatory as per any law, but under Indian society, the consent of spouse by default extends to the consent of the whole family, hence affecting the decisional autonomy of women to decide for themselves. Such issues can only be addressed by government initiatives and awareness programs.

Ethical Issues

Ethical issues refer to morality and moral obligations that shape the human behaviour and society. These factors are always evolving. The main ethical issue that acts as a barrier is the fact that people relate abortions to immorality. A significant portion of the society believes that abortions are an act of crime, an act against the core human right to life, since a defenceless unborn child's life is not honoured. The questions whether abortion is undertaken in early stage or a later stage becomes irrelevant because they believe that life begins at conception and taking away a life is an act of crime, a clear violation of moral duty of the society where no member has the right to take away the life of another. Hence in cases of unplanned pregnancies, it becomes extremely difficult for the women at times to convince their spouse or families, if they are not ready to continue the pregnancy.

Legal and Practical Issues

Legal and practical constraints bound women's and girls' ability to obtain safe abortion services swiftly. Caretakers are often under the misconception that abortion before 20 weeks requires judicial approval also causes delays. For example, in *Bashir Khan v. State of Punjab*, the High Court heard a case in which a 14-year-old rape victim requested the termination of pregnancy, and the court explained that doctors should proceed with MTP as long as the pregnancy does not reach 20 weeks. In certain situations, waiting in court, the pregnancy duration reaches the 24-week mark even before the court makes a decision, making termination nearly impossible unless special conditions exist.

Another legal issue that caused hindrance was the conflict between MTP Act and Hindu Marriage Act, 1955. Although such issues have been resolved legally, but on the social and familial front, consent of spouse is considered superior to women's autonomy. This creates an obstacle for women preventing them from utilizing the available legal remedies.

Lack of Effective Implementation of Laws

India does have a very liberal abortion policy which attempts to provide access and facilities to every woman. Yet there are many hurdles that obstruct a women's path in accessing their rights. Such as:

- Lack of awareness of the existing law and the legal procedures related to abortions amongst women in India, especially in women belonging backward social and economic backgrounds. Women are unaware of the laws that legalise abortions and often try to find solutions behind the closed doors of their houses instead of seeking help.
- Shortage of qualified healthcare professionals and lack of training and knowledge amongst the caretakers, when it comes to performing abortions, and the pharmacy owners who provide over the counter medicines, or abortion pills.
- Lack of accessibility of proper healthcare in rural areas, where it becomes difficult to reach and gain consent of a medical practitioner who fits the standards as per the Act, in cases where consent is required to terminate pregnancies.

- Cost of accessing safe abortions at proper medical centres is easily available to the elite. While, the women who are not able to afford such expensive treatments, resort to unhealthy medical procedures, hence playing with their lives.
- Several healthcare providers refuse to provide service to women without the consent of the spouse or the parents, even when the woman is a major and capable to make her own decisions.
- Delay at the hands of healthcare providers or the court of law in obtaining consent for abortions also impacts the effective implementation of the laws as these executive processes are time consuming and in case of abortions, time is the essence, even if it is a matter of few hours or days.
- Discrimination of women on the basis of caste and socio-economic status especially the women belonging to socially backwards groups face difficulty in accessing healthcare procedures due to the cost and caste-based discrimination.
- The Prevention of Children from Sexual Offences Act of 2012 (POCSO Act) and the Pre-Conception Pre-Natal Diagnostic Techniques Act of 1994 (PCPNDT) pose substantial impediments to the implementation, as in case of minors, consent of parents is necessary and a police inquiry becomes mandatory, which people generally avoid due to fear of stigma
- Third party authorization not only makes the process time-consuming, but also creates a barrier to women’s decisional autonomy.

