



## ABORTION AND REPRODUCTIVE AUTONOMY: A JUDICIAL ANALYSIS

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### Abstract

*The right to reproduction has been regarded as a fundamental human right recognized by all the civilized nations. The essence of this right can be found in embedded in right to life as secured by the Constitution of India. Reproductive rights as such have been developed by the judiciary. The reproductive rights have been expanded by the judiciary not only recognizing right to giving birth but also maternal health, spacing of children, post-delivery care and abortion also. The right to abortion always carries with itself the ethical debate. The judiciary has given wide interpretation to the abortion by extending these right to unmarried women also. It has widened the scope of reproductive autonomy also. The widening scope of abortion rights has brought the paradox of choice and rights into conflict. The impact of the decision in Roe v. Wade and its stand on the abortion debate and on its contrary the progressive approach of judiciary in granting abortion right to unmarried girls In this paper an endeavor, is made to analyze the role of judiciary in expanding the horizon of reproductive rights. The amendment as brought in the Medical Termination of Pregnancy Act, 1971 will also be studied and changing stance of judiciary in granting abortion in some cases and denying in others on the basis of best interest of the child.*

**Key words:** -Abortion, Reproductive Autonomy, Human Rights, Women, Constitution

### INTRODUCTION

Reproduction is the process which is common to flora and fauna including human beings. Reproduction or in other words procreation is held on very high pedestal as far the human beings are concerned. Reproduction in human beings is means of carrying one's progeny. The human beings have an intense feeling for having their off springs. The right to give birth or not is part of the reproductive autonomy. The term implies that it is the choice of the human being to beget or not children. This right of reproductive autonomy prevails in the privacy of the home and the state or the government cannot control such right of the man or woman to reproduce or not. This has formed itself to be a part of the reproductive rights.<sup>1</sup> The reproductive rights are recognized as human rights in many of the international conventions. The concept of reproductive autonomy implies both negative and positive liberty to reproduce children. In the negative sense it implies to reproduce or not without any interference or restriction by the government. On the positive aspect, this implies facilitations provided by the government in exercising choice for reproducing off springs. The choice to reproduce also carries with it the right to produce healthy children free from any kind of genetic defect. The reproductive autonomy encompasses right to birth and termination if the fetus is suffering from some kind of defect.<sup>2</sup> The choice of reproducing also includes terminating the fetus if it is suffering from some kind of incurable disease or genetic defect. The expanding reproductive rights also include abortion.

### Understanding Abortion

The term 'abortion' implies medical termination of the pregnancy. The history of abortion is as old as civilization. It also carries with the ethical debate as some of the religions disfavor abortion. The discourse about divorce lies in the contention that there is life after conception which needs to be protected and others advocate abortion in the case if the health of the woman is in danger. The advancement in medical science evolved in the development of birth control pills thus pushing the debate about abortion further. Since contraceptive pills was also not accepted idea among many of

<sup>1</sup>JameMaienschein, *Whose View of Life?* 144 (Harvard University Press, 2005).

<sup>2</sup> John A. Robertson, *Procreative Liberty and Harm to offsprings in assisted reproduction*, 30 American Journal of Law and Medicine, 9, 7-40 (2004).



the religions. The contraceptive pills prevent the fertilization of the egg which also amounts to abortion.<sup>3</sup> The debate about abortion has always brought the government and the religious agencies into conflict with each other. The most celebrated decision about legalization of abortion was by the Supreme Court of America in the case of *Roe v. Wade*.<sup>4</sup> In this case the supreme court legalized abortion in the first twelve weeks of pregnancy, in second trimester restrictions can be imposed but the health of the women has to be considered and in the third trimester if the fetus is viable, restrictions can be imposed on abortion but the health and safety of the woman is of paramount consideration. The abortion rights advocates all over the globe welcomed the decision in this case about legalizing abortion.

But decades after this decision, the supreme court of America in the year 2022 has overruled *Roe v. Wade* judgment that the decision was erroneous and there is no right to abortion in country's federal history.

### **Abortion in India**

The abortion laws in India have always been a subject full of controversies and concerns. The abortion laws in India have been developed as inclusive of reproductive rights and this has been expanded by the judiciary in India. The enactment of laws on abortion has been initiated by the various decisions of the courts in India. The law on abortion in India was influenced by the colonial rule. Earlier the abortion was an offence under the Indian Penal Code.<sup>5</sup> Section 312 of the code made provision for punishment of the woman if she undergoes abortion and also the medical professional who performs abortion.

The early efforts for legalizing abortion were initiated in India around 1960's when the government appointed a committee consisting of medical professionals to analyze the discourse of divorce. This committee was known as Shantilal Shah Committee after the name of Dr. Shantilal Shah. The committee suggested about liberalizing the law on abortion in India. Based on the recommendations of the committee, a bill on medical termination of pregnancy was introduced in both the houses of the Parliament and ultimately the bill on the Medical Termination of Pregnancy, 1971 was passed.

The Medical Termination of Pregnancy Act, 1971 legalized abortion under certain circumstances. The Act made provision for protecting doctors from penal provisions who are performing abortion as per the Act.<sup>6</sup> The Act permitted performance of abortion till the twenty weeks of the pregnancy. There is provision for termination of unwanted pregnancy in the first twelve weeks and upto twenty weeks after the advise of the doctor. The Act also protects registered medical practitioners from prosecution if they cause any injury to woman during abortion provided the abortion is done according to the provisions of the Act. There are certain other conditions also under which abortion is permitted; if there is physical and mental health risk to women, unplanned pregnancy, any pregnancy as a result of rape or in case the fetus is suffering from some kind of deformity. There is provision for setting of the medical board for the purpose of seeking opinion in case of termination of pregnancy beyond twenty weeks. The privacy provision is also included so as not to reveal the identity of the woman undergoing abortion.

### **Judicial Intervention and abortion**

The Judiciary has played very prominent role in upholding abortion rights for the woman. The judiciary's intervention has paved way for the enactment of the of abortion law in India. The Medical Termination of Pregnancy Act, 1971 has provided a time limit of twenty weeks for terminating pregnancy. Any pregnancy to be terminated beyond this period has been scrutinized by the judiciary from case to case. The judiciary has failed to provide a parameters or a framework in terminating pregnancy beyond twenty weeks. Every case is decided on its own facts and circumstances. This has created more contradictions in establishing woman's right to abortion.

<sup>3</sup>Miriam Boleyn – Fitzgerald, *Beginning Life*, 106 (InfobasePublishing, New York, 2010).

<sup>4</sup>*Roe v. Wade*, 410 U.S 113 (1973).

<sup>5</sup>Indian Penal Code, 1860, No. 45, Imperial Legislative Council, 1860 (India).

<sup>6</sup> Medical Termination of Pregnancy Act, 1971, No. 34, Acts of Parliament, 1971 (India).



The Judiciary has given decision on abortion on the opinion submitted by the medical boards. The courts have failed to provide proper framework about legalization of abortion beyond twenty weeks of pregnancy. The Supreme Court in *K.S Puttuswamy v. Union of India*<sup>7</sup> has recognized right to privacy as an integral part of right to life and personal liberty under Article 21 of the Constitution of India. In this case the court has reaffirmed abortion as a part of reproductive rights and its inclusion in right to privacy as was held in *SuchitaSrivastava v. Chandigarh Administration*.<sup>8</sup> In this case the court held that abortion is also a part of the reproductive autonomy.