CONCLUSION

There is no choice when there is no access. Despite whatever being mentioned in the codes and law, no country has been truly able to achieve equality and eliminate discrimination. In most countries, women's reproductive autonomy—which is central to the principles of equality—is undervalued and given least importance. Women have resorted to various forms of birth control and methods of termination of pregnancies since ages. Although legal, it still creates intense moral, ethical and legal debates on the subject of its liberalization. Although it has been declared as fundamental right in several verdicts of the Supreme Court, there are various barriers that cause hindrance in actually realizing those rights to their full potential. The rules, despite being relatively progressive and women-centric, fail to generate the expected results because, in a society where childbearing is heavily affected by societal norms, such regulations remain purely theoretical. Another factor is the lack of proper implementation of the existing laws and societal and systematic impediments. The ultimate aim of the independent maternity right is to ensure the wellbeing of the woman, her family and ultimately, the society. The recent developments conforming with international norms and standards of women safety and protection of their rights, give us hope that we are the right path in overcoming this discrimination and towards fully realizing women’s bodily rights.

REFERENCES

1. Raday, F., Alda, Facio, Zelinska, E., Chandrakirana, K., & Aouij, E. (2017). *Women’s Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends*.
2. Gibson, M. (2015, February 2). The Long, Strange History of Birth Control. *TIME*. <https://time.com/3692001/birth-control-history-djerassi/>
3. *UN Committee on the Elimination of Discrimination Against Women (CEDAW)*. (1999). Retrieved from CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health): <https://www.refworld.org/legal/general/cedaw/1999/en/11953>

4. General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights). (2016). In *General Comment*. <https://hivlanguagecompendium.org/pdf/2016-E-C.12-GC-22-CESCR-on-Right-to-SRHR.pdf>
5. *Dobbs v. Jackson Women’s Health Organization* 597 U.S. 215 (2022)
6. *Roe V. Wade* 410 U.S. 113 (1973)
7. Bharatiya Nyaya Sanhita, 2023, w.e.f. 01-07-2024, S. 88
8. The Medical Termination of Pregnancy Act, 1971, s. 3(2)
9. *Jacob George v. State of Kerala*(1994) SCC (3) 430
10. *Paschim Banga Khet Majdoor Samiti v. State of West Bengal*(1996) SOL Case No. 169
11. *Kalpna Srivastava v. Surendra Nath Srivastava*, AIR 1985 All 253; *Sushil Kumar Verma v. Usha*, AIR 1987 Del 86
12. *Suchita Srivastava &Anr. v. Chandigarh Administration*, 11 SCC 409 (SC: 2009)
13. Consolidated decision, *Laxmi Mandal v. Deen Dayal Harinagar Hospital & Others*, (W.P. (C) No. 8853/2008); *Jaitun v. Maternity Home, MCD, Jangpura& Others*, (W.P. No. (C) 8853/2008 & 10700/2009) (Del: 2010).
14. *Sandesh Bansal v Union of India*(MP: 2012) (W.P. (C) No. 9061/2008)
15. *Devika Biswas v. Union of India*6 (SC: 2016) (W.P. (C) 81/2012)
16. *K.S. Puttaswamy v. Union of India*(2017) 10 SCC 1
17. *Sarmishtha Chakraborty v. Union of India*, (2018) 13 SCC 339
18. *Meera Santosh Pal v. Union of India*, (2017) 3 SCC 462
19. *X vs. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi and Another*, 2022 SCC OnLine SC 1321
20. *Hallo Bi v. State of Madhya Pradesh and Others* (2013) (1) MPHT 451
21. *XXX. v. Union of India*, 2023 SCC OnLine Ker 3272 available at <https://www.sconline.com/blog/post/2023/05/22/kerala-high-court-allows-termination-of-pregnancy-of-minor-impregnated-by-own-brother-legal-news/>
22. Hirve S, “Abortion Law, Policy And Services In India: A Critical Review” (Taylor & Francis, 2005) available at <https://www.tandfonline.com/doi/full/10.1016/S0968-8080%2804%2924017-4>
23. *Bashir Khan v. State of Punjab*Civil Writ Petition No. 14058 of 2014