The breakthrough in the terrain of abortion law was made by the judiciary in the case of *X v. The Principal Secretary, Health and Family Welfare Department, Government of NCT of Delhi and another*<sup>9</sup>, in the year 2022. In this case the right of abortion was extended to the unmarried women also. This was a very progressive decision as it also included unmarried girls for aborting their fetus. In this case a woman got pregnant after consensual sexual relationship. Later the boy refused to marry her and thus she wanted to terminate her pregnancy owing to social stigma and mental hardship in carrying the responsibility of the child. The petitioner prayed before the Delhi High Court for termination of pregnancy but she was denied the right on the ground that she was pregnant from a consensual relationship and unmarried women are not covered under the Medical Termination of Pregnancy Rules, 2003. The counsel for the petitioner submitted that this is violation of the Article 14 of the Constitution of India. As the case involves substantial question of law, the present petition is before the Supreme Court of India. The apex court interpreted that Rule 3B not only includes the married women but it also recognizes the right of the unmarried women to undergo abortion between twenty and twenty - four weeks of pregnancy. The court held that narrow interpretation of Rule 3B would make futile Article 14 of the Constitution of India dealing with right to equality. The court also accepted the reproductive autonomy of the women which includes women's right about her sexual and reproductive health. The MTP Act includes the reproductive autonomy in every woman whether married or unmarried in terminating their pregnancy.

In *X v. Union of India and another*<sup>10</sup>, the court went a step further in giving progressive interpretation of the MTP Act and Rules. The facts of the case includes petitioner who is a married woman with two living children. The petitioner is praying for termination of pregnancy since she did not discover about her pregnancy till twenty weeks. The petitioner contended that she visited various medical hospitals but she her pregnancy was not terminated owing to provisions of the MTP Act and rules. She prayed before the court that she is suffering from depression, carrying of pregnancy will cause mental anguish and moreover her husband is the only earning member of the family and as such she cannot financially support the third child. The court directed the petitioner to appear before the Medical Board constituted by AIIMS, Delhi and the board submitted the report about termination of pregnancy. On 9<sup>th</sup> October, 2023 the court permitted termination of pregnancy on the ground of mental anguish. Before termination could be done, one of the doctors of the Medical board emailed ASG in the case to seek directions from the court to stop the heartbeat of the foetus since it has higher chances of survival. The AIIMS made a request whether foeticide should be carried in the facts of the case. The case went before the same judges but due to difference of opinion on stopping the heartbeat of the fetus, the matter was placed before the three judges benches. The court held that since the pregnancy in the present case has crossed the statutory limit and now the fetus is twenty-six weeks and five days, thus the case do not fulfill the requirements of MTP Act. The fetus does not suffer from any substantial abnormalities and have every chance of survival. The Court relied on two reports from the Medical Board. The court held that in the present circumstances, the medical termination of the pregnancy cannot be permitted.

<sup>7</sup>K.S Puttuswamy v. Union of India, (2017) 10 SCC 1.

<sup>8</sup>SuchitaSrivastava v. Chandigarh Administration, A.I.R 2009 S.C. 235 (India).

<sup>9</sup>X v. The Principal Secretary, Health and Family Welfare Department, Government of NCT of Delhi and another, Civil Appeal No. 5802 of 2022(India).

<sup>10</sup>X v. Union of India and another, A.I.R online 2021, Del 527 (India).



The Union of India will bear all the expenditure for the delivery of the child. After the birth of the child, if parents are willing the child can be given for adoption. This will be done at the earliest with the efforts of the union government.

In *ABC v. State of Maharashtra*<sup>11</sup>, the petitioner was in thirty second week of pregnancy, and was of the opinion that her fetus was found abnormal after routine medical check. The medical board submitted the report for not terminating the pregnancy. The Bombay High Court recognized abortion as a part of reproductive autonomy, right to privacy, equality and dignified life. The court held that reproductive autonomy also includes the right to bodily autonomy. Thus in terminating the pregnancy, the reliance cannot be placed solely on medical board's report but the woman's reproductive autonomy shall also be considered. This is a part of the informed consent of the women. Thus the court permitted medical termination of pregnancy of woman even in the thirty-three weeks of pregnancy.

In a recent case, the apex court refused the termination of pregnancy of twenty six year old woman. The woman wanted to terminate her thirty-two week pregnancy owing to death of her husband. The woman contended that carrying of pregnancy would cause her mental anguish and she has to bear the trauma since her husband has deceased.<sup>12</sup> The Medical Board submitted the report that there is no abnormality in the foetus and hence termination cannot be done. The court refused to entertain the petition of the woman and she was not permitted to terminate her pregnancy. The court held that they cannot go beyond the report submitted by the medical board as there is no physical or mental health risk to the woman even she delivers the child.

In another case the Delhi court refused to terminate the pregnancy of the unmarried girl about twenty years of age. She was twenty-seven weeks pregnant. The petitioner approached many doctors for terminating her pregnancy but she was refused for the same. The girl is a student and is not in the position rear the child after its birth. The court has preserved the rights of the unborn child. The petitioner was refused termination of pregnancy and was told to carry pregnancy and after the birth of the child, the child can be given for adoption.<sup>13</sup>

#### **The enigma for the Judiciary**

The apex court of the country has given very progressive interpretation of the MTP Act and Rules in different cases. The judiciary has widened the scope of reproductive rights by including right to maternal health, sexual and reproductive health, right to procreate or not, right to privacy and dignified life and above all reproductive autonomy. The overruling of *Roe v. Wade* showed that the west is moving into draconian abortion law. The apex court in India by widening the scope of the MTP Act has shown its progressive move in upholding women's reproductive autonomy or rightly the bodily autonomy.<sup>14</sup> The trend the judiciary has followed that by respecting reproductive autonomy the women are given abortion rights. But in many cases on the second opinion by the medical board on the stance of the fetus, the courts by way of recall orders have refused termination of pregnancy. The refusal by the courts has brought into existence the concept of protecting the rights of the unborn child. The reproductive regime in India is more towards family planning and there is no instance for protecting pregnant women. The 2021 amendment in MTP Act and then judgment of the Supreme Court in including every woman irrespective of her marital status under the Act was hailed as liberalizing abortion law. This was a step to prevent unsafe abortions and to hold women's right to bodily autonomy. But the recent decisions of the court have made it bound within statutory gestational limitations. The court has given the decision making powers in the hands of the medical boards completely ignoring women's right to reproductive autonomy.

<sup>11</sup>*ABC v. State of Maharashtra*, decided on 4<sup>th</sup> Feb, 2021.

<sup>12</sup>KrishnadasRajagopal, *Supreme Court refuses married woman to terminate her 26-week pregnancy, said there is no abnormality in the foetus*, *The Hindu*, October 16, 2023.

<sup>13</sup>ShrutiKakkar, *Delhi High Court Rejects woman's plea to abort 28 week foetus*, HT, February 02, 2024.

<sup>14</sup>Dipika Jain & PayalK.Shah, *Reimagining Reproductive rights Jurisprudence in India: Reflections on the recent decisions on Privacy and Gender Equality from the Supreme Court of India*, 4, *Colum. J Gender & L*, 1-53 (2020).



### CONCLUSION

The legalization of abortion in India was not an easy task. It took many years for the government to legalize abortion in India on certain permissible grounds. The Judiciary has played a very prominent role in upholding the reproductive rights of the woman by including the right to abortion within its ambit. The transformation of reproductive rights at the behest of the courts in India has infused more life into the reproductive rights. The reproductive rights including abortion are integral part of right to life and personal liberty. The judiciary has failed to provide proper framework for legalizing abortion beyond the period of twenty-four weeks period. Beyond this period the opinion of the medical board is given consideration. The divergent opinion of the courts has given myriad interpretation to abortion laws. The need of the hour is to have rights based approach as far the issue of medical termination of pregnancy of the woman is concerned. The courts need to adopt holistic approach by engaging the healthcare professionals for filling the gaps fro rights based approach. The progressive approach would help in providing access to women's reproductive health and at the same time respecting her reproductive autonomy. This would also promote safe abortions and performance of an abortion by medically trained personnel. The society is transforming as new familial structures are amerging and premarital sex is also the part of this structure. In such situations the social stigma of living with unwed pregnancy can also be overcome. The need is for radical changes in the present health care infrastructure.